House of Commons

Transport Committee

Cost of motor insurance: whiplash

Fourth Report of Session 2013–14

Volume I

Volume I: Report, together with formal minutes, oral and written evidence

Additional written evidence is contained in Volume II, available on the Committee website at www.parliament.uk/transcom

Ordered by the House of Commons
to be printed 15 July 2013

HC 117
Published on 31 July 2013
by authority of the House of Commons
London: The Stationery Office Limited
£17.50

The Transport Committee

The Transport Committee is appointed by the House of Commons to examine the expenditure, administration, and policy of the Department for Transport and its Associate Public Bodies.

Current membership

Mrs Louise Ellman *(Labour/Co-operative, Liverpool Riverside)* (Chair)
Sarah Champion *(Labour, Rotherham)*
Jim Dobbin *(Labour/Co-operative, Heywood and Middleton)*
Karen Lumley *(Conservative, Redditch)*
Jason McCartney *(Conservative, Colne Valley)*
Karl McCartney *(Conservative, Lincoln)*
Lucy Powell (*Labour/Co-operative, Manchester Central*)
Mr Adrian Sanders *(Liberal Democrat, Torbay)*
Iain Stewart *(Conservative, Milton Keynes South)*
Graham Stringer *(Labour, Blackley and Broughton)*
Martin Vickers *(Conservative, Cleethorpes)*

The following were also members of the committee during the Parliament.
Steve Baker *(Conservative, Wycombe*), Angie Bray *(Conservative, Ealing Central and Acton)*, Lilian Greenwood *(Labour, Nottingham South)*, Mr Tom Harris (Labour, Glasgow South), Julie Hilling (Labour, Bolton West), Kelvin Hopkins *(Labour, Luton North)*, Kwasi Kwarteng *(Conservative, Spelthorne)*, Mr John Leech *(Liberal Democrat, Manchester Withington)* Paul Maynard, *(Conservative, Blackpool North and Cleveleys)*, Gavin Shuker *(Labour/Co-operative, Luton South)*, Angela Smith *(Labour, Penistone and Stocksbridge)*, Julian Sturdy *(Conservative, York Outer)*

Powers

The Committee is one of the departmental select committees, the powers of which are set out in House of Commons Standing Orders, principally in SO No 152. These are available on the internet via www.parliament.uk.

Publication

The Reports and evidence of the Committee are published by The Stationery Office by Order of the House. All publications of the Committee (including press notices) are on the internet at http://www.parliament.uk/transcom. A list of Reports of the Committee in the present Parliament is at the back of this volume.

The Reports of the Committee, the formal minutes relating to that report, oral evidence taken and some or all written evidence are available in a printed volume. Additional written evidence may be published on the internet only.

Committee staff

The current staff of the Committee are Mark Egan (Clerk), Farrah Bhatti (Second Clerk), Richard Jeremy (Committee Specialist), Helen Agnew (Senior Committee Assistant), Adrian Hitchins (Committee Assistant), Stewart McIlvenna (Committee Support Assistant) and Hannah Pearce (Media Officer)

Contacts

All correspondence should be addressed to the Clerk of the Transport Committee, House of Commons, 7 Millbank, London SW1P 3JA. The telephone number for general enquiries is 020 7219 6263; the Committee's email address is transcom@parliament.uk

Contents

Report

Summary

In this report, our third on the cost of motor insurance, we focus on the impact on premiums of claims for whiplash injuries.

These are soft-tissue injuries, predominantly affecting the neck, caused by a sudden, forceful jerk. They can arise from motor accidents and can have debilitating consequences for those who suffer from them. There are around 500,000 claims for whiplash injuries arising from motor accidents each year. The number of claims has fallen recently but is significantly higher now than at the turn of the century. The relationship between the number of whiplash claims and the total number of road traffic accidents is unclear because of problems with the data on the number of accidents.

There is no generally accepted objective test for a whiplash injury. This, along with the trend for the number of claims to increase, has contributed to concerns about fraudulent and exaggerated claims. There is no authoritative data publicly available about the prevalence of fraud or exaggeration and no consensus about what constitutes fraud. The Government has described the UK as the "whiplash capital of the world" but this cannot be conclusively proved or disproved from the information available. There is scope for the insurance industry to provide better data about fraudulent or exaggerated claims so that there is a better evidence base for policy decisions. However, we accept that some of the increase in the number of whiplash claims will have been due, in the main, to fraud or exaggeration, even if it is not possible to give even a rough estimate of the scale of the problem.

The Ministry of Justice (MoJ) has set out proposals to improve medical reports accompanying whiplash claims and to transfer most claims to the small claims court procedure. We broadly support the Government's proposals on improving medical reports but would like to go further and require whiplash claimants to provide more information in support of their claim, such as proof that they saw a medical practitioner shortly after their accident. In addition, we recommend that the Government bring forward recommendations to reduce the time period during which whiplash claims can be made.

There are good arguments for and against switching most whiplash claims to the small claims procedure but we do not support the proposal at the present time. In our view:

- access to justice is likely to be impaired, particularly for people who do not feel confident to represent themselves. We recommend that the MoJ consider further ways in which litigants in person could be assisted to use the small claims procedure for personal injury claims;
- this change could create new opportunities for claims management companies;
- use of the small claims procedure could prove counterproductive in efforts to discourage fraudulent and exaggerated claims; and
- the impact of the electronic portal for processing claims should be analysed before deciding whether to proceed.

We also make recommendations on data sharing and on whether claims involving an element of exaggeration should be struck down.

There are many factors which contribute to the cost of motor insurance including the activities of claims management companies, the poor safety record of young drivers and competition issues now under investigation by the Competition Commission. We reiterate our previous recommendation for more effective cross-departmental co-ordination of work to reduce premiums.

Motor insurers have committed to passing any reductions in costs arising from legal reforms to consumers in the form of lower premiums. We recommend that the Government explain how it will monitor that this commitment is honoured.

We were surprised to hear that insurers will sometimes make an offer to personal injury claimants even before a medical report has been received. We also note that our previous recommendation on making the links between insurers and other parties involved with claims more transparent has been ignored. Insurers must immediately get their house in order and end practices which encourage fraud and exaggeration. If not, the Government should take steps to protect motorists.

1 Introduction

1. In March 2011 we published a report on the factors explaining the rising cost of motor insurance and what the Government could do to bring premiums down. At that time average quoted premiums were increasing by 30% per annum and younger drivers were particularly badly affected. The average quoted premium for men aged between 17 and 22 in October 2010 was £2,457; the corresponding figure for women of the same age was £1,423.[1]

2. Recently, average quoted premiums have fallen, from £1,132.24 in April 2012 to £746.75 in April 2013, a fall of 34%.[2] It should be noted that the average paid premium may be significantly lower than the average quoted premium.[3] The ABI told us that the average paid premium, based on the total value of payments for motor insurance and the total number of policies, representing 80% of the private motor insurance market, was only £440 in 2011.[4] The ABI said that paid premiums were likely to have decreased since 2011 because "quoted premiums turn into the price that a consumer pays".[5]

3. Motor insurance is compulsory so the escalating cost of policies had the potential to cause a number of problems for the Government to deal with, including increasing the risk of people driving without insurance or committing insurance fraud. There is also a risk that if premiums are too high some people will be forced to give up their cars, which may have an impact on their work and social lives and on local communities, particularly in areas without good passenger transport provision.[6]

4. Our recommendations covered:

- personal injury claims and the fees paid and received by different organisations involved with claims for data about claimants (known as referral fees);
- uninsured driving;
- clamping down on fraud; and
- raising the standard of driving amongst young people.

Our report was debated in the House on 8 November 2011 on the basis of a motion calling for the establishment of a cross-departmental ministerial committee on reducing the cost of motor insurance, which was agreed to.

1 Transport Committee, Fourth Report, 2010-12, *The cost of motor insurance*, HC 591 (hereafter *First CMI report*) paragraphs 1 and 4.

2 Figures are an average of five best quotes to a range of customers for comprehensive cover, taken from the quarterly AA British Insurance Premium Index (http://www.theaa.com/newsroom/insurance/bipi/british-insurance-premium-index.html). The basis on which this average was calculated changed in Q1 2012. Premiums appear to have peaked in mid-2011. For further discussion of trends in premiums see Ev w10 paragraph 2.5.7.

3 See *First CMI report* Ev 89 (memorandum from Duncan Anderson) for a discussion about the reasons for such a significant difference between quoted and paid premiums.

4 Ev 67 paragraph 7.

5 Qq 210–12 and see Deloittes press release 22 May 2013 http://www.deloitte.com/view/en_gb/uk/f4d0e4823ebce310VgnVCM2000003356f70aRCRD.htm.

6 *First CMI report*, paragraph 9.

5. We followed up our first report with a further report in January 2012 which focused on personal injury claims and referral fees. This reflected growing concern about the increase in claims for whiplash injuries in recent years and how much of this increase was due to fraud in some form. We said:[7]

> Where someone can demonstrate that they have suffered an injury, including whiplash, as a result of a road traffic accident for which they were not fully liable they should be able to claim and receive compensation. However, in relation to whiplash, we are not convinced that a diagnosis unsupported by any further evidence of injury or personal inconvenience arising from the injury should be sufficient for a claim to be settled. In our view, the bar to receiving compensation in whiplash cases should be raised. We note the Government's argument that its legal reforms should reduce the money in the system and encourage insurers to defend claims more vigorously. If the number of whiplash claims does not fall significantly once these changes are implemented there would in our view be a strong case to consider primary legislation to require objective evidence of a whiplash injury, or of the injury having a significant effect on the claimant's life, before compensation was paid.

6. The Association of British Insurers argues that costs associated with whiplash claims make up 20% of the average motor insurance premium.[8] If accurate, this is a significant sum that deserves closer scrutiny, particularly if a sizeable part of this cost is attributable to fraudulent activity. In this report we examine to what extent the cost of whiplash claims could be reduced without reducing access to justice for the genuinely injured. We focus in particular on recent proposals by the Ministry of Justice to tackle fraudulent and exaggerated claims.

7. We launched our inquiry on 15 March and asked

- Whether the Government is correct in describing Great Britain as the "whiplash capital of the world"
- Whether it is correct to say that the costs of whiplash claims add £90 to the average premium and, if so, what proportion of this additional cost is due to "exaggerated, misrepresented or fabricated" claims
- Whether the proposals put forward by the Government, in relation to medical evidence of whiplash and incentives to challenge fraudulent or exaggerated claims, are likely to reduce motor insurance premiums and, if so, to what extent
- The likely impact of the proposals on access to justice for claimants who are genuinely injured
- Whether there are other steps which the Government should be taking to reduce the cost of motor insurance.

---

7 Transport Committee, Twelfth Report, 2010-12, *Cost of motor insurance: follow up*, HC 1451 (hereafter *Second CMI report*) paragraph 8.

8 Qq218-19, Ev 67 paragraph 7 and WL 43A [printed with report]. Also see Ev w45 section 2.

We heard oral evidence on 20 May and 17 June from a wide range of interested parties. Our Chair visited Dr Andre Brittain-Dissont's medico-legal clinic in Bloomsbury on 13 May to see a patient examined for a possible whiplash claim. We are grateful to him for his assistance and to all our other witnesses.

8. We received a helpful memorandum from the Government and have also drawn heavily on the December 2012 Ministry of Justice consultation paper on reducing the number and cost of whiplash claims.[9] The consultation period closed in March and the MoJ indicated that it wished to await our report before publishing its own conclusions on the issues raised. We welcome the opportunity to contribute directly to the policy-making process and look forward to questioning ministers about their decisions in due course.

9 *Reducing the number and costs of whiplash claims*, MoJ, Dec 12, CP17/2012 (hereafter *MoJ consultation document*).

2 Whiplash: what's the problem?

What is whiplash?

9. The Government has described a whiplash injury as:[10]

> The neck pain which occurs after the soft tissue in the spine has been stretched and strained when the body is thrown in a sudden, forceful jerk.

Dr Andre Brittain-Dissont, an independent medical expert who provides reports on whiplash claimants in relation to legal claims, said:[11]

> The essence of the injury is that it is a muscle or ligament tear and it bleeds. As the bleeding collects, you get a muscle spasm and therefore within the first day, two days, three days or four days symptoms develop.

10. Whiplash injuries can affect daily activities which involve neck movement. Christian Worsfold of the Chartered Society of Physiotherapists said that in severe cases people can suffer from a sensitised nervous system which renders them more susceptible to pain than before.[12]

11. There are varying views about how long whiplash injuries typically last. Premex Services, a medical reporting organisation, reported to us that, reviewing nearly 280,000 reports of whiplash injuries, a prognosis of six months or less was given in 62% of cases and that only in 6% of cases was the prognosis over 12 months.[13] A survey for the Association of Personal Injury Lawyers of people who had suffered a whiplash injury found that symptoms had cleared up within "about six months" in 75% of cases. Symptoms persisted for more than one year in 20% of cases.[14] Christian Worsfold of the Chartered Society of Physiotherapy said that around 10% of sufferers of a whiplash injury still report symptoms four years from the cause of the injury. However, in his view, 50% of cases are resolved within one year.[15]

12. Whiplash injuries resulting from road traffic accidents are influenced by car design. Thatcham Research told us that seat design and the positioning of head rests were crucial in mitigating whiplash. Around one third of vehicles in the UK have seats which are designed to reduce the incidence of whiplash. However, Thatcham Research said that there is no evidence so far that improvements in seat design have reduced whiplash claims in the UK.[16]

10 *MoJ consultation document* paragraph 19 and see Q2. Also see Ev w76-77 (WL 52), Ev w20-23 for whiplash injuries to jaw joints and Ev w73 (WL 50) for claimed link to tinnitus.

11 Q136. Also see Qq2, 5.

12 Q17.

13 Ev 61-62 paragraph 15.

14 APIL, *The Whiplash Report 2012*, p12.

15 Qq3, 4, 35. Also see, survey evidence from Slater and Gordon LLP (Ev w84-86) as well as Ev 40 paragraph 1.3, Ev 44 paragraph 13, and Ev w7 paragraph 4.

16 Ev 49-50 paragraphs 15–20.

13. There is no generally accepted objective test for a whiplash injury. Like headache or backache there is no physical manifestation of the injury and nor can it be detected by a CT or MRI scan. However, there are techniques used by medical professionals for diagnosing whiplash as well as innovative ideas for developing objective diagnostic tools, such as the use of ultrasound, as described to us by Dr Amanda Roshier.[17] There is some scepticism about whether it might be possible to develop an objective test for whiplash.[18] The Government is working to deliver better guidance on the injury and its diagnosis.[19]

14. Witnesses generally agreed that it is possible to suffer a genuine whiplash injury, even if the symptoms cannot be objectively identified.[20] However, there are sometimes suggestions from insurers and others that whiplash injuries are by definition fake.[21] Axa Insurance referred in their submission to "so called 'whiplash'" and there were also references in the evidence we received to a whiplash "epidemic".[22]

15. **Whiplash injuries can arise from motor accidents and can have debilitating consequences for those who suffer them. It is appropriate that people injured in motor accidents through no fault of their own should be able to claim compensation from the party which caused the injury.**

Low-velocity impacts

16. Thatcham Research argued that below very low speeds and accelerations the likelihood of a collision causing a whiplash injury was "really small". Andrew Miller, Director of Research at Thatcham, drew attention to experience in Germany in the 1990s where claims for whiplash only progressed to medical assessment if the accident happened at a speed of at least 10 km/ph (6.25 mph). He argued that if the Government wished to adopt a similar approach it would be possible to derive from biomechanical evidence a speed of impact below which injury was very unlikely.[23]

17. Andrew Ritchie QC said "there are many medical papers to show that four to five miles an hour is about the threshold" for whiplash injury to occur but argued that women and older people are more likely than men and younger people to suffer injury during low-speed impacts. In his view, there was a danger that "if you introduce a threshold, what you are really doing is excluding the vulnerable from their right to claim".[24] Dr Donal McNally, head of the Bioengineering Research Group at the University of Nottingham, said Swedish research had shown that a 10 km/ph threshold for whiplash claims would exclude 40% of the more serious whiplash injuries.[25]

---

17 Q22. Also see Qq18 and 234 as well as Ev 44-45 paragraphs 14–19.

18 Q204. Also on diagnosis issues see Ev w86-91.

19 *MoJ consultation document*, paragraph 24.i.

20 For example see Ev 65 paragraph 1 and discussion in Ev 83-84 section 3.

21 *Second CMI report*, paragraph 6.

22 Ev 77-81 especially paragraph 3.1. Also see Q204, Ev 58 paragraph 2.1, Ev 67 paragraph 12, Ev w23 paragraph 1.3, Ev w109 paragraphs 6, 7, 10, Ev w110 paragraph 13, Ev w118 paragraph 91 and Ev w121.

23 Ev 50 paragraph 22.

24 Q271.

25 Q16. Also see Ev 44 paragraph 6.

18. The ABI supported a threshold speed in principle but said that current in-car technology could not conclusively demonstrate at what speed a car was travelling when involved in an accident.[26]

19. Both the ABI and Thatcham Research raised the case of *Rowan v Charnock*, where it was argued that the judiciary had not given sufficient weight to biomechanical evidence that the impact (in this case between a car and a stationary bus) could not have caused the injuries which were claimed.[27] However, in this case:[28]

> The judge found that the totality of expert opinion allowed the possibility of injury at lower speeds, and that there was in reality no scientific threshold below which injury could not occur. This was in part because the physiological mechanism of injuries such as those the court was concerned with was itself not scientifically known. In short, the judge found it not impossible that this minor collision could have caused whiplash injuries to passengers on the bus.

This conclusion was not subject to appeal.

Number of whiplash claims

20. Table 1 shows that the number of motor insurance injury claims increased by 109% from the average for 2000–05 until 2011–12. The number fell by 9.5% last year.

Table 1: Number of motor insurance injury claims notified to the Compensation Recovery Unit[29]

2000–05 average	2005–06	2006–07	2007–08	2008–09	2009–10	2010–11	2011–12	2012–13
395,735	466,097	518,821	551,905	625,072	674,997	790,999	828,489	749,555

We were told that 70% of these claims are for whiplash injuries but, until recently, firm figures were not publicly available.[30] However, the Government's memorandum disaggregates whiplash and other personal injury claims arising from road traffic accidents: this is shown in table 2.

26 Q171.

27 Ev 50 paragraph 21 and see Q172.

28 See judgment in this case, [2012] EWCA Civ 2.

29 http://www.dwp.gov.uk/other-specialists/compensation-recovery-unit/performance-and-statistics/performance-statistics/.

30 *MoJ consultation document* paragraph 18 and Ev 47 paragraph A1 and Ev 97 paragraph 18.

Table 2: Whiplash claims from road traffic accidents 2008–09 to 2012–13[31]

	2008–09	2009–10	2010–11	2011–12	2012–13
Personal injury claims from road traffic accidents	625,072	674,997	790,999	828,489	819,137
Whiplash claims from road traffic accidents[32]	482,297	514,816	566,998	542,922	476,938
% whiplash claims	77.2	76.3	71.7	65.5	58.2

Taken from Ev w93, paragraph 10.

It is apparent from the information now provided by the Government that the number of whiplash claims has fallen since 2010–11 and is now lower than at any time since at least 2007–08.

21. ***We recommend that the Government analyse pre-2008 statistics on claims arising from road traffic accidents in order to show how the number of whiplash claims has changed since the turn of the century.*** **We are also concerned by the emerging trend for claims for other forms of injury to increase as whiplash claims decline.** ***We recommend that the Government provide a breakdown of these claims for other injuries since 2008–09 and an explanation of any trends.***

22. It is a legal requirement for road traffic accidents in which someone is injured to be reported to the police. However, there is considerable under-reporting of such accidents. For example, in 2011, the number of people who attended hospital following a road traffic accident was more than twice the number recorded by the police as having been injured in such an accident.[33] This is a long-standing problem on which our predecessors commented in 2009 and which is now being investigated by the UK Statistics Authority.[34]

23. The absence of comprehensive statistics about road traffic accidents means that it is impossible to relate the increasing number of personal injury claims in recent years to the number of accidents.[35] Roger Carter, a businessman and former county councillor, also pointed out that this problem makes it harder for local authorities to know where to focus their spending on road improvements to enhance road safety. He suggested that the insurance industry should be required to provide details of motor accident claims to the Motor Insurance Bureau, so that data could be passed on to the relevant highways authorities to show where accidents were taking place. He also suggested that insurers should be required not to accept a claim for personal injury until the claimant can

31 Ev w93.

32 Figures for numbers of whiplash claims were published by the Association of Personal Injury Lawyers in *The Whiplash Report 2012*, pp5, but are slightly different from the figures provided to us by the Government.

33 DfT, "Hospital admissions data on road casualties 2011" in *Reported road casualties in Great Britain, 2011*, 27 Sep https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/9279/rrcgb2011–06.pdf.

34 Transport Committee, Eleventh Report, 2007-08, *Ending the Scandal of Complacency: Road Safety beyond 2010*, HC HC 460, paragraphs 21-34 and see, http://www.statisticsauthority.gov.uk/assessment/assessment/current-assessments/reported-road-casualties-statistics.html.

35 Qq 228, 238-41. Also see Ev w57 paragraph 4.

demonstrate that the accident was reported to the police.[36] We received a submission in support of this proposal from Road Safety GB and others.[37] ***We recommend that, in its reply to this report, the Government should give its view on how to improve the collection of data about road accidents, particularly in relation to how they could improve the detection of fraudulent personal injury claims as well as help highways authorities target spending on improving road safety.***

Prevalence of fraudulent or exaggerated claims

24. **There is no authoritative data publicly available about the prevalence of fraudulent or exaggerated claims for whiplash injuries and no consensus about what constitutes fraud**. Estimates of the percentage of claims which were fraudulent ranged from 0.1% to over 60%.[38] These estimates were based on firms' caseloads, statistical extrapolations or survey data. Forms of fraudulent activity mentioned by witnesses included 'cash-for-crash', where crashes were caused deliberately to generate claims; claims relating to non-existent passengers; fabricated or exaggerated symptoms; or exaggeration of the impact of a genuine injury.[39]

25. Implementing a recommendation in our first report on the cost of motor insurance,[40] an industry-funded police unit dedicated to work on insurance fraud was set up at the beginning of 2012. During the year it made 260 arrests, although not all of these will have related to motor insurance.[41]

26. David Powell of Lloyd's Market Association said insurers have different definitions of fraud and different ways of measuring it.[42] Peter Gradwell of Exchange Insurance Services complained that the insurers "merrily ... rolled together" fraud and exaggeration of claims. He said:[43]

> Exaggeration can't be classed as fraud. It is a matter of opinion on many occasions. Somebody's cost of something is arguable by another person ... If insurance claims were all absolutely correct ... then we would not need to have loss adjusters or claims departments of insurance companies.

27. The Government "shares the widespread concerns" that the growth in whiplash claims "may be linked to an increase in fraudulent and/or exaggerated claims" but does not give an estimate of the proportion of claims which are fraudulent or exaggerated.[44] In her foreword to the MoJ consultation document, Helen Grant MP, the Parliamentary Under-

36 Ev w59-62.

37 Ev w104-05. Also see Ev 88, paragraph 18.

38 Qq147, 64, 308, 311–13, 316; also Ev w9 paragraph 2.2.1.

39 For example Qq 158-60 and Ev 81 section 5.

40 *First CMI report*, paragraph 44.

41 http://www.cityoflondon.police.uk/NR/rdonlyres/06894EB0-EAAB-4FD5-8444-03CDE7866E3D/0/IFEDReviewWebversionfinal.pdf. Also see WL 43A [printed with this report].

42 Q61.

43 Q315. See also Ev w101-02.

44 *MoJ consultation document* paragraph 22.

Secretary of State at the department, referred to the UK as "the whiplash capital of the world".[45] This was based on a 2004 study which showed that the UK generated a higher proportion of bodily injury claims compared to overall claims than eight of the nine other countries studied and a higher proportion of "cervical trauma" claims than any of the other countries.[46] David Brown of the Institute and Faculty of Actuaries (IFA) said international data on whiplash injuries was scarce but the IFA's research supported the Minister's conclusion.[47]

28. Legal witnesses disputed this analysis.[48] The Law Society of England and Wales said "even if data from a 2004 study was relevant today, it cannot be used in isolated from other statistics from the European insurance industry". For example, motor premiums rose more quickly in the UK between 2010 and 2011 than in France and Germany; and claims paid out fell by 6% in 2011, compared to a 2% increase in Germany and no change in France.[49] The Chartered Institute of Legal Executives said that the Government's statement was "not backed by any real evidence ... such statements sound effective, but are meaningless without detail or independent evidence to back them up".[50] **The Government's claim that the UK is the "whiplash capital of the world" cannot be conclusively proved or disproved from the international evidence which is available. It is surprising that the Government has brought forward measures to reduce the number of fraudulent or exaggerated whiplash claims without giving even an estimate of the comparative scale of the problem.**

29. **There is considerable scope for the insurance industry to provide clearer data about the number of whiplash (and other personal injury) claims which it is confident are genuine and those which give cause for concern, ranging from the out-and-out fraudulent to those where symptoms may have been exaggerated. Industry-wide agreement about how to classify claims and the collection of data by the ABI would strengthen the case for the Government to act.** ***We recommend that the Government press the ABI to provide better data about fraudulent or exaggerated personal injury claims, so that there is a stronger evidence base for policy decisions.***

30. The growth in personal injury claims in recent years reflects an increasing tendency for people to exercise their legal rights, particularly following the introduction of 'no win, no fee' arrangements and the activities of claims management companies and others in encouraging people to make claims. Insofar as access to justice has been easier to obtain to rectify genuine losses resulting from road traffic accidents this is not necessarily a negative development, although it has inevitably increased motor insurance premiums.[51]

31. However, **we accept that some of the increase in the number of whiplash claims will have been due, in the main, to fraud or exaggeration, even if it is not possible to give**

45 Ibid., p3.

46 Ev w92, paragraph 8.

47 Q53 and Ev 52-53 paragraphs 4-7. See also Ev w128-47.

48 See Ev w35-36 paragraph 2.1 and section 3, Ev w1-2 and also Ev w8 paragraph 2.1.2.

49 Ev 86-87 paragraphs 7–9 and Qq 229–30.

50 Ev w43 paragraph 9.

51 On this see Ev 88 paragraph 6.

even a rough estimate of the scale of the problem. Since our first inquiry into this issue in 2010–11 we have received ample correspondence from members of the public complaining that after a road traffic accident they are bombarded with telephone calls, text messages, emails and correspondence inviting them to claim, even where no injury has been sustained, and offering an easy pay out.[52] We have also heard worrying evidence about how few claims are contested, because of the difficulties and cost of doing so.[53] This is an issue we will discuss in our next chapter.

52 For example, see Ev w4-5, Ev w105 and Ev w106.

53 See paragraph 63.

3 The Ministry of Justice proposals

32. Following publication of our two reports on the cost of motor insurance, the Prime Minister hosted a summit with insurance firms on 14 February 2012 to discuss the rising cost of premiums.[54] This led to the publication of the MoJ consultation paper on whiplash claims in December 2012. **We were disappointed to hear from witnesses from the legal profession that they had not been invited to the Prime Minister's summit and nor are we aware of any substantive contact with DfT ministers.[55] This is particularly surprising given that legal reforms were clearly under discussion.**

33. The MoJ consultation paper sets out four key areas on which the Government wishes to make progress:[56]

- Improving diagnosis of whiplash;
- Developing standards for diagnosis;
- Challenging questionable claims; and
- Tackling the perception that exaggerated claims are acceptable.

We dealt with diagnosis in paragraph 13 of this report. In this chapter we will consider the other three proposals.

Medical reports

34. The Government has set out a number of possible problems with the medical reports prepared in support of whiplash claims and the doctors who prepare such reports:

- There is no mandatory reporting form, so the information reported can be variable;[57]
- Opportunities for learning and developing skills in diagnosing whiplash injury may be limited; and
- Doctors may be biased towards whoever is paying for the work or, if a GP provides a report, may find it difficult to decline to certify an alleged injury because of the relationship which has built up over time between doctor and patient.

The MoJ is consulting on whether a system of independent medical panels, made up of accredited medical practitioners, should be established to assess claims for whiplash injury and give objective, impartial advice to the court. A key feature of this approach would be

54 Ev w91 paragraph 4. Also see Transport Committee, 2010–12, Thirteenth Special Report, *Cost of motor insurance: follow up: Government Response to the Committee's Twelfth Report of Session 2010–12*, HC 1934 (hereafter *Second CMI report: Government response*) p1. The former Secretary of State for Transport hosted a follow-up meeting with insurers on 2 May 2012 and the current Secretary of State did likewise on 25 March 2013 – see HC Deb, 25 Apr 13, c1068W and 27 Jun 13, c455.

55 HC Deb, 25 Apr 13, c1068W.

56 *MoJ consultation document*, p12.

57 See paragraph 38 in relation to the reporting form used for claims processed using the electronic portal.

use of a standardised medical report which would be based on best practice guidance and contain relevant information and evidence supporting its conclusion, such as the date of the accident and the medical notes of any consultation with the claimant's GP or other specialist immediately after the accident. The Government is considering options for peer review of reports and for apportioning costs.[58]

35. Both insurers and legal witnesses broadly agreed that the Government's proposals were heading in the right direction.[59] The main issue raised was the variable quality of reports.60 In some cases this was due to poor practice on the part of medical practitioners — Andrew Ritchie QC referred to the danger of "going to the old war horses who have almost given up and ... are no longer in clinical practice"[61] — but the lack of information provided to practitioners was also of concern. For example, Dr Simon Margolis, chief executive of Premex Group, a medical reporting organisation, said:[62]

> The way the system works is that we would receive a letter of instruction, either from a solicitor or an insurance company. That may say no more than "Road traffic; neck injury" or it may be more detailed. As the body in the centre trying to get the expert and the claimant together as efficiently as possible, we don't get involved in the actual process of instructing the expert in terms of telling the expert about the circumstances of the accident or previous injuries. Unless our instructing source tells us, then the expert would not know.

He added that it was "now unusual for an expert, particularly in these lower value claims, to see medical records", which could assist in the detection of fraud of exaggeration.[63] David Fisher of Axa Insurance said it was "crucial ... that the reporting doctor has access to both versions of events", so that discrepancies between a claimant's alleged injuries and the circumstances of the accidents could be taken into account.[64]

36. In terms of peer review, medical experts are responsible to the court for the quality of the reports they provide. However, Dr Andre Brittain-Dissont, an independent medical expert, questioned whether the quality of medical reports was, in practice, subject to judicial scrutiny.[65] Dr Margolis agreed that there was scope for increased audit of medical reports as well as sanctions against bad practice.[66]

37. ***We support the proposal that there should be an accreditation scheme for medical practitioners (who need not all be doctors)[67] who provide medical reports in relation to***

58 *MoJ consultation document*, Part Two.

59 For example, Ev 90 paragraph 25, Ev w5 paragraph 3.1, Ev w16 paragraph 38, Ev w27 paragraph 1, Ev w31 paragraph 8, Ev w36 section 5, Ev w38 paragraph VI, and Ev w65-66. For a different view see Ev 48 paragraph A3, Ev w12, Ev w44 paragraphs 16–17 and Ev w69-70 paragraphs 12-13.

60 For example, Qq 18–19, 26–27.

61 Q235.

62 Q132.

63 Q129.

64 Q201.

65 Q137.

66 Ibid.

67 See Ev 40, Ev 45 paragraph 20 and also Qq 28, 50–51.

whiplash claims. We also agree that these reports should be available equally to all parties. However, it is essential that the practitioners instructed to prepare such reports are provided with information about the accident and the claimant's medical records. Reports prepared without this information are likely to be of very limited value.

38. The section of the consultation paper on medical reports makes no mention of the electronic portal used to process most whiplash claims.[68] A standard medical form already exists in relation to claims processed using the portal.[69] ***The MoJ should explain whether it wishes to mandate for general use the standard medical report form already used for whiplash claims processed using the electronic portal, or introduce an altogether new form. In the latter case, the Government should explain why a new form is needed.***

39. We were concerned to hear suggestions from insurers, such as Axa, that medical reports routinely overstate the likely duration of whiplash symptoms.[70] If true, this is evidence of systemic exaggeration of claims. However, as we have noted, there is a range of views about the duration of whiplash injuries.[71] This is an area in which accreditation of medical reporters, and a focus on best practice, could lead to improvements. It also points to the importance of some form of audit. **In our view, a random audit of at least a proportion of medical reports prepared each year is essential. We also question whether existing regulatory bodies such as the General Medical Council could have a role in auditing reports and receiving and dealing with complaints about the quality of reports under these new arrangements.** ***We recommend that the Government consider this issue.***

40. A number of issues raised with us in this area are not mentioned in the MoJ consultation paper. For example, although symptoms of a whiplash injury usually emerge within seven days,[72] and do not usually last for more than one year, claims can be lodged up to three years after the accident alleged to have caused them. Nigel Teasdale of the Forum of Insurance Lawyers said that it was very difficult for a claim to be disproved in those circumstances.[73] Keoghs LLP said that the Government should consider reducing the limitation period for road traffic accidents under £10,000 to one year.[74] The Minister, Helen Grant MP, recently told the House that she had no plans to change the law on the limitation period.[75] ***We recommend that the Government explain the rationale for the three-year limitation period and bring forward recommendations for reducing it.***

41. Andrew Ritchie QC suggested that it might be desirable to require claimants to support their claims with objective evidence of injury, such as proof that they had consulted a medical practitioner or attended an Accident and Emergency department shortly after the accident, or photographs of the damage to their vehicle.[76] We agree. This is what we had in

68 See paragraph 49.

69 http://hmctsformfinder.justice.gov.uk/courtfinder/forms/rta3-eng.pdf.

70 Ev 78 paragraph 3.4. Also see Ev w23-24 paragraphs 1.4, 4.2.

71 See paragraph 11.

72 Qq 7–8, 136.

73 Q270. Also Ev 95 paragraphs 27-28.

74 Ev w30 paragraph 35.

75 HC Deb, 2 Jul 13, c729.

76 Q271.

mind when we recommended that the "bar to receiving compensation in whiplash cases should be raised" by requiring the provision of "further evidence of injury or personal inconvenience arising from the injury".[77] The Government did not comment on our suggestion in its reply to our January 2012 report. ***We recommend that the Government consult on ways of requiring whiplash claimants to provide more information in support of their claim, such as proof that they saw a medical practitioner shortly after the accident or evidence of the impact of the injury on everyday life. There should be a presumption against accepting claims where such information is not provided.***

Use the small claims track?

42. Civil cases, such as personal injury claims, are subject to different forms of procedure, depending on their size and complexity. Personal injury claims for general damages[78] over £1,000 (but less than £25,000) are currently dealt with using the "fast track" procedure. The MoJ is consulting on raising the threshold for allocating whiplash cases, or personal injury cases more generally, to £5,000. The MoJ states that "sample data has indicated an average value of around £2,500 paid in damages for road traffic accident personal injury claims",[79] so most would switch from the fast track to the "small claims track" if the Government's proposal is implemented in some form.

43. Raising the small claims threshold for personal injury claims was considered, and rejected, as recently as 2007. The electronic portal for processing claims was introduced instead.[80] The Government said that "with the continuing rise in whiplash claims since then ... we believe the time is right to revisit this issue".[81] However, we have already noted that whiplash claims peaked in 2011 and are now declining.

44. Switching most whiplash cases from the fast track to the small claims track would have the following procedural implications:

- The normal procedural rules and strict rules of evidence (including taking evidence under oath) would not apply.
- Expert witnesses are not usually heard.[82]
- The recovery of costs is strictly limited: no costs can be claimed for legal representation.[83]

A number of arguments were made about the wider implications of this change:

77 *Second CMI report*, paragraph 8.

78 Relating to pain, suffering and loss of amenity but excluding compensation for specific costs incurred eg physiotherapy.

79 *MoJ consultation document*, paragraph 57.

80 See paragraph 49.

81 *MoJ consultation document*, paragraph 25.

82 Ibid., paragraph 50.

83 Ibid., paragraph 52.

- According to the ABI, "the economic case in favour of challenging more claims that insurers suspect are fraudulent or exaggerated" would be likely to improve if the small claims procedure is used.[84]

- Some claimants may be deterred from making claims or challenging the rejection of claims because they would have to represent themselves or bear the cost of legal representation themselves.[85] Self-represented litigants are likely to come up against legal professional engaged by insurers, leading to a potentially unfair inequality of arms.[86]

- Without legal representation claimants might settle for less compensation than the amount to which their injury would normally entitle them.[87]

45. Insurers strongly supported this proposal and suggested ways in which any problems with access to justice could be mitigated.[88] The ABI described the small claims track as "a user-friendly and simple route for settling straightforward low-value claims" and drew attention to existing guides from the Civil Justice Council and Bar Council on using the procedure. It offered to work with the Government, the courts and other stakeholders in helping assist self-represented claimants pursue their claims.[89] In addition, Aviva suggested that claimants would still be able to engage legal representation for small claims using new Damages Based Agreements, whereby a solicitor's fee can be taken from any damages awarded.[90]

46. The Government suggested that claimants could use 'before the event' legal insurance cover, which is often sold alongside motor insurance, to fund claims using the small claims track. It said "following the implementation of the Government's reforms to civil litigation and costs, we expect a number of new innovative BTE insurance products to be developed for this market".[91] ARAG plc, which sells such policies, said that "less well-off members of society" tended not to buy such insurance and would "face the prospect of representing themselves" in court.[92]

47. Legal witnesses expressed outright opposition to the Government's proposals.[93] The Association of Personal Injury Lawyers pointed out that an allegation of fraud would lead to a claim being transferred to the fast track, something which it thought insurers would do tactically "to drive up costs and deter the genuinely injured claimant from proceeding with the case". Fear of the court system would deter some genuinely injured people from

84 Ev 68 paragraph 16.

85 *MoJ consultation document*, paragraph 65.

86 Ibid., paragraph 66.

87 Ibid., paragraph 67.

88 Aviva suggested that the limit be raised to £10,000 – see Ev 74 paragraph 50 and Q109.

89 Ev 68 paragraphs 20–21.

90 Ev 74-75 paragraph 55.

91 *MoJ consultation document*, paragraph 29. The sale of this type of insurance has recently been subject to investigation by the Financial Conduct Authority - http://www.fca.org.uk/static/documents/thematic-reviews/tr13–01.pdf.

92 Ev w9 paragraph 2.4.1. Also see Ev w44 paragraph 20.

93 For example, Ev w1, Ev w13 paragraphs 5-7 and Ev w17 paragraphs 46-57, Ev w19 paragraphs 6-10, Ev w33 paragraph 38, Ev w36-37 section 6, Ev w38 section 4 and Ev w44 paragraph 19.

making claims or drive them into the hands of claims management companies, for whom a "window of opportunity [would] be opened".[94] Desmond Hudson of the Law Society of England and Wales spoke of "very significant issues of injustice" and Andrew Ritchie QC asked "how are those who are old and infirm, those who have mental difficulties and those who are not so well educated going to issue their claim forms?"[95]

48. It was also suggested that, in settling claims directly, insurers might not offer the level of compensation likely to be awarded if a claim were taken forward by a solicitor.[96] We heard anecdotal evidence of undersettlement of claims but insurers argued that individual cases were not an accurate reflection of the overall situation. Dominic Claydon of Aviva said:[97]

> I am aware of cases that have involved solicitors where there has been under-settlement as well ...We believe the way forward is to have standardisation and transparency around the medical reports and, additionally, to have a standard method of assessing quantum ... I don't believe we need lawyers in all cases.

David Powell of Lloyd's Market Association agreed, arguing that the "volume of complaints against insurers settling claims is miniscule compared with the number of claims they settle".[98]

49. A complicating factor with this proposal is how switching claims to the small claims track might affect use of the electronic portal which is used to process personal injury claims up to £10,000 where liability is not contested.[99] Some 75% of claims are now processed using the portal.[100] Recoverable costs are fixed for each stage of the claim and have recently been reduced.[101] In July 2013, the portal is being extended to cover other forms of claims, as well as personal injury claims up to £25,000.[102] The portal is relatively new and its impact on claims volumes and costs is not yet clear.[103] David Fisher of Axa Insurance suggested that the electronic claims portal could be changed to accommodate self-represented claimants. He said "a similar situation occurs in employment tribunals and in criminal injuries compensation claims, where there is no automatic legal representation".[104] ARAG plc doubted whether litigants-in-person would have the "capacity, confidence or appetite to instigate claims through the portal".[105]

50. **There are good arguments for and against switching whiplash claims of between £1,000 and £5,000 to the small claims track, but on balance we do not support this**

94 Ev 89 paragraphs 16–20. Also see Ev w27 and Qq 318–20.

95 Qq 264, 269. Also see Ev w9 paragraph 2.4.5.

96 For example see Ev 90 paragraph 30, Ev w3, Ev w17 paragraphs 53-54 and Ev w53-54 paragraphs 4.14-4.20.

97 Q209. Also see Ev w23 paragraph 1.5.

98 Q108. Also see Q208.

99 See *MoJ consultation document*, paragraph 79. And see http://www.rtapiclaimsprocess.org.uk/index.html.

100 Q242.

101 See http://www.lawgazette.co.uk/news/rta-claims-plummet-following-fees-cut.

102 It is also being rebranded as the Claims Portal - http://www.claimsportal.org.uk/en/.

103 See Fenn, P., *Evaluating the low value Road Traffic Accident process*, MoJ, Jul 12. For comments on the need to review the portal see, for example, Ev w18 paragraph 61 and Ev w19 paragraph 10.

104 Q208. Also see Ev w26 paragraph 5.4.

105 Ev w9 paragraph 2.4.4. Also see Ev w16 paragraph 44.

proposal at the present time. We believe that access to justice is likely to be impaired, particularly for people who do not feel confident to represent themselves in what will seem to some to be a complex and intimidating process. Insurers will use legal professionals to contest claims, which will add to this problem.

51. **It would be financially difficult for many solicitors to assist litigants fighting personal injury claims using the small claims procedure, given the limited fees available. However, we are concerned that some claims management firms might find a way to enter the process, fuelling another boom in their activities**.[106]

52. **We are also concerned that use of the small claims track could prove counterproductive in efforts to discourage fraudulent and exaggerated claims**. It is not clear how medical and other evidence would be treated: the general presumption in small claims procedure is that expert evidence is not submitted. If an insurer wishes to argue that a claim is fraudulent or exaggerated that would lead to proceedings switching to the fast track, where evidence is taken on oath and such claims can be decided.

53. The £1,000 threshold for personal injury claims using the small claims track was set in 1991 and cannot be left at that level indefinitely. However, we consider that any proposal to change this threshold should be informed by a fuller understanding of the impact of the new electronic portal for claims on how claims are managed and on costs. ***We recommend that the Government analyse the impact of the electronic portal on claims management and costs before reconsidering whether to increase the threshold for whiplash claims to be dealt with using the small claims track.***

54. ***We also recommend that the MoJ consider ways in which use of the small claims track could be combined with the routine submission of expert evidence, such as a medical report, to help restrict opportunities for fraud and exaggeration. The MoJ should consider further ways in which litigants in person could be assisted to use the small claims process, particularly in order to counter the inequality of arms likely to arise in personal injury claims.***

Acceptability of fraud and exaggeration

55. The Government has said that it is working with insurers and other interested groups on measures to tackle perceptions that exaggerated claims are acceptable, building on current notable examples, such as the work of the City of London Police Force's Insurance Fraud Enforcement Department.[107] ***We recommend that the Government provide further details of what this work involves.***

56. David Fisher of Axa Insurance said that the courts could be too lenient in their treatment of exaggerated claims. He mentioned the case of *Summers v Fairclough Homes Ltd* which was decided by the Supreme Court in 2012.[108]

106 Q318.

107 *MoJ consultation document*, paragraph 24.iv.

108 Q170. Also see Q274, Ev 81 paragraph 4.3, Ev 95 paragraphs 25-26, Ev 109 paragraph 67, Ev w26 paragraph 6.4, Ev w29 paragraph 25, Ev w57 paragraph 31, Ev w119 paragraph 105 and WL 43A [printed with this report].

> Mr Summers had signed a statement of truth to the effect that his claim was in the region of £800,000. He recovered £80,000 and the Supreme Court declined to strike out his claim so that he would receive nothing at all. That is the situation that we face all the time in respect of exaggerated and falsified claims. If there has been injury, the common law allows for the recovery of compensation in respect of the genuine amount of injury, no amount how tainted the claim might be as a whole.[109]

Axa went so far as to claim that "the courts condone fraud and exaggeration in personal injury claims".[110]

57. In the case mentioned by Axa, the Supreme Court confirmed that it was possible for the courts to strike out claims which are "tainted by fraud" but that this power should only be used "in exceptional circumstances". It rejected the argument that if exaggerated cases are not automatically struck out, dishonest claims will be encouraged.[111] Keoghs LLP said that there was "some irony in this position ... perhaps the Supreme Court was unfortunately correct that claimants exaggerating their claim ten-fold is no longer deemed to be exceptional".[112]

58. We acknowledge the force of the argument that gross exaggeration of a claim should lead to it being rejected outright, even if there were grounds otherwise to award compensation. However, this is a complex area of law and judicial decisions invariably rest on the facts in individual cases. ***We recommend that the Ministry of Justice give its view on the issues involved in limiting the right to compensation where it can be shown that a claim is grossly exaggerated.***

Data sharing

59. Desmond Hudson, Chief Executive of the Law Society, described work being undertaken with the insurers to share data on potentially fraudulent claims. However, he described the insurers as "slow and not as helpful and collaborative as I would want them to be".[113] Craig Budsworth of the Motor Accident Solicitors Society said there was currently no sharing of data so that solicitors could be alerted to claimants with a track record of making repeated claims. However, he thought progress was now being made.[114] The Government has also called for greater co-operation between insurers and claimant lawyers to tackle fraud.[115] **Insurers and lawyers have a strong interest in preventing fraud so it is disappointing to hear legal witnesses say that progress in data sharing has been slow.** ***We recommend that the Government encourage both parties to establish collaborative arrangements aimed at identifying and deterring potentially fraudulent claims.***

---

109 Q165.

110 Ev 81 paragraph 4.3 and Q 226.

111 Supreme Court press summary, *Fairclough v Summers*, 27 Jun 12, http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2010_0212_PressSummary.pdf. Also see Q274.

112 Ev w30 paragraph 26.

113 Q248. Also see Ev w44 paragraph 21.

114 Qq249, 252. For the insurers' perspective see WL 43A [printed with this report].

115 Ev w96 paragraph 36.

60. We have previously commented on the project to enable insurers to gain real-time access to the DVLA database, to check details such as penalty points and convictions when insurance is being arranged.[116] The Government told us last year that a system could be in place by 2014.[117] ***We would be grateful for an update on progress with this project.***

116 *Second CMI report,* paragraph 25.

117 *Second CMI report: Government response*, p7.

4 Conclusion

61. The number of fraudulent and exaggerated whiplash claims has contributed to the increase in motor insurance premiums in recent years. However, we acknowledge genuine claims which relate to real injuries that can affect people for months or years. In the debate about how to reduce fraud and exaggeration, genuine claimants should not be demonised simply because their condition cannot be picked up on a scan.

62. We welcome the Government's commitment to reducing motor insurance premiums, but are surprised that ministers seem only to be listening to the insurers' perspective. This is particularly disappointing in the light of the Government's own observation that the insurers have "encourage[d] excessive and unnecessary claims within their own business models".[118]

63. We were surprised to hear that insurers will sometimes make an offer to personal injury claimants even before a medical report has been received. Insurers said that this illustrated the dysfunctionality of the current system because of the costs involved in defending claims.[119] Some witnesses suggested that the practice should be banned.[120] In addition, insurers told us that they sometimes paid claims they suspected were fraudulent or exaggerated.[121] Liverpool Law Society said "at the very least insurers should be required to consider whether it is appropriate to continue to pay compensation on claims that are considered to be fraudulent or exaggerated" rather than to work with claimant representatives on systems for weeding out such claims.[122] We agree. **Although it may make economic sense for an individual insurance firm to settle a claim without medical evidence or to pay out even if fraud or exaggeration is suspected, the industry as a whole is damaged, and motorists pick up the bill in the form of higher premiums. Insurers must immediately put their house in order and end practices which encourage fraud and exaggeration. If not, the Government should take steps to protect motorists.**

64. The insurers have committed to passing savings from reductions in whiplash claims to consumers in the form of lower premiums.[123] We were told that recent reductions in quoted premiums reflected expectations of lower legal costs as a result of the implementation of the ban on referral fees and other legal changes which came into force in April.[124] However, the Institute and Faculty of Actuaries (IFA) has pointed out that a reduction in premiums of 3–15% due to reduced fraud and exaggeration would soon be offset by inflation in compensation for other types of claim, which is currently averaging 3–7% per annum. The IFA concluded that measures to reduce whiplash claims "whilst material and favourable, may not necessarily lead to any material reduction in premiums".

118 Ev w95 paragraph 34.

119 Q84 and Ev 80 paragraph 3.10.

120 For example, Ev 96 paragraph 4 and Ev 99 paragraphs 35, 38, Ev 117 paragraph 5.7, Ev w2, Ev w33 paragraph 32 and Ev w34 paragraph 50.

121 Qq 159-61 and WL 43A [printed with this report].

122 Ev w35 paragraph 2.5.

123 Ev w91 paragraph 6 and Qq 77-78, 110, 214-17. Also see Ev w25 paragraph 4.10.

124 Q82. Also see WL 43A [printed with this report].

However, premiums could fall in parts of the market where fraudulent and exaggerated claims are more prevalent.[125] ***We recommend that the Government explain how it will monitor whether or not motor insurers honour their commitment to ensure that any cost reductions resulting from proposed legal reforms are passed through to consumers in the form of lower premiums.***

65. This goes to show the complexity of the factors which contribute to the cost of motor insurance. Tackling court processes associated with whiplash claims may help reduce premiums but will not deal with the cold calling and texting which now encourages claims, or the poor safety record of young drivers which is the root cause of the very high premiums they must pay. We also note that the Competition Commission is now following up an investigation by the Office of Fair Trading into the market for motor insurance premiums, looking in particular at how repairs and replacement vehicles are provided to 'not-at-fault' drivers. Provisional findings are due to be released in September. We have previously pressed for Government action in all of these areas, and for the creation of a cross-departmental ministerial committee to co-ordinate action,[126] but progress has often been slow and disjointed, betraying a lack of strategic vision. ***We recommend that the Government take a more strategic approach to tackling the cost of motor insurance premiums, bringing together action by the MoJ, Department for Health and DfT, as well as any future implementation of Competition Commission recommendations, under a single ministerial lead.***

66. In our original report on the cost of motor insurance we called on the insurers to be more transparent about their links with solicitors, vehicle repairers, credit hire firms and other organisations from which referral fees were received. Although referral fees have now been outlawed, links between insurers and such firms still exist and there are new legal mechanisms for bringing insurance firms and solicitors together under one roof.[127] We note survey evidence from Slater & Gordon LLP which suggests that a significant proportion of whiplash claims are generated by insurers themselves.[128] **It is regrettable that the motor insurance sector ignored our recommendation that consumers are entitled to know more about the financial and other links between their insurer and the many companies typically involved with each claim. Transparency breeds trust and confidence in the market. Unfortunately, the motor insurance sector remains as opaque as ever. This needs to change.**

125 Ev 56 paragraphs 26, 30, 31.

126 *First CMI report* paragraph 53 and *Second CMI report* paragraph 29.

127 Ev w77-78 paragraph 1.4

128 Ev w80-81.

Conclusions and recommendations

Number of whiplash claims

1. It is apparent from the information now provided by the Government that the number of whiplash claims has fallen since 2010–11 and is now lower than at any time since at least 2007–08. (Paragraph 20)

2. We recommend that the Government analyse pre-2008 statistics on claims arising from road traffic accidents in order to show how the number of whiplash claims has changed since the turn of the century. We are also concerned by the emerging trend for claims for other forms of injury to increase as whiplash claims decline. We recommend that the Government provide a breakdown of these claims for other injuries since 2008–09 and an explanation of any trends. (Paragraph 21)

3. We recommend that, in its reply to this report, the Government should give its view on how to improve the collection of data about road accidents, particularly in relation to how they could improve the detection of fraudulent personal injury claims as well as help highways authorities target spending on improving road safety. (Paragraph 23)

Prevalence of fraudulent or exaggerated claims

4. The Government's claim that the UK is the "whiplash capital of the world" cannot be conclusively proved or disproved from the international evidence which is available. It is surprising that the Government has brought forward measures to reduce the number of fraudulent or exaggerated whiplash claims without giving even an estimate of the comparative scale of the problem. (Paragraph 28)

5. There is no authoritative data publicly available about the prevalence of fraudulent or exaggerated claims for whiplash injuries and no consensus about what constitutes fraud. There is considerable scope for the insurance industry to provide clearer data about the number of whiplash (and other personal injury) claims which it is confident are genuine and those which give cause for concern, ranging from the out-and-out fraudulent to those where symptoms may have been exaggerated. Industry-wide agreement about how to classify claims and the collection of data by the ABI would strengthen the case for the Government to act. We recommend that the Government press the ABI to provide better data about fraudulent or exaggerated personal injury claims, so that there is a stronger evidence base for policy decisions. (Paragraphs 24 and 29)

6. We accept that some of the increase in the number of whiplash claims will have been due, in the main, to fraud or exaggeration, even if it is not possible to give even a rough estimate of the scale of the problem. (Paragraph 31)

Prime Minister's summit on motor insurance

7. We were disappointed to hear from witnesses from the legal profession that they had not been invited to the Prime Minister's summit and nor are we aware of any substantive contact with DfT ministers. This is particularly surprising given that legal reforms were clearly under discussion. (Paragraph 32)

Medical reports

8. We support the proposal that there should be an accreditation scheme for medical practitioners (who need not all be doctors) who provide medical reports in relation to whiplash claims. We also agree that these reports should be available equally to all parties. However, it is essential that the practitioners instructed to prepare such reports are provided with information about the accident and the claimant's medical records. Reports prepared without this information are likely to be of very limited value. (Paragraph 37)

9. The MoJ should explain whether it wishes to mandate for general use the standard medical report form already used for whiplash claims processed using the electronic portal, or introduce an altogether new form. In the latter case, the Government should explain why a new form is needed. (Paragraph 38)

10. In our view, a random audit of at least a proportion of medical reports prepared each year is essential. We also question whether existing regulatory bodies such as the General Medical Council could have a role in auditing reports and receiving and dealing with complaints about the quality of reports under these new arrangements. We recommend that the Government consider this issue. (Paragraph 39)

11. We recommend that the Government explain the rationale for the three-year limitation period and bring forward recommendations for reducing it. (Paragraph 40)

12. We recommend that the Government consult on ways of requiring whiplash claimants to provide more information in support of their claim, such as proof that they saw a medical practitioner shortly after the accident or evidence of the impact of the injury on everyday life. There should be a presumption against accepting claims where such information is not provided. (Paragraph 41)

Use the small claims track?

13. There are good arguments for and against switching whiplash claims of between £1,000 and £5,000 to the small claims track, but on balance we do not support this proposal at the present time. We believe that access to justice is likely to be impaired, particularly for people who do not feel confident to represent themselves in what will seem to some to be a complex and intimidating process. Insurers will use legal professionals to contest claims, which will add to this problem. (Paragraph 50)

14. It would be financially difficult for many solicitors to assist litigants fighting personal injury claims using the small claims procedure, given the limited fees available.

However, we are concerned that some claims management firms might find a way to enter the process, fuelling another boom in their activities. (Paragraph 51)

15. We are also concerned that use of the small claims track could prove counterproductive in efforts to discourage fraudulent and exaggerated claims. (Paragraph 52)

16. We recommend that the Government analyse the impact of the electronic portal on claims management and costs before reconsidering whether to increase the threshold for whiplash claims to be dealt with using the small claims track. (Paragraph 53)

17. We also recommend that the MoJ consider ways in which use of the small claims track could be combined with the routine submission of expert evidence, such as a medical report, to help restrict opportunities for fraud and exaggeration. The MoJ should consider further ways in which litigants in person could be assisted to use the small claims process, particularly in order to counter the inequality of arms likely to arise in personal injury claims. (Paragraph 54)

Acceptability of fraud and exaggeration

18. We recommend that the Government provide further details of what its work to tackle perceptions that exaggerated claims are acceptable involves. (Paragraph 55)

19. We recommend that the Ministry of Justice give its view on the issues involved in limiting the right to compensation where it can be shown that a claim is grossly exaggerated. (Paragraph 58)

Data sharing

20. Insurers and lawyers have a strong interest in preventing fraud so it is disappointing to hear legal witnesses say that progress in data sharing has been slow. We recommend that the Government encourage both parties to establish collaborative arrangements aimed at identifying and deterring potentially fraudulent claims. (Paragraph 59)

21. We would be grateful for an update on progress with the project to enable insurers to gain real-time access to the DVLA database. (Paragraph 60)

Conclusion

22. Whiplash injuries can arise from motor accidents and can have debilitating consequences for those who suffer them. It is appropriate that people injured in motor accidents through no fault of their own should be able to claim compensation from the party which caused the injury. (Paragraph 15)

23. Although it may make economic sense for an individual insurance firm to settle a claim without medical evidence or to pay out even if fraud or exaggeration is suspected, the industry as a whole is damaged, and motorists pick up the bill in the form of higher premiums. Insurers must immediately put their house in order and

end practices which encourage fraud and exaggeration. If not, the Government should take steps to protect motorists. (Paragraph 63)

24. We recommend that the Government explain how it will monitor whether or not motor insurers honour their commitment to ensure that any cost reductions resulting from proposed legal reforms are passed through to consumers in the form of lower premiums. (Paragraph 64)

25. We recommend that the Government take a more strategic approach to tackling the cost of motor insurance premiums, bringing together action by the MoJ, Department for Health and DfT, as well as any future implementation of Competition Commission recommendations, under a single ministerial lead. (Paragraph 65)

26. It is regrettable that the motor insurance sector ignored our recommendation that consumers are entitled to know more about the financial and other links between their insurer and the many companies typically involved with each claim. Transparency breeds trust and confidence in the market. Unfortunately, the motor insurance sector remains as opaque as ever. This needs to change. (Paragraph 66)

Formal Minutes

Monday 15 July 2013

Members present:

Mrs Louise Ellman, in the Chair

Sarah Champion	Adrian Sanders
Jim Dobbin	Iain Stewart
Jason McCartney	Martin Vickers
Karl McCartney	

Draft Report (*Cost of motor insurance: whiplash*), proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 66 read and agreed to.

Summary agreed to.

Resolved, That the Report be the Fourth Report of the Committee to the House.

Ordered, That the Chair make the Report to the House.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

[Adjourned till Monday 2 September at 4.00 pm

Witnesses

Monday 20 May 2013

Monday 17 June 2013

List of printed written evidence

List of additional written evidence

(published in Volume II on the Committee's website www.parliament.uk/transcom)

List of Reports from the Committee during the current Parliament

The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

Session 2013–14

Third Report	The work of the Vehicle and Operator Services Agency (VOSA)	HC 583
Second Report	Future Programme 2013–14	HC 438
First Report	Aviation strategy	HC 78

Session 2012–13

Twelfth Report	The European Commission's 4th Railway Package	HC 1001(HC 439)
Eleventh Report	Land transport security - scope for further EU involvement?	HC 875
Ninth Special Report	Rail 2020: Government and Office of Rail Regulation Responses to the Committee's Seventh Report of 2012–13	HC 1059
Tenth Report	The Coastguard, Emergency Towing Vessels and the Maritime Incident Response Group: follow up: Government Response to the Committee's Sixth Report of 2012–13	HC 1018
Ninth Report	Marine Pilotage	HC 840
Eighth Report	Cancellation of the InterCity West Coast franchise competition	HC 537
Eighth Special Report	Plug-in vehicles, plugged in policy?: Government Response to the Committee's Fourth Report of Session 2012–13	HC 884
Seventh Report	Rail 2020	HC 329
Sixth Report	The Coastguard, Emergency Towing Vessels and the Maritime Incident Response Group: follow up	HC 647
Fifth Report	Future programme: autumn and winter 2012–13	HC 591
Fourth Report	Plug-in vehicles, plugged in policy?	HC 239
Third Report	Competition in the local bus market	HC 10 (HC 761) (Incorporating HC 1861–i–iii)
Fifth Special Report	Flight Time Limitations: Government Response To The Committee's First Report Of Session 2012–13	HC 558
Fourth Special Report	Air Travel Organisers' Licensing (Atol) Reform: Government Response To The Committee's Seventeenth Report Of Session 2010–12	HC 557
Second Report	Road safety	HC 506 (HC 648) Incorporating HC 1738
First Report	Flight time limitations	HC 164 Incorporating HC 1838

Third Special Report	Sulphur emissions by ships: Government Response to the Committee's Sixteenth Report of Session 2010–12	HC 87
Second Special Report	Counting the cost: financial scrutiny of the Department for Transport 2011–12: Government Response to the Committee's Fifteenth Report of Session 2010–12	HC 15
First Special Report	Draft Civil Aviation Bill: Pre-Legislative Scrutiny: Government Response to the Committee's Thirteenth Report of Session 2010–12	HC 11

Session 2010–12

Seventeenth Report	Air Travel Organisers' Licensing (ATOL) reform	HC 1798
Sixteenth Report	Sulphur emissions by ships	HC 1561
Fifteenth Report	Counting the cost: financial scrutiny of the Department for Transport 2011–12	HC 1560
Fourteenth Report	Cable theft on the Railway	HC 1609 (HC 1933)
Thirteenth Report	Draft Civil Aviation Bill: Pre-Legislative Scrutiny	HC 1694
Twelfth Report	Cost of motor insurance: follow up	HC 1451 (HC 1934)
Eleventh Report	Thameslink rolling stock procurement	HC 1453 (HC 1935)
Tenth Report	High Speed Rail	HC 1185–I (HC 1754)
Ninth Report	Out of the jam: reducing congestion on our roads	HC 872 (HC 1661)
Eighth Report	Bus Services after the Spending Review	HC 750 (HC 1550)
Seventh Report	Taxis and private hire vehicles: the road to reform	HC 720 (HC 1507)
Sixth Report	The Coastguard, Emergency Towing Vessels and the Maritime Incident Response Group	HC 948, incorporating HC 752–i (HC 1482)
Fifth Report	Keeping the UK moving: The impact on transport of the winter weather in December 2010	HC 794 (HC 1467)
Fourth Report	The cost of motor insurance	HC 591 (HC 1466)
Third Report	Transport and the economy	HC 473 (HC 962)
Second Report	Financial Scrutiny of the Department for Transport	HC 683
First Report	Drink and drug driving law	HC 460 (Cm 8050)
Tenth Special Report	The proposal for a National Policy Statement on Ports: Government Response to the Committee Fifth Report of Session 2009–10	HC 1598
Third Special Report	The performance of the Department for Transport: Government response to the Committee's Fourth Report of Session 2009–10	HC 549
Second Special Report	Update on the London Underground and the public-private (PPP) partnership agreements: Government response to the Committee's Seventh Report of Session 2009–10	HC 467
First Special Report	The major road network: Government response to the Committee's Eighth Report of Session 2009–10	HC 421

Oral evidence

Taken before the Transport Committee

on Monday 20 May 2013

Members present:

Mrs Louise Ellman (Chair)

Sarah Champion
Kwasi Kwarteng
Karen Lumley
Adrian Sanders
Graham Stringer

Examination of Witnesses

Witnesses: **Christian Worsfold**, Chartered Society of Physiotherapy, **Dr Donal McNally**, Associate Professor and Reader in Bioengineering and Head of the Bioengineering Research Group, University of Nottingham, **Dr Amanda Roshier**, Lecturer in Anatomy and Behaviour, School of Veterinary Medicine and Science, University of Nottingham, and **Andrew Miller**, Director of Research, Thatcham Research, gave evidence.

Q1 Chair: Good afternoon and welcome to the Transport Select Committee. Could you give your name and the organisation that you represent?
Andrew Miller: Andrew Miller, Thatcham.
Dr Roshier: Dr Amanda Roshier, University of Nottingham.
Dr McNally: Donal McNally, University of Nottingham.
Christian Worsfold: Christian Worsfold, Chartered Society of Physiotherapy.

Q2 Chair: Mr Worsfold, could you tell us what a whiplash injury is?
Christian Worsfold: Whiplash injury basically describes a mechanism of injury. That is the simplest way of explaining it. You are talking about the transfer of energy to the head and the neck. It can occur in different situations, not just in a motor vehicle accident. It could be a sporting accident or a skiing injury, for example.
People obviously have different definitions, but the way I think of it is that the whiplash injury is the mechanism by which it happens, and the resulting problem or injury is a neck strain or a neck sprain.

Q3 Chair: How long does a whiplash injury last?
Christian Worsfold: The longest period that people have been followed up that I am aware of in the literature is for four years. Around 10% of people will be suffering levels of pain and disability at four years. At two to three years it is around 20%, and at around one year it is about 50% of people who would be suffering with pain and disability.

Q4 Chair: Are there many people who have never recovered from a whiplash injury? Is that something very unusual?
Christian Worsfold: The work I reference is Charles Galasko's work, who did work for the Department for Transport. The phrase he used was "a significant minority" will have a permanent problem. It is around 10% of people who will have a permanent problem over four years.

Q5 Chair: Does anybody else want to comment on that—to disagree or to put another perspective on what a whiplash injury is and how long it can last?
Dr McNally: It is possibly fair to say that there is not a single whiplash injury, if you like. In the acute phase, as Mr Worsfold said, it is very like a sprained ankle. You are looking at muscle and soft tissue tears and strains. As it progresses to a more chronic phase, then there are other, different symptoms.

Q6 Chair: How long does it take for a whiplash injury to develop? How long would it take to show?
Dr McNally: In the acute phase, from the moment you twist an ankle it starts to hurt, but it may take 24 to 72 hours for the full swelling, bruising and so on to come up. Where you start getting the chronic symptoms, then that is a progression that takes somewhat longer.
Christian Worsfold: I would agree with that.

Q7 Chair: Should there be some limitation put into the system? If somebody did not report a whiplash injury within, let us say, a week, should they then be disbarred from being considered? Should there be any limit like that?
Christian Worsfold: There is no justification I can find in modern medicine for an injury that occurs and then you don't feel symptoms for a week or two. There is no theoretical basis for that. You would expect the time scale that Dr McNally described. The onset of symptoms would be within 24 to 48 hours. I would say it is 72 hours at the outside.

Q8 Chair: Would you say that, if somebody did not report a whiplash injury within that time scale, they should be regarded as less credible?
Christian Worsfold: It depends how we are defining "report a whiplash injury". If you mean complaining of pain, disability and symptoms, yes, I would agree with that.
Dr McNally: But it is quite possible that someone might have a stiff, sore neck and not think to involve medical practitioners at that stage. If there was a public awareness that that was the time scale that they

needed to report pain, then that would be different. Does that make sense?

Q9 Chair: I am just asking for your view on it. Mr Miller, is it possible to have a whiplash injury at a low speed? Is there any speed below which you would say that somebody could not get whiplash?
Andrew Miller: The studies that have been done internationally looking at correlating actual recordings of crashes—so that we understand the accelerations and energy in the crash—with the actual claims show that, below very low speeds and accelerations, the likelihood is really small that someone could be injured who is reporting an injury in the way we have described so far in this discussion.

Q10 Chair: Would you name a speed as a minimum speed from which someone could receive a whiplash injury?
Andrew Miller: The system that was adopted in Germany for a period of time was around 10 kph, which is just over 6 mph. That correlated with research that had been done to understand the correlation between injury, potential for claiming and reported pain.

Q11 Chair: Do you think that is a valid system?
Andrew Miller: It appeared to be and appears to work in that particular country.

Q12 Chair: Do you think that is something that could be used here? Would it be fair?
Andrew Miller: In a system where the injured person is being addressed and examined for the validity of their claim, if we are trying to understand that, then it would be appropriate to use a threshold—a signifier—of where further evidence or further analysis should be done. In that case, as there was a very low likelihood of injury, is there a predisposition to injury or something like that? Bear in mind that we are coming at it from an engineering perspective; we are not medics. We are looking at how vehicle seat engineering has been moved forward based on the reported aspects of claims.

Q13 Chair: You have done some work, have you not, looking at the probability of injury from a device that you have developed?
Andrew Miller: Yes.

Q14 Chair: Is that to do with probability or can it relate to an individual?
Andrew Miller: That is linked to probability.

Q15 Chair: Is that why you don't think it has been used very much?
Andrew Miller: I think it is one of the reasons why it has not been moved forward by the insurance industry. The current scenario is looking very much at the individual rather than establishing a way of producing discrimination of particular claims, which would then be analysed further. For instance, we suggested that, below this speed or a similar speed, if somebody made a claim, where it had been shown through assessing the damage on the vehicles or an accident recorder in the vehicle that there was very low energy in the crash, then it would be appropriate to ask that person further questions, such as whether they had a previous medical history of injury or some other aspects that perhaps my colleagues here could comment on.

Q16 Chair: Do any other members of the panel have views on whether there should be a threshold of speed below which you could not accept a whiplash injury had taken place? Does anyone have any different views?
Dr McNally: I do. I am not taking quite that line. It is a very interesting study that Thatcham cited in their evidence. At the time the paper was written, a Swedish insurance company installed 60,000 black box recorders in cars and then waited for people to have accidents and see what happened. It is quite hard to extract the data because of the way they presented it; so I ended up counting spots on their graphs. The 10 kph cut-off would have excluded about 40% of the more serious injuries. About 40% of the more serious injuries happened below a change in speed of 10 kph, and about 30% of the chronic ongoing cases also seemed to happen below that 10 kph. The clinical evidence is maybe not quite as watertight as that.
I have more of an engineering issue in that it is quite difficult to quantify this change of speed. We are talking here about a change of speed of the vehicle in which the person is sitting. This could be them in a stationary vehicle that gets up to 10 kph after the crash. It could be a rear-end shunt on a motorway where the speed change happens by that much.
At very low speeds cars don't deform very much. Typically, you try and assess the change in speed of a collision by the amount of deformation that has been imposed on the vehicle. Apart from the clinical way of doing it, it is quite a hard measurement to make rigorously. I am sure Mr Miller knows more about that than I do.
Chair: No; you are all here to give your own evidence on your own views and experience.

Q17 Sarah Champion: I was diagnosed with having whiplash. I had a stiff neck and limited mobility for about three weeks. I had physiotherapy, which sorted it out. Whether that was time or physiotherapy, I will give it to the physiotherapy. Dr McNally, you said you would have a stiff neck. What are the actual impacts that whiplash has on daily life? I was very shocked to hear that people can be having chronic problems for up to four years. Could you give us some more detail about what those actual problems are as opposed to a stiff neck?
Dr McNally: Mr Worsfold would be a better person to answer that question.
Christian Worsfold: It can affect all aspects of daily living but especially those activities pertaining to the neck. An outcome measure that is used in whiplash research is the neck disability index. What sorts of things are on that? It is things like sleeping, driving and reading. Do some activities give you headaches? All these things would be impaired and you would have difficulty with these kinds of things. Any sustained postures at work might become a problem

and build up pain. That would be secondary to the pain limiting the head and neck movement.
With the sub-group of patients that don't improve, one of the characteristics that appears to be coming out of the literature is that they suffer a post-traumatic stress reaction. This seems to identify a sub-group of patients—maybe this 10% or 20%, who have pain for longer than two or three years—who have widespread sensory changes. They are tender all over their body. They are very sensitive to a cold stimulus and they present with a post-traumatic stress reaction. There is a cluster of clinical signs there that you would expect to find in somebody who is suffering pain that long. That will affect their day-to-day life as well, in the sense that they will have post-traumatic stress reaction so there is psychological impairment there as well. This sensitised nervous system may make them more likely to have other and more widespread aches and pains.

Q18 Sarah Champion: Do you think the current medical assessment is sensitive enough to pick up on all these things?
Christian Worsfold: I am glad you brought that up because I feel quite strongly that the medico-legal assessment of whiplash has just been left in the dark ages and I am not sure why. The emerging evidence base for the last 10 years has been dominated primarily by physiotherapists. The current research base suggests that at about six to eight weeks you can identify who has a post-traumatic stress reaction, whether their pain is related to nerve tissue damage and whether they have this widespread sensory presentation—for instance, whether they are tender around their legs where they have not been injured or they are sensitive to a cold stimulus.
If all those things are measured at six weeks and identified—they are not currently screened; I have never seen a medico-legal report with that contained within it, although the evidence suggests strongly that that should be utilised, not just in a medico-legal setting but a clinical setting to identify these patients earlier—it strongly predicts about 60% of the disability at two to three years. You can literally project into the future that this person is at high risk of chronic pain. There are reasons for that. There are a number of hypotheses as to why they present in that way, but that is the current state of the thinking at the moment from a clinical perspective.

Q19 Sarah Champion: I am just thinking that a number of claims may well be settled at six to eight weeks. Would you think that some of these are being missed, basically?
Christian Worsfold: I tend to concentrate my own experience as an expert witness because I only do higher value and more problematic claims than simple whiplash. I use that term very carefully. I often see people who are assessed early on with this standard Ministry of Justice form that goes into very little clinical depth with the claimant. I often see that it has been missed, yes. They are just not being screened adequately enough for the condition.

Q20 Sarah Champion: Dr Roshier, I am interested that there does seem to be a debate among professionals whether whiplash actually exists. Could I have your thoughts on that?
Dr Roshier: My PhD took place between 2002 and 2005. The drive behind doing my study was to find out potential tissues that could be involved in a whiplash injury, because there was no real idea about exactly what a whiplash injury is. I looked specifically at the soft tissue damage. That is the area that I focused on to see if that was something that could be a problem. Typically in a whiplash event, as has been described, the muscles are the first line of defence against such a movement on the neck. The potential for that area to be damaged is what I literally focused on for my work.

Q21 Sarah Champion: What was the outcome of your research?
Dr Roshier: When I looked at people who were reporting to an A and E department with whiplash injuries, it definitely appeared that they had sustained damage to the soft tissues, to the muscles. There was evidence of muscle bleeding and swelling within the tissues, so something was happening at that level.

Q22 Sarah Champion: Apologies for my ignorance, but is that something that is easy to diagnose? Is there a system by which you can identify that?
Dr Roshier: For whiplash injuries, as I say, we did not really know what tissues were involved. We were aware that ultrasound was being used to look at sports injuries. It is well established there and that is the technique that I applied. It is not a technique that is readily used to look at whiplash injuries at all, but it is in the field of sports injuries and musculoskeletal damage.

Q23 Karen Lumley: Why do you think it is that people think that whiplash is some sort of fictional illness?
Dr Roshier: I do not know the reasons behind it. My interest was just to try and contribute to the pool of knowledge and what could potentially contribute to it.
Christian Worsfold: One of the drivers is that, if you see a low-speed rear-end collision and there is no damage to the cars, it is counterintuitive to think that anybody could get injured in that accident. That is part of the problem. Everyone seems to have an opinion on whiplash, whereas most people don't have an opinion on anterior cruciate tears or the rehabilitation of that. It stems from the link between compensation and this seemingly trivial injury, whereas at those kinds of speeds you can still have huge acceleration of the head and neck. That has been demonstrated consistently since the 1950s at very low speeds of impact with no vehicle damage. I think it has grown out of that kind of environment.

Q24 Mr Sanders: I am a great believer in prevention rather than cure. Given all the research that you have done into what is happening physically to the body from people who have been in accidents, is there some way of designing better seating in motor vehicles or the design of seatbelts? Is there some way of

designing out the damage to a human being that is caused from a collision?

Chair: Mr Miller, is that something you can comment on?

Andrew Miller: Yes; perhaps I can answer that question. A lot of work has been done to promote better seat design based on some studies carried out in the late 1990s and into part of this century, looking at how we can correlate potential for injury to best practice. We looked at seats that appeared to cause a lower frequency of injury. On that basis, that was promoted first by the insurance industry and then it was picked up by the NCAP programme—the New Car Assessment Programme—and car safety promotion programmes. There is a regulation being developed over time to promote that as a standard performance requirement for seats. When we look at seats, we are looking at the whole seat, the head restraint and the back of the seat. The key thing is to stop the head moving relative to the body, to absorb as much energy as possible to stop the type of movement that has been described.

The next stage is to stop the accident happening at all, as you may have read from some of the written evidence. We have identified some key technologies that stop accidents happening. These are the so-called automated emergency braking systems. The insurance industry has taken the step to promote that within the group rating system, which is a way of driving consumer and car-maker behaviour to fit these types of systems and to adopt them on to the roads through fiscal incentives.

Q25 Mr Sanders: This is usually caused from a quick stop, isn't it? If you had some sort of automated system, it would presumably have to kick in before the average human would start to brake.

Andrew Miller: Absolutely. It acts just at that point upon which you, as a driver, would have had to have acted to avoid the crash.

Mr Sanders: That is interesting.

Q26 Chair: Mr Worsfold, in one of your answers to Ms Champion you said that some injuries had been missed on assessment. Could you tell us any more about that and what you meant?

Christian Worsfold: Yes; I can clarify that point. What I was referring to was one of my feelings around whiplash assessment. I lecture around the UK, so I am in touch with hundreds of physios a year. It is commonplace for them to mention that when their patients went off for these assessments they were in there just 10 minutes, they did not take their clothes off, and they were not examined thoroughly. Physios will often remark that these reports are not worth the paper they are written on.

My own personal feeling about that, as someone who specialises in this area, is that it is not an evidence-based assessment. It is not being informed by the current state of the science and publications. My comment related to the fact that, in the standard Ministry of Justice form that a GP or orthopaedic surgeon will complete on seeing someone who is making a claim for whiplash, there is not enough detail or depth in that. When I have been asked to give a second opinion on a case or have seen a case maybe two years down the line where the person has not recovered, there is often an initial report, and because the standard report is not in enough depth there is not enough information to predict that that person would go on and be at high risk of chronic pain. We can do that now but it is not being done. Does that answer your question?

Q27 Chair: Yes; I just wanted to clarify what you were saying. Do you think the proposal for independent medical panels would be an improvement on the present situation?

Christian Worsfold: The system needs a radical overhaul. It needs a revolution for the reasons I have outlined. I do not think the evidence base is getting through to the medico-legal assessment of claimants. From a clinical point of view, those most at risk from chronic problems are not getting the treatment they need early enough. That would be my main point, as a touchstone experience for changing the whole system.

Q28 Chair: Are you saying that physiotherapists should be on those panels?

Christian Worsfold: I think there is a very robust argument, yes. We have dominated the research for 10 years. We work at very high levels in the NHS and privately. If you go for an outpatient orthopaedic appointment, you may see a physiotherapist working at an advanced level ordering scans, sending you for blood tests and doing intra-articular injections. We are very conversant in the language of whiplash injury. The tests that our postgraduate specialists perform, which is part of our day-to-day work with all soft tissue injuries, have been shown to have specific utility in predicting outcome in whiplash injury. These are tests for the way muscles work. It becomes reorganised in whiplash injury. There are tests for nerve sensitivity and sensitisation. If we can start to involve physiotherapists more with designing medicolegal guidelines and getting us involved in the panels, that would be a step in the right direction.

Q29 Chair: Do you think the information those panels obtain should be made available to anybody else, such as defendants and the courts perhaps?

Christian Worsfold: Yes, certainly. I think so, yes.

Q30 Chair: You do not think there should be a problem with who can see that information.

Christian Worsfold: I don't see any reason why not, no. I am not sure what you are suggesting, but, no, I don't see any reason at all.

Q31 Mr Sanders: Where do people first report that they have an injury? Is it to A and E or is it to a GP? I can see there would be a problem with somebody going to a GP and then a delay before perhaps they receive appropriate treatment.

Christian Worsfold: It is usually a "wait and see" scenario when you have had a whiplash injury. You will often be given a prescription for some medication and then they will wait for a couple of weeks to see how you do. That is how it is managed in a primary care setting. Some people take it upon themselves to

go and have physio. I do not know what the delays are, but the medico-reporting organisation—

Q32 Mr Sanders: Do you know if there is an average delay between reporting a problem and receiving treatment?
Christian Worsfold: I am not aware of one, no. It would vary from case to case, but I am not aware of and I would not personally say there is a problem in that area, no, from my experience as a clinician and physiotherapist.

Q33 Sarah Champion: I have a very specific point. Dr Roshier was talking about ultrasound as a very good technique in her research to identify whiplash. Would you agree with that?
Christian Worsfold: I would agree wholeheartedly, yes. It is astonishing how it has not been studied more. It has huge potential in this area to confirm absolutely that there has been some sort of insult to the body. That is what we are looking for—objective evidence. I would agree with everything Dr Roshier has said.

Q34 Chair: Dr McNally, what are your views on how whiplash is treated? Is there adequate treatment and where is it available?
Dr McNally: That is probably outside my field of expertise. I am from an engineering and injury initiation background rather than clinical treatment.

Q35 Chair: Does anybody want to comment on the adequacy of treatment for whiplash? Mr Worsfold, what are your views?
Christian Worsfold: If we are saying that 10% to 20% go on and have chronic problems, we are looking at about 50% of people who will recover in a year and 80% in two to three years. There is obviously a natural process occurring there. In terms of the treatment that occurs at the moment, as physiotherapists, we are seeing people a lot earlier. It is a much better time to see them, advise them and, hopefully, get them on the road to recovery rather than leaving it a longer time. I would be concerned if there were big gaps between them seeing appropriate qualified health professionals and getting advice, but at the moment we are seeing people much earlier. I have been working in this area for nearly two decades. It literally used to be six months or 12 months in some circumstances, but it has changed dramatically in the last five years for the better in terms of treatment and seeing people earlier. I would reiterate what I said earlier about the assessment process that is taking place from a medico-legal point of view. Perhaps often people are not getting the treatment that they require through the medico-legal reporting. The source of the funding is what the expert recommends. Perhaps it is not being funded because these problems are not being identified and these high-risk individuals are not being identified early on. That is the only proviso I would say for that sub-group who do not improve. For the 80% that do, I think they are getting earlier treatment and, hopefully, getting better quicker because of that.

Q36 Chair: Where is appropriate treatment available? Is it available on the national health service or do people need to have private treatment?
Christian Worsfold: My experience is that it is funded mainly through the medico-legal reporting organisations. It is quite a fragmented market, but, if you are seeing whiplash patients, you will be working in private practice and they will be referred through an intermediary at an agreed price for you to do a set number of sessions. I do know that people on the NHS see whiplash patients though, yes.

Q37 Chair: In your experience, is it something that the private sector provides rather than an NHS provision?
Christian Worsfold: Yes, I would say so. There are no statistics to refute or confirm what I am saying, but that is my experience. When I run my course, I get mostly private practitioners who want to go on a whiplash treatment course. I get some from the NHS but it is much less. That would make me think that private practitioners are the people who want the information.

Q38 Chair: When people are prescribed a course of treatment for whiplash, how common is it for people not to complete the course?
Christian Worsfold: I was very interested in that question because my experience is that it is very rare for people not to complete. Most people will complete a course of treatment. I do not know what statistics the reporting organisations have. I should imagine there are some interesting thoughts about that.

Q39 Chair: The Government's proposal at the moment is for most whiplash claims to go into the small claims court. In practice, we are told that is what the provision would be. What impact do you think that would have on people's claims and access to justice?
Christian Worsfold: The Chartered Society of Physiotherapy's concern about that would be their access to justice, and obviously their access to funded treatment may be affected. That would be the main concern.

Q40 Chair: How many? Would that affect a fringe number of people or a lot of people?
Christian Worsfold: I should imagine it would affect 90% of whiplash claims. I am drawing that figure out of thin air but it would be a majority.

Q41 Chair: You are saying you think that about 90% of whiplash claims would be affected by this.
Christian Worsfold: I think so, yes. I am drawing that figure out of thin air. The legal interface is not my strong point, but as a clinician—that is my get-out clause—

Q42 Chair: I am asking you these questions as a physician, looking at the actual whiplash injury and the impact on the claimant.
Christian Worsfold: The concern would be that they would have to represent themselves in court. Reading the evidence that has been submitted, they may not get as much funding, so they may not be able to afford

as much rehabilitation or they may not bother trying to get compensation for their treatment because it may be so difficult. There may be obstacles to that. I don't think it is straightforward going to the small claims court.

Q43 Graham Stringer: Do you think the small claims court is more difficult to access than other courts?
Christian Worsfold: I am just going on some of the evidence that has been submitted. I am straying outside my area of expertise here. I do not have experience myself of the small claims court. I am just going on some of the evidence that has been submitted and from discussions with people who work in this area.

Q44 Graham Stringer: It is a fundamental objection, though, to what the Government are proposing. I just wondered what evidence you were presenting to show that people would get less justice in a small claims court, apart from the hypothesis that they might.
Christian Worsfold: If I think back, I was referring to a lot of form filling, and perhaps that may produce some obstacles for some people. I could try and locate that if you would like me to, but I do not have access to that sort of reference at the moment.

Q45 Graham Stringer: So you are just guessing really.
Christian Worsfold: No; I am not guessing. I was referring to something that I have read. I have an informed opinion because I work in this area, but this medico-legal interface is not my strong point.

Q46 Chair: Mr Miller, I want to go back to the system that you have developed. How could this be used more effectively?
Andrew Miller: We have suggested that the medical panels will need to create some level of discrimination between claims if they are to reduce the number, if that is their intended purpose. Engineering evidence around the vehicle—around its damage levels and event data recorder information that might be telematically available from the vehicle, depending on its age—could be used to understand the amount of energy that was contained in the crash and that the occupant experienced. Our research has shown that very low-speed crashes introduce very low levels of energy. If we think about real life, a very low-speed crash is a very low-speed crash. While you could have an infinitely stiff crash between two very rigid vehicles, at very low speeds you are going to see very low levels of acceleration. It is just physics.
If we are going to look at a causation process by which we are going to ask medics to just look at reported symptoms and other aspects like psychology or psychosomatic aspects of that, which of course is not our strong area, then you may need other information to understand whether that person is coming at it from a particular perspective. If you are trying to understand about the crash, you need to understand what level of energy they experienced. Our tool looked at risk factors around that to generate a probability of injury.

Q47 Chair: Is what you are doing generally accepted by the medical profession as a reasonable way of assessing injury?
Andrew Miller: We have had a number of conversations. I think it is debatable—their view on it—because they have not been involved in its development.

Q48 Chair: What is debatable? Is what you are doing debatable or their views on it?
Andrew Miller: On the outcomes from it. If we are going to deal with finite probabilities rather than overall probabilities, then obviously there is a finite probability that somebody could be injured, which is the court's current position when these challenges have come before them.
The real debatable question here is very low-speed crashes. There have been claims where there is absolutely no damage to the vehicles whatsoever or they have not even had a crash at all. Those are the challenges the insurers face and the challenges that we are trying to address in this investigation.
Our suggestion is that the medical panels could be provided with extra information about the type of crash it was and the type of information it was in the crash to be able to bring that level of understanding and assimilation to bear if they are trying to remove some claims from the process.

Q49 Chair: Mr Sanders asked you about the implications of different vehicle design for accidents. What percentage of whiplash accidents do you think could be removed or reduced by having different vehicle design?
Andrew Miller: In other countries where they are tracking claims rates—and assuming we have a causal link between injuries and claims rates, taking that as an assumption—we are seeing best practice seat design on a like-for-like basis among vehicles reducing claims rates by about 40%. You could suggest that it is as effective as that for reducing, on a like-for-like basis, the propensity for injury, taking an average population in the car.

Q50 Chair: Mr Worsfold, I want to go back to your proposal for having physiotherapists as part of any panels. Is there any resistance to that, as far as you are aware, from any other parts of the medical profession?
Christian Worsfold: Not that I am aware of, no. The way I view it is that the medico-legal world, from a physiotherapist's point of view, is in some kind of time warp. It is very hard to get into working in that area. There is a reluctance. I do not know whether the driver is the lawyers, the medics, the surgeons or the GPs, who are keeping a tight grip on this type of work. I do not know, but we have moved on as physiotherapists and we are working at a very high level now. I am not aware of any. No one has verbalised any resistance, but it is a closed shop if you are a physio. It is very difficult to get your foot in the door.

Q51 Chair: At least from outside the medical area, is there any resistance from lawyers or the claims companies?
Christian Worsfold: I lecture to lawyers a few times a year. They just say, "Why is nobody doing these kinds of reports?" I say I do not know, because I have discussions with GPs and they say, "We need guidelines to do this kind of reporting and to raise the bar." The lawyers may feel, not correctly, that perhaps a medic is more authoritative in this situation than a physiotherapist. I have had that said to me before. We are harking back to a time when doctors prescribed exercises and the physio carried them out. It was a technician kind of role. Boy, we have moved light years away from that now.
Chair: Thank you for coming and answering our questions.

Examination of Witnesses

Witnesses: **David Brown**, Chair of the Third Party Working Group, Institute and Faculty of Actuaries, and **David Powell**, Manager, Lloyd's Market Association, gave evidence.

Q52 Chair: Good afternoon and welcome to the Transport Select Committee. Could you give your name and organisation?
David Powell: I am David Powell from the Lloyd's Market Association.
David Brown: I am David Brown representing the Institute and Faculty of Actuaries.

Q53 Chair: Mr Brown, is the UK the whiplash capital of the world?
David Brown: It is a slightly difficult question to answer because we do not have a lot of data from other areas of the world. What we do have from some of the research carried out within the actuarial profession is a lot of data in the UK. What we have been able to do is to compare against benchmarks that we have been able to get from the United States, where the data is probably of the highest quality. Our research shows that the levels of whiplash or small bodily injury claiming are at lower levels within the United States than they are within the United Kingdom. Although the US leads the world in terms of matters of liability, in terms of being more litigious and so on, it is highly likely that the UK is, as you put it, the whiplash capital of the world.

Q54 Chair: There are different figures, aren't there, for different regions?
David Brown: There are; absolutely. The most pertinent would be the overall figure for the whole of the United States compared with the whole of the UK.

Q55 Chair: You have produced a figure that talks about 42% in the north-west of England and 37.5% in the north-east. How are these differences in figures accounted for?
David Brown: If I could refer you to paragraph 6 of the evidence, I am just talking about the national averages. If you look at the percentage of claims involving bodily injury from the UK statistic, that is about 30%. For the US, the equivalent figure is 23%.

Q56 Chair: Yes; I know that. I am asking you how you account for the differences in regional figures, which are pretty stark.
David Brown: They are; absolutely. The lowest in the UK is Scotland. In Scotland, there is a very different legal framework and there are no claims management companies. The area of the country that shows the highest propensity for bodily injury is largely the north-west. Coincidentally, that is the area of the country with the highest levels of claims management companies.

Q57 Chair: You find a correlation with the claims management companies.
David Brown: Absolutely; the two correlate. We do not know from our research—and we cannot strictly say—whether that is chicken or egg in the sense that the existence of the claims management companies has given rise to the claims, or whether there is some common underlying factor. What is certainly the case is that the claims management companies have, of course, facilitated the claiming

Q58 Kwasi Kwarteng: You have mentioned the correlation. Do you have a figure in terms of the correlation?
David Brown: No. Unfortunately, the quality of the data does not allow us to do that. Our geographical data on claims management companies counts the incidents of claims management companies and where they are positioned. We do not have geographical data on their turnover or their economic activities. It is more indicative.

Q59 Chair: Is there any correlation between traffic congestion and claims?
David Brown: As in traffic congestion?
Chair: Traffic congestion.
David Brown: Yes, to the extent first of all that, if you have more accidents, then you are going to have more bodily injury. What we are measuring here, though, is that, given that you have an accident or an insured accident, what is the likelihood that that has bodily injury associated with it? In our work, we have tried to take that out of account. Certainly, more accidents will lead to more whiplash claims and more bodily injury. Indeed, with fewer accidents having taken place year on year, and particularly over the last few years, potentially due to increases in petrol prices and less motoring on the roads, there has been a favourable impact on the numbers of whiplash claims.

Q60 Chair: But, within that, is there a relationship between congestion and reported injuries of this sort—these whiplash-type injuries?
David Brown: We have not been able to establish that.

Chair: You have not looked at that specifically.
David Brown: Certainly, and this is a slightly different question, if you go to rural areas, you will see lower levels of bodily injury claiming than you will in urban areas, but the style of motoring is very different. That is a slightly different question from congestion, I would guess.

Q61 Chair: Mr Powell, I want to ask you about assumed levels of fraud. We have figures of assessments from different insurance companies. There does not seem to be an industry-wide figure. Can you tell us why not and how the assessments are actually made?
David Powell: You are right—there is no industry-wide fraud data on whiplash claims. There is industry-wide data on fraud. The reason why is it is very difficult to get an accurate picture of fraud. Different insurers have different methods of measuring fraud. They have different definitions of what is and isn't fraud. They all fundamentally face the same problem, which is that it is easy to put a value on the fraud that you detect but not easy to put a value on the fraud you don't detect. That is a real limitation on measuring how much fraud is going on in terms of whiplash claims.

Q62 Chair: Is there an industry measure of fraud on whiplash claims? I have not seen a figure for the industry.
David Powell: No; there is no single figure such as 12% are whiplash claims, or 20% or 5%.

Q63 Chair: So should we believe the figures that come from the individual insurance companies?
David Powell: My thought on that is yes. There will be variation from one company to the next, depending on how they measure fraud. For example, you might have two claims and suspect they are both fraudulent, but one you can prove is fraudulent because you have good testimony and good evidence that it is fraudulent so you repudiate that claim successfully. If that was for £5,000, you have made a clear saving of £5,000 minus the cost of your investigation. Another case might look very similar but you can't prove that it is not fraudulent, so you pay it. Some insurers will still attribute that payment of £5,000 as fraudulent; others will say, "We couldn't disprove it so for us it is not fraud." That is where you get this variation. It comes down to judgment and estimation.
I still believe that the evidence that is produced is strong enough to warrant public policy decision making because fraud is a huge problem. We are talking about trying to nail down exactly how much and it is very difficult because of the reasons I have mentioned, but it is still strongly indicative that this is a real problem.

Q64 Chair: Mr Brown, in the figures that you have given us, you estimate that between 10% and 60% of whiplash claims may be exaggerated, misrepresented or fraudulent. What do you base that on?
David Brown: As Mr Powell was saying, it is very difficult to know what the exact figures are specifically in terms of fraud. What we have done is to come at it from a slightly different angle. First of all, we notice that the rise of whiplash claims has particularly taken place since 2007. One of the key ways, therefore, that we have tried to unpick the problem is to say, "If the world were as it were in 2007 and the only thing that had happened is that we had had normal levels of inflation since then, what would the world look like today?" That is the first way that we have looked at it.
The second way is to pick up on the geographical distinction that we have with Scotland. We have attempted to norm for differences between Scotland and England and Wales in various other ways that have followed through the trends that have been seen in Scotland. If you follow the Scottish model, that would give you the 10% figure. Then we have a range of estimates going up to the 60% for the other approach. Most of our methods would be towards 50%.

Q65 Chair: Mr Powell, do these figures sound plausible to you?
David Powell: Yes.

Q66 Chair: How do you come to that? Is it just an assessment or do you do any work to decide that?
David Powell: The feedback I get from the Lloyd's syndicates managing these claims is that they suspect that in a lot of cases the claims are exaggerated or fraudulent, but they are not able to prove it. It is quite a low legal threshold for the claimant to meet and it is easy for a claim to be made successfully. It is difficult for the defendant to challenge the cases; so they do get settled, but there is a strong suspicion that a lot of the claims are exaggerated.

Q67 Graham Stringer: Would you give your definition of "fraudulent"? It is an obvious question, but I would be interested to know.
David Powell: It is a good question. There is a statutory definition of fraud based on the Fraud Act 2006, which most insurers use as their basis for fraud. That is a wilful intent to defraud or deceive the insurer. You get into slightly more marginal territory when you get a claim where there was an accident and conceivably there was an injury, but perhaps it has been exaggerated. That comes down to the insurer making a judgment over whether that is fraudulent. If you have a claim for £4,000 and you end up settling it at £2,000 because you feel that that is what it is worth and the claimant accepts that valuation, was that additional £2,000 fraud or was it negotiating? That is a marginal area where you have to use your own judgment. Some insurers would call that fraud.

Q68 Sarah Champion: I was very struck by the figures that the number of motor insurance injury claims is going up year on year but the number of casualties in road accidents is coming down year on year. Could both of you comment on what your thoughts are around those figures?
David Brown: The statistic on the number of casualties comes from police statistics—from police attending accidents. It is not surprising that that should be going down because, indeed, the number of

accidents is down. That does seem to make a degree of sense. How I reconcile the increase in the number of bodily injury claims with a decrease in the number of actual injuries is that the difference is that people are claiming where they did not claim before. One can begin to guess at what the reasons might be. One of those reasons could be that it is easier to make claims than it was before. Whether recessionary factors mean that people are just simply more motivated to make claims that they would not have bothered making before, or whether there is some other factor, is probably a matter of conjecture and is quite hard to unpick. It is something to do with the propensity to claim that is giving rise to the difference.

Q69 Sarah Champion: Mr Powell, would you agree with that assessment?
David Powell: Yes, I would. My assessment is that the thing that has changed is the encouragement. There is enormous encouragement for people to claim. There is a claims-manufacturing industry that has developed over the last 10 to 15 years. There has always been a level of it but it has gone into overdrive. There is an industry that exists purely to identify people who have the opportunity to make a claim. They are picked up and pushed through the compensation system so that the professionals around them can earn fees.

Q70 Sarah Champion: What is your solution to stemming this tide?
David Powell: You need a number of steps to tackle the various issues. The legal medical test for demonstrating an injury is pretty weak. It is pretty problematic. It is easily tricked. The fees have been quite high. They have been reduced recently, which I think is very helpful. We need a much more stringent system. We need a more stringent medical test. We need a more stringent legal test for somebody to demonstrate that they were injured and it was somebody else's fault that proves the causation. If you have a more stringent test that the defendants are more confident in using, then you will get more fraudulent claims challenged and you will get more fraudsters put off.

Q71 Sarah Champion: This inquiry is obviously looking at whiplash injuries, but I am aware that the larger bodily claims are going up at even faster rates. If you manage to stem fraud on whiplash, do you think that is going to ripple through to other injuries? If it worked for one, would it work for all?
David Powell: It certainly won't hurt. The problem is in the mass low-level claims. It is much harder to exaggerate or fake a very serious injury. Those claims are generally treated as genuine. There is very sound medical evidence for somebody who has a spinal or brain injury.
With whiplash, you are talking about very subjective injuries. In the same accident some people might be injured and some people might not be injured. It is easy to fake the symptoms. You just describe that your neck is injured when you report to your doctor. A report confirming that is usually sufficient to get you home with a claim. There is no real scrutiny of that examination and of that process. It is a very low, easy threshold to get over.

Q72 Kwasi Kwarteng: Do you have any international comparisons? We have heard earlier evidence in which, for example, whiplash is very uncommon in Germany for whatever reason, but claims here are very high. Would you like to comment on that?
David Powell: I think there are cultural factors. As I mentioned in the previous answer, we have a huge industry that exists to find people and push them through the compensation system. That is probably the primary difference for me. The other factor is one of compensation for legal advice and representation. In Germany, I understand the rate is about €300. It is reasonably small beer. A lot of law firms are not interested in picking up those sorts of cases. In this country, until recently, the legal fees were over £1,500 for a low-value whiplash claim. That has been reduced significantly and I think that will have a positive effect. In fact, it is already having a positive effect in terms of reducing premiums. I would say those are the big differences between the British and German experience. I would suggest it is nothing to do with German necks being stronger than British necks.

Q73 Mr Sanders: Coming back to your answer just now about the threshold, what about a threshold for redefining whiplash in some way? It seems to me that there is a very broad spectrum. Even at the bottom there is a broad spectrum. To me, you could easily get a whiplash injury from riding a dodgem car. I wonder how many claims there have been for whiplash from a dodgem car accident. Is there not a physical threshold that could be put into a definition—that something demonstrable has to have occurred for it to be recognised as a whiplash injury?
David Powell: I would wander outside my area of expertise, I am afraid. It is more of a medical issue. My suspicion is that, if you used a specific injury mechanism as the trigger, so if you can demonstrate that you have muscle damage or an ultrasound can find that you have some kind of abnormal physiology, then you would need a different test for everybody. This is the problem. There is a huge distribution of how susceptible people are.
Whiplash claims are so problematic because it is a very subjective injury. In the same accident, one person might report neck pain and the other person might not. It would be a very difficult area to try and pin down a specific diagnostic test to identify whether somebody is genuinely injured or not. If there was, it would be a fantastic way of dealing with these cases, because they are so easy to fake and exaggerate. I do not think there is such a test, but perhaps it is a question for the medics.

Q74 Mr Sanders: But isn't it a question for the insurance industry themselves? At the end of the day they put in their policies what they will or won't cover, so they could come up with a definition of whiplash if they wished, could they not?
David Brown: Unfortunately not, because under the terms of the Road Traffic Act it is a third party that

has to be covered. It really would be a matter, I would suppose, of separate legislation to exclude liability to third parties under particular circumstances.

David Powell: Perhaps another way of tackling it would be to do with the level of damages. This is where we come on to territory that is easier to grapple with, in my view. The courts define who gets compensation for what and how much. It is not the insurance industry that define that; it is the courts. The insurance industry takes reference from court awards when negotiating settlements. To a certain extent, the insurance industry is neutral on what level of damages is awarded for whiplash claims. If it is a high level of damages and high level of legal costs, you need high premiums to pay for that. If it is low damages and low costs, you get low premiums.

You can have whichever system you like. If you decided to award lower damages and use a system that is lower cost, then you would get lower premiums. If that is the focus of the exercise, then—

Q75 Chair: Are you absolutely sure about that? Do you have a categorical commitment from the insurance industry that they would lower the premiums?

David Brown: In terms of the competitiveness of the market, I do not think that that needs to happen.

Q76 Chair: You don't think what needs to happen?

David Brown: I am not suggesting you should not get it, but, even absent any commitment from insurers, there is evidence that the market is highly competitive. I can cite evidence on that.

Q77 Chair: But there isn't a commitment, is there, from the insurance companies that, if this system changed, premiums would actually go down—or is there one?

David Powell: It is my understanding that there is a high level of commitment that savings realised from reforms that are now in the pipeline or have recently gone through will be passed on. It is also my understanding that premiums have gone down between 5% and 10%.

Q78 Chair: But where is the commitment that they would go down as a result of this change?

David Powell: I believe it was made at the prime ministerial summit earlier this year.

Q79 Chair: Is that public information?

David Brown: It is, yes. There was the Valentine's Day summit.

Q80 Chair: Yes; I have read all kinds of reports about the Valentine's Day summit. I am asking if a categorical commitment exists from insurance companies that they will reduce their premiums if these proposed changes are made. Does that exist?

David Brown: I can't answer that.

David Powell: As I understand it, yes, but I wasn't present. I have heard that said.

Q81 Chair: So you think this was said at a private meeting, of which we don't have any public record.

David Powell: I believe you are speaking to the Association of British Insurers next month, so perhaps you could ask them.

Q82 Chair: We will be asking them, but, seeing as you made that statement, I wanted to know the basis of it.

David Powell: The basis for my statement, separate from that line of inquiry, was that the intense competition in the market competes away savings. The example I can give you is that it is my understanding that the premiums have gone down by between 5% and 10% over the last 12 months. That is as a result of anticipated savings in respect of reforms that are just coming in now, such as the reduction in fixed legal costs and the changes introduced by the LASPO Act, which have made success fees and ATE premiums non-recoverable. They are technical changes that should reduce insurers' costs. Those anticipated savings have already driven a reduction in premiums by 5% to 10%.

Q83 Chair: Mr Powell, you also referred to awards being made by the courts. If the proposals that we are now discussing in relation to whiplash actually went through, fewer would be decided by courts and there could be more pressure from insurance companies to persuade claimants to settle for lower amounts than they might otherwise have reached. Isn't that a factor in this particular debate?

David Powell: If you are talking about lowering the level of damages, for example, that would have to be introduced by a change to the judicial process, and the Judicial Studies Board would have to change the damages brackets for injury types and things like that. It would feed through via the court system—the judicial system.

Q84 Chair: But what about the system where insurance companies can persuade claimants to settle for an amount before those claimants have had any medical advice?

David Powell: I am with you; you are talking about the pre-medical offers. They exist now and they are a symptom of a compensation system that is not working properly for defendants. If the system worked better, was cheaper to operate and applied more stringent legal and medical checks, I think those offers would largely disappear.

Q85 Karen Lumley: I want to move on to the claims management companies. Do you think they are properly regulated?

David Powell: I would like to say no. How I would evidence that I am not sure. The regulation is not very strong. They have to register, but to what extent they are actively managed is an open question. I suspect that they entice potential claimants with the offer of damages but are probably not very forthcoming about the fees they will earn out of the process.

David Brown: I have no particular evidence on it, unfortunately. I guess, if one is trying to identify claims that are proper, that is one of the points of intervention. The extent to which those will continue to exist in their current form in the absence of referral

fees of course is another matter. That issue may diminish to an extent.

Q86 Karen Lumley: For example, I had an accident and I had a call from one of these people. How would they know that I had had an accident? Have you any idea? Is it being sold on from the insurance company?
David Brown: You might receive a text. You might receive an e-mail.

Q87 Karen Lumley: But how would they know that I had had an accident? Are my details being sold on?
David Brown: You might receive one even if you hadn't. I frequently get them myself.

Q88 Chair: Yes, but why do they happen? Where does the information come from so they know who to contact?
David Powell: There is a whole series of people in the chain that could find out and could pass on or sell your information to a claims management firm or a claims solicitor.

Q89 Karen Lumley: Can you just tell me who it is?
David Powell: It could be some medical people attending an accident. It could be in the A and E department. It could be a doctor. It could be an insurance broker. It could be an insurance company, and others.

Q90 Kwasi Kwarteng: Is there any informational data relating to the numbers of claims management firms that have been set up in the last 10 years? There is very clear data about the number of claims that there are and very clear data about the number of casualties, and they are going in completely the opposite direction. I wondered what the data was relating to the number of firms.
David Brown: It comes from the regulator. The data has just been published for the last year. Since 2007, there has been a very strong rise in the number of claims management companies. Going into 2011, there was a 5% reduction, although turnover went up some 20%.

Q91 Kwasi Kwarteng: A "strong rise" is very graphic, but is there a number to that?
David Brown: In terms of the numbers, I don't have them to hand.

Q92 Kwasi Kwarteng: Is a "strong rise" 15%? Is it double? Is it 20%?
David Brown: In terms of the numbers I believe it is of the order of doubling, but in terms of the turnover it will be more than that.

Q93 Kwasi Kwarteng: It would be more than double.
David Brown: Yes. Going into 2010, I believe there was a 50% increase in turnover. Going into 2011, there was a 20% increase in turnover. We do not yet have the figures for the turnover in 2012, although the number of claims management companies themselves did reduce by 20% in terms of registrations for personal injury and motor.

Q94 Chair: The motor insurance industry claim that they are not profitable, yet they want to be in the business. The Motor Accident Solicitors Society have given information that shows they are highly profitable. How do we reconcile those different pieces of information, Mr Brown?
David Brown: The data that we have comes from the returns to the regulator of the costs of claims and expenses set next to the premiums that are taken in. The data for private motor for the year up to the end of 2011 and accidents arising in that year was that, for every £1 of premium that was taken, there was £1.06 of expenses and claims. The latest data, which has come out from the 2012 returns, has an equivalent figure of £1.05.
There are a number of factors, to begin to answer your question. The first is that there is a range of degrees of profitability in the underwriting results of different companies, so, within that, there will be companies that lose more money and companies that make money. An additional factor, however, is that this is simply talking about underwriting profits. There will be other sources of income. There will be investment returns, for example, although in the current market, with investment returns being low, those are not particularly pronounced. There is income from ancillary products, and then, of course, to the extent that there is referral by insurance companies to claims management companies and solicitors, there is referral income as well. Under the current initiatives that have been launched, that is due to stop.

Q95 Chair: Were the Motor Accident Solicitors Society wrong in the information they give? They have produced figures to say that the companies are profitable.
David Brown: The data of my working party is drawn from the FSA returns. They may be looking at wider data, which includes sources of income other than pure underwriting activity, but I am guessing really.

Q96 Chair: That is not something that you have looked at in your working party?
David Brown: It is not, no. We have restricted ourselves to the data that is in the FSA returns.

Q97 Chair: Mr Powell, your association has called for a public debate on the appropriate level of damages for whiplash. Why a public debate? Shouldn't this be a judicial assessment about equity?
David Powell: Simply because what we are hearing, following on from the previous inquiry from this Committee, is that people don't want to pay high premiums for their car insurance, particularly in an environment where the number of accidents is going down. They do not want to enrich middlemen, who make a lot of money out of this system.
One thing that has happened already is that legal costs have been reduced, which is a great way of introducing some savings into the system. The next step, if you want to try and reduce costs that will feed through to premiums, is to look at damages. That is the next obvious place to look. The insurance industry, as I say, is reasonably neutral on this issue and will compete in a high-damages, high-costs, high-premium

environment or a low-damages, low-costs, low-premium environment. The industry will compete in any environment that operates, but, if people want low premiums, you have to look at where the cost is in the system and how it can be taken out.
If society wants to look at reducing the level of general damages for whiplash or removing them completely, then those are ways that could be used to get the premium down. I am not saying that should or should not happen; it is a matter for debate. Those are ways that could be used to get the premium down.

Q98 Chair: Where are you saying the problem is? Is the problem in the high level of damages for some people or maybe in the lower level of damages for claims that are not justified? What exactly are you saying there?
David Powell: The cost comes with the volume of these claims. I suspect that most claimants are attracted by the carrot of £2,500 damages, which is roughly the typical award for a low-level, non-serious whiplash claim that resolves reasonably quickly in terms of medical condition. I think that is what attracts people. Certainly, that is what the claims industry use when they are enticing people to make a claim. There is the carrot of some money. If you reduce that, you would reduce the incentive.

Q99 Chair: You also say that what you call "extremely lenient court decisions have prevented insurers from contesting potentially fraudulent claims". How often has that happened and what do you mean by that?
David Powell: Rarely, to be fair.
Chair: Rarely.
David Powell: Yes, rarely. If you look at the total number of whiplash claims settled every year versus the total number of claims litigated, it is a tiny fraction. Less than 1% of whiplash claims will be litigated in any one year, simply because insurers cannot afford to litigate routine whiplash claims with low or weak evidence supporting the claimants. They just cannot afford it; it is not financially viable.

Q100 Chair: But the statement you made is based on something that happens rarely, you say.
David Powell: Because court awards affect the subsequent—

Q101 Chair: There can be reasons for it. I am not disputing that. I just want the factual basis that it is rare that this happens.
David Powell: Yes.

Q102 Chair: You also say in your evidence that some medical reporting organisations have "strong financial links" with claimant solicitors. How many such situations are there?
David Powell: I don't have specific information on that, but it is a matter of common knowledge in the insurance industry that there are those links and that some claimant firms own their own agencies. Those claimant firms commission huge volumes of these reports and they want to control that process. They might suggest that there is sufficient governance in place that the medical decisions are not interfered with, but the insurance feeling is that it is not a good way of running that system. It just doesn't feel right.

Q103 Chair: When you say it is commonly known, how would we be able to make some reasonable assessment of how often that happens? It is a very serious statement and it has big implications. It may be commonly known that that is what people say, but how can we find out the actual extent of that?
David Powell: You would perhaps have to ask some of the representative claimant firms to declare how many of their members own a medical agency or have a financial stake in them greater than x%. It may be that some people in the insurance community know of these arrangements and could report them.

Q104 Chair: You have spoken about the interests of claimant solicitors. Even if you cannot quantify that, that has to be a factor in this. The insurance industry itself has very strong interests as well, doesn't it? How do we make sure that the new plans to put more people in the small claims court are fair and equitable to claimants as well as to insurance companies? What can we do to make sure that happens?
David Powell: You can design a system to protect claimants who are not represented. It needs to be a simple system. It needs to be easy to understand and easy to follow. You need to give the claimants tools to evaluate fairly the offer they are being made so they can see if it makes sense or not. You need to make sure that the insurers are properly regulated so that they are treating their customers fairly. There is existing regulation in place to ensure that happens, but if you wanted to beef it up as a safeguard you could do that.

Q105 Chair: You have made a statement there that sounds very easy. They are actually very serious proposals. We would need to know a bit more how they could be done. You have said in your written statement, "It is our view that in a large proportion of the cases valued <£5,000 there is simply no need for legal advice, as long as the process is simple enough for unrepresented claimants to follow, they are fairly treated by the defendant and they are able to check if the settlement offer made to them is fair and reasonable." Is it realistic that those safeguards can be achieved? Let us say they are fairly treated by the defendant. How would they know that?
David Powell: My suggestion would be twofold. One is that you have a system in the medical assessment where the claimants get categorised so they understand exactly what type of injury they have and how severe it is so they get a good understanding of where they belong in terms of the scale of compensation they are entitled to. Then, to support that, you would have a public tariff of damages. Agreed scales of damages are used in other areas of compensation, whereby if you know that you are claimant type A5 you are entitled to compensation of between £1,800 and £2,500. If the insurance company makes an offer of £2,000, you can decide to accept that or reject it and wait for a better offer.

If you have the tools so that the claimant can understand the offer they are being made, they are able to make an informed judgment. The evidence that that will work is that we already operate this system with first-party claims in the insurance industry. If you are making a claim against your own policy because your car was stolen, for example, you have access to tools that tell you what your vehicle is worth, so that when the insurance offer comes in you can make a judgment about whether that is fair or not. You accept it if it is fair and you don't accept it if you don't think so.

Q106 Chair: But the specific situation we are discussing in this inquiry is to do with whiplash, and that is to do with medical situations with implications for health; so it is slightly different. Perhaps the individual is not in as strong a position to make an assessment. How would they be able to tell if what was offered was, in the words you used, "fair and reasonable"?
David Powell: There are two ways. First, they get categorised so that they can understand what type of compensation they are entitled to. The French use a system on this basis where they have a disability index and they make an unequivocal statement about how badly injured the claimant is so that they know exactly where they stand. The second part is that they have a published tariff of damages that they can look at to ensure they are being offered the right amount. The additional factor is regulation on the insurer to make sure that they are handling these claims fairly.

Q107 Chair: What kind of regulation?
David Powell: There is already regulation requiring insurers to treat claimants fairly, to make them fair offers and not to differentiate.

Q108 Chair: Do you think it works?
David Powell: Yes, it does work. The volume of complaints against insurers settling claims is minuscule compared with the number of claims they settle. You could beef that up. You could introduce a specific set of regulations through the insurance regulator to manage this new part of the system.

Q109 Chair: Do you think that a vulnerable individual with little knowledge about medical matters would be in a position to work out if what they were being offered was fair and reasonable, when they did not have access to any legal advice, by the insurer making the offer to them?
David Powell: I understand the concern. There are ways of dealing with it. One is to try and protect them in the system. The other is that there are ways they can get legal advice within the small claims track. I believe the small claims track allows people to recover £250 or £260 for legal advice—not for representation but advice—on whether the offer they are being made is reasonable. There is no reason why that could not occur if that was required.
The other issue is that the small claims track is suitable for very simple cases. If it is not a simple case and if the claimant is vulnerable for any reason—if they are without capacity or if they are a minor—that claim does not belong in a small claims track. If there are complicated liability issues, for example, about who was at fault, those cases do not belong in a small claims track. They could be escalated to the fast track or to the multi track, where they can be dealt with with a bit more scrutiny and time. This is about settling mass claims cheaply to get premiums down.

Q110 Chair: And you guarantee the premiums would come down.
David Powell: Any savings would be competed away. We are already seeing that with changes that are still in the pipeline. Insurers have already brought the premiums down in expectation of savings down the line. It is a gamble, but some insurers have done that and others have had to follow.
Chair: Thank you very much, both of you, for coming and answering our questions.

Examination of Witnesses

Witnesses: **Dr Simon Margolis**, Chief Executive, Premex Services, and **Dr Andre Brittain-Dissont** gave evidence.

Q111 Chair: Good afternoon and welcome to the Transport Select Committee. Would you give your name and organisation?
Dr Brittain-Dissont: I am Andre Brittain-Dissont from Andre Brittain-Dissont Medical Reporting, an independent medical expert.
Dr Margolis: I am Simon Margolis. I am chief executive of Premex Group, which is a medical reporting organisation.

Q112 Chair: Could you explain to us what medico-legal reporting normally involves?
Dr Margolis: Ordinarily, it is a process whereby claimants who typically will be represented by a lawyer will be required to have some examination carried out to assess the extent of any injury, with a view to a report being produced that will outline the extent of the injuries and offer a prognosis for recovery. Typically, because of the Civil Procedure Rules, the instruction would come from the claimant's representative, which would ordinarily be a solicitor.

Q113 Chair: Who actually instructs you? Where does it come from?
Dr Margolis: Ordinarily, because of the Civil Procedure Rules, it allows the claimant's representatives to request the report. The majority come from the claimant's representative, although we would also do reports for insurance companies where they are looking after the claimant on occasions. The bulk of them are from the claimant's representative.

Q114 Chair: Who is paying you?
Dr Margolis: Ultimately we will be paid by the at-fault party. Ordinarily, we would not be instructed unless the claimant's representative is comfortable that liability is not an issue and that they will therefore be able to recover costs. Typically, we will be paid by the at- fault insurer.

Q115 Chair: Dr Brittain-Dissont, can you tell us any more about that? Do you want to add anything on what you do? Tell us more about who instructs you and who pays you.
Dr Brittain-Dissont: I get instructions from a variety of different people. It can be from the claimant's solicitors directly or from the defendant's solicitors. It can be a joint instruction from both or from an organisation like that of Dr Margolis, which is a medico-legal agency. There is a variety of different means whereby an independent expert receives instructions.

Q116 Chair: What is the balance of where you get your work from—what kinds of organisations?
Dr Brittain-Dissont: It is probably about 50:50. It is 50% direct from solicitors and 50% from an agency.

Q117 Chair: Do the people sending work to you get any referral fee or anything of that nature?
Dr Brittain-Dissont: From me, no, they don't. There is no payment to them for sending the case to me.

Q118 Chair: What happens to the report that you produce?
Dr Brittain-Dissont: The report that I produce goes, first, to whoever sends you the instructions. If it was from a company such as Premex, it would go to them directly. If it was from a claimant's solicitor or a defendant's solicitor, it goes direct to those people who instruct you first of all.

Q119 Chair: How do you distinguish between the injury that you are looking at and a pre-existing injury?
Dr Brittain-Dissont: I suppose experience is the best way. There is no absolute scientific mode of doing that. Like all assessments that any doctor performs in any surgery in the world, it is really a question of listening, looking, feeling and examining. You come to a decision at the end if it seems like a reasonable situation. It is very hard to distinguish between purely old and purely new. You listen to the person's history and that then guides you through the examination as to what you should be examining. Then you come to a conclusion if you think that is reasonable. You may have medical records that can assist you in seeing how they were pre-accident and therefore what complaints they had post-accident. Of course, if somebody comes to you with a condition that was not documented in the records previously, that is an indication that there is a new situation that has arisen since this index event of an accident.

Q120 Chair: Dr Margolis, do you have any other comment on how to distinguish between an injury that you are looking at and a pre-existing injury?
Dr Margolis: No; I would agree. With any medical condition, the history is an absolutely key part of coming to a conclusion on the diagnosis. That is arguably one of the areas, with the current system, that is probably not as good as it could be, in the sense that, as far as these types of injuries are concerned, the expert examining a claimant would typically have the history from the claimant and that is it. This is one of the areas where people are looking at how the system could be improved that would be relevant in the sense that there is only one side of the story. It is quite difficult for a medical expert, when they just have a single account of events, where insurers might say, "That account bears no resemblance to what actually went on," if they do not know the other version of events and is not helpful. Arguably, in terms of a new world, that would be one of the areas that would be very sensible to look at to give experts more information. To some extent, they are currently operating with one arm tied behind their backs.
Chair: I did have the opportunity of visiting Dr Brittain-Dissont's surgery to see an examination. These are very big questions. They do not relate to any one individual; they relate to the nature of the examinations you do and what you are able to assess.

Q121 Graham Stringer: What percentage of the clients who come to you do you reject—"reject" is probably the wrong word—or do you say, "You have no injury whatsoever"?
Dr Brittain-Dissont: I would estimate that between 1% and 2% involve me reaching a decision that the conclusion for injury is really very unsafe or the assessment has just been so clouded with poor information, poor history and then inappropriate findings on examination whereby you cannot come to a conclusion that there is injury; or, if, worse than that, it just seems to be a nonsense case with signs that seem to be blatantly malingering signs, it is probably in the region of 1% of people that I would see. That would be about correct, I would say.
Dr Margolis: I am not actively involved in assessing people.

Q122 Graham Stringer: No, but your organisation is, is it not? I would imagine you must have some idea in a commercial organisation of how many cases you do not want to take forward because I presume that would affect your eventual income.
Dr Margolis: I am afraid I do not have that information to hand. It will be a very small percentage; I would agree with Dr Brittain-Dissont. Typically, there has been an element of weeding-out of cases prior to us being asked to arrange an examination, so it is going to be a low figure.

Q123 Graham Stringer: How long do the examinations take?
Dr Brittain-Dissont: It depends how many injuries there are, of course. One difficulty here is that we are talking about whiplash, which is a poor term anyway. That is often just the beginning of the story. There may be multiple injuries. It can happen that you have one crash and one injury. Probably the majority involve psychological injury, lower back injuries and

other cuts and bruises. Some injuries are more serious than others; some crashes are more serious than others; so you wind up with a multitude of injuries to be dealt with. Sometimes there is major psychological distress and therefore a psychological assessment really prolongs the examination. It can be from 20 minutes to an hour. If someone is a really superb historian, who comes in and you sit back and they give you all the information, then it can be much quicker. If someone is a bit more difficult to interview, then it can take a little bit longer. It is a variation. It can be 20 minutes or it can sometimes be an hour.

Q124 Graham Stringer: In the cases that are rejected, coming back to that word, how do you decide that? Do you find that people are lying or do you examine them and find there is no tissue damage?
Dr Brittain-Dissont: It is a build-up. It begins with the history. Generally, that is where doctors really earn their salt. They ask questions and learn about their patients. If you have ever been for any medical assessment, you will spend much more time talking to your doctor than being touched by your doctor. Generally, it is learning to know about people and by asking the right questions that we learn how we can direct our examination.
Generally, if you are injured and have a significant problem and it is three or four months post-accident, you will have a lot to say about that injury. If I give you an open question like, "How has the injury affected you?", you will fill that time with detail about when it hurts, how it hurts, how it affects you and how it interferes with things. When you ask these questions and there is virtually no information coming back apart from, "Neck pain, doctor", or, "It hurts, doctor, doesn't it?", and then you go on to the end of the examination and there is withdraw reaction or you touch superficially and people withdraw, you start to build up a picture that this is less safe. Eventually, if you are getting true inappropriate signs and things that should not cause any pain, even in somebody with a significant problem, and they say, "I'm getting pain, doctor," without some significant psychological disorder, it becomes unsafe. Therefore you say, "That's probably where we should terminate things. I have no reason to assume that you are injured here. There is something else going on but it's not really a medical issue."

Q125 Graham Stringer: Does it give you any pause for thought, having listened to the estimates of the number of fraudulent claims that there are, that you are only finding there is no medical case in 1% or 2% of the people who are coming to you, whereas the estimated figures for fraudulent claims are much higher than that? Does it give you pause for thought at all?
Dr Brittain-Dissont: It was interesting information. I am not able to verify the actual validity of it. All I know is that one of the reasons why I gave an open offer for anybody from the Committee to come and see a clinic and see what happens—because there is still nothing better than just seeing people coming in—is because I didn't know who was going to come on that day. Anybody could have come in—good claimant or bad claimant. In general, I am confident that I see genuine people with genuine injuries, which have a genuine impact on their lifestyles. That would be similar for anybody coming to any clinic on any one day. I think the figure of 1% or 2% is, in my experience, more robust, because I see these people face to face. I actually see them and get my hands on them. Through the evidence of my own eyes that is what I would say. Maybe there is some filtering process and some of the worst cases get lost to me, or maybe people who refer me cases are better referrers. There may be better practitioners and worse practitioners in terms of where the work comes from. That is what I see and I am quite confident that that is about the right figure.

Q126 Graham Stringer: When you talk to patients—which is obviously a good thing, because some doctors don't talk to their patients very much—there is no hard, diagnostic test that is firm and fast for this. How confident are you in the reports that you put out?
Dr Brittain-Dissont: Dr Margolis is a doctor with great experience. He will know that, if you enter medicine hoping that every condition has a test that means you can make the diagnosis, you will be very disappointed very early on in your career. There are a multitude of things we all suffer from whereby there is no pure test for it. You may have no physical signs—for example, epilepsy and migraine. There is a multitude of cases whereby we simply go on what we listen to, what we feel and what we see when we examine you, together with the history. An acute sprain injury fits into that category. Again, with a good history and finding the correct tender points, when you examine somebody, it is important to ask whether those findings are reproducible. If I examine you here at this point, and then we pause for a second and I come back to examine you again, would I find the same things the first time and the second time? It is quite difficult to fake reproduction of the exact tender points once, twice or three times. A good expert would examine you and then, if he had some concern, he would take a break and examine you again. If the tender point, as it is called, migrates around the body, then you start to get more concerned. If somebody comes across as a genuine historian with lots of information and looks like one of your patients you would see every day in your clinic, then you will lean towards that person being a genuine claimant.

Q127 Sarah Champion: Dr Margolis, I think I understood you correctly to say that when you get a claimant you don't get the context around that claimant. Is that correct?
Dr Margolis: Correct, yes.

Q128 Sarah Champion: So you would not know, for example, of the speed at which the person was hit.
Dr Margolis: You would have an account from the claimant as to what happened, but you would have no way of corroborating that account. It is literally the claimant's account of the event. The claimant could theoretically go and see an expert and say, "I was

stationary and I was hit from behind at 30 mph," when in fact something completely different happened.

Q129 Sarah Champion: What information would you like to be presented with so that you can feel your diagnosis is more robust, knowing all of the evidence?
Dr Margolis: If there is a scenario, which is the case with this type of incident, where there may be two accounts of an incident, and possibly even a third account that is the real one, if you only have one account, then the obvious one would be for the rules to allow, for example, for the insurer who is defending the case to put information into the claims portal so that the expert receives two accounts of what actually happened. The reason why that would be of benefit is because that would potentially achieve a cultural shift. If claimants can go along and give an account that might not be an accurate representation of what happened, and if it was common knowledge that the expert was going to hear the other account, which arguably was the correct account, I would imagine—this is just an opinion—that over a period of time you would get a cultural shift. Those claimants who are not giving an accurate account would give a more accurate account, which would undoubtedly make the expert's job easier in terms of assessing whether what the person was telling them sounds consistent in terms of their injuries with the indexed accident. That is the fundamental bit that is missing at the moment that would absolutely need to be addressed.
The industry has moved, over the course of years, to try and speed up the whole process. Experts took six months to do a report 10 or 15 years ago and the whole thing was very slow and clunky. Claims literally ran on for years. The world is a much better place in that respect, but certain things have changed along with that. It is now unusual for an expert, particularly in these lower-value claims, to see medical records. In fact there is a rebuttable presumption that they won't see the records. Again, that is not necessarily that helpful if, as an expert, you are thinking, "Something is not ringing quite true with this person." For example, if the claimant has said, "I've never had any previous injuries," again, I do not feel it would be that difficult to have a scenario where, if there was a record of previous accidents, which I believe insurers will have, that the expert should know about that. For instance, to turn up to an assessment having had an injury six months or 12 months previously and not mention it is clearly going to make the job more difficult.

Q130 Sarah Champion: What is your assessment of why you are not given that information?
Dr Margolis: It is just the way the system works at the moment. As I say, over the course of maybe the last 10 years there has been a general drive to try and speed up the process. Claimant lawyers and the insurers want that. They want to settle claims and get on to the next one. Things like medical records are part of the process that is probably the most difficult and time-consuming. There is obviously a cost involved as well. There has almost been an industry move to try and take the records out of the process, but it is possible that the pendulum has just swung a little bit too far the wrong way.

Q131 Sarah Champion: As one of the biggest providers of these sorts of services, have you lobbied to try and get that information?
Dr Margolis: There are all sorts of conversations going on, in the context of the MOJ consultation paper and looking at that, about how the system might be improved. Those are exactly the sorts of things we are talking about: more information to the expert, possibly medical records reviewed, accreditation, some sort of audit and potential sanctions. Those are all sorts of things that we feel would absolutely give more confidence in the process.

Q132 Sarah Champion: I have a final question for clarity. If someone had had three whiplash claims before, you wouldn't know that when they came and presented to you.
Dr Margolis: The way the system works is that we would receive a letter of instruction, either from a solicitor or an insurance company. That may say no more than, "Road traffic accident; neck injury," or it may be more detailed. We get what we get in terms of the information. As the body in the centre trying to get the expert and the claimant together as efficiently as possible, we don't get involved in the actual process of instructing the expert in terms of telling the expert about the circumstances of the accident or previous injuries. Unless our instructing source tells us, then the expert would not know.

Q133 Chair: Would it be reasonable to say that a claimant would have to report, whether to their insurance company or to the doctor, a whiplash injury within a given length of time—say, within a week, a fortnight or any other specified time after an accident had occurred?
Dr Brittain-Dissont: Do you mean would the symptoms have to develop within a certain amount of time afterwards?

Q134 Chair: Yes; how long would it take for someone to think they have whiplash injury? If, say, somebody was involved in an accident and six months later, or maybe longer than that, they came and reported that they might have whiplash, should they be ruled out of time?
Dr Brittain-Dissont: If they are reporting symptoms for the first time as having just started after six months, is that what you are referring to?

Q135 Chair: Should there be any limitation there?
Dr Brittain-Dissont: Do you mean when the symptoms first begin or when they first say, "I have"—

Q136 Chair: When somebody reports that they think they have whiplash.
Dr Brittain-Dissont: The essence of the injury is that it is a muscle or ligament tear and it bleeds. As the bleeding collects, you get muscle spasm and therefore within the first day, two days, three days or four days symptoms develop. You can get less common

situations where it comes on after seven days if there are mitigating circumstances. If you sprain your knee at the same time and you are given strong painkillers such as Tramadol, it may mask the initial symptoms that come on. When you then take the medication away, when the knee is getting better, the pain becomes more obvious. You must not just be completely blanket, "That's it." You must listen to the circumstances. If someone has a broken hip, goes into hospital and is on morphine for two weeks, when they come out and the neck is very stiff, you might realise there maybe was an issue that was missed because they were on very powerful painkillers. Again, you would hopefully take a holistic view on it.

With no other factors and purely just injury in a normally robust person, symptoms should usually evolve within the first seven days. It is rarely after seven days unless there are some exceptional circumstances. Beyond two weeks, it becomes almost impossible to know that that would be the reason for the problem being caused in the first place.

Q137 Chair: Are there any examples of a doctor being criticised by a judge or reported to and criticised by the GMC for wrong assessments in these cases—or for misconduct in relation to them?

Dr Brittain-Dissont: I tried to do a search on that. I did not come up with any good, hard instances. I am aware, anecdotally, some years ago of people being called in by judges saying, "This is your practice; there has been some criticism of it; are you seeing too many people a day?" There have been anecdotal instances like that. I did a search to try and find some documented evidence of it and I was not successful in finding anything.

Dr Margolis: I am not aware of any obvious examples. Part of the problem is that, particularly with the more minor injuries that we are talking about, it is very rare that they end up in court. It is very rare that a judge would be assessing the medical evidence. That is, again, potentially one of the issues with the current system. There is very little auditing, for want of a better word, of opinions that experts are offering, and it becomes difficult on a rifle-shot basis to pick off a single report and say, "That opinion was wholly unreasonable." Potentially, one of the routes to making a more robust system is to have some sort of peer review or audit-type process overseen by an independent body that could take a view and look to criticise, if that is the appropriate word, and sanction against experts who are maybe felt to be operating out at the extreme of opinion.

Q138 Chair: What would be the impact of the current proposal to put more or most claimants for whiplash on the small claims track? What would be the impact on those individuals themselves?

Dr Brittain-Dissont: One big impact would be that it is more likely not to burden the health service. You would have people with injuries and little access or able to fund their own therapy. Whereas now the system allows for assessment from a doctor and then referral for treatment or investigation, this would be lost and it would just go to a claims court. There would be an amount of money paid but there would be a lack of follow-up and interventions. Therefore, they would turn up to their GPs and say, "Look, I have this problem. Can you help me?" Waiting lists on physiotherapists and investigations are already very intense and acute. That would be a burden upon the health service that way.

There is a concern that people just don't fully appreciate the magnitude of their injuries and that maybe an insurance company is not sympathetic to the magnitude of them. I can give an example. If you have neck pain but the pain refers into your arm and it is your dominant arm, and then you develop spasms as a consequence of the injury that is pinching on the nerves, it is still a whiplash injury and neck injury. It may be a particular type of injury that could cause long-term difficulty if that spasm persists and causes indentation of the brachial plexus and therefore gradual increasing debility down one arm. Therefore, that person would then not be treated in the early stages, which is ideal, but would turn up later at the GP and it is a problem to be dealt with by the health service.

There may be other issues in terms of post-traumatic stress, which often develops sometimes after an accident. It is very expensive once you start treating it. Again, this may not be treated properly if it was just going through a small claims court. You are relying on people to understand their injuries very well and to make their own assessments about what their injuries were.

Q139 Chair: Is there any way people could be helped to make their own assessments in situations like that?

Dr Brittain-Dissont: There is always guidance you could give. They would get guidance from their GP, I suppose, from just asking, "Do they have a reasonable view on what I am suffering from here?" There is that access. I imagine help could be given to allow them to assess that better.

Q140 Chair: What percentage of the cases you see would actually go through the small claims process, if the proposals were enacted?

Dr Brittain-Dissont: If it is RTA cases, then probably in the region of about 90% are going to fit into that category of a £1,000 to £5,000 payment. It is the vast majority of them.

Q141 Chair: Dr Margolis, what percentage are you looking at on those?

Dr Margolis: We do not get feedback on what cases settle for, but everything I read and everything we hear anecdotally would support that. It is probably somewhere between 75% and 90% of these types of injuries that would fall into that basket.

Q142 Chair: What if cases were assessed on a standard format and they were dealt with that way rather than the bespoke way you look at them?

Dr Brittain-Dissont: There are two ways of doing reports in the current climate. I do not use any sort of laptop or computer program to do a report. I still do a bespoke report, so the report is different for every single person with individual language for that person.

Therefore, every one is different. I hope that gives greater detail and makes the person sound more like a person and not just simply a block case or a reference number. I thought that was still a better way of doing it because we are all talking about how medical experts can be better. We have heard from people saying that the assessments could be better and the reports could be more detailed.

Everyone seems to want detail, to give you records and engineering information. It seems correct that the report itself should start as being very detailed in the first place. Some of the computer reports have not really helped the situation because you are given the language of the computer program and not your language. It confines you pretty much to that. Having the computer interface between you and the patient reduces some of that one-to-one contact that is very useful for a doctor making an assessment. My view is that you are quite right that detail is excellent. A high standard initial quality report, which is evidence-based and highly detailed, is the way forward. I think that is the best way forward rather than the cost-cutting computer laptop reports that have come into the industry as costs have been driven down.

Q143 Chair: Do you think the current concerns that there are a lot of fraudulent claims for whiplash are well-founded or do you think they are exaggerated? If they are there, what do you think could be done to make your assessments more accurate?

Dr Brittain-Dissont: We have all assumed that fraud is out there. That seems to be a natural state of play for any industry. In this case I think it is a bit exaggerated from what I have seen and have seen for 15 years in this industry. I think 7% is probably a sevenfold increase of what I would see. I believe claims can be profiled where there is doubt and concern about the validity of the claim. If it is five unemployed men in a van hired for the day and they hit another five men in a van hired for the day, it would draw a high level of concern that maybe it was not a real accident. Profile those cases and refer them on for a higher-level medical assessment, with this information and maybe with two doctors looking at the case so you get a good dual view at that point, rather then sending everybody with all the information to a doctor every single time. That would surely increase the costs hugely if everyone has to have engineering evidence, medical evidence and everything else. This will not reduce costs but massively increase costs. It would be sensible to profile cases where there is some concern and maybe have two doctors with all the information for those cases. That is just a simple recommendation.

Q144 Chair: Dr Margolis, do you have any suggestions as to how to deal with the issue of fraud in relation to whiplash?

Dr Margolis: Yes. In terms of the numbers, we have obviously heard already this afternoon that there is probably no clear view on what level that is at. There is a significant range in there. There may well be an element of opportunistic exaggeration that goes on. One of the things that could absolutely help address it and has been alluded to here is multifactorial information to the experts to profile, which is a good word, and pick out cases where further and more robust investigation might take place. That might be an investigation by an insurance company as well as a more robust medical assessment. Talking about the experts, again, there could be an auditing of the experts and looking to pick off outliers or experts who may not be behaving appropriately in terms of the opinion they are offering, and having a system and a process in place that can allow that particular issue to be addressed. That would arguably help reduce the cost burden to insurers. That would be a useful approach.

Chair: Thank you very much for coming and answering our questions.

Monday 17 June 2013

Members present:

Mrs Louise Ellman (Chair)

Sarah Champion	Karl McCartney
Jim Dobbin	Adrian Sanders
Karen Lumley	Graham Stringer
Jason McCartney	

Examination of Witnesses

Witnesses: **James Dalton**, Assistant Director, Head of Motor and Liability, Association of British Insurers, **Dominic Clayden**, Director of Claims, Aviva UK, **David Fisher**, Catastrophic and Injury Claims Technical Manager, Axa Insurance, and **Steve Maddock**, Managing Director for Claims and Business Services, Direct Line Group, gave evidence.

Q145 Chair: Good afternoon and welcome to the Transport Select Committee. Would you give your name and organisation, please?
James Dalton: My name is James Dalton. I am the head of motor insurance at the Association of British Insurers.
Dominic Clayden: I am Dominic Clayden. I am the claims director at Aviva Insurance.
David Fisher: I am David Fisher, catastrophic and injury claims technical manager at Axa Insurance.
Steve Maddock: I am Steve Maddock, Managing Director for Claims and Business Services for Direct Line Group.

Q146 Chair: Mr Dalton, what is your estimate of the proportion of whiplash claims that are either fraudulent or exaggerated?
James Dalton: The first point I would like to make is that the industry is committed to paying genuine whiplash injuries. Therefore, the question about the amount of fraud that exists is quite a difficult one to answer on the basis that each individual insurer—my colleagues will answer for their own firms—will take a different view on what fraud is. If an insurer knows that a claimant is actually committing fraud, that will be a fraud claim. If an insurer has suspicions that a claim is exaggerated, they may pay that claim and count it as fraud, or they may pay that claim and not count it as fraud. My colleagues to the left may be able to help you further on that.

Q147 Chair: But what proportion of claims fall into either of those categories? We have heard very loudly over a long period of time from the Association of British Insurers that a large proportion of claims are fraudulent or exaggerated. Are you telling me that you can't give us a figure?
James Dalton: I can give you a figure for fraudulent claims.

Q148 Chair: What is that figure?
James Dalton: The figure for fraudulent claims is around 7%. That doesn't take into account exaggerated claims. In terms of the issues that we are focusing on in this Ministry of Justice consultation in relation to improving medical evidence—

Q149 Chair: Mr Dalton, you are not talking to the Ministry of Justice; you are talking to the Transport Select Committee. I am putting a question to you because I want more information about statements that the Association of British Insurers, whom you are here to represent, has made.
James Dalton: As I said, 7% is about the number of known fraudulent claims, but we don't know and it is very difficult to capture how many exaggerated claims there are.

Q150 Chair: Can any other witnesses give me any other information? Mr Maddock, how many exaggerated or fraudulent claims are there?
Steve Maddock: Supplementary to the answer that James has given, obviously you are aware of the Faculty of Actuaries' third party working group that estimates fraud or exaggeration to represent anywhere between 10% and 60%.

Q151 Chair: That is a pretty wide range, isn't it?
Steve Maddock: That is a pretty wide range. We have conducted an internal study ourselves. We have independently sampled over 2,000 claimants. In answer to the question, "Have you exaggerated or submitted a fraudulent claim?" we found that 12% responded positively—i.e. they had. We think that is arguably the thin end of the wedge.

Q152 Chair: Mr Fisher, do you have any information?
David Fisher: Fraud by its nature is difficult to identify and prove. Our own estimation of low-speed impact and phantom passenger claims that would fall within the ambit of fraud is 15%. Looking at fraud and exaggeration overall, the position in our submission to this Committee is that the prognosis that we see in medical reports is in stark contrast to that which is reported in medical literature and the like, which suggests that, where there have been accidents, about 17.6% of victims will sustain injury and about 75% of people will recover within six months, going down quite dramatically from the six-month stage. I would estimate that the percentage of fraudulent and exaggerated claims is even higher than the 60% suggested by the Faculty of Actuaries.

Q153 Chair: On what basis would you suggest that?

David Fisher: The mismatch between the medical literature and what we see in medico-legal reports. They will invariably give a prognosis period of 12 to 24 months for a whiplash injury.

Q154 Chair: You are taking your information from your reading of medical reports rather than an examination of claims that have been made to your company.
David Fisher: Obviously all the claims will be examined.

Q155 Chair: Have they been examined?
David Fisher: Yes; well, not all the claims. We do sample claims and that drives the low-speed impact and the phantom passenger figure that I have given of 15%. Exaggeration claims, unless they go to court, are more difficult to identify.

Q156 Chair: But, in your evidence, your company or you talk to us about the compensation culture.
David Fisher: Yes.

Q157 Chair: Do you think you have enough firm evidence to be able to talk about a compensation culture as something that is derogatory?
David Fisher: The fact that the number of claims submitted through the Road Traffic Act portal from April 2012 to April 2013—in other words, the means of fast-tracking whiplash-type claims—has increased by 27% is a cause for concern and perhaps indicates that we have a compensation culture. Our experience across Europe is profoundly different from that within the UK.

Q158 Chair: Mr Clayden, what work has your company done and what figures can you give us?
Dominic Clayden: If I could build on the evidence of my colleagues rather than repeat it, I would add two additional pieces of information. The first is the incidence of fraud rings in personal injury claims. This is not individuals in isolation committing a fraud. These are rings of people connected to commit fraud.

Q159 Chair: Is this cash-for-crash?
Dominic Clayden: It is a combination of cash-for-crash, which is good shorthand for it, but it is a material problem for us. Currently, we have more than 5,000 individual claims under close scrutiny that have a very high subsequent evidence of fraud and repudiation in them. That figure is around 5% of our total claims numbers, which are organised multiple people involved in the incidences—in the plural. It is the same groups of individuals involved.
In addition, we recently surveyed 2,500 members of the public. The response there was that 17% of people either admitted to having committed a faked or exaggerated whiplash claim or had known somebody who had committed a faked or exaggerated whiplash claim. Of course we know the ones we know. We have an inkling of the ones about which we have great suspicions but we cannot necessarily get the evidence, and there is a body that is a complete unknown volume of fraudulent or exaggerated claims.

Q160 Karl McCartney: On that point, all four of you have mentioned different figures for the actual percentage of fraudulent claims. How many of that percentage of fraudulent claims do you examine and then take those fraudulent claimants to court to try and recover your costs or back up the other driver who is being claimed against?
Dominic Clayden: In terms of a hard figure, the 7% quoted is very similar to Aviva's, which is understandable bearing in mind our market share. The vast majority of those claims are where the claimant simply withdraws the claim. We have not paid money out; we have declined it and said no when we have produced the evidence, and they simply go away. We take cases through to court. I can give an example that will bring it to life. There was a case of a taxi driver who claimed, following a whiplash, that he was unable to work. We commissioned video surveillance on him, which is expensive. The claim was for £100,000. When it finally went to court he got £500. While it was a good result, our total costs outlay was £41,000 for defending that claim. Pursing that for recovery of costs is very difficult.

Q161 Karl McCartney: That one example is very commendable, but how many are you not taking to court? At what level do you decide that you just pay out the claim?
Dominic Clayden: I am sorry—I thought you were referring to the criminal court. In terms of the evidence when we go through to taking them to court, we look to scrutinise all claims. We challenge where we believe we have evidence, but in a lot of instances—for example, if there is a rear-end shunt so liability for the accident is not in dispute—the factual evidence is very difficult if someone is claiming whiplash and it did not occur.

Q162 Karl McCartney: Do you think you make it easy for the people who have paid you premiums to defend themselves against claims like that?
Dominic Clayden: We make it as difficult as we can for people who—

Q163 Karl McCartney: I think you misunderstand me. Do you make it easy for people who have paid premiums to you, for them to defend in those cases where a fraudulent claim is being made against them?
Dominic Clayden: We look to support our customers where we can, yes.

Q164 Karl McCartney: How many of those do you take to court, percentage-wise? Can you give me numbers or a round figure of 1,000 or 500 a year?
Dominic Clayden: Bearing in mind that 7% are ultimately proven to be fraudulent or gone away, that will give you a rough idea of the percentages.

Q165 Graham Stringer: I want to follow up Mr McCartney's question. We are using the word "fraudulent", but that usually has consequences apart from a lower payout. Are there any consequences for people who fill in a fraudulent claim? Can you prosecute them separately, and do you?

David Fisher: Yes, they can be prosecuted separately. Sometimes that will be with the co-operation of the police and other agencies. In other instances, they will be prosecuted by insurers for contempt of court or some other device. The situation that we have, though, is that the common law, as opposed to the criminal law, allows for the recovery of damages by a claimant who has falsified or exaggerated part of his claim. That is the issue that we face.

An example that went to the Supreme Court a year ago last April was the case of Summers *v* Fairclough Homes Ltd, where Mr Summers had signed a statement of truth to the effect that his claim was in the region of £800,000. He recovered £80,000, and the Supreme Court declined to strike out his claim so that he would receive nothing at all. That is the situation that we face all the time in respect of exaggerated and falsified claims. If there has been injury, the common law allows for the recovery of compensation in respect of the genuine amount of injury, no matter how tainted the claim might be as a whole.

Q166 Graham Stringer: Have you had any successful claims where somebody has not suffered whiplash, they claim £x thousand and you can show that they have not had whiplash? Have you prosecuted anybody for that?

David Fisher: The difficulty would be demonstrating that someone has not sustained whiplash.

Q167 Graham Stringer: I understand that it is difficult, but have you actually prosecuted anybody?

David Fisher: Prosecuted or defended a civil claim—there is a difference.

Q168 Graham Stringer: There is a huge difference—prosecuted.

David Fisher: There are lots of examples where there have been prosecutions in respect of staged accidents or phantom passengers and the like. There will be attempts to use criminal or other civil remedies against the claimants.

Q169 Chair: How many times has your company prosecuted somebody in these circumstances?

David Fisher: It will be very small numbers because the balance of evidence is high.

Q170 Graham Stringer: When you get these cases of three or four people getting into a car and putting the brakes on at a roundabout so that they cause an accident, who prosecutes them? Is it the insurance company or the police?

James Dalton: The insurance industry has funded an Insurance Fraud Bureau as well as a dedicated insurance fraud unit at the City of London Police. Insurers will tend to gather the evidence and pass that to the City of London Police unit, who will then go and prosecute those people. That unit has been operating for just over a year and has had quite a lot of success in prosecuting people. I can write to the Committee with some statistics from that unit in terms of the number of prosecutions, convictions and jail sentences that have resulted.

Q171 Graham Stringer: That would be interesting. On a slightly different tack but with the same objective of trying to stop fraudulent claims, do you think there is any benefit or sense in following the German system of saying you cannot get whiplash below a particular speed of, say, 10 kph?

James Dalton: The first question that will come up in that sort of scenario—and I am not sure how the Germans and Austrians have dealt with this—is what speed the car was travelling at. As we get more in-car technology and computer-based telemetrics-based systems in cars, that will be an issue that we may come back to in time. At the moment, there is not enough of that in-car computer technology in the vehicle fleet for us to be able to go to court and say, "The car was travelling at x kph." It will be me saying that the car was travelling at one speed and you saying the car was travelling at another speed, and then there will be a debate about what speed that actually was.

Q172 Graham Stringer: There could be, but there is often residual evidence like little bumps. If there is only the tiniest bump in the back or side of the car, you could make an estimate that it was not going at 10 mph.

James Dalton: The problem that the industry has historically faced in those sorts of cases is that, in court, the judge tends to put quite a lot of weight, if not determinative weight, on the medical report that he or she has in front of them. Insurers have tried introducing into court processes the use of biomechanical evidence, and that has been rejected by courts.

Q173 Graham Stringer: Do you think a statutory speed would help to influence the court's decision?

James Dalton: Today, no; in future, possibly.

Q174 Jason McCartney: I would come back to this figure of maybe more than 60% of whiplash claims being potentially fraudulent or exaggerated. Mr Fisher, I see your job title is Catastrophic and Injury Claims Technical Manager. Mr Maddock and Mr Clayden, as Director of Claims, would you not agree that this is really a catastrophic state of affairs if we are looking at potentially more than 60% of claims being fraudulent or exaggerated?

Steve Maddock: Potentially, yes.

Dominic Clayden: I certainly agree. It is also an issue of social policy. When we refer to a compensation culture, we believe that part of this is also about the behaviour of the individual involved when making a claim. If the institute's number is as high as 60%, people are absolutely putting evidence forward that they themselves know not to be the case.

Q175 Chair: But is that figure of 60% for cases that are made up and where the incident either did not happen or there was no injury, or is that related to where there has been some kind of injury but it has been exaggerated?

Dominic Clayden: The latter; there is an exaggeration element in there as well.

Q176 Chair: How do you know it is 60%?

Dominic Clayden: It is the best view that the actuaries have from chewing the numbers. Based on the review of the medical evidence, as my colleague Mr Fisher referred to, it is what the underlying medical community is saying is the level of whiplash, the likely recovery period and what is seen through the medical reports presented to us as an insurance industry.
Steve Maddock: Equally, it is a comparative analysis between the frequency of whiplash injuries in different geographies of the UK. If you look, for example, at the frequency of bodily injury claims per claim reported in Scotland, you will see it is 10%. As you go through to the north-west, where there is a higher concentration of claims management companies, that frequency of occurrence increases significantly. It is for the reasons that Dominic describes and those that I have outlined from which the Faculty of Actuaries have drawn their numbers.

Q177 Jason McCartney: With these cash-for-crash fraud rings, are there regional hotspots for this kind of activity? Have you done a regional breakdown on this?
Dominic Clayden: Yes.

Q178 Jason McCartney: What are the results?
Dominic Clayden: Apologies for referring to the Institute of Actuaries, but we would be happy to write to you separately. They have a very interesting set of graphics showing the spread of density of whiplash claims over a period of time, which started in the north-west and has spread out. For ourselves, we know there is a strong linkage between cash-for-crash and incidences where there are higher elements of claims management companies. That may be coincidental, but there is a linkage to the north-west and it has spread out from there.

Q179 Jason McCartney: Have you done quite detailed analysis on this?
Dominic Clayden: Yes, for two reasons. Frankly, from a claims point of view, it is to understand how to handle claims. The other part of understanding the frequency of personal injury claims is that this is something that is used by people who are setting the price of insurance policies. The more likely a policy is to receive a personal injury claim, including whiplash, then that will have to be factored into the price. There is an extensive amount of work done to understand this.

Q180 Karen Lumley: Mr Clayden, you mentioned you have 5,000 claims under close scrutiny. What does "close scrutiny" mean?
Dominic Clayden: They have been pulled into a central unit that simply handles fraud ring claims.

Q181 Karen Lumley: Have whiplash claims increased since we have seen a big increase in claims management firms?
Dominic Clayden: We have seen an increase over time. Whether it is the causative link to claims management companies, I couldn't say. We have certainly seen over time an increase in the number of fraud rings and so-called crash-for-cash claims.

Q182 Karen Lumley: How do they get the information that these people have had accidents? Do they get them from you?
Dominic Clayden: No. Whether it is a claims management company or whatever, a fraud ring doesn't—

Q183 Karen Lumley: I am not talking about a fraud ring; I am talking about people who get whiplash. How do people get hold of them?
Dominic Clayden: You are probably best to ask the people giving evidence later. My understanding is that it is by advertising.

Q184 Karen Lumley: You don't sell details on to them.
Dominic Clayden: Not to accident or claims management companies, no.

Q185 Chair: Are you absolutely sure about that?
Dominic Clayden: Do I refer claims to solicitors? Yes.

Q186 Karen Lumley: Do you sell those details on?
Dominic Clayden: Not since the change in the law in that situation. I do not receive a referral fee.

Q187 Chair: But you did before then.
Dominic Clayden: Absolutely. We have been a strong advocate of the ban on referral fees and the reduction of the legal fees that go with it. It is the nature of the system. The reality is that, to remain competitive in a market where something is legal, we referred and took a referral fee. We still refer people to solicitors but we do not take a referral fee.

Q188 Chair: We have had quite a lot of evidence saying that insurers themselves often generate claims. The Government have said that they would like to see you, the insurance companies, address behaviours that encourage excessive and unnecessary claims within their own business models. It appears that the Government think that you are the people who are generating the claims. Are they wrong?
James Dalton: As Dominic has said, the system has changed very recently.

Q189 Chair: But before it changed you were guilty of this, were you?
James Dalton: The industry has long said that there is a dysfunctional compensation culture in the UK and that we are part of the problem.

Q190 Chair: What I am putting to you is that part of that dysfunctional system is the behaviour of the insurance companies. That is what the Government say.
James Dalton: Yes; and we have admitted that the insurance industry has played a part in that dysfunctional system, which is why we made a very strong case for the banning of the payment and receipt of referral fees. That came into force from 1 April.

No insurer can pay or receive referral fees for personal injury claims.
Dominic Clayden: If I can give clarity on that, within my own company our processes have not changed before or post the ban on referral fees. The fact that we do not receive referral fees has not changed what we do for our customers.

Q191 Chair: What about the new alternative business structures? Is it any of your intentions to become involved in those structures so that you, as insurance companies, are still involved in legal companies through a different route?
James Dalton: The new legal framework of alternative business structures allows a number of people to think about whether an alternative business structure is the right thing for their customers. There are a number of insurers that have entered those arrangements and a number that are considering entering those arrangements. At the end of the day, it is about improving customer service from an end-to-end claims perspective. ABSs are not just about personal injury; they are about the entire claims spectrum, whether that is vehicle hire, personal injury or conveyancing.

Q192 Chair: Mr Clayden, is it not correct that Aviva still refers claims to solicitors?
Dominic Clayden: We do.

Q193 Chair: Why do you do that?
Dominic Clayden: I would make it clear that we do not have an ABS. We don't have a financial interest in the firms of solicitors. We have customers who have had accidents that are not their fault and we have explained to them, where they have a legal expenses policy for example, that if they have had a personal injury claim they have a right, should they choose, to pursue that personal injury claim and we will refer them to solicitors.

Q194 Chair: Do you have a financial benefit from doing that?
Dominic Clayden: No. We absolutely do not take a referral fee on that. Equally, I suspect, if we were having a conversation with the FCA asking us whether or not we had deterred people from being referred to a solicitor, they would be having an awkward conversation with us. I believe it is the right thing for us from a customer point of view to explain to them their rights in the current system and, should they so choose, to be referred to solicitors. I do not receive a referral fee income and I do not have a financial stake in the law firms.

Q195 Chair: Is it possible that your company might become involved in alternative business structures in the future and have a legal interest then?
Dominic Clayden: I never say never; that would be a rash thing to say. At the moment, we do not have an application in process. We will keep the situation under review. It is not at the top of my priorities in terms of where I want to go.

Q196 Chair: But it is under review.
Dominic Clayden: We keep lots of things under review in terms of where we are going. As I say, I do not have an application in and I have known about this for a while.

Q197 Jim Dobbin: You have mentioned the issue of medical opinion a few times. What is your view of the medical opinion that you receive? Do you trust it?
James Dalton: The industry has had a problem with the quality of medical reporting for quite some time. The current process does not allow for sufficient independence of the person commissioning the medical report from the person who is providing the medical report. There are known financial linkages between claimant law firms and medical reporting organisations. At the end of the day, if a doctor has a patient in front of them claiming for whiplash two and a half years after a road traffic accident, their symptoms were long ago, they have resolved and basically the doctor is simply hearing about the subjective views of the claimant in relation to the accident circumstances. The medical report provides no value to an insurer whatsoever.

Q198 Jim Dobbin: Is that the general view?
David Fisher: By and large, whiplash is a non-demonstrable injury. The diagnosis, save for in extreme cases, is made from having taken a history from the patient. That means it is highly subjective, and that is reflected in the nature of the medical reports we see.

Q199 Jim Dobbin: Has there been any dialogue with the British Medical Association or the general practice organisation at all?
James Dalton: No.

Q200 Jim Dobbin: Why is that?
James Dalton: It comes back to the system of how one commissions those reports. As I said, it is the hired gun approach. If I was a claimant lawyer, I would choose the doctor that is going to provide a diagnosis of whiplash. That is why, in our view, the independence and transparency of the current medical reporting process is not fit for purpose.
David Fisher: In addition to that, many doctors will not get paid until the solicitor has been paid. Therefore, it may be that they feel they have a vested interest in supporting the claim.

Q201 Jim Dobbin: Do you think the Government proposals on this issue will satisfy your doubts about the system?
James Dalton: The Government's proposals are absolutely a step in the right direction. In the current medical reporting process, we need to see a system of accreditation of those doctors that are providing medical evidence. We need to see some improved training for medico-legal experts on the conversation that we are having here today about the nature of whiplash. There needs to be some standardisation around instructions for medical reports and getting some peer review into the process.
David Fisher: In terms of instructions, one crucial thing is that the reporting doctor has access to both

versions of events. At the moment, they invariably see only the version of events for the person instructing them, who is the claimant lawyer. There could be an absolute divergence in terms of what has happened in the accident, but they will get the claimant's version and that will be reflected in their report. That may influence their view.

Steve Maddock: Added to that, where you have conflicting pieces of medical evidence, it is very difficult for the defending party to overturn that medical evidence.

Q202 Jim Dobbin: If this goes to court and you are defending or fighting the claim, are these points raised in the courts?

David Fisher: Yes. At the moment, the balance probably rests in favour of the claimant because of previously decided cases.

Q203 Karl McCartney: I want to come back on a general point. It seems that you have done very well in front of us today castigating everybody else involved in whiplash claims but have not really taken any responsibility yourselves. You seem to have absolved yourselves as insurance companies from getting to where we are today, which is 1,500 whiplash claims a day. In anybody's books, that is a phenomenal amount.

Listening to what Mr Clayden had to say, it seems that business is business and whiplash claims mean that you and various people within the legal profession are in work. Surely, though, we are representing our constituents and 32 million people who drive in this country. We all want to see premiums lower than they should be, but unless we start reducing the number of whiplash claims we are not going to get there, are we? At the moment it does not seem that you, as a business sector, want to do anything about that; otherwise in the past 10 or 15 years not only would we not have the claims we have at this point but also our court system, which the taxpayers pay for, would not be clogged up with those claims.

Steve Maddock: I want to set the context a little around the insurance industry here. Clearly, we are here to compensate innocent victims of genuine road traffic accidents. As a function of that, as Dominic said, for genuine claimants we do refer to panel lawyers. That is without a referral fee post-LASPO, to clarify the point.

If I looked at the number of cases that my organisation refers on—I think this is reflective of the insurance industry—and then extrapolate that up by my market share to derive an industry total, I would expect to see about 170,000 whiplash claims in the market. Today I see half a million. I think that, hopefully, sets in context the level of referral that is made and is indicative of the referrals made for genuine claimants by the insurance industry versus the headline level of half a million claims a year that are reported to the Compensation Recovery Unit.

Q204 Mr Sanders: Who ought to be investing in the development of diagnostic tests for whiplash injuries? Should it be the insurance industry?

James Dalton: If I had a pound for every time someone came to me with a cure for the whiplash epidemic facing the UK, I would be retiring. The reality is that whiplash is a soft tissue injury. It is little different from a headache, in that I can't prove that I have whiplash any more than you can prove that I don't. If the insurance industry could buy a diagnostic test for whiplash, it would. There isn't one.

Q205 Mr Sanders: Therefore, if there is not going to be a remedy to this through testing, shouldn't the answer be to put some barrier in under which you cannot claim? Would that be your preferred policy solution? If an accident occurred below a certain speed limit and somebody claimed whiplash, then the normal position would be, "That is not a claim," and they would have to make an exceptional case in order for it to be considered?

Dominic Clayden: If I can part-answer the previous question, as an industry we are absolutely committed to reducing the cost of claims, including whiplash claims, where they are not genuine. Part of the issue that we have here, and it partly goes to the solution you are seeking, is that the Government have gone some way in terms of reducing what I believe is the significant oxygen that fuels the fire of this, which is by reducing legal fees.

Q206 Chair: But Mr Sanders is asking you a different question. He is asking you if the industry should be involved in funding better diagnosis.

Dominic Clayden: He is also asking whether there should be a threshold test as to whether or not there should be any compensation at all. I believe, for my own part, that a sensible compromise may be to increase the small claims track limit quite considerably so that there are no legal fees associated, but people still have an opportunity, where they have had a genuine injury, to get some compensation. It is a matter of political or judicial decision as to what the level is, but I believe removing legal fees and other associated fees up to a threshold would be a good way forward.

David Fisher: Threshold tests do exist in other jurisdictions within Europe, notably France. I think there is merit in a threshold test as a means of reducing the number of whiplash claims. As James has mentioned in terms of low-speed impact, you have to be careful about evidential issues. It is trying to make a threshold sufficiently robust so that we don't end up with lots of litigation proving or disproving whether the threshold has been breached, which is what happened with low-speed impact claims.

Q207 Chair: If that threshold was increased, wouldn't there be a concern that people wouldn't have access to legal representation to ensure their claims are heard properly and that the insurers would have the advantage? Does that concern you?

David Fisher: In terms of an increase in the small claims court, because of the changes introduced at the beginning of April—a claimant has always been able to have legal representation in the small claims court; they just had to pay for it themselves—now you have a situation—

Q208 Chair: That is quite significant, isn't it? It is not that they will just have to pay for it themselves. That could exclude somebody of limited means from being represented.

David Fisher: Since April, damages-based agreements would facilitate legal representation in the small claims court at a capped percentage in terms of cost. They would lose up to 25% of their damages but they would be able to have legal representation. In any event, the small claims track can be facilitated with use of the MOJ portal to allow unrepresented claimants to bring their own claims and to bring their own claims successfully. A similar situation occurs in employment tribunals and in criminal injuries compensation claims, where there is no automatic legal representation. Our experience of direct claimants, where we have dealt with them, is that their cases are settled far quicker. There is an almost unanimous uptake of rehabilitation at 94.6% of cases. In respect of represented claimants, it is less than 40%. The damages payment is about £70 less. That is across a big portfolio of represented claimants and a small portfolio of unrepresented claimants, so there will be some larger claims in the represented pool. I do not think there is evidence that the insurance industry is under-compensating direct claims.

Q209 Chair: Those claims may be settled more quickly, but would it be a just award? We have had a lot of evidence on this issue. One of the pieces of evidence refers to an 84-year-old lady who was dealt with under third party capture, where they dealt quickly with the insurance company. The first offer made to this 84-year-old lady was damages of £2,500. That went up to £7,000, but when she had legal advice and the legal adviser said she should not accept that, she eventually got up to £9,000. If she had accepted the initial offer without legal representation, she would have got £2,500, when actually she ended up with £9,000. That is just one example of the pieces of evidence we have had. Do you think that is just?

Dominic Clayden: It is unfortunate to look at individual cases. As a large professional indemnity insurer and insurers of solicitors, I am aware of cases that have involved solicitors where there has been under-settlement as well. In terms of reform and ways we could improve the system, it is absolutely a risk that needs to be managed. We believe the way forward is to have a standardisation and transparency around the medical reports and, additionally, to have a standard method of assessing quantum.

There are a number of computer-based systems that translate severity of medical conditions to a financial award. As a company, we use a system called Colossus. We are very transparent about it. We believe, going forward, that it should be appropriate to have a standard medical assessment process and then that is standard and in an agreed tariff for the award of compensation. I don't believe we need lawyers in all cases.

In the related area that I see day in, day out, in other insurance claims where people don't have lawyers, there is no suggestion that we are under-settling. It is something where the lawyers peddle a need for services that I don't think is justified.

Q210 Chair: Quoted premiums for motor insurance have decreased over the last few months. Have the actual premiums paid by motorists decreased? Mr Dalton, can you help us with that?

James Dalton: I do not have any figures in front of me. I am happy to write to you on the actual numbers. My colleagues to the left will hopefully be able to give you more detailed information, but my sense is that, yes, they have reduced, because quoted premiums turn into the price that a consumer pays.

Q211 Chair: Can any of the other witnesses give me any information? Have the actual premiums paid reduced?

David Fisher: On a like-for-like basis, bearing in mind that we may flex our risk profile of our book from one year to another, our premiums have reduced.

Q212 Chair: The actual premiums paid.

David Fisher: Yes.

Steve Maddock: I would concur with that.

Q213 Chair: Is that because the anticipated savings from civil litigation changes have already been factored in? Is that the reason for it?

James Dalton: Yes, I think that is the reason. Insurers price on a quarterly basis. That is why you saw premiums reduce for Q2 of this year, in anticipation of the civil litigation changes that the Government had made.

Q214 Chair: Therefore, if whiplash claims reduced as a result of the changes that are now being discussed, would there be any guarantee that the premiums paid by motorists would reduce in the future, or would the insurance industry then say that they have already been reduced?

James Dalton: We have made a very public commitment that premiums will reduce as a result of changes to the civil litigation system and a reduction in the number of whiplash claims. Premiums have and will come down if further changes are made to improve the claims landscape for insurers.

Q215 Chair: That means they would come down further.

James Dalton: Yes.

Q216 Chair: Is that categorical?

James Dalton: Yes.

Q217 Chair: By how much?

James Dalton: No further changes have yet been introduced. The Government have consulted on them. If something is delivered, premiums will come down dependent on whatever is implemented. If you have a small claims track in one matter versus another matter, there will be different amounts that the insurance industry will be able to pass on to premium payers as a result of that. At the end of the day, the Government have consulted on something; they have not done anything.

Q218 Karl McCartney: On that point, you as an industry have been telling us for a long time now that

whiplash costs are approximately £90 on the average premium. How exactly is that figure calculated, and are you prepared to publish that calculation? Why isn't it a lot more? If your premium is £1,500 a year, then £90 is a reduction, but it is not as big a reduction as I think—if you removed all fraudulent whiplash claims—you could make as an industry.

James Dalton: It is £90 on the average car insurance premium. The average car insurance premium is £440.

Q219 Karl McCartney: Do you not think it could be even more?

James Dalton: Could the saving be more? There will always be an element of whiplash. There are genuine injuries for whiplash, and the insurance industry continues to be committed to paying those chronic conditions. If there is a reduction in the number of whiplash claims, there will be a reduction in premiums as a result of that. I do not know how much, but at the moment £90 pays for whiplash.

Q220 Karl McCartney: How did you come to that calculation? Are you prepared to make that public?

James Dalton: Yes, absolutely. I am happy to write with information on that. At the moment, insurers pay about £2.2 billion a year for whiplash out of an overall claims spend of about £10-point-something billion. I can write to you with the specific numbers. That is 20% of claims just for whiplash.

Q221 Chair: In what ways would you like the judiciary to take a stricter approach to whiplash claims?

David Fisher: I would like them to take a more robust approach and to move away from the common law position that we have at the moment, where, if part of the claim is tainted or exaggerated, then the whole claim should fall.

Q222 Chair: Does anyone else have any comment on that?

Steve Maddock: Setting a de minimis timeframe within which to report a whiplash claim would be helpful as well.

Q223 Chair: What do you think is the appropriate recompense for whiplash? You presumably think people are getting too much now. What are your suggestions?

James Dalton: That is not really a question that the insurance industry can answer. Insurers will pay whatever society determines is the appropriate amount for a whiplash claim. That will be built into car insurance premiums. If society decides that £2,500 is the appropriate amount of compensation for a whiplash injury—by which I mean a low-speed shunt in a supermarket car park resulting in a sore neck for a couple of days—then that is what insurers will pay. The question that society and the public need to have a debate on is whether that is the appropriate level of compensation.

Q224 Jason McCartney: Mr Maddock, picking up on that, currently what is the time limit for a whiplash claim after the actual incident itself?

Steve Maddock: Within the statute of limitations it is up to three years.

Q225 Jason McCartney: Somebody threw a scaffolding bolt off a motorway and it hit my car. I was still getting calls two years after the event. It just damaged my car; I was okay. Two years afterwards, I was still getting cold calls to my home address asking if I had been injured.

Steve Maddock: That is exactly the type of behaviour we would like to see stopped.

Q226 Chair: Mr Fisher, you say in your written evidence "the courts condone fraud and exaggeration in personal injury claims." Do you mean that, and on what do you base that?

David Fisher: To all intents and purposes, that is how it appears on this side of the fence. That comment is borne out by decided cases in the Court of Appeal in 2009 and the Supreme Court decision last year that I referred to earlier. A distinction is drawn between claims under a contract of insurance. If I fraudulently made a claim on my household policy, it would automatically fall, if it was proven to be fraudulent, to a common law claim for compensation, where, as I said earlier, the common law takes the view that a genuine injury is compensated and the claim stands. Attempts to have the claim thrown out have been unsuccessful in the courts.

Chair: Thank you very much, gentlemen, for coming and answering our questions.

Examination of Witnesses

Witnesses: **Desmond Hudson**, Chief Executive, Law Society of England and Wales, **Matthew Stockwell**, President, Association of Personal Injury Lawyers, **Nigel Teasdale**, Forum of Insurance Lawyers, **Craig Budsworth**, Chairman, Motor Accident Solicitors Society, and **Andrew Ritchie QC** *gave evidence.*

Q227 Chair: Good afternoon and welcome to the Transport Select Committee. Would you give your name and organisation, please?
Andrew Ritchie QC: I am Andrew Ritchie QC. I am head of chambers at 9 Gough Square.
Desmond Hudson: I am Des Hudson, chief executive of The Law Society.
Matthew Stockwell: I am Matthew Stockwell, president of the Association of Personal Injury Lawyers.
Nigel Teasdale: I am Nigel Teasdale, representing the Forum of Insurance Lawyers.
Craig Budsworth: I am Craig Budsworth, representing the Motor Accident Solicitors Society. Chair, I am sorry to interrupt, but may I start with a possible inaccuracy that the Committee has over this minimum speed involved in whiplash cases in Germany?

Q228 Chair: No, no. There may well be questions put to you on that, so you can deal with that in the course of the session. Is the UK the whiplash capital of the world?
Andrew Ritchie QC: It is not, because there is a fundamental defect in the consultation document that Helen Grant issued. She compared the DWP figures—those are accurate figures for the number of personal injury claims made—with Stats 19, which are the figures gathered by the police for the number of road traffic accidents. That was the comparison. Stats 19 are known and have been analysed to be inaccurate by a factor of at least 200%, if not 300%, as a record of the road traffic accidents in the UK.
The Department for Transport in 2006 came to that conclusion. The report is here. There are three lines I could read to you, but my summary to you is accurate. The figures are inaccurate to record road traffic accidents in the UK. Why? The police are rarely called to minor whiplash crashes. Secondly, if they are called, they may not get there in time, so people leave. Thirdly, it only covers on-road accidents, not industrial estates, car parks, private land and the rest. That is supported by international commentaries on Stats 19, which say that it is recognised worldwide that the police figures from various countries are not accurate for all of the road traffic accidents. All you need to do in this Committee is ask the insurers to give you the figures for crash damage claims. If you compare the personal injury claims with the crash damage claims that they pay out for bent metal, you will have a proper, accurate comparison.

Q229 Chair: Are there any other views on that, either adding to that or does anyone disagree?
Desmond Hudson: I very much agree with the points that have been made. If I could add to those, we have available to us today information from the insurers. There is a document called "European Insurance in Figures," which was published in January of this year. It is produced by insurers throughout Europe. It is based upon data in the year ending 2011. That shows, for example, that in 2011 Germany's share of European insurers' total motor claims expenditure was 20%, France's was 13%, and the UK's was 14%. If you think about the size of our populations, the number of cars being driven, the traffic densities and so on and so forth, that seems to me to be the normal market share you would expect for our country and for those other two countries.
That report also gives us some very interesting information about the level of premium increases seen that year across European countries and relates those to the number of claims. If I may, let me just share this with the Committee. Motor insurance premiums rose by 3.6% in Germany, 3.5% in France—

Q230 Chair: We may well come on to this afterwards; I am dealing with this particular issue at the moment, on the extent of the problem.
Desmond Hudson: I understand; of course.
Matthew Stockwell: We have the benefit of our own statistics compiled by the Compensation Recovery Unit. They indicate that there is a 47% share in relation to whiplash claims out of the total number of claims. The figure that was put forward as a European-wide average by the insurance companies was 48%, which would place us slightly below, but it is not statistically significant in terms of percentages. That is based on our own reporting within this country of claims that are recorded by the Compensation Recovery Unit.

Q231 Jason McCartney: The Chair just asked the question whether the UK is the whiplash capital of the world. You have said not, but is the UK the fraudulent and exaggerated whiplash capital of the world?
Desmond Hudson: We don't know because we don't have statistical evidence. We have heard a number of claims made to this Committee this afternoon. I would ask all insurers to make all of that information available for scrutiny and review.

Q232 Chair: We are asking you. This is your opportunity to say what you think. You have told us, Mr Hudson, what you think. Do any other members of the panel want to answer Mr McCartney's point?
Craig Budsworth: You have heard from the ABI suggesting that they have established that only 7% of cases have fraud attached to them in some form or another. My personal experience in practice is to say that I suspect it is slightly less than that in that I am seeing, in practice, only about 3%.

Q233 Chair: Mr Teasdale, do you want to comment on this matter?
Nigel Teasdale: Statistics are helpful to a certain extent, but we can all perhaps come up with our own statistics that best help us. The fact that we have all the interested parties giving evidence to the Transport Select Committee into whiplash and an MOJ consultation suggests that there is perhaps, at the very

least, a perception that there is a whiplash problem in the UK.

Q234 Jim Dobbin: In my view, the issue of medical opinion is a very important aspect of this whole process. I want to ask this group of witnesses about their opinion of the quality of that evidence supplied to a claimant or on behalf of a claimant to the courts. How professional is that?
Craig Budsworth: The reports that I see, again through practice, are decent reports qualified by a statement of truth. The experts have to comply part and parcel with the Civil Procedure Rules when they are completing their reports. What must not be forgotten here is that when a GP, an orthopaedic expert or whatever further expert is needed compiles a report, the defendant insurance company or solicitor has the perfect opportunity to put more questions to that medical expert if they don't feel as though that report is professional enough. Further, if they feel as though they are still not convinced after that report, they can arrange for that person to be medically examined themselves. There are checks and balances in the system that is already there.
Andrew Ritchie QC: When I was a baby barrister I did a lot of whiplash cases, and the baby barristers in my chambers do the same. The quality of medical evidence in whiplash cases is variable. There are some reports that are word-processed and are poor. There are others where thought has been added to the pot and they are well produced.
I consider that it would help if there was accreditation or certification and more training for those who are involved. They should be trained to look at photographs of the crash damage and whether a report has been made to A and E or a GP of the sore neck. They should hopefully see the claimant early on when the claimant is still suffering pain. I do not agree with the insurance industry that you cannot diagnose whiplash—nor do the doctors. If you ask them, they consider they can diagnose whiplash. They move the neck, they press on the neck and shoulders and they come to a clinical view. If they are experienced, they have seen a number of fraudsters compared with those who are not. I suggest it is diagnosable, but the quality of reports is variable and should be improved.

Q235 Jim Dobbin: Is the general view that very often the medical report is biased towards the claimant?
Andrew Ritchie QC: I see you are looking at me. I hope you don't mind if I put one more sentence in. No; there are some experts who favour one side and there are some who favour the other. In my opinion, 80% to 90% are doing their best as independent experts. It is a danger if you are going to the old war horses who have almost given up and are just doing a medico-legal practice and are no longer in clinical practice. In my experience, that is a danger.
Nigel Teasdale: I would say they are not necessarily biased in favour of the claimant, but they are based on the claimant's version of events. That is probably part of the problem.
Matthew Stockwell: I think there needs to be a greater consistency through training and accreditation. In so far as I agree with the evidence that was given by the insurers, a greater dialogue in relation to the issue surrounding whiplash would inform the medico-legal experts. We would like to see that as part of a process of training and accreditation to improve standards. I certainly agree with everything that Mr Ritchie has said in relation to there being good and bad. Everybody should be committed to trying to improve the quality of medico-legal reporting.

Q236 Jim Dobbin: For clarity, are these reports available to both the defendant and the claimant?
Desmond Hudson: Yes.

Q237 Jim Dobbin: I do not know this, but has there ever been a round-table session between the insurers, the medical profession and others involved in this process, like yourselves?
Matthew Stockwell: The difficulty is that it has been slanted. There have been studies funded by insurance companies. When I was a baby barrister, I bought the book on this very subject that Mr Ritchie wrote. There are lots of different papers digested in that publication. Some should be treated with caution for a variety of different reasons, but certainly some kind of symposium or longer-term study looking at what can be objectively verified would be welcome. There have to be checks and balances within that process so that it is not manipulated by one party or another.

Q238 Graham Stringer: Are there real statistics, going back to Louise's question, about whether we are the whiplash capital of the world? The statistics show reducing road accidents, which have come down by about a third, but an increase in the number of whiplash claims, which have doubled. Doesn't that indicate that there is a great deal of fraud going on?
Andrew Ritchie QC: That is based on Stats 19. Both CMI1, this Committee's first report in paragraph 16, and CMI2, this Committee's second report in paragraphs 5 and 6, summarise the number of road traffic accidents based on Stats 19. When you say that the number of road traffic accidents is going down, that is Stats 19 reporting; that is police reporting.

Q239 Graham Stringer: But they are internally consistent, aren't they?
Andrew Ritchie QC: They are internally consistent but wholly inaccurate. It is a little bit like saying we should judge the number of voters in this country by the number of people who voted. Voting is optional. A third—or 40%—vote. You can't judge the number of voters from that.

Q240 Graham Stringer: I understand that—unless there is an empirical ratio between them. What you have here are two graphs going in opposite directions. The number of claims is increasing and the number of accidents is going down. We don't know the exact relationship, although you gave some relationships in your previous answer, between those statistics and the absolute number statistics, but you would expect those two graphs to be following each other and not diverging from each other, would you not?

Andrew Ritchie QC: I think not. It depends on funding. The Department for Transport compared the reported Stats 19 with the NHS, and those graphs are going in different directions. For serious injuries, the NHS numbers are going up and Stats 19 is still going down for road traffic accidents. That shows how Stats 19 is nose-diving for other reasons.

Q241 Graham Stringer: You keep comparing apples and oranges. The reason serious injuries are increasing—and it is a completely different argument—is because of the survival rates in accident and emergency units. One can immediately think of an answer to that. These are very large figures of number of accidents from one database internally consistent with the number of claims for whiplash. Surely you can see that, as the insurers have told us, there is a serious case that fraud is increasing massively here.
Andrew Ritchie QC: That does not support it. It is wrong in principle. You need to know the crash damage figures from the insurers to see a correlation.

Q242 Graham Stringer: Why? You do not have the absolute number of figures, but you have a direction of travel as a series of statistics. It was very interesting that when we had the insurers before us and when they were asked about the medics, they all did silent laughs. When you are here representing the legal profession you have a lot more confidence. Isn't that just self-interest?
Andrew Ritchie QC: No, it is not. The portal has now been introduced and 75% of personal injury cases go through the portal, if not more. Lawyers' fees for the solicitors that deal with that have been completely fixed. What the portal does, unfortunately, is prevent the defendants from examining medically so there is just one medical report. The system has been set up—

Q243 Graham Stringer: There are a lot more cases here, aren't there?
Craig Budsworth: I would point you to paragraph 22 in our response because I think it is offering the explanation that you are seeking here.
It says, "Average car speeds (due to congestion) in the UK are amongst the lowest in Europe and so minor accidents are more common (the number of road deaths per million population in France is double that of the UK (France—61 per million, UK—30 per million), in Germany more than 50% higher (49 per million) and double in Italy (63 per million)."
The number we are alluding to there is that the roads are slower in the UK, which brings about more minor collisions than any other country in Europe. In some ways that is the correlation that you are looking for. We are more susceptible to a whiplash injury, because we are slow-speeding vehicles, than we are to a more serious injury, which is happening across the continent.

Q244 Graham Stringer: That is the equivalent of, "My homework fell down the drain," isn't it? Basically, you have a doubling of the number of whiplash claims. There are different reasons for road safety, but you are saying that there is a doubling of whiplash claims because we have slow traffic. Do you think traffic has slowed down dramatically over the last five or six years?
Matthew Stockwell: Everybody can identify the increasing congestion that is taking place, so you have a greater traffic density.
Graham Stringer: That just simply isn't true.

Q245 Chair: But has that happened particularly over the last five years or the years for which these figures were chosen?
Matthew Stockwell: We can all look at the roads over the last 10 years or so—

Q246 Graham Stringer: But if you actually look at the evidential basis for congestion and speeds in urban areas—I did a lot of this in the debate about the congestion charge in Greater Manchester—there actually was not any increase in congestion. That is one of the reasons why the process was rejected. You are coming out with all sorts of hypotheses that are not based on the evidence.
Desmond Hudson: I wonder if I could add to that. In response to Mr Stringer's questions, while I don't believe there is an evidential basis to suggest that we are the whiplash capital of the world, it would be a mistake if we don't accept that there are some pernicious drivers here. The existence in England and Wales of claims management companies, for example, and the practice of insurers in selling referrals have contributed to the number of claims. That is why, for example, the Law Society has been arguing for some years that we should ban referral claims. It seems to me that the Ministry of Justice should be coming to Parliament tomorrow and making the practice and activities of claims management companies unlawful. They serve no purpose and do not advance the public good.
My final point is that if we do have people who are genuinely injured in an accident and who have suffered a whiplash injury, then it seems to me that, being a reasonable country, they ought to receive reasonable compensation. The proposals that are before you—
Chair: We are going to come on to that. We are dealing with the issues that different members wish to put to you.

Q247 Sarah Champion: Could you expand on the relationship between the legal profession and the insurers, specifically looking at what you do collaboratively to drive down insurance fraud? Mr Hudson, would you like to start?
Desmond Hudson: I am bound by a confidentiality agreement that the Law Society has signed with the ABA in relation to a joint piece of work that we are currently doing. I must try and comply with that.

Q248 Chair: Mr Hudson, you refer to this in the written evidence of the Law Society so we do want to know more about what you mean.
Desmond Hudson: We have been seeking to work with the insurers in particular for about the last 12 months. Technology is being introduced that will give you some indications about potentially fraudulent or

inappropriate claims. Those claims are a hazard for any honest solicitor. If a fraudulent client comes in front of a solicitor and a solicitor takes on that case, and only discovers two months down the line that that is an inappropriate claim, the solicitor will have wasted money. We are looking to work with the insurers to try and improve those things.
With regard to the comments made by my colleagues about working with the BMA—the accreditation schemes, training and thinking about how we could improve the generally questionable quality of medical evidence that is produced in the majority of cases—all of those are things that the Law Society wants to see improved. Society is not helped by inappropriate or exaggerated claims. We need to deal with that and we certainly need to root out the fraudsters.

Q249 Sarah Champion: How do you find the insurers responding to these suggestions?
Desmond Hudson: I find them slow and not as helpful and collaborative as I would want them to be.
Matthew Stockwell: That has been our experience as an organisation as well.
Craig Budsworth: Perhaps this is a surprise, but within the industry there is no exchange of data. If I present a claim, the insurer will not say to me, "By the way, this person has been involved in 17 other accidents in the last three years. Are you aware of that?" That does not happen. This exchange of data between the claimant's side and the insurer's side, together with them bringing in the medical expert, providing the medical expert with that information and that data, means we might receive a better quality of medical report and help drive out fraud in the first place.

Q250 Sarah Champion: I am quite challenged to hear that. Is that something you have been lobbying to try and get the insurers to do?
Craig Budsworth: Certainly. MASS as an organisation has been working for the last two years to try and gain this exchange of information to try and help eradicate fraud. You need to link that in with prevention overall. The next point is that the insurers are not utilising the information that they have through the claims records of these people to stop these policies being purchased in the first place.

Q251 Sarah Champion: Why do you think there is that reluctance?
Craig Budsworth: They get paid for a policy. I am not sure; perhaps they are the better ones to ask.

Q252 Chair: To whom have you been making representations?
Craig Budsworth: Through the ABI. We are getting there. There is progress being made in relation to this sharing of data.

Q253 Chair: So you are making progress on that.
Craig Budsworth: We are making progress.
Desmond Hudson: It is very slow.

Q254 Karl McCartney: I am very interested in all those points you have recently brought up, but I have a specific question regarding court time and how much the five of you think it has increased exponentially over the past 10 years in terms of how many whiplash claims you see in court now compared with 12 or 15 years ago. By the way, I don't think it is because we have slower traffic in this country.
Nigel Teasdale: I am not sure it has necessarily increased as much as you would think because a lot of the claims get settled before they reach the courts, and that is still the case. The portal that has been introduced is designed to push the parties towards a settlement. The latest portal figures show that only a very small percentage of those claims go through stage two, where they don't settle and go into litigation. Generally speaking, other than the true fraud cases, the cases that are litigated due to whiplash and disputes over the amount are probably a very small percentage.

Q255 Karl McCartney: Do you think it should be higher?
Nigel Teasdale: I speak on behalf of the Forum of Insurance Lawyers. The point is that we could challenge it but we would lose. I can understand the insurers' position. They say, "What is the point of fighting them when we know that, if the claimant has a medical report that says he was injured and we go to a hearing before a judge, the judge is likely to say, 'The medical expert says he was injured; the claimant says he was injured; I am going to award him damages'?"

Q256 Karl McCartney: Brokerbility chairman, Ashwin Mistry, is quoted recently as saying that any action on whiplash may take as long as 10 years to filter down from legislation to premium adjustments. He says, "It is fantasy to assume that rates will come down. The market forces won't allow them to reduce rates to the tune that the Government expects." Do you all agree with that view?
Andrew Ritchie QC: No.
Craig Budsworth: As a result of the changes from April, there have been nearly £1.5 billion of savings straight away to the insurance industry by the reduction in costs from £1,200 to £500 for a portal case. At the end of July we are going to see a further change, in that costs are going to become fixed for cases in which court proceedings have already been issued. That will introduce another significant change. That is not in three years' time; that change is happening now.

Q257 Karl McCartney: So where will their savings go at this point in time, do you think, considering the two companies have announced quite large profits so far this year?
Craig Budsworth: Exactly that.

Q258 Karl McCartney: It is not being passed on to those who pay the premiums.
Craig Budsworth: I am worried that it is not being passed on to those who are paying the premiums. You are talking about, for instance, Aviva. UK General Insurance made a profit of £448 million in 2012, up from £433 million. Direct Line had an operating profit

of £262 million in its motor division, up from £246 million. Axa had an underlying profit of £134 million in 2012, up 86% on the £72 million it made in 2011. Admiral had £345 million. These are significant amounts of money. When you break that down into individual policies, on average it is nearly £100 a policy that these firms are making.

Matthew Stockwell: This is obviously against the background of an absolutely astronomical marketing spend. I sometimes come home for a sandwich after a day in court and turn on the TV. I am besieged with the same adverts about compensation and so on. When I sit down at prime time with my wife to enjoy a meal, that type of advertising wall-to- wall from insurance companies or brokers is a damned sight more expensive than the daytime TV. We know that that is filtering into the administrative costs that are being passed on to consumers because they are all trying to outbid each other for market share.

Q259 Karl McCartney: When actually what they should be doing is driving the cost of premiums down.

Andrew Ritchie QC: Precisely. What they have effectively achieved is capping legal costs, particularly for the small claims. The portal has capped legal costs. In effect, the Bar has been excluded because very few of those go to stage three of court. Yet we have not capped their advertising costs. Why not cap their advertising costs by reference to their payout?

Q260 Karen Lumley: Can you explain what happens and how you normally hear about whiplash claims? Is it through insurance companies or through people walking in off the street?

Desmond Hudson: The majority of solicitors would, at this stage, see their cases coming via referrals or paid for or from claims management companies. Almost half of the claims would start in that way. That is why I think we should close down claims management companies tomorrow.

Andrew Ritchie QC: And the insurers pass the details on.

Desmond Hudson: Yes, and sell them.

Andrew Ritchie QC: As soon as you have called your insurers, those details are passed on and then you are contacted.

Q261 Karen Lumley: Insurance companies are not allowed to sell on details any more, are they? Is that true?

Desmond Hudson: We have a ban on referral fees in relation to a civil process applying to lawyers. For example, a question was asked before about ABSs being used as a route round this. Of the 115 or so ABSs licensed by the Solicitors Regulation Authority, six involve solicitors connected to an insurance company. One insurance company has recently formed an ABS with a claimant's solicitor. It is lawful within an in-house structure—let's call it an ABS—to pass cases from one part of the business to another. That would not be classified as a referral fee. I am very cautious and very worried that the ban on referral fees is going to be ineffective. I don't believe referral fees serve society at all.

Matthew Stockwell: However they are described. If a solicitor had a client walk in with a whiplash claim, it would be the solicitor who would have to sit down, take a comfort break and adjust and deal with that situation. They would be more surprised than the person who had had a rear-end shunt or something of that nature. It is pretty much unheard of for somebody to go into a solicitor's firm with that type of claim.

Desmond Hudson: I suspect that we are also seeing insurance companies receiving referral fees from car insurers, from the sellers of parts to car repairers, and from the sellers of paint to car repairers. What we need is a very transparent understanding of everything that is going on here and just where all these flows of money are coming from.

Q262 Karen Lumley: In terms of referral fees, what sort of money or cost are we talking about? Could you quantify that at all?

Craig Budsworth: £22.1 million is what Direct Line put in their referral fee receipt box from solicitors for 2012.

Q263 Chair: How do you think this will change in the new system? How much money will be received in the new equivalent of referral fees, in your view?

Craig Budsworth: I am not sure. I don't mean to dodge the question, but it is still early days yet to fully understand the impact. Referral fees were funded out of the costs that we received. When you now see that these costs have been slashed as much as I said they have, there is not enough money there to pay referral fees. In my mind, that was part of the reason why the MOJ wanted to see the costs reduced so significantly, as a way of getting rid of the referral fees because they know a ban is difficult to enforce.

Q264 Chair: Do you think there will be a new market developing where solicitors represent claimants on the small claims track in return for a proportion of the compensation given? Do you think that will be the new pattern?

Andrew Ritchie QC: No.

Nigel Teasdale: Yes.

Matthew Stockwell: It is going to be very difficult because 25% of what will be a relatively small sum to begin with is going to mean, more likely, that people find themselves unrepresented. When I started off in practice, I was arguing over uninsured losses. A driver's excess, for example, may be £100 or £200. There would be one insurance company providing legal expense cover to its policy holder and I would be representing another insured policy holder. Absent before-the-event insurance, I suspect you are simply not going to get the overwhelming majority of people represented at that level. There will be an imbalance if the insurer is represented to resist those claims. It will be much more difficult for them.

Andrew Ritchie QC: I would like to answer that question as well. It is deeply discriminatory, in my view, to increase the small claims limit to £5,000,

because how are those who are old and infirm, those who have mental difficulties and those who are not so well educated going to run their own cases? How are they going to issue their claims forms? If they are going to be met with an allegation of fraud—

Q265 Chair: But is it likely that a new market will be created where solicitors do represent those people in exchange for a proportion of the compensation?
Andrew Ritchie QC: No. 25% of past loss when the whole claim is worth £2,500? That will be 25% of £1,000, so £250. I have run a small claim when I was clamped. It is a lot of work and it is difficult. Then you have to turn up—

Q266 Chair: So you don't think that will happen.
Andrew Ritchie QC: There will be no such market. People will be deprived.
Desmond Hudson: I think there is likely to be a change in the market.

Q267 Karl McCartney: The Competition Commission inquiry has raised multiple concerns around the insurance industry. I have some concerns having just listened to what you have said. We know that the insurance industry has been in to see some of our colleagues from the Conservative side and the coalition side in the Transport Department. I believe they have also been in to see the Prime Minister at No. 10. Have you all had that same access, or have all those people who do business within this part of the business sector had the chance to get their points over?
Desmond Hudson: No, not at all.

Q268 Chair: Do any of you feel you have had the same access as the insurance companies to No. 10?
Andrew Ritchie QC: No.
Craig Budsworth: There were two questions there. There was a Competition Commission question and a question about No. 10.

Q269 Karl McCartney: The Competition Commission has some concerns about the insurance industry per se. I have as well and the fact that they have been given access to different levels of Government, as well as obviously the Transport Select Committee. I am talking about the Department for Transport and to No. 10. We know publicly that the insurance industry has been in to see the powers that be. I just wanted to find out if you, as part of the business sector, had been in or if you are aware that other parts of the same business sector had been in to see them.
Matthew Stockwell: No. Valentine's Day came and went this year and we didn't get any invitations, unfortunately.
Desmond Hudson: But the point of the matter is it is not really a surprise, is it? Back in February, the Law Society wrote to complain to the Prime Minister that we were denied access. He did not want to hear from people with a contrary view. All of these changes are simply about making it harder for people to make a claim. That is what this is all about. The risk is that that carries very significant issues of injustice. There are better ways for us to maintain justice than deal with the inappropriate, exaggerated and small number of fraudulent claims.

Q270 Chair: What problems are caused by people bringing whiplash claims at the very last moment just before the expiry of the three-year period?
Desmond Hudson: They make the prospects of success in their own case more difficult. If you have no good reason why you wait until towards the end of the limitation period, I suspect a court and a defendant is going to look askance at that. There is no sensible reason why you would do that unless there is an extraneous factor.
If you have cases being raised like that—and one of the members spoke about it earlier—that cannot be a good thing. It does seem to me that the existing systems, if they are used, work to make that sort of practice unattractive and unrewarding for the claimant. But the systems are not used by the insurers. It is easier just to settle and add that to the cost of premiums.
Nigel Teasdale: I think we still come back to the fact that the claimant will say, "I suffered an injury two and a half years ago, and I have three years within which to bring that claim." It is then up to the defendants to prove that no injury was sustained. We can analyse medical records. We can perhaps look for inconsistencies elsewhere in some other report where they have said that they were not injured. If you cannot find that, then you are fighting with one hand behind your back. The process is such that the claimant will go and get a medical report. He will say to the expert, "I was injured." The medical expert has no way of proving or disproving that. We will come back before the court with the position where the claimant is holding all the cards really and saying, "I was injured."
The late notified claims, as you have mentioned, of two and a half years is perhaps a more extreme element, but everyone knows these days that they have whiplash within 72 hours or thereabouts. If you have not made a claim within two and a half years, with all the advertising and texting that goes on to say, "Why don't you make a claim?" something has gone wrong somewhere.

Q271 Chair: Can you get significant whiplash injury from a low-speed accident?
Craig Budsworth: Yes, very much so. That was the point I was trying to make earlier on this de minimis speed. The rule in Germany is that if your accident has happened at less than 10 kph, the burden of proof shifts. It is not that you can't sustain the injury but that you now have to prove that you have sustained that injury. It is only a subtle difference but it is there. If you are involved in a low-velocity impact, you might be sitting there waiting to pull out of a side road so you are looking to the right. It might be that you then get hit from behind. Your head rest is not positioned properly to protect you from that impact. You might miss the head rest. That is the type of injury you are likely to sustain during a low-velocity impact that would still warrant having compensation and might still bring on a compensatable injury.

It is this balance of understanding the person and where they were in the vehicle. It might be that that person is more susceptible to injury anyway, depending on the person's age or their own physical abilities. There is this balance to be drawn here rather than just saying, "It's a low-speed impact so you can't sustain an injury."

Mr Dalton put forward earlier the highlighted figures of a low-speed injury with a two-week injury. Is it worth £2,500? Never in a million years is that going to be worth £2,500. That type of injury valued through the courts at the moment is a few hundred pounds. Each injury has to be valued individually for each person. It is not just the injury that is valued; it is the pain, suffering and loss of amenity.

Andrew Ritchie QC: There are many medical papers to show that four to five miles an hour is about the threshold. What worries me about introducing a threshold is that older people have weaker necks and so they are more likely to be injured. The figures are quite clear. Women are more likely to be injured from a low-speed impact than men. If you introduce a threshold, what you are really doing is excluding the vulnerable from their right to claim. The better way of doing it, in my view, is to require photos of the damage and a note from the GP or the A and E. If you want to set thresholds, set thresholds that put a burden on the claimant to go and get at least some objective record of what has happened. If you impose that burden, you don't discriminate between one and another.

Matthew Stockwell: There may be circumstances in which somebody suffers injury where somebody else wouldn't. Everybody from common experience has moved awkwardly and twitched a knee, a neck or something else of that nature. Age, sex and all the other predisposing factors will influence that.

I can only speak from personal experience. I had a road traffic accident about 10 years or so ago. I was at a junction and had been in the car for about three hours or so. I was quite stiff to begin with and I had to lean forward to see to the right of myself at a junction. Somebody went into the back of me. I had a small injury to the left-hand side, which was the bit that was extended in that motion round to the right-hand side, but it was unsupported by the back of my seat. There can be a variety of different circumstances that might mean that somebody would suffer injury in circumstances where somebody else in precisely the same type of accident with the same surrounding circumstances would not suffer any trauma.

Q272 Graham Stringer: I accept the anecdotal evidence that it is possible to break your leg walking down stairs. Is there any harder medical evidence about the percentage chance of getting a whiplash injury or injury at less than 10 kph?

Nigel Teasdale: In the papers that Mr Ritchie has already referred to.

Andrew Ritchie QC: There are a number of papers that have examined it.

Q273 Graham Stringer: I accept it is possible. I am just talking about the percentage.

Andrew Ritchie QC: How many do at certain speeds?

Graham Stringer: Yes.

Andrew Ritchie QC: They used some American troops in the 1960s in one set. They put them in cars and they bashed them into walls. You just need to read the papers and you will see how many got injured.

Craig Budsworth: I think Thatcham has done a fair bit of research into that.

Chair: It seems a bit drastic.

Andrew Ritchie QC: They consented apparently.

Desmond Hudson: And they didn't have a lawyer.

Jason McCartney: It was either that or Vietnam.

Desmond Hudson: The point we are all making here is that what greatly concerns us is that, at the moment, there appears to be a risk that we are legislating on the basis of lobbying from one side only. If we are going to make changes, we should do it on the evidence.

Q274 Chair: No, no, Mr Hudson. The purpose of today's session is to have different people giving their views. This is your opportunity. It is not to comment on what someone else has said but to give us your views. Have the judiciary been unduly lenient in dealing with whiplash claims?

Andrew Ritchie QC: I will deal with that briefly. In the cases that are taken before the courts, if it is proven on the balance of probabilities that there is an exaggeration, then the damages are lower. The House of Lords said in the Summers case that the way the insurers protect themselves is by making a relevant offer. In that case, where £80,000 was awarded but a lot more was claimed, if the insurers had offered £80,000 or £85,000 or £90,000 or £95,000, they would have got their costs and they would have been fine. They didn't, so they made an error of judgment. This worry about exaggeration is dealt with properly by the courts. If the judge finds that the claimant has intentionally exaggerated—and there are a number of cases where that has happened—what happens is that the insurers bring proceedings in effect for misleading the court. It is contempt of court. There are two or three cases over the last two or three years where people have been imprisoned for it. One got four months and one got six months. That needs to be better advertised and better utilised.

I fear that what happens is that the portal is cheap; the claimant bungs in one medical report; the insurers don't even put in a medical report but say, "Well, we'll chuck £3,000 at that; it is cheap and we can't be bothered."

Matthew Stockwell: I do not think the insurance companies can have it both ways because you do see this at the other end of the spectrum. What happens in the larger value cases is that you have an immediate needs assessment. It is like a nursing assessment so that the insurer can get an idea of what support needs to be provided. Without any medical evidence, I have had £750,000 offered to one of my clients in circumstances where, when the medical evidence was available, it was proved that the claim was worth well over £1 million. There were other cases where there were £100,000 offers that insurers were prepared to make without a single scrap of medical evidence available to them.

You can have a system that is robust at the smaller end and one that is robust at the larger end, but what you can't have is one that does not carry any cost if you are going to properly scrutinise claims across the whole cross-section.

Chair: Thank you very much for coming and answering our questions.

Examination of Witnesses

Witnesses: **Andrew Wigmore**, Policy Director, Claims Standards Council, **Russell Atkinson**, Managing Director, National Accident Helpline, and **Peter Gradwell**, Owner and Managing Director, Exchange Insurance Services, gave evidence.

Q275 Chair: Good afternoon and welcome to the Transport Select Committee. Would you give your name and organisation, please?
Andrew Wigmore: I am Andrew Wigmore, representing the Claims Standards Council.
Russell Atkinson: I am Russell Atkinson, managing director of National Accident Helpline.
Peter Gradwell: I am Peter Gradwell of Exchange Insurance Services.

Q276 Chair: It seems that both the insurance companies and the solicitors think that you are the cause of the problem we are discussing and perhaps think you should be shut down. Why do you think you should still be here?
Andrew Wigmore: The claims industry has probably been demonised more than any other industry ever. I use the historic reasons for that and probably there was some justification. Going back to 2003, when you had the Accident Group and Claims Direct, you will remember the issues surrounding that. It was very clear that there were huge abuses to the detriment of the consumer. When they looked at bringing in the regulation, they were looking at what they thought was actually quite a small industry, not also recognising the tentacles that that industry had. When they brought the regulation in, they were mildly shocked at the DCA, or Ministry of Justice as it is now, when they realised how intertwined claims management companies were within the entire sector, including lawyers, the insurance industry, brokers, car repair organisations and so on.
If you asked me that question about whether or not we were to blame five years ago, I would agree. Now I have a very different view in that I would say very positively, strongly and confidently that those organisations—the claims management companies that you talk about that are often demonised—are often owned by law firms. They work directly with insurance companies and brokers. There are very few claims management companies, as you would probably understand them, that exist doing what they used to do prior to the regulation in 2006.

Q277 Chair: How do you work with insurance companies? Could you tell us a bit more about that?
Andrew Wigmore: Very easily. Again, this goes back to the fact that claims management companies were very good at what they did. The commodity, which was the individual who was injured, was the bit that everyone wanted. It was a race to get to that commodity because that is where the value and the money was. The lawyers, also realising that, decided to turn from poacher into gamekeeper. So now they employ claims management companies to act on their behalf. They say, "Here is our data and here is what we want to do. We want you to get to that customer first, so please do it because you are better at it than we are." That is what you have now. You have lawyer collectives, lawyers and law firms recognising how the claims management companies first started and how well they did it. That is what they now deploy and that is who they employ to get to those claims first.

Q278 Chair: You are saying that the insurance industry works with you.
Andrew Wigmore: Absolutely.

Q279 Chair: Would any other witness like to comment on why you think your business is worth while?
Peter Gradwell: Yes. I am not a claims management company; we are insurance brokers. When the system changed, as referred to before, clients of ours were able to make recoveries that they were not able to make before. Before we had this system, if you were an ordinary guy, and somebody who was speeding crashed into the back of your car and it was written off, you had to wait for your insurance company to pay you out before you could afford to get back on the road, unless you were rich enough to be able to hire a car, fund it yourself, go to the court, employ a lawyer and recover the costs there. You would wait for a long, long time.
Claims management companies came in, along with credit hire companies, and they work together. They were happy to fund the hire of the vehicle to you in return for handling the whole of the claim for you, including the personal injury recovery. By that means, innocent clients were able to get back on the road quickly. It was no fault of theirs that they had had the accident. They got the compensation from their own insurer and they were then able to get on with their lives. I believe that has been a good thing. They have been properly compensated for the injuries they have received. Overall, we are a better served culture as a result.

Q280 Chair: Mr Atkinson, what can you tell us about National Accident Helpline?
Russell Atkinson: I would say that, while we are regulated as a claims management company, we are actually a marketing company. We work on behalf of

our partners, who are solicitors, in a pooled marketing model. They pay the costs of marketing and we have a national brand that basically allows accident victims the opportunity to assess whether or not they have a claim, and then we can pass that claim on. Claims management companies as a group is a very wide and broad church of organisations doing different types of things. It has been quite a convenient way of saying that the worst practices of the industry all belong in that particular area. I, for one, would want to focus on the worst practices of the industry as a whole and put an end to those, rather than vilifying one particular sector or another as a means of scoring a point.

Q281 Chair: Mr Wigmore, could you explain to us why your organisation—the Claims Standards Council—did not submit any evidence to this inquiry and had to be pressured very hard indeed to persuade you to come in front of us today? Why was that?
Andrew Wigmore: Because pretty much everyone that we work to made a submission to you. When you ask a group of people, "Do you want to make a submission?" most bases were covered. In relation to whiplash, which is quite specific, I think pretty much anyone who had anything to do with the Claims Standards Council, however tiny, had made a submission to you. To put forward a collective view would have been duplicating what you already have.

Q282 Chair: You are aware of all the criticisms of claims management companies.
Andrew Wigmore: Oh yes.

Q283 Chair: Didn't you feel that as the Claims Standards Council you had some responsibility?
Andrew Wigmore: I would agree, yes, but we have been demonised so often that you end up thinking, "What's the point?" because anyone in the industry—

Q284 Chair: Are you serious, Mr Wigmore?
Andrew Wigmore: Yes.

Q285 Chair: Because you have been demonised, you think that means you should not come before this Committee and answer questions about your conduct of the industry.
Andrew Wigmore: No, no; we were very happy to come before the Committee, but we—

Q286 Chair: You didn't seem to be very happy. It took a lot of persuasion, didn't it?
Andrew Wigmore: Point taken, but we were quite happy to. The reason why the Claims Standards Council didn't think it would add any value to what you understand is because you pretty much know everything through the Ministry of Justice and the regulator anyway. The claims management industry is so broad and vast, whether you are looking at insurance, the laws or whatever it is, I don't know if we could have added any value other than to illustrate to you that, in fact, the biggest spenders in claims management activity are lawyers, not claims management companies. The insurers work very closely with us. We would have been duplicating stuff that you already know. If you want specifics about whiplash, we have a view, which I am happy to share.
Chair: You are here to give your view and to answer some of the criticisms.

Q287 Karen Lumley: Mr Atkinson, what is your annual budget for advertising?
Russell Atkinson: I do not wish to go into commercially sensitive information but it is a significant budget for advertising.

Q288 Karen Lumley: Percentage-wise.
Russell Atkinson: We advertise on TV, through the internet and various ways. It is a multi-million pound budget.

Q289 Mr Sanders: Don't your company accounts show what you have spent on advertising?
Russell Atkinson: Yes. We—

Q290 Mr Sanders: So could I ask the question: what do you spend on advertising?
Russell Atkinson: We spend a very significant sum on advertising. I will quite happily write to you with all of the details of what we spend so that we are not sharing commercial information. In principle, we are allowing accident victims access to justice by having a point to which they can go to discuss their claim and to have the merits of that claim discussed and validated. If we believe there is a valid case, we will pass on the information to our partners with whom we work who actually pay for that advertising. Of the 200,000 or so calls that we get in any year, we only pass on about 75,000. We filter out over 60% of the cases or the calls that come our way.
Peter Gradwell: I would make a point on this as well. Claims management companies tend to be grouped all in one—and understandably so by the buying public—but there are completely different models. There are those models that are based around managing the claim from beginning to end, including, necessarily, car hire and so on. There are also small claims management companies that get the industry a very bad name. They can be involved in fraud. I am an insurance broker; I do not derive money from this. You wouldn't go near them with a disinfectant.
I represent insurance companies that do ATE insurance—after-the-event insurance. We have to filter through. There is an exchange of information between ATE insurers and acceptable claims management companies, saying, "You do not want to get involved in this because that is the third stage of the check. They are known to have been fraudsters in other parts of the country," and so on.
Personally, I welcome any form of regulation that will close down those companies. Lord Justice Jackson's reforms should, by the doing away of referral fees, close them down. That is what the MOJ is asking for currently. I am in favour of more regulation—not less.

Q291 Jason McCartney: Mr Wigmore described the victims of whiplash as "a commodity". You are spending millions of pounds on television advertising. Is that the most cost-effective way of you getting access to the commodity?

Russell Atkinson: First, we would never describe victims of any accident as a commodity. They are victims of an accident. From our perspective, we advertise broadly. We don't advertise specifically for victims of whiplash. Road traffic accidents represent about 30% of the claims types that we get, and, of that, whiplash represents about 22% of the overall claims. From our advertising, we get a very broad selection of different types of claims. Each of those claims is judged on its merits as we go through as to whether the accident victim has a meritorious claim or not.

Q292 Jason McCartney: You are the initial point of call because there could be different types of accidents that people have been in, and you will pass on those details to third parties and get a referral fee.

Russell Atkinson: No; we don't get any referral fee. The way our model works is that we are paid by those third parties for marketing services, irrespective of whether they get any inquiries from us or not. The services we provide are the advertising I described earlier and also the initial vetting or triage of that claim as it comes through. We ask a number of questions of the consumer to establish the nature of the claim, the sort of things they have had, how long ago it was and those kinds of things. We then pass that data to our partners, who will assess whether that claim is worthy of further action and it becomes a claim.

Q293 Jason McCartney: Do you have a grading system for when customers come to you in terms of those that are top-notch—the gold standard ones?

Russell Atkinson: No; we don't grade the claims. We don't earn our money based on how much money is in a claim. We earn our money effectively from the advertising and marketing services that we provide. We don't grade the claims. We ask questions of the claimants to work out whether there are merits in the claim in the first instance. There are also questions that may indicate whether there is some form of fraud or something similar, but we then pass those inquiries on to our partners, who are more qualified than us to make the final assessment of whether or not there is a valid claim to be pursued.

Q294 Karl McCartney: I have a question to all three of you. We are here in particular about whiplash, but I was very interested in what Mr Gradwell had to say about you welcoming all sorts of regulation. Whiplash is a complete issue, if you like, and we would all like to see fraudulent whiplash claims reduced. We would hope, if insurance companies passed them on, that that would enable premiums also to be reduced. That is what I would like to see as well. Would you like to see the amount of claims reduced per se, or would that impact on your business model? Secondly, if you were in our position or if you were Secretary of State for Transport or in the Ministry of Justice, what would you want to see done?

Peter Gradwell: I spend a lot of my time with claims directors of insurance companies working on getting my clients' claims down. That is not just the claims that my clients are making but the claims that are being made against them. One of the biggest problems that we have is that it takes insurance companies—and large ones in particular—an inordinate length of time to settle a claim. The longer it takes to settle a claim, the bigger the claim gets and the higher the expenses get. It is not uncommon for a motor accident to run for two and a half years in this country. That is very frustrating for a guy who is running a fleet of 30 vehicles and who is looking at that on his claims experience year after year. I have to explain to him why his premiums are staying at such a high level. He will say, "But it was never my fault," but if the insurance company don't bring it to a conclusion, he is blamed for it. On a domestic level, your no claims bonus is docked for that period until it is settled. Commercially, it is a disaster because you never get it back. After three years, it is out of time and you just roll on to the new claims experience that comes in. That is the way it works.

I want insurance companies to respond to claims quicker. I want them to respond to the claims that are put in by lawyers quicker. To respond to them would be quite good, because they don't on many occasions. In 50% of the cases for personal injury at Liverpool court they don't turn up. That just increases the cost of the claim. There is one firm of lawyers in Liverpool that employs 90 people. Four of those people are on permanent enforcement of judgments against insurance companies. That adds 15% to every single claim. They send the bailiffs in 50 times a year to major insurance companies and then they get paid. There is no excuse for that at all—none at all. As you say, their advertising budgets just go up and up.

You can get insurance claims costs down. Smaller insurance companies can and work hard at it. If you work with them and you look at a claim, it is absolutely clear to anybody who works in this business, if you have the right people on the claim, when you should settle it quickly. It is only going to get more expensive and the legal fees go up. I am not in favour of big legal fees; it is of no advantage to me and I don't earn anything from it. I want them down.

Q295 Karl McCartney: But the legal firms do.

Peter Gradwell: My legal friends probably do, but you should ask my legal friends about that and not me. I am interested in the policy holders, and they want claims settled as cheaply as possible. Yes, you have to explain to them that insurance companies will pay claims that they think they shouldn't pay. I heard you before questioning whether they fight and all the rest of it. It is a very difficult explanation to give to somebody to say, "Look, it is just not monetarily worth it." That conversation regularly takes me about an hour a week with a couple of people. In the end, they accept it. It is not nice and you do feel as though you have been done, but I am afraid it is just the way things are.

Q296 Karl McCartney: But it doesn't necessarily have to stay that way and nor is it right.

Peter Gradwell: Yes, I think so. But if you go to court on certain cases and you lose, then you are looking at £10,000. It is the sort of judgment everybody makes

all the time—"Am I going to sue or aren't I going to sue?" In the end, you just say, "Oh, forget it."

Q297 Karl McCartney: Could I ask that same question of the other two?
Chair: Could I ask you for answers to the point, please?
Russell Atkinson: Your point is very clear. First of all, there is nothing wrong with genuine whiplash victims claiming for whiplash, but we have no interest in non-genuine or fraudulent claimants claiming. You talked about regulation and whether it should be regulated. The worst practices and excesses of the industry should be regulated against and stopped, in whichever part of the industry we are referring to. It is not just claims management companies but insurers, body shops or whoever. That includes data mining, third party capture, cold calling and cold texts. They are things that we passionately believe should be stopped because they don't do their industry or the consumer any good at all. Mr McCartney talked before about still receiving texts two and a half years later. Those are the sorts of practices that give our industry a bad name and that NAH would like to see banned.
Andrew Wigmore: We need a reality check. Ultimately, this is a business and you are going to have organisations that exist, whether you call them claims management companies or marketing firms. The other reality is the fact that there is a merger of this industry, I think for the good. You now have lawyers and insurers working together like never before. Marketing companies and claims management companies are working together like never before. That is a good thing.
The LASPO and legislation currently in place has been the right propellant to see the disintegration of a lot of the abuses in this sector. I think that is happening. The Government have to have a watching brief on what is going on. The way the sector is going to shake itself out will be a good thing.
From the perspective of whiplash, there is an issue—no question—but raising the bar medically and looking at some of the innovations that are taking place between the insurers, lawyers and some of these claims management companies should be looked at in some detail. I know you have evidence there. You will see some great initiatives that I do think will work. Using the word "whiplash" needs to be got rid of completely. I don't think it describes soft tissue injury at all. Again, you will see some submissions in your evidence that indicate there is tremendous movement towards the whole process being looked at and performed correctly.
As it is an industry, you have to remember that every single person in this room and who has given evidence to you is ultimately in this to make a profit and make sure that they continue to do so. You can't disguise that or get round it, no matter what excuse is given to you. That is a fact of life. The abuses of marketing that you talk about are wrong. We have regulation through the Ministry of Justice, which is doing and has done a very good job, and I would like to see that continued, but the 21st century junk mail, I am afraid, is going to be your mobile phone. Whether or not people like that, we are just going to have to get used to it. You do what we did with junk mail, which is turn it off, chuck it out or delete it if necessary. Unfortunately, that is the reality of this sector and it is not going to change.

Q298 Chair: Should the Claims Standards Council be dealing with some of those abuses?
Andrew Wigmore: We try to but it is very difficult. Historically, we were good at grassing up the people who had done things wrong. In cash-for-crash we were instrumental in providing a lot of that information, simply because people quite literally used to dump brown envelopes on to our desk.

Q299 Chair: But what about now?
Andrew Wigmore: For instance, with regard to the text messaging issue, which is as relevant in personal injury as it is with PPI, a lot of that information we are able to glean from who was providing all those texts into this country.

Q300 Chair: What are you doing about it as a Standards Council?
Andrew Wigmore: We tell the Ministry of Justice and the Information Commissioner if we get sight of absolutely anything that we think is breaking the rules. We do it regularly. I am sure that if you spoke to the Ministry of Justice they will tell you. That is the only thing we can do.

Q301 Chair: I am asking you. You are telling me that your Council is actively dealing with these issues.
Andrew Wigmore: We have no power other than to grass them up, and that is what we have been doing for 10 years.

Q302 Chair: Can you explain in other words what you do?
Andrew Wigmore: Ultimately, remember, it was meant to be a self-regulatory body—the initial trade body for the industry—so that the regulator, the DCA and the Ministry of Justice, had a bridge to talk and look and find out what these organisations were doing. We did that very well. It has moved on apace since then. What we were representing then is not what we are representing now at all, apart from maybe in PPI.

Q303 Chair: What are you actually doing about the abuses that have been identified?
Andrew Wigmore: All we can do is highlight that to the Ministry of Justice and the regulator. That is absolutely all we can do. Legally, we can't do anything other than let people know. I often tell the press. If the press highlight a story, which they often do in the *Daily Mail* or *The Mail on Sunday*, that sometimes has an effect, and a knock-on effect on what the regulator, the Information Commissioner and the Ministry of Justice can take action on. The law is quite complicated under the Compensation Act. There are lots of ways people get round it—and do. Unfortunately, that is criminal and not something that the regulator is ever going to be able to control. It is a criminal activity, cash-for-crash being a perfect example.

Q304 Sarah Champion: Mr Wigmore, your panel members have both spoken about shady and fraudulent practices within your industry. You say that you have no power. Would you therefore like more regulation in place so that you do have more power?
Andrew Wigmore: You have to remember that the Ministry of Justice regulation team is self-funded. It is paid for by the fees that they get from those organisations they regulate. There has been a dramatic drop-off of organisations that are regulated, so the police force that they have is diminished. Therefore, the effect that they have on regulating is also diminished. If you could get a few extra pounds off the Government, it would do a tremendous amount pretty instantly, but unfortunately it is difficult, with everyone's budgets being tight.
What the Ministry of Justice has done, which I think is very clever and good, is to get other agencies involved. The Information Commissioner can now come and take action on text messages. That has had some great effect. Relying on other agencies to support the regulator has been very effective, and that has to continue. If they do that, they will get rid of these abuses.

Q305 Sarah Champion: Going forward, are there other recommendations that you would make?
Andrew Wigmore: More money for the police force at the Ministry of Justice; that is what it needs.

Q306 Sarah Champion: To do what exactly?
Andrew Wigmore: They have 20 officers to go round the United Kingdom knocking on doors to find these abuses. They have to gather intelligence before they can bring a case in order to suspend authorisation of a claims management company. Recently, the Ministry of Justice put up for the very first time a shame website containing names of organisations that are under investigation, which is a great thing. The consumer and people who work with these organisations can look to see whether these organisations are fit for purpose. That is a good thing. It does not matter whether you are an insurer, a lawyer, any kind of funder or the consumer. It is important to name and shame. Up until recently we have not had the ability to do so. A combination of the regulators working together will have effect, but as I said, the propellant of the regulation that has been put forward is a good thing and it is starting to take shape. You have a watching brief to see exactly how the land lies, but if necessary, you have to come in and be pretty nuclear with your next step. If that is more regulation, so be it.

Q307 Chair: What proportion of whiplash claims are either fraudulent, in the sense that they don't exist at all, or exaggerated? Would any of you have an assessment on what proportion of claims fall into either of those categories?
Andrew Wigmore: I think this is a society issue. We have to look at the advertising and the way—

Q308 Chair: No—what proportion?
Andrew Wigmore: I think a good third. You could probably easily question whether they have whiplash.

Q309 Chair: How many?
Andrew Wigmore: A good third of all claims, easily.

Q310 Chair: A third are exaggerated or fraudulent.
Andrew Wigmore: I think they are exaggerated. Fraud is different, but exaggeration is easy. The grading of whiplash has been completely misdiagnosed. They call it a whiplash associated disorder. I think there is a better measurement, which is called the neck disability index, which looks at soft tissue injury as a grading rather than whiplash. It often becomes a lazy way of prescribing the prognosis. You just put "whiplash" because it is a grade 3 what? A whiplash associated disorder. A physiotherapist will tell you that gradings 1 to 2 would not classify as a whiplash as you currently know it. It would be a soft tissue injury grading and, therefore, the treatment is very different, the diagnosis is very different and probably the legal compensation they get is very different. At the moment we do not have that. Maybe three firms and three insurers are starting to pilot it. If you expanded that, you would probably have a very different recalibration for the way whiplash or soft tissue injury is looked at and diagnosed.

Q311 Chair: Mr Atkinson, do you have any assessment of the proportion of claims that are fraudulent or exaggerated?
Russell Atkinson: I would concur that it is a difficult area in terms of diagnosis. Our figures would say it is very much less than some of the figures we have heard today.

Q312 Chair: What sort of figure would you say?
Russell Atkinson: In terms of the way that we would see it happening, effectively, we have an after-the-event insurance policy that works with a claim that is being progressed. The number of those policies that have been cancelled because of fraudulent activity is less than 0.1%; that is less than one in 1,000 cases. That does not mean that there are not other forms of fraud happening.

Q313 Chair: Is that fraud where the incident has not happened or the injury has not occurred at all?
Russell Atkinson: Yes. Effectively, that is fraud where the insurer has said, "No, this is a fraudulent case and we will cancel the insurance policy."

Q314 Chair: What about exaggeration of the extent of the injury?
Russell Atkinson: We don't have any figures ourselves in that particular area so I would not give you anything on that.

Q315 Chair: Mr Gradwell, is that something on which you have any assessment?
Peter Gradwell: Yes; only on the difference between fraud and exaggeration, which is merrily being rolled together by the insurers. Unfortunately, if insurance claims were all absolutely correct and submitted, then we would not need to have loss adjusters or claims departments of insurance companies. You would put your claim in and say, "I have lost £600," and they

would just send you £600 back. We all know they don't do that.
Exaggeration can't be classed as fraud. It is a matter of opinion on many occasions. Somebody's cost of something is arguable by another person. That cannot be classed as fraud. We would have nothing to do with fraud itself. You mentioned ATE insurers. The policy is voided by fraud immediately, so there is no protection for the lawyers. The lawyers do not get their fees and the car hire company lose all their money because they have invested in it. That is it; fraud is the enemy of the industry, and that is why 25% of cases that come to respectable companies are turned down. They say, "We won't get involved," because there are people out there trying to commit frauds.

Q316 Chair: Is that the figure of fraud, in your view?
Peter Gradwell: It is certainly the average case for lawyers, yes, 25%.

Q317 Chair: I just want to get an idea of how you see it. I have one final question. What steps, if any, do you think should be taken to address the rising number of whiplash claims? Should anything be done and, if so, what, or do you think there is no problem and no action needed?
Russell Atkinson: First, in terms of some of the worst excesses of the industry, we should let the LASPO changes that have just come in bed in. I talked before about some of the practices that should be stopped such as the cold calling, the data mining and those kinds of things. We would certainly suggest that those things happen. Allowing the current regulation and the banning of referral fees to take effect and also banning some of those other activities that we have already talked about would be the two things that I would propose.
Peter Gradwell: I would like to see all parties regulated by the Financial Conduct Authority, which used to be the FSA. They require a fit and proper person test. It costs us a lot of money. You referred to Government money; it is not; it is self-funding. An average company with a turnover of £1 million of brokerage has to pay about £30,000 a year to the FCA. I don't see why others shouldn't as well because then it is self-regulating and self- funding.

Q318 Chair: So regulation is what you would say.
Peter Gradwell: Absolutely—regulation.
Andrew Wigmore: I think, Chair, you should raise the bar on medical diagnostics. If you do that, I think it will remove a lot of the issues that have been discussed. I would also caution raising the small claims limit, otherwise you are going to have everyone becoming a claims management company. Ultimately you don't want that, do you?
Russell Atkinson: I would certainly emphasise that. The raising of the small claims limit gives us significant access to justice issues; 80% of the consumers that come to us have a problem going to solicitors and going to the court. They will effectively be debarred from proper access to justice by raising the limit.

Q319 Chair: Mr Wigmore, you say that everyone would become a claims management company. Do you think this will open up a new area of activity?
Andrew Wigmore: Yes, I do, absolutely. People have already started talking about it. These are clever marketeers and clever people. They have looked at what could potentially be over the horizon. They are sitting there saying, "Yes please, raise it," because it makes them much more profitable. It gives them a better way of getting to that customer. They don't need lawyers. If you de-legalise it, they will all become claims management companies.

Q320 Chair: Who would be doing that?
Andrew Wigmore: Claims management companies. You will have insurers and lawyers. Everyone will start into it. The whole cycle will start again. You will have the reinvention of new marketing companies, which is fine if that is what you want, but, bearing in mind that the words "claims management companies" are demon words, I would strongly suggest you take a deep breath, have a watching brief, see what happens and then decide.
Chair: Thank you very much. Mr Wigmore, I hope you decide that your visit here was worth while.

Written evidence

Written evidence from the Chartered Society of Physiotherapy (WL 17)

The Chartered Society of Physiotherapy welcomes the Transport Select Committee inquiry into whiplash. This is a key area of interest for us as physiotherapists are involved with the recognition and management of whiplash injury at all levels and in the last decade have become world leaders in the field of whiplash injury research.

Physiotherapists have specialist training in soft tissue injuries and neuromusculoskeletal conditions. As such, they are regularly called upon to recognise and manage whiplash associated disorder and act as reliable and efficient expert witnesses.

We believe that any changes to the way whiplash claims are handled should be developed with the expert input of physiotherapists. With specific regard to the current proposals from the Ministry of Justice, we recommend that accredited specialist physiotherapists should be part of any "independent assessment panels" that are established.

Physiotherapy research has also identified measurable traits of whiplash which may help to differentiate between fraudulent and genuine claims. This important work, though in its early stages, may provide innovative ways of approaching both assessment and management/rehabilitation of whiplash injury.

I have enclosed a copy of the evidence we prepared, with the support of expert physiotherapists who specialise in this area, for the Ministry of Justice consultation on reducing the number and costs of whiplash claims. I hope that the Committee will find this to be a helpful contribution to its inquiry.

We would be delighted to provide you and your Committee with any additional information and would welcome the opportunity to give oral evidence to the inquiry.

Reducing the Number and Costs of Whiplash Claims

Chartered Society of Physiotherapy

Consultation response

The Chartered Society of Physiotherapy (CSP) is the professional, educational and trade union body for the UK's 51,000 chartered physiotherapists, physiotherapy students and support workers.

The CSP welcomes the opportunity to respond to the consultation on reducing the number and cost of whiplash claims. Physiotherapists are involved with the recognition and management of whiplash injury at all levels and as such, are able to contribute key knowledge and ideas which will assist the Government in achieving its stated aims.

Our response is focussed on the areas of scientific knowledge in which we feel we can most effectively contribute to the debate. We would be pleased to supply additional information on any of the points raised in our response at a later stage.

The Contribution of Physiotherapy to the Whiplash Injury Debate

The assessment and management of soft tissue and neuromusculoskeletal (NMS) injuries is at the heart of physiotherapy expertise. Physiotherapists have made significant advances in the field of whiplash injury research, both challenging current practice and thinking, as well as suggesting new ways to approach this complex problem.

In the last decade, physiotherapists have become world leaders in the field of whiplash injury research, contributing seminal peer reviewed scientific papers which answer many of the questions raised in the consultation document. Physiotherapists have delivered much of the "novel" research which the consultation paper refers to. It also provides new and innovative ways to address this complex and costly issue.

This response addresses the key points raised in the consultation document and links them to the emerging evidence base. In addition this response makes a case for the inclusion of Physiotherapists on the proposed "Medical Assessment Panels".

1. Introduction

1.1 Physiotherapists have specialist training in soft tissue injuries and NMS conditions. As such, they are regularly called upon to recognise and manage whiplash associated disorder (WAD).

1.2 Physiotherapists are qualified allied healthcare professionals (AHPs) and emerging as world leaders in the field of WAD research.

1.3 The most recent epidemiological evidence suggests that approximately 50% of individuals with WAD will report neck pain symptoms one year after their injuries.[1] There is also preliminary evidence that the prevailing compensation system is prognostic for recovery in WAD.[1]

1.4 Physiotherapists are at the cutting edge of research focused on identifying (at an earlier stage) why some individuals may to go on to suffer long term symptoms following a whiplash injury.[2] This means that resources can be targeted to the most appropriate patient groups (ie away from the fraudulent claims).

1.5 Specialist clinicians and researchers in the physiotherapy field are providing training and guidance on the latest research and changes in practice, in line with the emerging evidence base as described below.

1.6 Physiotherapy has a national network of specialist musculoskeletal clinicians who are responding to contemporary evidence on whiplash injury management with numbers providing expert opinion for the courts and/or providing rehabilitative treatment of claimants in personal injury cases.

1.7 The CSP has developed *Clinical guidelines for the physiotherapy management of Whiplash Associated Disorder*[3] which demonstrate the robust and thorough manner in which physiotherapists assess and apply evidence based practice to the diagnosis and management of WAD.

2. Better Medical Evidence

Question 1: *Do you agree that, in future, medical reports for whiplash injury claims should be supplied by independent medical panels, using a standard report form, and should be available equally to claimants, insurers, and (for contested claims) the courts?*

2.1 The CSP is content with the proposal to introduce "independent medical panels" which will provide independent reports for whiplash injury claims. However, based on the evidence provided herewith, we believe that they should be inclusive of Allied Health Professionals (AHPs) and referred to as *"Independent assessment panels"*. This inclusion has potential cost saving implications for the proposed model.

2.2 Physiotherapists are already recognised as independent medical experts under the Pre-action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents.

2.3 We would support the use of a standardised report form. However, this should make provision for the flexibility needed by the healthcare professional carrying out the assessment to use their clinical judgment.

2.4 The CSP would urge the Ministry of Justice and the Department of Health to ensure that physiotherapists and physiotherapy researchers are involved in the design of the standardised report form to ensure that this is fit for purpose.

Question 2: *If not, how would you address the problems listed at paragraphs 35–39 in the consultation document?*

2.5 A key issue is the challenge of diagnosis (paragraphs 37 & 38 in the consultation document). Physiotherapists are involved in academic and clinical research focused in this area. International collaborators within physiotherapy research have recently published key papers which challenge current thinking on the classification[4] and diagnosis of whiplash injury.[5] These findings have specific implications for those involved in diagnosis, prognosis and rehabilitation and, as well as highlighting the biopsychosocial nature of WAD, also demonstrate the need for more research in this area.[6]

Question 3: *Which model should be used for the independent medical panels Accreditation, national call-off contract or some other variant?*

2.6 Both models described in the consultation document appear to be inclusive only of medical doctors and medical organisations. Given our response to question one (above), we would support an accreditation scheme inclusive of physiotherapists.

2.7 With the benefit of the emerging research, skilled physiotherapists are able to undertake assessments which go beyond the commonly used and outdated *"Quebec Task Force"* classification. Using new and evidence-based approaches to examination, physiotherapists are able to identify subtle objective measures of genuine whiplash associated disorders.[4] This may in addition, provide methods of filtering out fraudulent claims. In addition, we would highlight that physiotherapists are able to assess the psychological and social factors that are also important in the diagnostic and prognostic process for WAD.[7,8]

2.8 This addresses some of the issues raised in paragraph 44 of the consultation document. Physiotherapy input will provide knowledge and interpretation of the emerging research (detailed below) and has potential cost saving implications for the process.

Question 4: *Do you consider that an element of peer review should be built into every assessment, or only for a sample of assessments for audit purposes?*

2.9 The CSP would support the inclusion of peer review being built in to a sample of assessments for audit purposes**.**

Question 5: *How should costs be dealt with and apportioned?*

2.10 The CSP does not take a view on how costs should be apportioned.

Supporting evidence for the inclusion of physiotherapists in the proposed independent assessment panels

2.11 Physiotherapy research has also identified *measurable traits of whiplash* which may help to differentiate between fraudulent and genuine claims.[2,9,10] This important work, though in its early stages, may provide innovative ways of approaching both assessment and management/rehabilitation of whiplash injury.

2.12 Physiotherapy led research into predictive models for prognosis have suggested effective ways to identify those patients at risk of poor recovery in the first few weeks following the injury. This approach takes into account; pain levels, sensory and psychological changes[11] and would provide *prognostic guidance for assessment panels.*

3. Better Incentives to Challenge Fraudulent or Exaggerated Claims

Question 6: *Should the Small Claims track threshold be increased to £5,000 for RTA related whiplash claims, be increased to £5,000 for all RTA PI claims or not changed?*

3.1 Measures which allow insurers to challenge fraudulent or exaggerated claims in a less costly way are logical. The caveat is that contemporary science should be incorporated into the decision making of "experts" in this field.

3.2 However, the CSP does not believe the small claims threshold (SCT) should be increased, as this is likely to result in fewer genuinely injured patients having quick access to expert legal representation and thus rehabilitation treatment. This is because raising the SCT will mean injured parties will not have access to a solicitor unless they are willing to personally fund the legal fees. Not having a solicitor could mean genuinely injured parties will not have advice on accessing rehabilitation if this is not provided by the NHS, meaning that they will have to fund treatment up front and reclaim costs at a later date.

Question 7: *Will there be an impact on the RTA Protocol and could this be mitigated?*

3.3 The CSP has nothing to add on this point.

4. Further Action

Question 8: *What more should the Government consider doing to reduce the cost of exaggerated and/or fraudulent whiplash claims?*

4.1 The CSP is committed to working with the Ministry of Justice and Department of Health to achieve the aims of this consultation. We recommend that accredited specialist physiotherapists should be incorporated into the "independent assessment panels" and that physiotherapy research should be incorporated into the model of thinking for the proposed changes.

4.2 WAD is currently an area subject to ongoing scientific research. The emerging research presented in this response adds vital understanding into this field. We believe it is imperative that Government action in this area includes physiotherapy led science and clinical skills.

5. Impact Assessments

Question 9: *Do you agree with the accompanying equality screening? If not, please explain why*

5.1 The CSP supports the proposed accompanying equality screening.

Question 10: *Can you identify ways in which the procedure under current arrangements impacts on people with protected characteristics? If so, please provide evidence of impact*

5.2 The CSP has nothing to add on this point.

Question 11: *Do you consider that the introduction of independent medical panels to assess whiplash injuries will impact on people with protected characteristics? If so, please give details*

5.3 The CSP supports inclusivity in any format. Panel diversity is likely to have a positive impact upon people with protected characteristics.

Question 12: *Do you consider that an increase in the small claims limit for Whiplash/RTA personal injury claims from £1,000 to £5,000 will affect people with protected equality characteristics? If so, please give details*

5.4 The CSP has nothing to add on this point.

6. Conclusion

6.1 The CSP welcomes this review of whiplash injuries in England and Wales and is pleased to contribute to key areas of discussion in the consultation document based on experience and evidence in this field.

6.2 Physiotherapists are emerging as world leaders in the research and clinical management of whiplash injuries, and as reliable and efficient expert witnesses.

6.3 The CSP argues that the proposed "Independent Medical Assessment Panels" be inclusive of physiotherapists and be referred to as *"Independent Assessment Panels"*.

6.4 The CSP is keen to continue to work with the Ministry of Justice and the Department of Health to facilitate the Government's aim to reduce the number and costs of whiplash claims.

References

1. Carroll L J, Holm L W, Hogg-Johnsons, *et al*. Course and prognostic factors for neck pain in whiplash-associated disorders (WAD): results of The Bone and Joint Decade 2000–10 Task Force on Neck Pain and Its Associated Disorders... Reprinted from Carroll LJ et al. Course and prognostic factors for neck pain in whiplash-associated disorders (WAD): results of the Bone and Joint Decade 2000–10 Task Force on Neck Pain and Its Associated Disorders. Spine 2008;33:S83-S92. Journal of Manipulative & Physiological Therapeutics. 2009;32(2S):S97–107.

2. Jull G, Soderlund A, Stemper B, *et al*. Toward optimal early management after whiplash injury to lessen the rate of transition to chronicity: discussion paper 5. Spine (Phila Pa 1976). 2011 Oct 20;36(25 Suppl):S335–42.

3. Moore A, Jackson A, Jordan J, *et al*. Clinical guidelines for the physiotherapy management of whiplash associated disorder. London: The Chartered Society of Physiotherapy; 2005.
Available from: http://www.csp.org.uk/publications/clinical-guidelines-physiotherapy-management-whiplash-associated-disorder-wad

4. Sterling M. A proposed new classification system for whiplash associated disorders—implications for assessment and management. Manual Therapy. 2004;9(2):60–70.

5. Elliott J M. Are there implications for morphological changes in neck muscles after whiplash injury? Spine (Phila Pa 1976). 2011 Dec 1;36(25 Suppl):S205–10.

6. Sterling M. Does knowledge of predictors of recovery and nonrecovery assist outcomes after whiplash injury? Spine (Phila Pa 1976). 2011 Dec 1;36(25 Suppl):S257–62.

7. Williamson E, Williams M, Gates S, *et al*. A systematic literature review of psychological factors and the development of late whiplash syndrome. Pain. 2008 Mar;135(1–2):20–30.

8. Walton D M, Macdermid J C, Giorgianni A A, *et al*. Risk Factors for Persistent Problems Following Acute Whiplash Injury: Update of a Systematic Review and Meta-analysis. J Orthop Sports Phys Ther. 2013;43(2):31–43.

9. Treleaven J, Jull G, Grip H. Head eye co-ordination and gaze stability in subjects with persistent whiplash associated disorders. Manual Therapy. 2011;16(3):252–7.

10. Jull G A, O'Leary S P, Falla D L. Clinical assessment of the deep cervical flexor muscles: the craniocervical flexion test. Journal of Manipulative & Physiological Therapeutics. 2008;31(7):525–33.

11. Sterling M. Physical and psychological aspects of whiplash: important considerations for primary care assessment, part 2—case studies. Manual Therapy. 2009;14(1):e8–12.

April 2013

Written evidence from Dr Donal McNally, Dr Amanda Roshier and Mr Christian Worsfold (WL 10)

AUTHORS

1. Dr McNally is Associate Professor and Reader in Bioengineering and Head of the Bioengineering Research Group at the University of Nottingham. He has been engaged in post-doctoral research in spinal mechanics since 1989 and impact biomechanics since 2001. He has published more than 160 articles in journals and conferences and has won a number of international and national research prizes including the International Society for the Study of the Lumbar Spine Award, the International Society of Biomechanics Clinical Biomechanics Award and the European Spine Society Acromed Prize for Spinal Research.

2. Dr Roshier is a Lecturer in Anatomy and Behaviour at the School of Veterinary Medicine and Science, University of Nottingham. She completed a PhD in 2005 at the University of Nottingham titled "Observation and Quantification of Pathological Lesions in the Musculoskeletal Structures of the Cervical Spine". This study focussed on using diagnostic ultrasound to investigate soft tissue damage following a whiplash injury. Study findings have been presented to the medical and scientific community internationally, published in peer-reviewed science journals and through public media.

3. Mr Worsfold is a clinical physiotherapist and expert witness specialising in whiplash injury and neck pain. He is pursuing a PhD at Imperial College in whiplash injury. He regularly lectures to health professionals and lawyers on whiplash injury. He has a specific interest in evidence based approaches to medicolegal reporting in whiplash injury and he represented the Chartered Society of Physiotherapy at the Ministry of Justice stakeholder consultations on reducing whiplash claims in early 2013.

INTRODUCTION TO WHIPLASH

4. The term "whiplash" describes a mechanism of mechanical damage to the spine in the neck that can lead to a number of different injuries and clinical outcomes. These outcomes cover the entire spectrum of injury severity from vertebral fractures and dislocations to minor strains that resolve within a few days.

5. Typically, whiplash results from collisions where the occupant's vehicle is struck from behind by another vehicle. Their chest starts to accelerate forward (pushed by the seat back), whilst their head remains relatively stationary. This results in the lower part of the neck being forced into extreme backwards bending (extension) and the top of the neck into extreme forwards bending (flexion). This wave of bending propagates up the neck until the head starts to move forwards. The whole process is then repeated in reverse when the motion of the chest is stopped by seat belt, but the head continues to move forwards.

6. Even low speed impacts can be extremely violent, eg the head experiences accelerations of 12–14g for a 7mph shunt. This means that the neck will be experiencing forces 12–14 times higher than those experienced normally due to the weight of the head. (Yoganandan and Pintar, 2000)

7. The timing of the impact is too quick for the muscles of the neck to react to the imposed loads and therefore they are resisted passively by the soft tissues. Muscle forces, however, may still be an important factor in injury initiation. Normal volunteers have been shown to generate very high muscle forces as a "startle" reaction to both impact and the noise of impact. Such muscle contractions have the potential to create injuries in their own right. Similarly, there is often sufficient warning for occupants to brace before an impact. (Brault *et al*, 2000, Mang *et al*, 2012)

8. In most whiplash cases the initial injuries are relatively minor, and are similar to those experienced when twisting an ankle: minor muscle, tendon and ligament tears, internal bleeding (haematoma) and there may be localised swelling (oedema). Symptoms can take up to 24 hours to become apparent.

9. In the majority of cases, there are no external signs of injury and the severity of injury does not normally merit further investigation such as MRI. Similarly, soft tissue injuries will not be visible on x-ray based imaging techniques such as plain radiographs and CT scans. (Yoganandan *et al*, 2001)

10. Diagnosis immediately after the event relies upon the history of the injury, for example that the patient experienced a rear-end shunt, and self-reported pain.

11. There are two different groups of patients based on their outcomes, and it is important to recognise this when considering both the diagnosis and costs of whiplash injury.

12. In 80% of cases, the patient will make a full recovery from their injuries over a period of up to three months. The only medical treatment required by such patients is short term pain medication, monitoring and possibly a short course of physiotherapy (much like a sprained ankle). (Sterling *et al*, 2005, Sterling *et al*, 2006)

13. However, the remaining 20% go on to suffer chronic high levels of pain and disability following their injury. (Sterling, 2012)

14. To establish the validity of an initial whiplash claim, it is important to make a diagnosis of the initial soft tissue injuries that is objective rather than entirely reliant on the honesty of the patient. This is not part of current practice because, as noted in paragraph 10, only patient reported symptoms are recorded. Further, medical advice is often only sought after the initial injuries have resolved.

15. Although not current practice, it is possible to image and document whiplash related soft tissue injuries independently. This is best done, using ultrasound imaging, 24–48 hours after the injury (when the haematoma and oedema have had time to develop). The imaging can identify minor soft tissue tears, haematoma and oedema. We have demonstrated that such injuries correspond to areas of localised pain in patients with a history of whiplash injury.

16. Equipment and expertise for ultrasound imaging of superficial soft tissues is now available in most physiotherapy clinics where it is used for both biofeedback and assessment. Similarly, it is common for ultrasound imaging to be used to identify soft tissue injuries in sports medicine clinics.

17. To establish the validity of a whiplash claim for on-going chronic pain and disability requires an evidence based objective assessment. (Sterling and Kenardy, 2008, Sterling, 2009)

18. Currently employed approaches to the medicolegal assessment of Claimants appear to emphasise clinical opinion to the exclusion of evidence based practice.

19. Recent work has suggested ways to identify those patients at risk of poor recovery in the first few weeks following the injury, with pain levels, sensory and psychological changes appearing to be the most useful measures in this respect. Simple, portable and inexpensive equipment that can objectively record sensory changes in tender areas of the body (hand held algometer) or areas of increased sensitivity to cold stimuli (hand held thermoroller) have potential to establish the veracity of Claimants' complaints. (Jull *et al*, 2007, Jull *et al*, 2008, Sterling and Kenardy, 2008)

Responses to the Questions in the Consultation Document

Question 1: *Do you agree that, in future, medical reports for whiplash injury claims should be supplied by independent medical panels, using a standard report form, and should be available equally to claimants, insurers, and (for contested claims) the courts?*

20. Medical reports should be supplied by suitably accredited medical practitioners (although not necessarily doctors), using standard protocols and reporting documentation. However, we would additionally suggest that this is a two stage process.

21. The first report should focus on assessing the initial soft tissue injuries. Such injuries should be appropriately imaged and recorded (ultrasound is the most readily available modality to do this, although MRI would also provide appropriate soft tissue imaging).

22. This assessment should be completed between 24 and 48 hours following the initial injury.

23. Typically, the imaging facilities required to make such an assessment are not available in a GP's surgery, but are common in NHS and private physiotherapy clinics.

24. The report should also identify appropriate rehabilitation interventions, such as provision of analgesia and physiotherapy, to optimise the patient's recovery. Such interventions are not controversial and there are nationally agreed standards of care.

25. Were the patient not to comply with such a rehabilitation programme, there would then be grounds to challenge a further claim for chronic pain and disability.

26. Similarly, a standard assessment and rehabilitation protocol would provide a low cost route to ensure that all claimants with genuine soft tissue injuries had access to appropriate rehabilitation with the potential to reduce the number progressing to chronicity and therefore higher insurance costs. Similarly, since this process is uncontroversial savings could be made by out of court settlement.

27. It is expected that in 80%, or more, of cases this would be the only clinical assessment necessary because the patients would progress to a complete recovery.

28. For the 20%, or less, of patients progressing to a chronic pain condition, a further assessment would be necessary to assess the severity of the condition and the resulting level of disability.

29. Such an assessment should be standardised, use a standard protocol, standard disability outcome measurements and a standard clinical assessment. The assessment of pain levels, sensory and psychological changes, as stated previously, would be the most useful measures in this respect. Similarly, the report should be in a standard format and available to all interested parties.

30. The assessment of chronic pain and disability is a specialist procedure and should be performed by appropriately trained and accredited personnel. It is therefore more appropriate if the assessment is conducted by specialist assessor rather than the patient's GP.

31. The timing of the second assessment should be such that it takes place when all soft tissue healing has taken place and when a chronic pain condition has become established. We would propose a timing of at least 3 months after the initial injury.

32. The proposed two stage assessment process has the potential to significantly reduce the legal costs of making and defending a whiplash claim. The initial independent assessment would incur a fixed cost (probably

well below the current GP assessment fee), would be unlikely to be contested in the courts because the value of the initial claim is small and will probably lead to a reduced number of claims for chronic pain due to timely and appropriate rehabilitation.

33. The second assessment, the rigorous assessment of chronic pain, will be a further up-front cost to insurers; however, it will be limited to a small sub-set of claims. It will provide independent, standardised and detailed report of the claimant's pain and disability. Such independent assessment will therefore streamline the settlement process; firstly by facilitating settlement of claims without going to court, and secondly by limiting the legal process to the assessment of damages rather than the establishment of the injury. So the overall cost to insurers might well be reduced.

34. Rigorous independent and evidence based assessment has the potential to discourage fraudulent or exaggerated claims since they will be performed by experts using well-validated assessment tools.

Question 4: *Do you consider that an element of peer review should be built into every assessment, or only for a sample of assessments for audit purposes?*

35. If the assessments are independent, standardised and conducted by suitably trained and accredited practitioners, peer or regulatory assessment could be confined to an auditing process to ensure the quality of the reports submitted. However, it might be appropriate to allow claimants access to a second opinion (from within the standardised and accredited system) should they wish to make and appeal.

Question 8: *What more should the Government consider doing to reduce the cost of exaggerated and/or fraudulent whiplash claims?*

36. The high cost of whiplash claims largely arises from the small subset of patients who progress to a state of chronic pain and disability. This progression is also found in other musculoskeletal disorders such as degenerative disc disease. There is strong clinical evidence to support that this is a genuine medical condition that has a devastating effect on people's lives. Currently, however, our understanding of what leads to such a progression to a chronic pain state is very poor and the assessment tools available would benefit from further refinement. The Government should therefore consider targeting funding for research in these areas to reduce the overall socio-economic impact of whiplash injuries.

37. With good and validated tools developed, as suggested in paragraph 36, there would be evidence with which to challenge fraudulent or exaggerated insurance claims. At the moment, such evidence is often absent.

38. Whilst assessment of musculoskeletal soft tissue injuries is well established in areas such as sports medicine, its use in whiplash is still experimental. Further research needs to be funded to validate techniques and to determine suitable standard assessment protocols.

39. One aspect that has been holding back research into the progression of whiplash related neck pain and disability has been the inability to objectively quantify the initial injuries and to identify which structures have been damaged. With improved assessment tools, as outlined in paragraph 38, researchers will be much better equipped to predict which injuries will progress to a chronic pain condition allowing for more rapid compensation to those claimants who genuinely deserve it.

References

BRAULT, J, SIEGMUND, G & WHEELER, J. 2000. Cervical muscle response during whiplash: evidence of a lengthening muscle contraction. *Clinical Biomechanics*, 15, 426–435.

JULL, G, STERLING, M & FALLA, D. 2008. *Whiplash, headache, and neck pain: research-based directions for physical therapies*, Elsevier Health Sciences.

JULL, G, STERLING, M, KENARDY, J & BELLER, E. 2007. Does the presence of sensory hypersensitivity influence outcomes of physical rehabilitation for chronic whiplash?-A preliminary RCT. *Pain*, 129, 28–34.

MANG, D W H, SIEGMUND, G P, INGLIS, J T & BLOUIN, J-S. 2012. The startle response during whiplash: a protective or harmful response? *Journal of Applied Physiology*, 113.

STERLING, M. 2009. Physical and psychological aspects of whiplash: Important considerations for primary care assessment, Part 2–Case studies. *Manual Therapy*, 14, 8–12.

STERLING, M. 2012. PROCESSES UNDERLYING THE TRANSITION TO CHRONICITY FOLLOWING WHIPLASH INJURY. *Internal Medicine Journal*, 42.

STERLING, M, JULL, G & KENARDY, J. 2006. Physical and psychological factors maintain long-term predictive capacity post-whiplash injury. *Pain*, 122, 102–108.

STERLING, M, JULL, G, VICENZINO, B, KENARDY, J & DARNELL, R. 2005. Physical and psychological factors predict outcome following whiplash injury. *Pain*, 114, 141–148.

STERLING, M & KENARDY, J. 2008. Physical and psychological aspects of whiplash: Important considerations for primary care assessment. *Manual Therapy*, 13, 93–102.

YOGANANDAN, N, CUSICK, J F, PINTAR, F A & RAO, R D. 2001. Whiplash injury determination with conventional spine imaging and cryomicrotomy. *Spine*, 26.

YOGANANDAN, N & PINTAR, F A. 2000. *Frontiers in whiplash trauma: clinical and biomechanical*, Ios PressInc.

April 2013

Written evidence from Thatcham Research (WL 30)

THATCHAM

1. Thatcham is a world class motor vehicle research centre funded by the leading UK motor insurers. For over 40 years, Thatcham has provided specialist research based services which have contributed to significant improvements in vehicle safety, theft reduction and control of accident damage costs.

2. Thatcham's work directly influences the UK vehicle parc, through collaboration and engagement with vehicle manufacturers. Our focus on safety, security and tackling the whiplash problem is a key strategic priority of our work. We remain intent on this aim and are fully committed to support this important Government initiative.

EXECUTIVE SUMMARY

3. Thatcham has been at the forefront of research into whiplash injuries, their causes and remedies. Working with international researchers Thatcham has identified the increase in whiplash injury and the UK trends in comparison with other countries. This has shown clearly that neck injury claims in the UK are out of step with the reported reduction in Road Traffic Accidents (RTAs) over the same period. In-depth research has identified the main factors affecting injury risk in a typical low speed accident, including the role of the vehicle, its structures and their interaction during the crash, including other human factors such as gender.

4. Through real world data studies, medical researchers have identified the biomechanical factors which influence injury and have proven the key role of the seat in mitigating injury. Good seat design includes support for the head and the neck to prevent differential movement of the head relative to the body. In 2004 Thatcham, working with other international research centres, developed a crash test for assessing comparable seat ratings and published these as part of the Euro NCAP consumer crash test ratings from 2008. This public rating activity has encouraged vehicle manufacturers to provide seats which conform to best-practice.

5. Thatcham has now focused its research into the new crash-avoidance technologies such as Autonomous Emergency Braking, which enables a vehicle to stop itself should a low speed accident be imminent. These systems promise to significantly reduce low-speed accidents of the type which cause whiplash injuries and claims.

6. Using its considerable research data and expertise, Thatcham has developed a prototype injury probability estimating tool, in conjunction with Austrian crash reconstruction experts DSD, which could be of considerable value in attempts to understand the causes and prevention of whiplash injury. To support Government efforts to bring better regulation to the whiplash claim phenomenon, Thatcham offers its technical and engineering support to the proposed medical panels.

7. We believe the Government is in a position to influence consumers directly through educational activity such as advertising, which could provide information regarding the correct use of a vehicle Head Restraint (not Head Rest), and encouragement to purchase vehicles which have better seats and collision avoidance technology. Additionally the Government could provide robust guidance and publicity to stress that insurance fraud is a moral and criminal offence—this seems to have been largely lost within public perception.

INQUIRY QUESTIONS

Q1: *Whether the Government is correct in describing Great Britain as the "whiplash capital of the world"?*

A1: Robust research has shown that the UK has significantly higher whiplash rates than many other relevant and comparable European countries. It has been estimated that 70% of road accident personal injury claims are for whiplash in the UK, compared to 47% in Germany, 32% in Spain and only 3% in France, earning the UK the unwanted reputation as Whiplash Capital of Europe.[1]

Q2: *Whether it is correct to say that the costs of whiplash claims add £90 to the average premium and, if so, what proportion of this additional cost is due to "exaggerated, misrepresented or fabricated" claims?*

A2: Thatcham cannot comment on the quantum of the premium impact of whiplash claims on the average premium, although ABI report that this figure is £90.[2]

Q3: *Whether the proposals put forward by the Government, in relation to medical evidence of whiplash and incentives to challenge fraudulent or exaggerated claims, are likely to reduce motor insurance premiums and, if so, to what extent*

A3: There is currently no objective test for whiplash injury. For a typical patient presenting with neck pain, a doctor is in the unenviable position of being forced to provide a diagnosis based on a purely self-reported injury. For this reason Thatcham support the proposed use of an expert medical panel to discriminate between claims. However, this will not be an easy task and without any systemic scientific approach there is a distinct possibility that they will be unsuccessful, as much of the evidence they will review will be based purely on claimed pain symptoms. Thatcham has developed a software system which uses biomechanical and engineering data to estimate the probability of an injury in a specific whiplash claim. Thatcham suggests that the Government should consider provision of a suitable diagnostic system and/or suitable training in these factors to assist the doctors on the proposed medical panels in their task and offers its experience and the prototype software toward this end.

Q4: *The likely impact of the proposals on access to justice for claimants who are genuinely injured?*

A4: As outlined above if the doctors on the proposed medical panels have access to a suitable diagnostic system and/or suitable training in factors which can be used to assess probability of injury, they will be able to more accurately discriminate between injured and uninjured claimants, thus increasing access to justice. Without a systemic system which uses relevant, impartial and objective factors their evaluation may be subjective and thus there may be a risk of a decrease in access to justice.

Q5: *Whether there are other steps which the Government should be taking to reduce the cost of motor insurance?*

A5: Thatcham recommends that the Government consider regulatory or fiscal incentives to promote the introduction of safer cars into the UK car park. Specifically these would be vehicles which are fitted with best-practice seats and AEB collision avoidance technology as standard; claims data shows that both these technologies reduce whiplash claims rates. These incentives could include vehicle purchase incentive schemes such as partial or complete VAT exemption, lower Road Tax for these vehicles and/or a scrappage scheme. It is highly likely that some or all of these incentives would be very popular with vehicle manufacturers. Additionally, the acceleration of the introduction of legislation for both these technologies would accelerate fitment rates in the UK car park.

Whiplash Research

8. Soft tissue neck injuries, commonly known as whiplash injuries are well documented as being a large societal burden with a sharp upward trend, (up 60% since 2006–07[3]), whilst reported RTAs are falling (down 20% in the period 2006–11[4]). It would be reasonable to assume that whiplash injuries and consequent claims would be a sub-set of the broader RTA statistics; therefore a rise of this magnitude and with this continued growth indicates that other factors are at work. This carries a significant cost which ABI reported in 2010 to be £2 billion, a figure adding circa £90 to every premium.[2]

9. Research by Volvo has shown that 75% of road crashes occur under 30km/h (18.75mph),[5] and it is at these low speeds where the bulk of whiplash claims are made. Whiplash is a biomechanical injury, medically termed: Whiplash Associated Disorders (WAD), experienced most frequently by the occupants of the struck vehicle in front-into-rear crashes. The mechanisms of injury have been the subject of intense research over the past two decades. Despite significant research the medical causation of neck pain is poorly understood. However, the symptoms are clear and have focused research into the biomechanical loadings that car occupants are subjected to in a typical low speed crash. The direct effect on the severity and duration of injury and the risk of having symptoms have been well documented.

10. In the typical impact which may result in a whiplash injury, the occupants seated in the vehicle are subjected to accelerations in excess of those in normal daily living. The transfer of energy from the rear direction through the neck is not a loading path that humans have evolved to sustain and this often leads to genuine discomfort or pain, even at relatively low impact speeds. The struck vehicle is typically hit from behind leading to the forces of the impact being transferred through the vehicle structure. Once the energy has been absorbed by deformable crash structures the vehicle will be pushed forward. The seats, attached to the vehicle structure, will also be pushed forward taking the occupants' bodies with them. Due to inertia the head, weighing 3–5 kg, will lag behind. The ensuing differential movement of head and body creates distortion beyond normal biomechanical tolerances creating the so called "whiplash" movement, leading in higher energy crashes to the pain associated with the injury.

11. Occupants struck from the rear make up the majority of whiplash claims and these comprise minor crashes where there is only superficial minor damage to either vehicle; typical repair costs per vehicle are approximately £1,280.[6] The way in which two vehicles crash is the most significant factor in identifying injury risk, with their mass and speed being the most important variables. Also influential is the stiffness of the vehicle (the load absorbing characteristics of the structure) and its overall structural properties. Consumer crash test programmes from organisations such as Euro NCAP have strengthened vehicle structures, which have

become significantly stiffer in the past 15 years to better protect their occupants from life threatening injuries. Combined with better restraints in the form of airbags and seat belts, these changes have led to a very significant reduction in the risk of being killed or seriously injured (KSI), and the UK is a leader in this area having the lowest rate of KSI in the G20 at just 31 road deaths per million of population.[7] Stiffer vehicles pass more energy into the seat and occupant of the vehicle being struck and in order to mitigate this effect, is it necessary to provide energy absorption in the seat. This has been the initial focus for insurers and vehicle manufacturers in developing seats which provide better protection against whiplash injury.

12. Whiplash injury risk is thus primarily related to the quantum of the transfer of energy from one vehicle to the other during the crash, but many other factors can influence injury risk including seat and bumper design, vehicle mass, and occupant morphology. Real world crash data reveals 35% of crashes exhibit unstable engagement where bumper beams underride.[7] Good bumper design also plays a part in controlling energy transfer and works in conjunction with seats to reduce whiplash injury risk.[8]

13. Folksam Insurance from Sweden has fitted over 450,000 Event Data Recorders (EDRs) to vehicles since 1992. This data has been invaluable in identifying real world injury risk factors such as crash speed and the influence of the change of speed after the impact (delta v), vehicle stiffness and seat design. Their data clarified the influence of mean acceleration on injury outcomes and identified injury risk curves for male and female occupants. Analysis of EDR data obtained from these crashes produced a classification of injury by time: "no symptoms"; "initial"—up to one month; "long term"—symptoms up to one year; "permanent". For rear struck crash cases 12% of injuries were reported as "long term", with symptoms over one month; 28% of injuries were reported as "initial" symptoms, and 60% of rear struck crash cases were reported as having "no symptoms". This data showed that the most significant factor in injury risk is acceleration and that few genuine injuries occur below an average of 3g.[9]

14. In the late 1990's researchers established the specific kinematics of human spine structures in typical rear end crashes, leading to advances in seat and crash dummy design. Biomechanical data from cadaver and human subject testing was established and complex measures developed which could be used to quantify levels of tolerance to injury. The human subject data was used by scientists to build a suitable test dummy which could be used to replicate humanlike loadings on a seat, which resulted in the development of the BioRID II,[10] a new whiplash test dummy.

Seat Design

15. In order to focus efforts toward better seat design, international insurer research institutes under the auspices of the Research Council for Automobile Repair (RCAR) worked together to develop a suitable best-practice engineering standard for seat designs, which would reduce whiplash injury. Biomechanical research in the 1960's and 70's by Mertz and Patrick showed that the human frame can sustain very high forces in rear impacts where the head is supported with the body.[11–12] In a motor vehicle it is the head restraint (often mistakenly called a head rest) that can protect the occupant from the distortion that creates the whiplash injury. To protect the occupant the head restraint must be of adequate construction and be placed sufficiently close to the back of the head of the occupant to control this neck distortion during a rear impact.

16. German insurance data identified that the most frequent impact speeds of the striking car in a rear-end accident with reported WAD lie between 9 and 45km/h. This was based on traffic accident data which showed that over 80% of neck injuries in rear impacts occur at vehicle speed change during the accident—delta v—of equal to or less than 25km/h.[13] Based on this data it was concluded that evaluation of seats to assess their effectiveness at preventing injury at a delta v of 16km/h would deliver the most benefit towards reducing WAD injuries.[14]

17. Thatcham's 2000 study into real-world usage of head restraints research showed that 72% of head restraints were poorly placed or were incapable of correct adjustment.[15] The Insurance Institute for Highway Safety (IIHS) published research which showed that based on geometry only (the size and placing of the head restraint); drivers of cars with "GOOD" rated head restraints were 24% less likely than drivers of cars with "POOR" rated head restraints to suffer neck injuries in rear-end crashes.[16]

18. Since whiplash injuries are the result of an impact event the RCAR partners began to crash test seats using the BioRID II rear impact test dummy, recreating the forces in a typical 16km/h (10mph) rear end crash. The tests identified that the Volvo and Saab seats, which had been previously been shown to reduce whiplash injuries in the real world, exhibited specific anti-whiplash design characteristics—they absorbed the energy of the crash and promoted early head restraint contact, which supported the head and neck, thus reducing the retraction phase, which is identified as being the phase where injury occurs. From this research biomechanical tolerance values were defined in order to rate seats and encourage best practice design. Seats were rated from "POOR" to "GOOD", the latter typically being a seat with includes specific anti-whiplash design attributes and a head restraint which does not necessarily require pre-adjustment by the occupant.

19. Since testing began in 2004, over 1000 seats have been tested. A comparison between 2005 and 2012 shows that in 2005 only 16% of new vehicles available into the market rated as "GOOD", a figure which has now risen to 68% in 2012. Thatcham has been publishing ratings since 2002 and in response to this, the vehicle manufacturers have invested in new seat designs which conform to best-practice. Thus the UK fleet

has considerably changed in terms of the protection it offers to consumers, who have been able to purchase vehicles with seats which are "GOOD" and which protect them.

20. Thatcham estimates that these changes have brought about a situation in which 34% of the current UK fleet comprises vehicles which have "GOOD" seats and which therefore should reduce the incidence of whiplash and the consequent claims. Considering the similarity between the US and European (including UK) fleets in terms of content and mix, plus the reduction in real world claims reported in several countries, it is reasonable to expect that were it not for our dysfunctional claims environment, the UK would have experienced a similar reduction in injuries and claims.

Biomechanical Evidence

21. In the recent *Charnock vs Rowan* ruling (20/01/12)[17] the judge viewed the quality of technical and scientific evidence as insufficient to support the defendant's position, even though the likelihood of injury to the multiple claimants was for all practical purposes zero. In this case a small car had struck a bus at a very low speed, with a consequent impact change of speed for the bus estimated to be 3km/h (1.875mph). Thatcham suggest that the inability of the judiciary to apply the balance of probabilities to claim evaluation based on sound biomechanical and vehicle data has the consequence that defendant insurers are unable to reject any claim, unless so enabled by other aspects to the claim which show it to be disingenuous.

22. This quandary has been addressed in other countries and in the 1990s, the German legal system placed an increased burden of proof on the claimant. In the German system, insurers obtain a technical assessment of the change of speed and acceleration of the vehicle and the cost of repair, evaluating whether the impact was at or above a guideline value of 10km/h (6.25mph).[18] Assuming the claim is shown to be above the guideline value, a medical assessment is then done which uses the technical data to identify pain periods and which defines a number of "pain days" which form the basis of settlement by the insurer. This guideline value was built on biomechanical research which introduced the concept of biomechanical tolerance—a typical limit that the average person could endure without long term consequences. This followed research which identified a correlation between vehicle change of speed—delta v—and reported injury from subject testing. Should a similar approach be adopted by UK Government in the future, Thatcham would concur with the latest research that a meaningful biomechanical tolerance value could be used as a practical guide for very low probability of injury.

23. In 2006 Thatcham and DSD developed web-based prototype software which is designed to assess whiplash injury probability for an occupant involved in a motor vehicle crash. This is currently used by some UK insurers in their internal operations to guide their responses to claims. In order to do this Thatcham aggregated the key risk factors that affect whiplash injury risk including vehicle engagement paths and seat design. Key occupant risk factors included gender, age and occupant seated position. The system is able to compare the input data with known rules and internal databases to estimate the relative transfer of energy between the respective partner vehicles. Finally, reference to the specific seat performance data and occupant profile enables the system to calculate a "whiplash injury risk probability".

24. The system does not consider pre-existing medical conditions relating to the cervical spine and is not related to a specific occupant; nor can it prove or disprove the existence of a soft tissue neck injury—it provides a probability output. Some UK insurers use the software with other evaluation methods within their claims operations to quickly identify those claims which should be challenged further and those which should be settled quickly.

25. Despite the obvious value of this more in-depth circumstantial analysis of the claim, UK insurers have not adopted the use of the software en masse and will not fund its development to increase its detail resolution. This is because of the approach taken by the judiciary toward whiplash claims where there is a challenge by insurers. In these situations witness credibility is the main influence on the outcome rather than a holistic appraisal which includes relevant engineering evidence and the use of finite probability rather than the balance of probabilities is a further compounding factor.

26. Thatcham suggests that the Government should consider provision of a suitable diagnostic system and/or suitable training in these factors to assist the doctors on the proposed medical panels in their task and offers its experience and the prototype software toward this end.

Autonomous Emergency Braking (AEB)

27. AEB technology is now available which can enable a vehicle to automatically avoid a low-speed car to car impact, typical of those which cause whiplash injuries and claims. This is achieved through radar, camera and laser sensors which detect that the vehicle is about to strike another and apply full emergency braking to either mitigate the accident or avoid it altogether. This first generation technology is typically capable of functioning up to 30km/h (18.75mph) and is thus highly effective at avoiding the type of crashes which commonly cause whiplash injuries.

28. A US study from the IIHS on the first vehicle to have an AEB fitted as a standard, the Volvo XC60, has reported that bodily injury frequency had been reduced by 51% for this vehicle in comparison with similar vehicle models.[19] Studies from AXA[19] and Volvo[20] also indicated a reduction in rear crash rates by 31% and

28% respectively. A further IIHS study indicated that optional radar systems designed to work at higher speeds, 30 km/h+ (18.75 mph+), also have a positive benefit by reducing damage rates by 10–14%.[21]

29. At present Thatcham estimates that just 4%[22] of new vehicle models are fitted with these new AEB crash avoidance systems, but vehicle manufacturers are now being incentivised to accelerate the fitment of these systems to new models by the UK insurers. Examples of this technology are "City Safety" from Volvo, and "City Emergency Braking" from Volkswagen. Volkswagen is now fitting the system as standard on a number of variants of the new Golf 7, bringing auto-braking to the mass market. The next generation of systems is now coming into the market; these are capable of detecting pedestrians and other vulnerable road users. Thatcham is working with international researchers, vehicle manufacturers and system suppliers to develop a suitable assessment test for these systems.

30. Following analysis by Thatcham on the potential benefits of widespread adoption of low-speed AEB into the UK fleet, the UK insurers have taken the unprecedented step in October 2012 of providing incentives to consumers to purchase vehicles fitted with this technology. The incentive is a 1–5 group rating reduction to vehicles which have AEB as standard fit. The advisory group ratings are provided by the ABI to the insurance industry to provide comparable risk rating between every UK vehicle model and variant. In the 50 group system a consequent premium reduction on a specific vehicle type on a like for like basis is of the order of 10%. Thatcham is actively promoting the technology to vehicle manufacturers and has developed an assessment test for use within the group rating risk evaluation. This applies to every new model entering the UK. Euro NCAP will adopt a similar assessment test within the 2014 ratings system that evaluates both low and high speed systems and are committed to the introduction of a rating test in 2016[23] for systems which protect pedestrian and vulnerable road users.

References

[1] Figures quoted in the Ministry of Justice's Consultation "Reducing the Number and Cost of Whiplash Claims" published in December 2012.

[2] ASSOCIATION OF BRITISH INSURERS (2010). The UK's pain in the neck culture must end says the ABI. London, Association of British Insurers.

[3] COMPENSATION RECOVERY UNIT (2013). Performance Statistics. London, Compensation Recovery Unit.

[4] DEPARTMENT FOR TRANSPORT (2012). Reported Road Casualties Great Britain 2011. Table RAS40001; Reported accidents and casualties, population, vehicle population, index of vehicle mileage, by road user type and severity, Great Britain, 1930–2011. London, The Stationery Office.

[5] VOLVO CAR CORPORATION (2007). Estimates from NASS and STO data. Gothenburg, Volvo Car Corporation.

[6] THATCHAM (2007). Real World Damageability. Thatcham, UK.

[7] DEPARTMENT FOR TRANSPORT (2012). Reported Road Casualties Great Britain 2011. Table RAS52001; International comparisons of road deaths1: number and rates for different road users: by selected countries: 2010 and 2011 (provisional) 2. London, The Stationery Office.

[8] AVERY, M & WEEKES, A M (2010). The influence of vehicle engagement characteristics on whiplash injury risk. ICrash 2010: International Crashworthiness Conference. Washington D.C.

[9] KULLGREN, A & KRAFFT, M (2008). Influence of change of velocity and acceleration on whiplash injury risk: results from real-world crashes. Neck Pain in Car Crashes. Munich.

[10] DAVIDSSON, J, SVENSSON, M Y, FLOGÅRD, A, HÅLAND, Y, JAKOBSSON, L, LINDER, A, LÖVSUND, P & WIKLUND, K (1998). BioRID—A New Biofidelic Rear Impact Dummy. Proceedings of IRCOBI Conference on Biomechanics of Impacts. Göteborg, pp.377–390.

[11] MERTZ, H & PATRICK, L (1971). Strength and response of the human neck. 15th Stapp Car Crash Conference. Coronado, pp.207–255.

[12] MERTZ, H & PATRICK, L (1967). Investigation of the kinematics and kinetics of whiplash. 11th Stapp Car Crash Conference. Anaheim, pp.267–317.

[13] HELL, W, LANGWEIDER, K & WALZ, F (1998). Reported soft tissue neck injuries after rear-end car collision. International IRCOBI Conference. Goteborg, pp.261–274.

[14] AVERY, M (2001). Car to car testing and crash pulse selection by the IIWPG. IIWPG & IRCOBI Symposium: Dynamic Testing for Whiplash Injury Risk. Isle of Man, UK.

[15] AVERY, M (2001). Vehicle damage—what relationship is there to injury? Lyons Davidson Conference: Fibromyalgia, Chronic Pain and Trauma. Bristol, UK, pp.16–19.

[16] FARMER, C, WELLS, J & WERNER, J (1999). Relationship of head restraint positioning to driver neck injury in rear-end crashes. Accident Analysis and Prevention, 31(6), 719–728.

[17] (2012) Charnock & Ors v Rowan & Ors [2012] EWCA Civ 2. England and Wales Court of Appeal (Civil Division).

[18] MEYER, S, WEBER, M, KALTHOFF, W, SCHILGEN, M & CASTRO, W (1999). Freiwilligen-Versuche zur Belastung der Halswribelsäule durch Pkw-Heckanstöße. Medizin.

[19] HATT, M (2011). Frequency of rear-end collision accidents for Volvo XC60 equipped with City Safety. AXA Winterthur.

[20] Volvo CAR CORPORATION (2012). Volvo's City Safety technology drives down chauffeur company's at fault rear impact accidents by 28%. Gothenburg, Volvo Car Corporation.

[21] INSURANCE INSTITUTE FOR HIGHWAY SAFETY (IIHS) (2010). They're working. Status Report, 4(7).

[22] THATCHAM RESEARCH (2012). Review of AEB fitment on the UK car market. Thatcham, Thatcham Research (the Motor Insurance Repair Research Centre).

[23] Euro NCAP (2012). Euro NCAP Rating Review: Report from the Ratings Group. Brussels, Euro NCAP.

April 2013

Written evidence from the Institute and Faculty of Actuaries (IFoA) (WL 36)

1. The Institute and Faculty of Actuaries (IFoA) set-up the Third Party Working Party (TPWP) in 2009 to look into emerging claim trends in third party motor insurance in the UK. The TPWP has conducted three surveys to date based on aggregated data from the largest motor insurance companies writing business in the UK. The last completed study was based on Private Car Comprehensive data as at 31 December 2011 and included data from 17 different companies representing premium in 2011 of £8.5 billion. Using earned premium for the 2011 accident year from the 2011 FSA returns, the study represents around 98% of FSA regulated UK insurers. A fourth study is currently being carried out, updating the analysis for more recent data. However, this has not been completed by the deadline for this submission.

2. In November 2010 the TPWP reported to the Transport Select Committee during its inquiry into the price of motor insurance. The TPWP has also reported to a number of other inquiries, including to the OFT on its Call for Evidence on Motor Insurance Pricing in 2011 and to the Ministry of Justice on its consultation on Claim Management Regulation (CP19/10) also in 2011.

3. While the working party has not directly analysed whiplash claims, the latest survey has looked at personal injury claims split by claim size. As whiplash claims are the dominant source of personal injury claims under £20,000 we believe the TPWP data can provide significant insight into the current level of whiplash claims and how this has grown recently. We have provided responses to specific questions below.

I: *Whether the Government is correct in describing Great Britain as the "whiplash capital of the world"*

4. Based on the work of the TPWP, we have comprehensive industry data from the UK up to 31 December 2011. However in terms of countries beyond the UK, we only have access to publicly available sources of data. The most ready source of overseas data is in respect of the USA. We have not been able to confirm the comparability of this data or otherwise, either in terms of the structure of motor insurance products, their use, or on the structure of the data. Nonetheless treating this data at face value provides an interesting comparison with UK data. Our conclusions below rely on an assumption that, given the high litigiousness which we see demonstrated in the USA as observed in other insurance products, we would have expected the USA to show more whiplash claiming than any other country all else being equal. For example, the USA has very much led the way with regard to claims on industrial diseases, pollution, medical malpractice and other issues arising from third party liability. Our comparison shows that the UK may, however, have even higher levels of whiplash than the USA.

5. We have used the ratio of the number of third party personal injury claims made to the number of insured accidents (as measured by the number of third party property damage ("TPD") claims which are made largely in respect of damage to third party vehicles) as a measure of the scale of whiplash (given that personal injury claim numbers are dominated by small whiplash type claims). Comparing these statistics across regions of the UK shows two key features; year on year increases and marked regional differentiation. In a previous submission to the Transport Select Committee, we demonstrated a correlation between the location of Claims Management Companies and areas with high incidence of third party personal injury claims. We can supply the Committee with detailed charts presenting the UK data, if required. The ratios for recent years are likely to be understated, particularly so for accidents arising in 2011, due to slower reporting of third party personal injury claims relative to the equivalent property damage claims. Noting this restriction, as at the end of 2011, the data showed an average propensity to claim for personal injury of 30% of third party accidents, with the highest claiming regions being the Granada region in the North West of England (42%) and the Tyne Tees region in the North East (37.5%). The lowest claiming regions are in Scotland in the northerly Grampian region (15%) and the southerly STV region (21%), including Glasgow and Edinburgh.

6. Average data from the USA has been sourced from ISS's Private Passenger Fast Track Data report and is also taken at the same date as the UK data. This shows a national US average of 23% compared to the 30% in the UK. *Assuming comparability of UK and US statistics, it is likely that the UK is the whiplash capital of the world in as much as the UK shows more whiplash claiming per insured third party accident than the US.*

7. The comparison of the highest claiming US states with the highest-claiming UK regions is however even more stark. The six worst US states are shown below, with only Louisiana and Nevada showing levels of whiplash claiming at higher levels than the North East of England, but remaining nonetheless lower than the levels seen in the North West of England.

State	*BI/TPD Ratio*
Louisiana	38.8%
Nevada	37.7%
Rhode Island	37.3%
Oregon	35.9%
South Carolina	34.3%
Washington	32.0%

II. *Whether it is correct to say that the costs of whiplash claims add £90 to the average premium and, if so, what proportion of this additional cost is due to "exaggerated, misrepresented or fabricated" claims?*

8. The TPWP has analysed UK Motor insurance market claims data split by various claim sizes. Note that this cost includes multiple claimants as well as legal costs. As motor claims can take many years to settle (for example some of the largest claims could take up to 15 years to settle), the final cost of claims at any point of time is unknown. Our analysis estimated the final cost of claims by projecting the development of the claims into the future based on the historical claims development. As these projections concern events that have not yet occurred, they are inherently uncertain.

9. We believe that whiplash type claims, or less serious personal injury claims, dominate the size bands up to £20k and are not material for larger claim sizes. As such, based on claims under £20k, we estimated a total cost of "whiplash" claims per policy in respect of private motor comprehensive policies of £75 for accidents taking place in 2011. Note the impact of inflation as this figure was £66 in 2010 and £61 in 2009. It is worth noting that the equivalent figure for 2004 was only £30. *If inflation continues at the average rate seen across 2009 to 2011, the average cost of whiplash claims in 2013 might be expected to be £91 per policy.*

10. We have no specific direct data on what proportion of these claims are "exaggerated, misrepresented or fabricated". We have therefore sought to estimate what the cost of whiplash type claims might be if elements of "excess" claiming were to be removed. We have estimated the level of "excess" claiming in two ways: firstly with reference to the "low" levels of claiming seen in Scotland, where geographical and legal factors have arguably prevented the "excess" claiming seen in England and Wales (Scenario A); and secondly, by reference to what levels of claiming would have been seen in the UK as a whole, had 2007–2011 not seen burgeoning inflation (Scenario B).

11. Before going on to look at these estimates of "excess" claiming, it is worth nonetheless observing that simultaneously with the rise in whiplash claims there has been a reduction in motoring.[1] This drop is likely associated with increases in petrol prices[2] and recessionary factors, but has meant that, with fewer cars on the road, there have been fewer accidents. This was of course over and above a long term trend of reductions in accidents which has largely been attributed to improvements in road safety.[3] As such, any inflation seen in personal injury claims has been partially offset by the benign economic effect. There is of course a risk that a return to normal levels of motoring, absent any measures to tackle the rise in whiplash claims, could mean that the excess inflation seen to date redoubles in the future. A scenario around this risk is considered under the answer to the next issue ("Whether the proposals put forward by the Government, in relation to medical evidence of whiplash and incentives to challenge fraudulent or exaggerated claims, are likely to reduce motor insurance premiums and, if so, to what extent.")

Scenario A: Geographical comparison based on Scotland (low estimate)

12. The stark differences in the geography of bodily injury have already been set out above. Some of these differences may come from the differing nature of accidents in rural and urban areas and the different balances of rural and urban exposure across the various regions. Setting this factor to one side, our national data as a whole has seen a 30% uplift in the proportion of insured accidents since 2007. This compares with Scotland (as represented by Grampian and STV) which saw an uplift of 18%.

13. If we believe that this divergence over the period 2007 to 2011 benchmarks the extent of potential "excess" claiming in England and Wales, we would expect a saving of 9%, or circa £8 per policy. This figure

[1] https://www.gov.uk/government/organisations/department-for-transport/series/road-traffic-statistics
[2] https://www.gov.uk/government/organisations/department-of-energy-climate-change/series/road-fuel-and-other-petroleum-product-prices
[3] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/9280/rrcgb2011-complete.pdf

allows for the higher base of personal injury claims in England and Wales than in Scotland and, thereby, implicitly for differing distributions of urban/rural exposures, but only to the extent seen in 2007. Note also that this assessment is built solely on assessments of the numbers of claims made and does not allow for any differences in average claims amounts: a priori, we should expect such differences to exist, if only because higher claim frequencies might be expected to correlate with higher numbers of claimants on each claim. As such the estimate is likely to be a low one.

Scenario B: Claiming levels if whiplash inflation from 2007–11 was more "normal"

14. As previously mentioned, the overall number of insured accidents has fallen from 2007 to 2011. We estimate that the accident rate has fallen by on average 6% per year over this period. However the frequency of whiplash claims has shown the opposite trend with an average increase of 5.6% per year.

15. Similarly the average cost of each of those whiplash claims has increased by on average 8% per year. This is significantly higher than the average cost inflation experienced from 2004 to 2007, which was around 1.8% per year. The actual inflation rates are shown in the table below.

Year	*TPD Frequency Inflation Actual*	*Whiplash Frequency Inflation Actual*	*Whiplash Average Cost Inflation Actual*
2007			
2008	-6.6%	5.1%	8.9%
2009	-0.2%	9.7%	10.8%
2010	-5.5%	3.1%	4.6%
2011	-11.2%	4.7%	8.0%
Average	**-6.0%**	**5.6%**	**8.0%**

16. We have assessed the impact of following alternative frequency and average cost inflation rates on the current cost of whiplash claims:

Scenario B1—Whiplash frequency followed that of underlying accidents (TPD) from 2008 to 2011, but whiplash severity is unchanged.

Scenario B2—Whiplash severity inflation was 1.8% from 2008 to 2011, in line with earlier inflation rates, but whiplash frequency is unchanged.

Scenario B3—Whiplash frequency followed that of underlying accidents and whiplash severity was at the lower rate of 1.8% from 2008 to 2011.

17. The impact of these alternative inflation scenarios is shown in the table below.

Year	*Whiplash Cost per Policy Actual*	*B1: Whiplash Frequency follows TPD*	*B2: Whiplash Severity is 1.8%*	*B3: Whiplash Frequency follows TPD and Severity Inflation is 1.8%*
2007	44.1	44.1	44.1	44.1
2008	50.5	44.9	47.2	41.9
2009	61.4	49.6	52.7	42.6
2010	66.2	49.0	55.3	41.0
2011	74.8	47.0	58.9	37.0

18. Scenarios B1, B2 and B3 result in a reduction in whiplash claim cost of 37%, 21% and 51% respectively. These translate to savings of £34, £19 and £46 respectively per policy based on our estimate of whiplash claims in 2013 of £91.

19. *We expect the average cost of whiplash type claims to be circa £90 per policy for accidents arising in 2013, assuming that inflation continues at the rate seen across the 2009 and 2011 years. Although we do not have any direct measures of "exaggerated, misrepresented or fabricated" claims, we have assessed these based on norming to either lower whiplash regions (Scotland), or to a time when whiplash was less common (prior to 2007). The results of this norming indicate that between 10% and 60% of whiplash claims may be "exaggerated, misrepresented or fabricated". Based on our estimates of the costs of whiplash claims in 2013, this "excess" cost could be £10–£50 per policy.*

III. *Whether the proposals put forward by the Government, in relation to medical evidence of whiplash and incentives to challenge fraudulent or exaggerated claims, are likely to reduce motor insurance premiums and, if so, to what extent*

20. We have not sought to assess the initiatives specifically and, indeed, do not currently have the data that would allow us to do this. Our response to this question is based on the assumption that all of the "excess" claims identified in question 2 are removed by the proposals.

21. While any initiatives that stem, or reverse, whiplash inflation would help mitigate claims inflations, how this translates into reductions in motor premiums is unclear. We estimate that whiplash claims account for around 20–30% of the total cost of motor claims. The claims inflation on the remaining 70–80% of cost will also have an impact on potential premium changes. And this is particularly the case for large bodily injury claims—claims which are unrelated to whiplash claims. The TPWP has also studied these larger claims and reported on its findings.

22. Large bodily injury claims (>£100k) have experienced material annual inflation over the past number of years. The table below shows the estimated frequency, average cost and cost per policy for large claims (> £100k). While the change from year-to-year is very volatile owing to the low occurrence and the potentially exceptionally large size of these claims, the average cost per policy inflation is 7.7% for large claims. Large claims account for around 20% of the total claims cost.

Accident Period	*Frequency (claims per million vehicle years*	*Average Cost (£000s)*	*Cost Per Policy (£)*	*Year-on-Year Change in Frequency (% pa)*	*Year-on-Year Change in Average Cost (% pa)*	*Year-on-Year Change in Cost per Policy (% pa)*
2004	98	273,881	26.9			
2005	92	296,369	27.2	-6.5	8.2	1.2
2006	83	316,941	26.4	-9.1	6.9	-2.9
2007	84	359,190	30.1	0.6	13.3	14.0
2008	79	396,668	31.3	-5.9	10.4	4.0
2009	85	494,179	41.9	7.5	24.6	33.9
2010	71	443,142	31.6	-15.9	-10.3	-24.6
2011	78	581,015	45.3	9.2	31.1	43.1
Average				**-3.3**	**11.3**	**7.7**

23. The inflation observed for bodily injury claims (both small and large) over recent periods has been offset somewhat by falling costs for motor property damage claims (TPD) resulting from the reduction in the number of accidents previously mentioned. For example, there was an 11% reduction in the frequency insured third party accidents in 2011 compared to 2010.

24. The scope of the TPWP study did not include non third party perils. As such to gain an understanding of overall trends in motor insurance, we have had to use general market knowledge to set assumptions as to the relative significance of the various private motor comprehensive perils as set out below. Similarly allocating them with illustrative indicative inflation levels for the various perils, overall motor inflation is likely to be sitting at circa 5.5% currently. Were the recent decreases in accident trends to reverse (by say 5% over a year) making the accident rate flat, this level of inflation would increase to 11%.

		No initiatives	
Peril	*% of Cost*	*Current Illustrative Inflation*	*Current Illustrative Inflation +5% Increase in Accidents*
Whiplash	26.1%	10.4%	15.9%
Small bodily injury excluding whiplash	13.9%	10.4%	15.9%
Large bodily injury	20.0%	7.0%	12.4%
AP	15.0%	0.0%	5.0%
TPPD	20.0%	0.0%	5.0%
Other	5.0%	0.0%	5.0%
All		**5.5%**	**10.8%**

25. To get an idea of the likely impact of reductions in the costs of whiplash, we have used the four scenarios A and B1 to B3 outlined in our response to question II above. These show that, in the absence of any increase in the numbers of accidents, these would lead to claims inflation of between 3% and -9%. With a 5% increase in the numbers of accidents, the equivalent range would be 8% and -4.5%.

Peril	*Adjustment of Whiplash to Scenario A*		*Adjustment of Whiplash to Scenario B1*		*Adjustment of Whiplash to Scenario B2*		*Adjustment of Whiplash to scenario B3*	
	Current Illustrative Inflation	*Current Illustrative Inflation +5% Increase in Accidents*	*Current Illustrative Inflation*	*Current Illustrative Inflation +5% Increase in Accidents*	*Current Illustrative Inflation*	*Current Illustrative Inflation +5% Increase in Accidents*	*Current Illustrative Inflation*	*Current Illustrative Inflation +5% Increase in Accidents*
Whiplash	0.2%	5.2%	-30.7%	-27.2%	-13.0%	-8.7%	-45.4%	-42.6%
Small bodily injury excluding whiplash	10.4%	15.9%	10.4%	15.9%	10.4%	15.9%	10.4%	15.9%
Large bodily injury	7.0%	12.4%	7.0%	12.4%	7.0%	12.4%	7.0%	12.4%
AP	0.0%	5.0%	0.0%	5.0%	0.0%	5.0%	0.0%	5.0%
TPPD	0.0%	5.0%	0.0%	5.0%	0.0%	5.0%	0.0%	5.0%
Other	0.0%	5.0%	0.0%	5.0%	0.0%	5.0%	0.0%	5.0%
All	2.9%	8.0%	-5.2%	-0.4%	-0.6%	4.4%	-9.0%	-4.4%

26. *As such, if the measures reversed out all the elements of whiplash claiming that we identified as "excess", premiums could be impacted favourably to the extent of 3%–15%* (as per the scenarios). Using the benchmark of the average cost of whiplash claims of £90 per policy, this would amount to *a saving in the range £10–£50 per policy. This saving, whilst significant in itself, would necessarily be countered by other forms of inflation which would themselves be in the illustrative range of 3%–7% pa*. Whilst the impact of the measures would be a one-off benefit (and potentially stem future whiplash inflation), it would not remove those other sources of inflation.

Market Considerations

27. We have previously mentioned that the cost of whiplash claims has increased from £30 for accidents in 2004 to £75 for accidents in 2011. However, the average premium in the market (based on Towers Watson analysis of 2011 FSA returns) did not reflect these increases. In fact, the premium rates fell on average each year from 2004 to 2008, with 2009 showing only a small increase. Premiums increased in 2010 by 5% and in 2011 by 13% as the profitability of the market deteriorated.

28. In addition, it should be noted that as per FSA returns from 2011, the Motor market is not profitable in underwriting terms, with a combined ratio (a ratio of above 100% means the market is paying out more in claims and expenses than it receives in premiums) of 106% (again based on Towers Watson analysis of 2011 FSA returns). Ernst & Young has estimated that the 2012 combined ratio will improve further to 102% based on an analysis of company annual results. Assuming that the market would need to return to a combined ratio of 95% for sustainable profitability, premium inflation would need to outstrip claims inflation by 7%.

29. Despite the current levels of profitability in the UK Motor market, premium rates have been falling since the second half of 2011 with Private Car Comprehensive premiums 12.7% lower at the end of 2012 compared to the end of 2011 (as measured by the Confused.com/Towers Watson Car Insurance Price index).

30. *As such the impact of the measures, whilst material and favourable, may not necessarily lead to any material reduction in premiums. The actual impact will however depend on the competitive behaviours of insurers and the level of inflation on other types of claims.*

31. It should be noted that our analysis considers only national changes in premium and is not focused on particular segments. It is possible, and indeed likely, that *those segments exhibiting higher levels of excess claims will see proportionate premium benefits if measures are successful.*

32. If you wish to discuss any of the issues raised in this response, please contact Philip Doggart, Policy Manager at the IFoA (Philip.Doggart@actuaries.org.uk; or 0131 240 1319).

April 2013

Written evidence from Lloyd's Market Association (WL 42)

About the LMA

The Lloyd's insurance market underwrites insurance business from over 200 countries and territories worldwide. In 2012, premium capacity was in excess of £24 billion.

The Lloyd's Market Association (LMA) represents the 57 managing agents at Lloyd's which manage the 90 syndicates underwriting in the market, and also the three members' agents which act for third party capital. Managing agents will be "dual regulated" firms by the Prudential Regulation Authority (PRA) and Financial Conduct Authority (FCA) and members' agents will be regulated by the FCA.

We appreciate the opportunity to contribute to this discussion. Whilst this response is distilled from the views of our members, the views of individual members may differ.

1. Summary

1.1 The LMA welcomes the Transport Committee's consideration of this important issue, and we strongly support measures that would decrease the costs associated with fraudulent whiplash claims.

1.2 Before we can reduce the cost of exaggerated and/or fraudulent claims, it is necessary to understand why there are so many of them. We believe that the high frequency of false/weak claims occurs for the following reasons:

(1) Many people see making a personal injury claim as an easy way to get some money. This avenue is especially attractive in the current period of economic difficulty.

(2) The advent of no-win, no fee legal advice (introduced by Government reforms to legal aid in 1999) has meant that claimants can make a claim, at little or no risk (financial or legal) to themselves if their claim is unsuccessful.

(3) The legal barriers to making a successful whiplash claim are extremely low; the accepted legal evidence of causation and injury is entirely based on doctors describing self-reported symptoms. The current process does not:

— produce meaningful legal evidence that can be fairly evaluated by comparison with a peer group, and challenged where appropriate by defendants;

— require any serious counter-fraud measures; and

— require the measurement and audit of prognoses given by doctors, who are implicitly encouraged to give overly cautious advice, reinforcing weak claims.

(4) Attracted by the referral fees and legal fees (reduced recently), an entire claims manufacturing/servicing industry has developed, which is entirely focussed on recruiting potential claimants and pushing them through the compensation system. Potential claimants are continually pestered by agents and adverts into making a claim. Some insurers and insurance brokers have also developed dysfunctional business models that encourage claims, generating referral fee income and loading cost onto their competitors.

1.3 Several of the reforms in the LASPO Act are addressing some of the issues set out in points 2 and 4, but not the remaining issues, particularly those set out in point 3, which form the focus of the Ministry if Justice's recent consultation. This is why we believe that further Government-led reforms are necessary to increase the barrier to compensation for fraudulent, exaggerated and weak claims.

1.4 Specifically the LMA believes that further Government action is required, and supports:

(1) Increasing the Small Claims Track (SCT) for injury claims to £5,000, to reduce the cost of processing or defending simple claims.

(2) Introducing a new fit-for-purpose medico-legal process, with better governance over the cost, production and content of medical reports, including better categorisation of whiplash patients.

(3) A new public tariff of damages setting out the amount payable for whiplash claims, to aid claimants in valuing their claim without needing expensive legal advice.

(4) Limitation for whiplash claims to be reduced from three years to six months, or for lower damages to be paid in the event of late notified claims.

(5) A new public debate on the appropriate level of damages for whiplash claims.

1.5 The above changes, combined with the effects of the LASPO Act, and the recently announced reduction to fixed recoverable costs, should be sufficient to reduce the frequency and cost of (low value) motor claims in the next few years, which should facilitate lower premiums for customers. The effects of these reforms should be closely monitored, and reviewed after three years (given the ultimate effect on prices is hard to predict), and adjustments made as appropriate to ensure that sufficient unnecessary costs and abusive behaviours have truly been engineered out of the compensation process.

2. Responses to Questions

Whether the Government is correct in describing Great Britain as the "whiplash capital of the world"

2.1 Yes. In our view this statement is unfortunately correct. Although we do not have any new data to contribute to the debate, it is apparent to us that we are in the midst of an epidemic of whiplash claims, a problem that is largely unknown in many comparable European countries.

Whether it is correct to say that the costs of whiplash claims add £90 to the average premium and, if so, what proportion of this additional cost is due to "exaggerated, misrepresented or fabricated" claims?

2.2 Yes, we believe this statement is correct, as calculated by the ABI.

2.3 In terms of what proportion of claims are fraudulent, it is hard to say with any precision, and the lack of a clear, objective test for whiplash injury makes it extremely difficult to judge whether or not claims are valid. Further, the volume of fraudulent whiplash claims also depends on the book of business in question, the counter-fraud resources available to the insurer, and how each insurer defines fraudulent claims. Great variability from one insurer to the next is common.

2.4 For example, one LMA member has reported a rate of fraudulent claims of between 2% and 2.5% of total claims over the last three years. However, another LMA member reported that over a recent 18 month period they investigated 8.3% of injury claims arising from their fleet book as suspected fraud, and 15.5% of personal injury claims arising from their private car account. NB In the latter case subsequent savings against initial reserves of over 20% has been realised to date.

2.5 In summary it would be fair to say that every insurer expects a proportion of whiplash claims to be fraudulent, and the cost of investigating and repudiating can be significant. One LMA member advised that the average value of fraudulent cases increased from £8,368 in 2009 to £11,048 in 2012, indicating that the problem is worsening.

2.6 Further, one of our members recently provided us with a case study, indicating that the general damages claimed for whiplash only formed a part of the overall cost of a claim (which was successfully repudiated in this instance). Following a single (fictitious) accident the insurer faced three whiplash claims, each reserved at £2,500 for general damages, and a further £2,500 in costs (per injury), totalling £15,000. A further claim of £4,000 for vehicle damage was submitted, £2,000 for storage costs, and £10,000 for provision of a replacement vehicle via a credit hire arrangement. Whilst the entire claim was successfully repudiated in this case, the incurred cost to the insurer of investigating, compiling evidence and taking legal advice would have been considerable—perhaps £10,000 or more.

2.7 A major difficulty is that the low barrier to success for whiplash claims, and the high cost of opposing them, often makes it uneconomic for defendants to mount a legal defence, even where the claims are very weak. In the above case, the insurers had a clear financial justification to spend £10,000 defending the case because there was £31,000 at stake. In most basic whiplash claims the general damages are around £2,500, where the insurer cannot justify the cost of a bespoke counter-fraud inquiry. What we need is a robust system of evaluation, where fraudsters are deterred from submitting false claims by the medico-legal evidence required, and/or lack of financial benefit. (See recommendations at 1.4).

Whether the proposals put forward by the Government, in relation to medical evidence of whiplash and incentives to challenge fraudulent or exaggerated claims, are likely to reduce motor insurance premiums and, if so, to what extent

2.8 This is very difficult to predict. The reforms referred to (SCT increase, better regulation of medics) are still proposals. The LMA supports these proposals, and believes that these measures should help reduce costs, which will quickly be reflected in premiums. In our response to the recent MoJ consultation we made the following key points:

- We support the proposal to *extend the small claims track (SCT) to £5,000 for personal injury claims.* We agree with the MoJ that it is possible to increase the SCT to enable fast and cheap resolution of low-value claims, whilst protecting claimants' interests and promoting access to justice.
- Medics and claimants need a *better medico-legal process* to use, based on establishing clear legal facts not just an improvement to governance and efficiency. The current process is badly flawed, with medics providing overly cautious prognoses, and reports that are not fit for evidencing common law claims.
- A *tariff of damages* should be introduced, linked to better categorisation of whiplash diagnoses. This will enable simple valuation of claims. The tariff could be based on a measurable metric such as number of weeks of disablement (for example), as is used in the Government's Criminal Injuries compensation scheme.
- *Limitation for whiplash claims should be reduced* to six months, or alternatively lower damages should be awarded to claims brought >6 months post-accident.

Raising the bar to compensation—a new medico-legal process is needed to produce better evidence

2.9 The content of current medico-legal reports is heavily standardised (insurers see thousands of reports where only the name of the claimant and date of accident are different), and yet *the medical evidence is usually extremely weak*—entirely based on a description of claimant reported symptoms, and the exams often take place many weeks, months or even years after the accident in question. There is rarely adequate *proof* that the claimant is injured, and that the injury was caused by a traffic collision, but many of these claims are impossible to defend successfully as the current legal test of proof is so low. Extremely lenient decisions at Court have also hampered the legal defence against weak claims (see *Barker v Watkins,* 2006 for example).

2.10 A new process is needed to correctly diagnose whether or not the claimant is injured, by comparison with the health of their peer group (NB There is now sufficient precision in the scientific literature to ensure that this comparison can be made accurately and appropriately, and this process can be audited). NB The legal test should assume that, in absence of evidence to the contrary, the claimant's condition is the same as that of his peer group. This test should be robust, requiring strong evidence in order for a claim to succeed, bearing in mind the burden of proof lies with the claimant.

2.11 A new process should require the doctor to make an accurate medical judgement on the prognosis of the claimant. This judgement should be auditable against the available scientific data, to ensure that only medics that give accurate and realistic prognoses are retained on the independent panel. Doctors who give prognoses that wildly exceed those indicated by the scientific literature should be challenged.

2.12 *Re Timing of examinations:* If the medical exam is to be of any use in providing the legal evidence to prove or disprove a claim, it must take place as soon as possible after the incident in question. It is worth bearing in mind that whiplash symptoms are acute, generally presenting within 24–48 hours of an accident. The introduction of reduced limitation for whiplash claims would also help ensure that doctors are not asked to produce a report on a claimant long after the alleged accident.

2.13 *Governance:* We also see it as very problematic that some claimant solicitors, who have a financial interest in the successful outcome of claims, have strong financial links with medical reporting organisations. Such links bring into question the independence of medical reports produced from this source.

The likely impact of the proposals on access to justice for claimants who are genuinely injured

2.13 There are several safeguards to access to justice contained in the proposals to increase the small claims track:

- The making of offers to unrepresented claimants by insurers is regulated by the FCA, with regulations requiring insurers to treat these claimants fairly, and not to differentiate between treatment of third party claimants and first party claimants (who are very rarely represented).
- Judges in the Small Claims Track are already tasked with ensuring that all unrepresented claimants are fairly treated.
- The publication of a tariff of damages would aid inexperienced claimants in valuing offers from insurers—in the same way that motorists currently use vehicle value guides (such as Parkers or Glass's Guide) to assess offers from insurers when their vehicle is being written off. This could be supported by better categorisation of claimants' injuries—this should be reviewed and new best practice developed.
- The Small Claims Track is suitable for resolving low-value, simple claims. Where a claim is complex, it should be escalated into the appropriate Court track, and independent legal advice (with recoverable legal fees) can be offered to the claimant.
- We recognise that many claimant solicitor firms will oppose these measures, and may cite a risk re access to justice. It is our view that in a large proportion of claims valued <£5,000 there is simply no need for legal advice, as long as the process is simple enough for unrepresented claimants to follow, and they are fairly treated by the defendant, and they are able to check if the settlement offer made to them is fair and reasonable. There is no reason why the existing RTA Protocol cannot be amended to support an SCT process, operating quickly and efficiently on a low-cost basis without compromising the rights of unrepresented claimants.
- NB It should be remembered that the existing system is flawed, and is failing stakeholders. Helen Grant MP remarked on this specifically in the recent MoJ consultation, pointing out that the Government shares the widespread concern over the disproportionate growth in claims, and the effect that rising insurance premiums has on individuals, families and businesses.

Whether there are other steps which the Government should be taking to reduce the cost of motor insurance

2.14 To re-iterate, we would support:

(1) Increasing the Small Claims Track for injury claims to £5,000, to reduce the cost of processing or defending simple claims.

(2) Introducing a new fit-for-purpose medico-legal process, with better governance over the cost, production and content of medical reports, including better categorisation of whiplash patients.

(3) A new public tariff of damages setting out the amount payable for whiplash claims, to aid claimants in valuing their claim without needing expensive legal advice.

(4) Limitation for whiplash claims to be reduced from three years to six months, or for lower damages to be paid in the event of late notified claims.

(5) A new public debate on the appropriate level of damages for whiplash claims.

April 2013

Written evidence from Premex Services (WL 25)

INTRODUCTION

1. This written submission has been prepared by Premex Services in response to the Transport Select Committee's current inquiry into whiplash.

2. Formed in 1996, Premex Services is the leading provider of independent medico legal reports for the insurance and legal sector. In 2012 Premex produced 124,371 medical reports using a panel of 2,500 independent medical experts. Premex has an estimated market share of 20% of all the medical evidence produced for personal injury cases.

3. About Premex:

(i) Premex receives instructions from both insurance companies and claimant lawyers, and uses the same expert panel to produce the medical reports.

(ii) Premex has invested considerably in its IT systems and infrastructure, which has streamlined the medical evidence procurement process significantly. These systems include an online appointment and diary management system for customers and medical experts. Report writing software (X-Port) is also used by GPs; this delivers a standardised report, detailing all the relevant information set out in RTA3 (The MOJ compliant medical reporting format) in a consistent format.

(iii) Premex is Sarbanes Oxley compliant and is working towards ISO 27001.

(iv) A founding signatory to the MRO Agreement between the insurance industry and MRO's (relating to the cost of volume medical evidence) which was introduced in 2007.

(v) Premex now employs over 350 people and in 2012 it created 60 new jobs at its head office in Bolton. It was awarded Investors in People, Gold Award, upon reaccreditation in 2012.

(vi) Premex has a panel of medical experts which spans all disciplines and who are paid an agreed commercial rate regardless of the outcome of the case. Premex also pays its experts significantly in advance of when it itself receives payment of its fees.

(vii) Medical experts in the most part are selected by Premex based upon speciality, geographical location and waiting times.

Independence is a cornerstone of Premex's business ethos, something that is reflected in the wide range of opinion and medical prognosis periods delivered by its expert panel.

(viii) Premex has developed a medical expert accreditation, The Certificate in Medical Reporting (CertMR). This industry kite mark ensures that medico legal experts have the required expertise and knowledge of their obligations under the Civil Procedure Rules, and are aware of all current best practice, and guidelines around the diagnosis of whiplash type claims.

3. As the leading provider of medico legal reports, Premex holds a meaningful underlying data set relating to whiplash type injuries and associated prognosis periods. To the best of our knowledge, this is the largest data analysis of its kind involving some 279,148 "whiplash" type injuries. Whiplash reports have been defined as an injury sustained to the shoulder, neck and/or spine and have been compiled by a General Practitioner through the X-Port software.

4. In March 2013 Premex submitted a response to the MoJ's consultation paper "Reducing the number and costs of whiplash claims". Premex is fully supportive of positive reform and believes its recommendations regarding some proposed evolutionary changes would materially improve the quality and independence of medical evidence in PI claims.

EXECUTIVE SUMMARY

5. Whilst there may be some issues with the current system for obtaining evidence, we do not believe it is irrevocably broken or flawed.

6. There may be some reporting where the opinion of the expert is influenced by the source of the instruction but this is a minority and this could be addressed by appropriate accreditation, auditing, sanction and separation of the expert (or MRO) from any "connected party" relationship.

7. Experts may currently have difficulty in determining the veracity, or otherwise, of the claimants injuries due to a lack of evidence other than the verbal account of the index accident, injuries and previous problems from the claimant. More information could and should be sent to the expert at the time of instruction.

8. The analysis of a significant data sample from Premex relating to neck, back and shoulder injuries and their associated prognosis periods does not support the view or suggestion that experts in whiplash type cases routinely provide an elongated prognosis for recovery. The notion that the current system does not allow experts to act independently is clearly inaccurate and should not be applied to all individuals and organisations.

9. There is a risk, which should not be ignored, that a revolutionary change to the current way in which medical evidence is obtained will not in fact lead to the savings anticipated and could in fact, perversely, create additional costs that wipe out any savings. This would clearly mitigate against the idea that a new system would ultimately lead to reduced Insurance premiums.

10. There are simpler evolutionary developments that would create a change in culture for both experts and claimants that would address several of the shortcomings in the current system, making it harder for both experts and claimants to knowingly act inappropriately. These changes would reduce the overall cost burden to the Insurance industry without destroying the legitimate, independent, organisations and individuals that in recent years have revolutionised the way in which medical evidence can be obtained in an efficient, objective and cost effective manner.

Section 1—The Link Between Insurance Premiums and Medical Evidence

11. It is first worth forging a link between how the proposals outlined in the government's whiplash inquiry could reduce premiums.

12. The proposals would have to achieve one or more of the following to reduce the overall cost to the Insurance Industry of "Whiplash" which would, in theory, then create the ability to reduce premiums.

(1) A decreased ability for claimants to attend medicals and convey misleading information about accident circumstances, previous relevant injuries/medical problems or the extent of injuries sustained.

And/or

(2) An increase in the number of claimants seen by medical experts who are assessed and subsequently determined to have not suffered ANY injury at all as a result of the index accident.

And/or

(3) A decrease in the average prognosis period for full recovery if the medical expert believed that the claimant did suffer an injury (which would lead to a reduction in General Damages).

And/or

(4) A decrease in the cost of medical evidence used in whiplash cases.

Section 2—Medical Reporting—The Good and The Bad

13. The key implication of the consultation on medical evidence is that there is an endemic problem with the integrity of medical experts and their evidence that, if addressed, will lead to one or more of the above coming to pass. Equally there has been some suggestion, which we fundamentally disagree with, that the current medical process has been a factor in the increased claims numbers in recent years. We do not see any link between the two and are not aware of any evidence to support any such assertion.

14. Whilst we believe there are probably some individuals and organisations, that produce medical evidence, that may be behaving inappropriately, (eg, accepting the claimant was injured when, on the balance of probabilities, they feel they were not or by offering an unrealistically protracted prognosis for recovery) we do not believe this is an accusation that can or should be levelled at all individuals or organisations with a broad brush.

15. An analysis of 279,148 injuries assessed in Premex's GP reports over the past 36 months containing shoulder, neck or back injuries reveals that only 6% of injuries had prognosis periods of > 12 months, 62% had prognosis periods of less than six months, and 13% had prognosis periods of less than one month.

Table 1

PROGNOSIS PERIOD BASED ON WHIPLASH TYPE INJURY (LAST 36 MONTHS)

An injured party may have sustained an injury to more than more one area of their body, this table illustrates the prognosis period of each diagnosed injury.

Body Part	*Up to 1 Month*	*1–3 Months*	*3–6 Months*	*6–9 Months*	*9–12 Months*	*Over 12 Months*	*No Prognosis*	*Grand Total*
Grand Total—count	37,166	36,408	99,464	56,539	26,064	15,616	7,891	279,148
Grand Total—Percentage	13%	13%	36%	20%	9%	6%	3%	100%

16. We are concerned that dramatic changes might be implemented that could "throw the baby out with the bathwater" without actually achieving the objective of reducing premiums.

17. We believe that there are elements of the consultation that have the potential to deliver improvements that would have an impact on some, if not all, of the four points above, however, we believe that these benefits could and would be achieved by evolutionary rather than revolutionary change.

18. In attempting to answer the key question *would changes to the medical process reduce premiums and to what extent*, our view is that progress on all of the above four areas ought to lead to a reduced cost burden for Insurers. The extent to which those savings would be passed on in the form of reduced motor insurance premiums can only be a matter of conjecture. The possibility that significant changes could be introduced which ultimately would not lead to a reduction in premiums is not one that can be ignored.

19. At a very high level, if the ABI's figures are correct in suggesting that £90 of every motor premium is paid out in relation to "whiplash" injuries then the reduction in the overall cost burden by changes to the process for obtaining medical evidence would have to be substantial in order for that to make any such changes worthwhile. This is without considering the potential that a radical change might in itself create additional costs as an unintended consequence.

20. If a radical, rather than evolutionary, new process brought with it consequences such as increased cost of evidence, delays in the speed with which evidence is obtained leading to a longer claims process, or a culture of claimants feeling they have been assessed unfairly, then it is not difficult to see how that potential to reduce premiums might easily be wiped out by increased costs elsewhere in the process for Insurers.

Section 3—Evolution not Revolution

21. Our view is that there are in fact a number of ideas that could be introduced in an evolutionary manner which, without completely reinventing the wheel, would have the potential to address one or more of the requirements outlined at the start of this paper.

22. In order to give some context to the suggestions that will follow, it probably merits outlining some of the shortcomings in the current system that may be creating the misconception that all medical experts, or the MRO's that instruct many of those experts, are not acting with honesty and integrity and therefore need "dealing with".

23. *Difficulties with diagnosis:* "Whiplash" is a generic term which describes a mechanism of injury…… .not the injury itself. Symptoms can be caused by damage to muscular, ligamentous, nerve, intervertebral disc, vascular and bony structures. There exists no definitive method of confirming the presence or absence of a "whiplash" type injury and, as with many medical conditions, the history of the patient along with the training and clinical experience of the Dr is critical in reaching a diagnosis. The lack of a definitive test is a factor that would not be changed by any of the MOJ recommendations but the search for some such test is obviously something that should be pursued and supported.

24. It is interesting to note that prior to the implementation of the Civil Procedure Rules in 1999 (the Woolf reforms) when the process for obtaining medical evidence was much more adversarial, with "hired gun" experts prevalent, it was in fact rare that a defendant expert acting on behalf of an Insurer or defendant law firm would suggest that there was no injury at all sustained. Typically they might suggest that injuries were not as bad as purported, or were not entirely due to the index accident but due to some constitutional or pre-existing problem, but rarely would a report come back saying "I don't believe they suffered any injury at all". If that was happening in the context of a much more adversarial system then the extent to which experts in a new process would be able to say that there was "no injury" must be considered.

25. *Experts working with limited information/Claimants able to give misleading information to expert:* The current system typically involves medical experts being asked to assess claimants with very limited information, in fact typically just the claimant's account of the accident and subsequent injuries. Given that the history is so important when assessing any medical condition, if this history is deliberately misleading then the expert is clearly going to be working with one hand tied behind his/her back when determining if the injuries outlined are consistent with the index accident. Whilst one or both parties may well know about previous accidents,

injuries or medical problems and, similarly, will have a good account of the index accident (albeit there may be two differing versions), it is typical that the examining Doctor rarely has access to that information. Similarly, on occasions when the expert might feel reviewing medical records would be informative that rarely happens as there is currently a "presumption" that medical notes will not be seen.

26. *"Connected party" relationships:* The duty of the expert is to the court. When the relationship between expert and any party involved in the claims process itself (such as solicitor, Insurer, Claims Management or Accident Management company) is too close then there exists, at the very least in perception if not in reality, a risk that the expert may come under pressure to produce reports that favour one party or the other (depending on who is doing the instructing). There are independent MRO's that provide medical evidence for both claimant and defendant organisations, using exactly the same experts irrespective of the source of instruction, who are able to offer truly independent evidence. If the source of instruction is connected to, or owned by, a party that has an interest in the claims process itself, then clearly there is potential for a conflict of interest. There has been an increase in recent years in the number of close relationships of this type which could be contributing to a perception of a lack of independence. Further, the recently announced reforms regarding significantly reduced legal costs has already driven a growth in the number of solicitor and CMC owned medical reporting organisations, presumably as these businesses seek to replace income lost through the cost reforms.

27. *Lack of accountability:* Currently, if an expert is not acting honestly and with integrity there is a low chance of that expert being taken to task. It is rare, especially in the low value RTA arena, that cases go to court and therefore little likelihood of a judge censuring or criticising an expert if he has clearly given an inappropriate opinion. There is no formal method of accreditation, no peer review or audit and no route by which experts can be sanctioned or prevented from undertaking medico legal work. In essence a "bad" expert (either one acting without the necessary level of expertise or one offering an inappropriate opinion) can effectively undertake this work with impunity.

28. *"Pre-med" offers:* A not insignificant percentage (estimated about 20%) of cases are settled by Insurers where an offer is made without the claimant undergoing any sort of medical assessment. This can only create a perverse culture where dishonest claimants may pursue a claim knowing there is a distinct possibility they may not even have to describe their accident and injuries face to face with a Doctor. The medical examination is often the only face to face interaction a claimant has during the entire claims process and as such is a significant hurdle for a potentially fraudulent claimant to overcome. "Pre-med" offers may well be a factor in the rise in claims numbers as it can be argued that such offers encourage the so called "have a go" culture.

29. *Excessive prognoses:* There are some that take the view that the experts who currently prepare medico-legal reports are in the habit of always offering an excessive prognosis for recovery, irrespective of the severity of the injury. Comments along the lines of "all reports are the same and always offer a prognosis of 12–18 months" are often bandied about and, as is often the case, if stated frequently enough move from being "anecdote" into "fact" and thereby become "proof" that the current system is irreparably broken and needs revolutionary reform. Whilst there are undoubtedly examples of such inappropriate behaviour, which is allowed to persist by virtue of the previously stated lack of peer review and audit, this is not an accusation that can or should be levelled at one and all.

Section 4—Recommendations

30. All of the issues outlined above demonstrate that the process clearly has room for improvement. Fundamentally we are, however, of the view that these issues could be addressed by evolutionary rather than revolutionary change. The larger MRO's have brought much to the procurement of medical evidence in terms of efficiency, reduction in timescales and cost control. Huge sums have been spent developing IT systems and processes that all stakeholders benefit from. The fact that all the major personal lines insurers use the services of the large, independent, MRO's should not be ignored. They would not do so if they felt that reports were unsatisfactory.

31. In terms of the evolutionary changes that we believe would create greater confidence in the system, without essentially scrapping everything that currently exists; they are driven largely by the issues outlined above.

32. These include:

(i) *Accreditation of experts and MRO's:*

Experts should be able to demonstrate a suitable knowledge of the relevant laws and rules relating to their role. Similarly they should have a good understanding of the research into, and current thinking about, the injuries they are expected to assess. In the case of MRO's, they should be required to demonstrate true independence from any party involved in the claims process.

(ii) *Peer review/audit of experts:*

A system of random and targeted review of experts and their reports by a body independent of the organisation providing the report should be introduced. This would address the frustration that no doubt exists where Insurers feel powerless to challenge experts they believe are reporting

dishonestly. The "threat" of review would almost certainly lead to a cultural shift in the thinking of those experts who are not behaving appropriately.

(iii) *Sanction:*

The accreditation and review process would create the evidence to then impose sanctions on those experts not behaving properly with the ultimate sanction being a loss of accreditation (so they couldn't report any more) and reporting of the expert to the General Medical Council.

(iv) *Banning of connected party relationships:*

Organisations and individuals would be obliged to sign a statement of truth to confirm they were not owned by, or too closely connected to, any other organisation or individual actively involved in the claims process. This would remove the risk of any perverse incentive that might be brought to bear on experts.

(v) *More information to experts:*

Experts should have access to both parties account of the accident, not just the claimant's account. Similarly, experts could be told in advance of any history of previous accidents/injuries that the compensator and/or solicitor are aware of. Both of the above would mitigate against the claimant giving a knowingly dishonest account of the index accident and previous injuries/ claims. On a similar theme, experts who feel that a review of medical records would be appropriate either because they have doubts about the honesty of the claimant or because of previous medical history, should be allowed to see those notes. Currently there is a presumption that notes will not be reviewed in lower value cases.

33. There are other ideas that would also help address the perceived problems including the introduction of capped fees into the Civil Procedure Rules for the reports most commonly obtained for these injuries. "No medical, No damages" is also an idea that would address those claimants who may have been led to believe that a claim can be pursued and settled by simply filling in a form and waiting for an offer to be made, which as outlined above does occur in a significant percentage of cases.

April 2013

Written evidence from Dr Andre Brittain-Dissont (WL 32)

INTRODUCTION

1. Dr Andre Brittain-Dissont is the owner and managing director of Dr Brittain-Dissont Medico-Legal Reporting. The practice runs clinics in Liverpool, Manchester, London, Birmingham, Cheshire and Wigan.

2. Dr Andre Brittain-Dissont qualified from Liverpool University in 1994 as Bachelor of Medicine and Surgery. After working In Emergency Medicine and Psychiatry he worked as GP from 2001 till 2009, Medical Officer for the Littlewoods Group and Physician for Everton Football Club before becoming a medico-legal expert.

3. He founded his medico-legal practice in 2008 and deals with personal injury, work related accidents and clinical negligence.

4. The company works with the following sectors: Insurance, Personal Injury Litigation, Healthcare, Medical Malpractice.

COMMENTS ON THE INQUIRY

5. As the Transport Select Committee seek to understand the reasons for the very high cost of motor insurance and consider steps to bring that cost down it is hoped the following observations on the role of medical assessments in the insurance process following an RTA are of help.

6. The gold standard of medical assessment in a personal injury claim should be an accurate, complete, bespoke report by a competent, qualified, independent medical expert.

7. The independence of court experts is enforced and guarded by the Civil Procedure Rules. In each report doctors make a declaration that their first duty is to the court. To breach that duty can result in prosecution. Safeguards therefore already exist to ensure the integrity of an independent medical report.

8. In recent years, collusion between larger medical agencies and insurers has resulted in something of a race to the bottom in terms of doctors' fees. No doubt as a consequence of this the overall quality of reporting suffered.

9. Where poor practice exists from medical experts, the expert faces the wrath of the court, their own medical insurer or protection society, the GMC and their overall professional standing.

10. The Committee members may find it of value to attend a medicolegal clinic conducted by a PI solicitor's medical expert to observe "at the coalface" the way in which claimant's present, the reasonableness of that

presentation and the real world problems that develop from these injuries. The impact of these injuries are often minimalised or rejected by insurers.

11. Pre medical financial offers undermine the integrity of an RTA claim and will logically result in an increase in fraudulent behaviour. Such offers bypass the claimant being assessed by an independent medical examiner with a duty to the court. The offer negates any objective assessment of the claim.

12. Whether an individual claimant should be assessed by one doctor or multiple doctors is certainly a matter for debate. The obtaining of the claimant's then defendant's medical reports appears to waste time and increase costs. Where there is potential argument from the outset, it may well be that these joint assessments are of more help the court, less expensive and more fruitful than two separate reports obtained in isolation.

13. In many circumstances the medical expert will put forward a report which raises concerns about the reliability and plausibility of the claimant's presentation leading to early termination of the claim before defendant solicitors or insurers become involved. The medical assessment therefore represents an important filtering process.

14. Large training companies are now offering medicolegal qualifications which involve doctors undertaking hours of training per year in medicolegal issues and topics. One would expect this to improve the quality of medical reporting as a whole.

15. Pro forma medical reports already exist. In general, these strictly computer generated reports are regarded by barristers and lawyers alike as a poor tool for use by the court and judge. This is because the language and conclusions are identical from report to report and rarely give a bespoke picture of a unique claimant with individual problems. A superior system is a bespoke medical report that follows routine headings but allows the medical expert freedom to personalise the report in order that a judge is able to view the claim from a holistic perspective and not just an anatomical injury. A sprained little finger in an insurance office worker can provide little impediment but for a professional violinist, it can be career ending.

Conclusion

16. There is a strong and ethical medicolegal industry in existence in the UK who's first duty is to the court.

17. Pre-medical settlements by-pass a medico-legal report and do not allow for objective assessment of any injury resulting from an RTA.

18. The Committee are invited to attend a Medico-legal clinic to witness the process, manner of injury and impact of injury on an individual's life.

April 2013

Written evidence from the Association of British Insurers (ABI) (WL 43)

The Association of British Insurers (ABI) is the voice of the insurance and investment industry. Its members constitute over 90% of the insurance market in the UK and 20% 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.

Background

1. The insurance industry has always been committed to ensuring that those injured in road traffic accidents (RTAs) receive the compensation and support that they need as quickly as possible. A small number of whiplash injuries can be debilitating, and many claimants have the evidence to demonstrate the nature and extent of their injuries. But there are many opportunists who file fraudulent or exaggerated whiplash claims in the hope of securing compensation from an insurer—a cost that ultimately leads to higher car insurance premiums for everyone.

2. There are a number of contributing factors that have led to the rise in whiplash claims. The first factor is the dysfunctional compensation system which has led to a growing compensation culture in the UK. Aggressive marketing by Claims Management Companies (CMCs) and referral fees paid by claimant solicitors (the latter was banned from 1 April 2013), have led to an increasing number of personal injury claims in general, and whiplash claims specifically.

3. Funding arrangements in civil litigation, namely Conditional Fee Agreements (CFAs) which allow for success fees that are recoverable from the paying party and the recoverability of "After the Event" (ATE) insurance premiums have led to a "have a go" attitude in personal injury claims. The claimant has nothing to lose; they can make a claim safe in the knowledge that there will be no financial repercussions, even if they are unsuccessful. The excessive legal costs for low value personal injury claims also serve as an additional incentive for CMCs and claimant solicitors to generate claims by, for example, advertising in hospital waiting rooms or sending spam text messages. When combined with the difficulties insurers face in fighting fraudulent or exaggerated claims, there have been few effective barriers to claimants making whiplash claims Although ATE insurance and success fees are no longer recoverable (replaced by qualified one-way costs shifting and a

10% uplift in general damages) combined with reductions in fixed legal fees for claimant solicitors (from 30 April 2013), it is too early to say what impact this will have on the UK's entrenched whiplash claims culture.[4]

4. The second reason for the increase in the number of whiplash claims in recent years, which has contributed to the first, is the lack of an objective test for "minor" soft tissue (or "whiplash") injuries. Minor whiplash is like a headache or backache: it is self-reported with no physical evidence of injury and, as a result, is notoriously difficult for insurers to challenge. The term "whiplash" is itself problematic. "Whiplash" is a description of the movement of the head and neck leading to injury, not the injury itself. A soft tissue neck sprain which occurs in an RTA is clinically indistinguishable from other sources of neck pain. This means that whiplash claims can be paid out by insurers on no more objective evidence than the word of a claimant that they suffered an injury in an RTA.

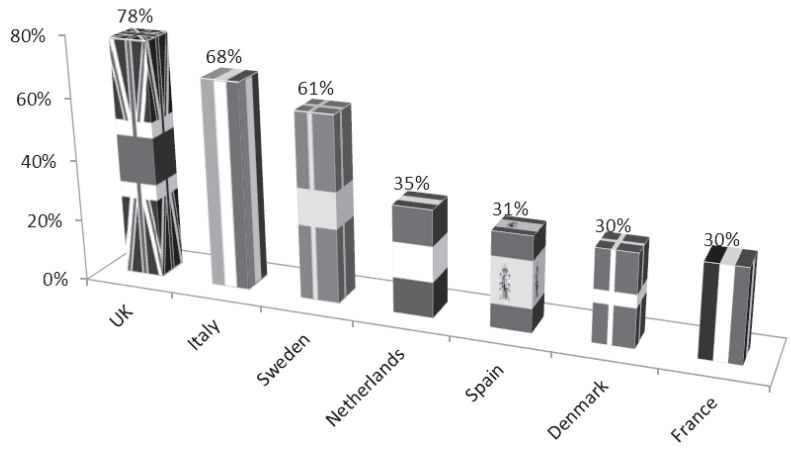
Is it correct in describing Great Britain as the "whiplash capital of the world"?

5. Yes. Although the lack of an objective test for minor whiplash injuries is an international problem, it is the UK's civil litigation system and wider compensation culture which has led to the steep rise in whiplash claims in recent years.

6. Research carried out by the European Insurance and Reinsurance Federation (now Insurance Europe) in 2004 showed that, at 76%, the UK had twice the average percentage of whiplash claims as a proportion of personal injury claims compared with the European average. The ABI has carried out further research with a number of insurance federations across the EU and the overall position has changed little since 2004. The UK (78%) still has substantially higher than average percentage of whiplash claims as a proportion of personal injury claims, than our EU counterparts (48%).

Chart 1

INTERNATIONAL COMPARISON[5]



[4] See Legal Aid, Sentencing and Punishment of Offenders Act 2012 and https://consult.justice.gov.uk/digital-communications/extension-rta-scheme

[5] Information has been supplied by the ABI, the Danish Insurance Association, Insurance Sweden, Dutch Association of Insurers, Unespa, Fédération Française des Sociétés d'Assurances, ANIA. The Hungarian, Austrian and German Insurance bodies were unable to supply data on whiplash as they do not capture the information as it is not seen to be a problem in their countries.

Is it correct to say that the costs of whiplash claims add £90 to the average premium and, if so, what proportion of this additional cost is due to "exaggerated, misrepresented or fabricated" claims?

Cost of whiplash

7. The motor insurance industry paid out £10.7 billion in claims in 2011, of which whiplash claims cost approximately £2.2 billion.[6] While there are a number of factors that affect the price of a premium, and individual insurers will price their policies differently, the cost of claims is highly indicative of the overall level of premium that an average motorist can expect to pay. The average paid premium in 2011 was £440.[7] With whiplash claims representing 20% of overall claims expenditure, this represents approximately £90 of the average premium.

Exaggerated and frivolous claims

8. Although there was a 20% decrease in the number of injuries reported to the police in accidents between 2006 and 2011, data from the Institute and Faculty of Actuaries[8] shows a 40% increase in the number of third party injury claims over the same period. This inverse relationship demonstrates that it is the incentives in the compensation system that results in whiplash claims rather than a change in the underlying risk.

9. The ABI does not have information related directly to exaggerated, misrepresented or fabricated whiplash claims. The fact that there is no objective test for whiplash will often make it almost impossible for insurers to fight a whiplash claim they believe to be fraudulent or exaggerated as they have to accuse the claimant of fraud. The effect of this is to shift the burden of proof from a civil standard ie the balance of probabilities, to the criminal standard of proof, ie beyond reasonable doubt. As such, insurers will generally only fight claims when there is a compelling case of fraudulent behaviour.

10. It would be helpful for the judiciary to take a stricter approach to frivolous whiplash claims when the industry has sought to fight these cases. Instead, certain judges have adopted an approach that tends to say: the at-fault driver has been negligent in their actions and, on the balance of probabilities, an injury has been caused and the non-fault motorist should receive compensation.

11. In *Barker v Watkins (2006)*, the judge stated: "the court is not required to decide how likely it is that the forces involved could have caused injury, but rather whether, more probably than not, they actually did cause injuries in the particular circumstances of a particular case and (if so) what injuries they did cause." Therefore, arguments based on bio-mechanical evidence (whether the forces involved could have caused a whiplash injury) are arguments for medical experts rather than for the courts. Furthermore, in *Armstrong v First York (2006)* the judge effectively ruled that even where the medical evidence establishing the injury is inconclusive (that is, two experts disagree), the general presumption is that an injury has been caused and that the disputing party has potentially missed something. A similar position was recently affirmed in the case of *Charnock v Rowan (2012).*

Are the proposals put forward by the Government, in relation to medical evidence of whiplash and incentives to challenge fraudulent or exaggerated claims, likely to reduce motor insurance premiums and, if so, to what extent?

12. The ABI supports the Government's proposals in relation to reforming the way medical evidence is sourced for RTA personal injury claims and improving the incentives to challenge the fraudulent and exaggerated whiplash claims. These reforms can play an important role in helping the Government and industry achieve the shared goal of tackling the whiplash epidemic and reducing premiums. The ABI response to the Ministry of Justice's consultation is attached at *Annex A* [not printed].

Medical evidence

13. Two main problems with the medico-legal reporting system exist: the lack of independence of those producing the medical reports and the quality of the reports themselves.

14. Firstly, the current system does not allow for sufficient independence or transparency in the way in which medical reports are obtained. A number of claimant solicitors have strong financial links to the medical reporting organisations (MROs) that they instruct and the MROs exist to make a profit out of providing medical evidence. The ABI is aware of a number of firms of claimant solicitors who have established their own MRO to obtain medical evidence. Partners of the firm are often the directors of the MRO as well. In addition, a number of CMCs have purchased MROs. These financial links raise serious questions as to the independence of the medical evidence produced. Secondly, many medico-legal reports simply report the claimant's history of symptoms which may have resolved by the time of the consultation. This adds little, if anything, to the claimant's report of the accident and, in circumstances where the claimant says that they are fully recovered, the medical report offers little value.

[6] This represents both the cost of the compensation for claimants (for pain, suffering and loss of amenity and special damages) and the legal fees attached to paying compensation.

[7] This is calculated by the Gross Written Premium divided by the number of policies and represents 80% of the overall private motor insurance market.

[8] http://www.actuaries.org.uk/news/press-releases/articles/data-institute-and-faculty-actuaries-shows-whiplash-type-claims-continu

15. Although no objective test for whiplash exists, the ABI believes that the government proposals can help to ensure that the medical experts producing medical reports are truly independent and, when combined with accreditation and training, will help to improve the quality of medical evidence.

Small Claims Track (SCT)

16. The average whiplash settlement agreed under the RTA protocol process is approximately £2,000.[9] When insurers are faced with a decision on whether to challenge a suspected fraudulent or exaggerated whiplash claim, the risk of a costs liability which far outweighs the cost of the claim often means it is uneconomical to do so. Raising the SCT limit to £5,000 is likely to improve the economic case in favour of challenging more claims that insurers suspect are fraudulent or exaggerated. Additionally, where the claim falls into the fast or multi track, claimants may be less likely to pursue fraudulent and/or exaggerated claims when faced with the costs consequences of doing so, namely the removal of qualified one way costs protection where a claimant's conduct is found to have been fundamentally dishonest.

17. Improving the ability of insurers to challenge fraudulent claims is only one part of the solution. It is also necessary to challenge the perception that it is acceptable to bring a fraudulent or exaggerated claim. This problem has been fuelled by CMCs generating more claims through such approaches as advertising with incentives to claim, unsolicited text messages and cold calling. If changes are made to the SCT without addressing the issue of claims capture by CMCs, the frequency of fraudulent and exaggerated claims is unlikely to reduce. Damages Based Agreements (DBAs) will mean that CMCs will continue to be incentivised to generate as many claims as possible through claims farming. The ABI sets out below a process by which insurers can deal with claims by self-represented claimants directly. This process must be formalised in order to reduce the incentives that drive the frequency of fraudulent claims.

Impact on premiums

18. If implemented, the proposals on medical evidence and increasing the SCT limit will have a positive impact on the cost of whiplash claims. It is not possible at this stage, however, to gauge the impact of these changes on the behaviour of claimant solicitors and CMCs. More robust medical evidence may reduce claims frequency but this is likely to be mitigated by increases in general damages awards—including the recent 10% increase in Judicial College Guidelines and the recent 10% uplift in general damages following the Court of Appeal's decision in *Simmons v Castle*.

19. The insurance industry made a public commitment to pass on savings from legal reforms to customers at the Prime Minister's insurance summit in February 2012.[10] The motor insurance market is one of the most competitive markets in the world with some 93 active underwriters,[11] writing business under multiple brands. In any highly competitive market, costs savings are competed away. The industry has responded to the forthcoming legal changes positively. The AA shop around premium index[12] shows that the average quoted premium has decreased by 2.9% in the past quarter (Q4 2012) and by 2.8% in the past year. There a number of factors behind this but part of this is insurers factoring in the anticipated savings from the civil ligation reforms.

The likely impact of the proposals on access to justice for claimants who are genuinely injured

20. The ABI does not consider that the changes proposed by the Government, including increasing the SCT threshold would impede access to justice for genuine claimants. The SCT is a user-friendly and simple route for settling straightforward low-value claims. The ABI recognises that there will be a need to work to assist self-represented claimants in understanding their rights under the new system and provide information on how they can file a claim. There are already a number of guides, including from the Civil Justice Council[13] and the Bar Council,[14] which are aimed at supporting self-represented claimants.

21. The ABI would welcome the opportunity to work with the Government, the Courts and other stakeholders in taking this forward. The ABI has already produced a third party assistance guide[15] which explains how the defendant's insurer or appointed claims handler can assist a self-represented claimant for relatively straight forward claims, and what a claimant's rights are when dealing with the at-fault insurer. The ABI is currently reviewing and updating the guide and we are happy to work with government to help raise awareness to a wider audience.

[9] This is before the 10% average uplift that was brought in under the Judicial College Guidelines in October 2012 and the 10% uplift being introduced in April 2013 as part of the Lord Justice Jackson reforms are factored in which will increase the average whiplash claim to approximately £2,400

[10] http://www.number10.gov.uk/news/insurance-summit/

[11] Motor Insurers' Bureau

[12] http://www.theaa.com/newsroom/insurance/bipi/british-insurance-premium-index.html

[13] http://www.judiciary.gov.uk/JCO%2fDocuments%2fCJC%2fPublications%2fOther+papers%2fSmall+Claims+Guide+for+web+FINAL.pdf

[14] http://www.barcouncil.org.uk/media/203109/srl_guide_final_for_online_use.pdf

[15] www.abi.org.uk/Information/Consumers/General/49113.pdf

Are there are other steps which the Government should be taking to reduce the cost of motor insurance?

22. The ABI recently produced a report *Lifting the bonnet on car insurance—what are the real costs?*[16] which identities a number or key areas, along with personal injury, that need to be addressed. Two of these key areas is addressing the young driver problem and tackling fraud.

Addressing the young driver problem

23. High motor insurance premiums for young drivers are the direct result of their poor safety record, and a result of the statistically higher risk that they will cause themselves, their passengers, or other road users severe and life-changing injuries.

24. Insurers want to see premiums for young drivers come down to more affordable levels, but the only way this can happen is to make them safer drivers. If they make fewer claims, the amount insurers will have to pay will decrease. Put simply, if the number of RTAs involving young drivers decreases, the risk they pose to an insurer decreases and insurance premiums for young drivers will follow.

25. We have worked with academics and governments around the world to look at the most appropriate interventions. The international evidence points to the overwhelming success of a minimum learning period coupled with post-test restrictions. Introducing a 12 month minimum learning period, developing a more structured learning syllabus, introducing a restricted phase where there is a limit of the number of passengers a new driver can carry, and lowering the blood alcohol limit, are all critical components of an effective graduated driver licensing scheme which the UK should introduce. We estimate that if our proposals to improve the safety of young drivers are implemented in full, young driver car insurance premiums could fall by around 15–20%.

Predictable damages

26. 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. There is currently no evidence of under-settlement of self-represented claimants' claims. However, the ABI believes that any potential concerns about under settlement of a claim would be addressed if Lord Justice Jackson's recommendations on predictable damages were to be implemented alongside an increase in the SCT.

27. Predictable damages are already used in many counties for valuing personal injury claims (for example Spain, Italy and France).[17] The ABI considers that predictable damages are a logical step in facilitating access to justice if the small claims track is to be increased as it adds a layer of transparency and certainty into the claims process. That would allow claimants to proceed with their own claim and negates concerns that claimants are unable to value their own claim for general damages.

28. 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. Although the Working Party did not reach a final conclusion, the range of damages that they were considering was up to £10,000. Their work should be reconsidered on the basis of damages up to £5,000 as it is likely that greater consensus can be achieved.

Review of general damages awards

29. A public policy debate is required as to whether the greater good for society is achieved by the many paying increased premiums in order that a few can receive high levels of compensation for minor RTA injuries. It is important for the public to have their say on whether: 1) they support a medico-legal system with high compensation awards for personal injury claims, with the consequent impact on insurance premiums; or 2) they support lower compensation awards for personal injury claims with subsequent reductions in premiums. Ultimately, insurers will price their policies based on the compensation framework in place and, in our view, a greater understanding is needed of the trade-offs involved in the current system.

April 2013

[16] http://www.abi.org.uk/Media/Releases/2013/03/Lifting_the_bonnet_report_uncovers_the_real_cost_of_motor_insurance_.aspx
[17] See Lord Justice Jackson's Preliminary Report Ch. 27

Written evidence from Aviva (WL 44)

Foreword by Dominic Clayden

I am pleased to attach Aviva's response to the Ministry of Justice consultation outlining proposals to reduce the numbers and costs of whiplash claims.

Summary

The Government has clearly grasped what a significant issue whiplash has become and what cost it is adding to the hard pressed motorist's insurance premium. This is in spite of Britain's roads being safer places to drive and advances in vehicle technology making injury much less likely. I for one do not accept that Britain has the weakest necks in Europe.

Aviva supports the message that action is needed urgently. We believe the key reforms that are required are:

1. We urge a fast response from MoJ to this consultation with firm proposals outlined to reduce the number and cost of whiplash claims plus a rapid implementation date.
2. The Small Claims Track Limit should be increased to £10,000 for all injury claims.
3. There should be fixed fees for fast track claims and hourly rates reduced.
4. Insurers of the at-fault party should have the first chance to handle the claim.
5. Care not cash should become the focus with targeted rehabilitation.
6. Medical reporting should be returned to an independent and monitored discipline.
7. We think these changes will impact the RTA Protocol but offer suggestions on mitigation.
8. We would welcome a simple tariff award or set criteria for minor whiplash claims where no general damages would be applied leaving the compensation for serious whiplash injuries only.

As we set out at question 8, we see the above reforms as only the minimum necessary steps in fixing a deeply dysfunctional wider system, which is currently the subject of review by the Competition Commission.

In practice the cost of motor premiums is largely driven by the cost of providing cover for the insured party's potential liability to others for damages and legal costs where the user is at fault. These costs have increased considerably in recent years because of the separation of liability for cost control and cost liability in supply of services, insofar as those advising the claimant have every incentive to maximise their income (whether from referral fees or legal costs) and no reason to exercise restraint. The key is to incentivise some form of settlement way before court action is reached.

Aviva is therefore calling upon Government to undertake a review of the Road Traffic Act 1988 to allow the at-fault insurer the opportunity to right the wrongs inflicted before legal proceedings get under way. Also, to incentivise settlement by increasing costs for at-fault insurer if they don't settle.

Rest assured that our proposed reforms are designed to ensure that those who are genuinely injured and need compensation will get it quickly and effectively while other less serious injuries may be better treated with rehabilitation to get them back to the health they enjoyed prior to the crash. We want to see a significant reduction in the costs of the current dysfunctional system which would benefit all UK motorists, who will begin to see reductions in their premiums.

About Aviva

Aviva provides peace of mind for more than 43 million people across the world, protecting their families and possessions by providing insurance, savings and investment products.

More than 14 million customers rely on us in the UK of which nearly 2.5 million are personal motor customers. We are committed to serving our customers well in order to build a stronger, sustainable business, which makes a positive contribution to society, and for which our people are proud to work.

In 2011 Aviva dealt with approximately 810,000 claims from our customers in their time of need, ranging from a car accident, to an illness which prevented them from working and being able to pay their bills, to a flooded home. In 2011 we responded to more than 8.1 million telephone calls for sales, enquiries and renewals.

Full Responses to Consultation Questions

Question 1: *Do you agree that, in future, medical reports for whiplash injury claims should be supplied by independent medical panels, using a standard report form, and should be available equally to claimants, insurers, and (for contested claims) the courts?*

Comments: Yes—Aviva agrees with this proposal.

1. At present more than 80% of all medical reports for whiplash are provided by a GP who will be selected by the Claimant's Solicitor. This has become standard practice since the Woolf reforms in 1999 and has become enshrined in the MOJ RTA Protocol. In over 90% of whiplash cases a GP will be instructed via a Medical Agency who will often have an arrangement with the instructing solicitor and in many cases will pay a referral

fee per instruction. (We believe this ranges from £50 to £80 per claimant medically examined by a GP and more than this for an Orthopaedic consultant.)

2. Many of the GPs to whom Medical Agencies pass referrals have become "factories" who simply process a report stating there has been a whiplash injury and provide a prognosis based simply upon asking a claimant how long they think it will be until they recover. Aviva is aware of one GP who advised one of our staff he has seen c25,000 whiplash claimants in the last 15 years!

3. Because such GPs and Agencies are tied into the process and rely upon a huge volume of instructions, there is no qualitative assessment of the "injury"—merely a recording of what the claimant says and the report which is produced (often "cut and paste") is of little medical or legal value. As the Government has recognised there is no incentive for a GP to challenge or question a claimant as to whether he/she is telling the truth because this means there will be no payment.

4. While Aviva does not challenge the honesty or efficacy of large Medical Agencies, their independence can be questioned as many are owned by claimant solicitors (eg MAPs are owned and used exclusively by Thompsons) and one of the largest MROs, Mobile Doctors, has recently been purchased by Quindell.

5. It is vital the MOJ break this chain and return the medical process to what it should be ie an independent qualitative assessment of:

(a) Whether a claimant has been injured in the RTA.

(b) What pain, suffering and loss of amenity was actually caused by the accident.

(c) What the prognosis for recovery is.

6. Aviva believes that only an independent medical assessment can achieve this. Currently a medical expert will provide a declaration at the end of a medical report indicating that the report is independent and produced for the purposes of the Court. But we do not accept this, as in reality we believe there is a tied in relationship between Claimant Solicitor, Agency and GP all acting for mutual reward. There is no incentive to make a negative report as this would jeopardise agency referrals and a significant income stream for the expert.

7. An independent panel comprising of medical experts would remove the tied-in instruction to one which is genuinely independent will take away the claimant solicitor—Medical Agency relationship. Aviva can see competitive advantages in this as the cost of medical reports can be standardised. Also a claimant can expect a fully objective assessment by a GP (or other expert) via an Agency which has no referral fee/relationship with the solicitor providing the instruction.

8. A standard report form in such instances is essential to ensure there is objectivity. This will also assist in peer review/audit (see Question 3).

9. Aviva suggests that a standard format report should contain questioning which is predicated upon the basis that the claimant *is not* injured. This will make the GP/expert think objectively about the claimant's injury and not simply state what he/she has been told by the claimant.

10. Insurers who are called upon to value whiplash injuries currently use valuation tools to assist them. Any standardisation of the reporting will bring increased clarity and assist both claimant and defendant in understanding quickly the value of an injury. In Aviva's experience, dispute in valuation generally arises when a medical report is vague and/or does not provide sufficient clarity around the three issues detailed in paragraph 5. A form of standardised report will greatly assist both defendant and claimant in valuing the injury and ensuring compensation is paid quickly.

11. Aviva notes that Professor Fenn who has analysed claims passing through the MoJ RTA Portal (P Fenn—Evaluating the low value Road Traffic Accident process 2012) has noted a reduction in the average time a claim takes to settle damages of about 8%. In Aviva's experience the "damages lifecycle" of a standard whiplash claim (ie from claim notification to settlement of damages) has reduced by c20% within the RTA Portal and partly this is due to both parties having to exchange information in a set format including the submitting of a value of the injury via the Portal.

12. If both parties were to receive a standardised medical report from an independent medical expert at the same time, then this would further increase the speed of settlement. This means the defendant would have the opportunity to offer a settlement immediately rather than wait for the claimant solicitor to obtain his/her client's consent to submit the medical report and then send the report (in whatever format) via the Portal.

13. A standard format would force GPs to think objectively about the claimant ie in completing such a report a GP could objectively compare patients and use this to make better reasoned assessment. As the MoJ notes at Para 44, two experts could on occasion examine the same claimant and on similar terms explain why they have (or have not) reached consensus.

14. Making the report standardised and available to the Court in contested cases would assist the Court (and the parties) greatly. Firstly the report would be independent and capable of agreement; secondly it would be in a format easily valued by the parties (reducing dispute) and also if necessary by a Judge who can draw on precedent more easily.

15. Aviva, with other insurers, uses a system based general damages valuation tool called Colossus. Standardising medical reports would enable inputs to such a system to also be standardised providing a better (and quicker) valuation to the claimant. There is a direct link to Question 7—if medical reports are standardised a claimant needs very limited (if any) legal advice in valuing his own injury. This facilitates a claimant acting on his own behalf (ie unrepresented) or with very limited legal assistance which can be paid for as a percentage of damages recovered.

16. Aviva envisages under such a standardised system quantum disputes becoming much rarer and will as a consequence allow the Court more time to assess more important matters.

Question 2: *If no, how would you address the problems listed at paragraphs 35 to 39 of part two of this consultation document?*

Comments:

17. While Aviva supports the suggestions set by the MoJ in Question 1, there are potentially other means of addressing the issues raised in the MoJ's paragraphs 35–39.

18. Aviva proposes the MoJ look at a range of options that other jurisdictions have used to tackle whiplash and minor injuries. There are lessons which can be learned which we have incorporated into this section.

19. To address the problem at Para 35 Aviva suggests there could be a staged assessment which a claimant must satisfy to claim compensation:

(a) The claimant must visit his/her GP within 1 week of the accident. The claimant's GP will be asked to complete a standard form report with his/her views on PSLA and prognosis.

(b) The claimant then cannot formally claim compensation until six months post accident when a further GP (who is not the claimant's GP) will see the claimant and also review the original GP's report.

(c) In the intervening period, a claimant can seek rehabilitation services from a defendant insurer who has admitted liability.

20. This would provide an initial assessment and the opportunity to feed back on initial assessment or question the claimant as to why recovery is not in line with his own GPs report. Rehabilitation reports can also become an integral part of the independent process ensuring feedback on reaction/response to treatment.

21. A claimant who does not visit his GP in the first week following an accident and where there is no initial report could face a tougher assessment. For example, only be examined by an expert appointed by the defendant who has access to full medical records and reports plus photographs of any damage (or lack of damage) to use in his assessment.

22. The issues in Paragraphs 37 and 38 may be addressed by introducing a tariff or minimum criteria for whiplash. The criteria would be such that below a certain level of injury, no compensation or damages would be payable. A minor injury would therefore either, not call in General Damages, or would attract a simple tariff award. Any special damages or associated consequential losses would remain open to be claimed subject to reasonableness as is currently the case. Aviva suggests the tariff could be:

Period of Whiplash Injury	*Tariff Standard Award*
Very minor < a few days	£0 (No damages)
More than very minor but less than 3 months	£250
3 to 6 months	£500
6 months to 12 months	£1000
>12 months symptoms	Standard Award

23. The above tariff could also be on a points based system or severity assessment derived from the standard medical report. Such a tariff would also assist claimants in valuing their own injury.

24. Aviva sought legal advice and our view is that the MoJ could, via primary legislation (which is not retrospective) make certain types of minor injury (eg such as defined in the Judicial College Guidelines 2012 Chapter 6(A)(c)) either not call in general damages at all or attract a nominal sum set by tariff.

25. A tariff system is an attractive option as it accepts that a minor RTA can cause trivial symptoms which are "compensated" by fixed damages. Fixed damages could be set by a "Damages Assessment Board" composed of claimants, defendants and arbitrated by the Courts. A model of this type (The PIAB) is in operation in Eire.

26. Aviva points to other international solutions which the MoJ could learn from and consider implementing in the UK. In Italy and Spain injuries are assessed on a "points" basis which use quantum scales to measure (independently) an objective level of severity. The "*Baremo"* system in Spain and equivalent *book of quantum* in Italy both place whiplash on a very low severity rating of 1–2 on a scale of 1 to 100 with the points awarded comparing to an appropriate damages scale. While neither is perfect, both offer a better, more objective assessment of the injury and the damages awarded are entirely predictable.

27. In some states in Canada, Sweden and Germany there is a general presumption that a low level road traffic collision will not cause injury and a higher burden of proof exists upon the claimant to show why this should be rebutted.

28. If the MOJ determines minor whiplash injuries should not call in General Damages at all, this would make "whiplash" a more serious injury only—for which potentially the Court of Appeal could revisit damages awards more adequately compensating those genuine claimants who are perhaps currently "prejudiced" by the fraudulent and exaggerated claimants. By removing minor injuries the MOJ could, if it wished, remove completely the type of claimant who (at most) suffers minor inconvenience and who at worst has no injury at all. Aviva addresses the "policy" nature of this debate in its answer to Question 9.

29. This would certainly remove the "factory" effect which this consultation describes at Paragraph 39 whereby GPs cannot certify very minor injuries and are reliant upon income from agencies that process large numbers of referrals where a claimant cannot objectively have suffered more than a trivial inconvenience.

Question 3: *Which model should be used for the independent medical panels—Accreditation, national call-off contract or some other variant?*

Comments: Aviva favours option 2—A National Call-off Contract

30. By ensuring full involvement by interested parties Government can oversee the development of such a scheme but then step away and give oversight only. This also best fulfils the Government's stated intention of not imposing a taxpayer burden in terms of assessing potential solutions—with no tax payer input required.

31. A National call-off contract will also offer all parties the most competitive and cost effective provision of medical reports. This in our view is because national (or regional) tenders can be issued with a common specification and encourages both national and regional competition.

32. The Medical Agencies will therefore have to compete on service offering and price to BOTH claimant and defendant with no possibility of referral fees being a factor. This will enforce the right behavioural actions from the Medical Agencies who will need to offer the Board representatives their best experts at the best possible price—everyone wins.

33. The creation of an independent review Board in our view will create a healthy tension and if arbitrated by the Courts Service one where decisions can be made. Aviva will certainly wish to be involved either directly or via the ABI.

34. The Board can oversee the contract process and the evaluation of tenders on an objective basis.

35. The Board can also be responsible for peer review/audit (see Q4) and can be funded collectively (see also Q4).

Question 4: *Do you consider that an element of peer review should be built into every assessment, or only for a sample of assessments for audit purposes?*

Comments

36. Aviva believes it would be impractical to peer review every assessment. This would be simply too costly and time consuming. It also risks diluting the benefiting of the independent medical examination scheme with standard format reports set out at question 1, by building inefficiency into what should otherwise be a more efficient process.

37. Aviva is of the opinion a form of Qualitative Assessment or Review should take place. This could be a random selection of cases whereby as the MoJ suggests two GPs see the same patient and one peer reviews the other. A random selection whereby every GP who undertakes whiplash medical legal work is peer assessed at least once a year (say 2% of cases) would suffice to ensure there is a good degree of oversight.

38. To ensure audit efficacy and accuracy, the MoJ should invite the Department of Health to work with the appropriate professional organisations to ensure an audit/peer review framework is developed which is objective and capable of calibration.

39. This would involve peer review of c11,500 cases per annum assuming there remain c550K whiplash claims a year however we hope this figure will reduce. We anticipate each peer review would cost approx. £125 (the current MRO GP fee less any allowance for a referral fee payment) meaning the peer review scheme would cost c£1.5m per annum again based upon current whiplash numbers.

40. Aviva suggests this audit fee be split between claimants and defendants with the MIB proportionate levy covering insurer contributions and a similar levy perhaps via APIL or MASS covering claimant contributions on a proportionate basis. Alternatively, this cost could be met by the CRU from the NHS charges recovery scheme.

41. There would need to be a formal feedback process which follows peer review or audit and a mechanism which sees inadequate performance addressed—with a right of appeal.

Question 5: *How should costs be dealt with and apportioned?*

Comments

42. Aviva makes clear that it expects the cost of medical reports to drop significantly if the MoJ's proposals in Questions 1–4 are adopted. The current "standard" fee for a GP whiplash medical report is £200 through the MRO agreement. Of this we believe the medical expert receives less than 50%. We are also aware that referral fees of £50 or £75 are frequently paid.

43. We suggest that the defendant insurer bear the initial cost of the medical report on condition that all the provisions suggested in Question 1 be implemented. Aviva suggests that this be restricted to liability admitted cases ie where a Stage 1 admission of liability has been made via the RTA Portal process.

44. This would, in effect be similar to the current MRO process whereby in liability admitted cases the MRO provider can invoice the defendant insurer directly and receive direct payment for the medical report (at a discount if the insurer pays within a certain time frame).

45. Where liability is disputed, Aviva believes the claimant should be liable for the cost of his own medical report with a risk of non recovery should the claim be unsuccessful. This creates an incentive for genuine claims only to be presented and ensures the claimant himself has "skin in the game".

46. We believe a claimant who is deemed "fundamentally dishonest" or fraudulently presenting a whiplash claim should lose his protection under QOCS and also be liable for the cost of the report.

47. This will have a further spin off in implementing one of Lord Justice Jackson's recommendations which the MOJ has not yet taken forward. In his paragraph on fast track fixed costs at paragraph 5.22, Lord Justice Jackson states:

> "In my view the sums recoverable for obtaining medical reports and medical records should be capped at the levels currently specified in the MRO Agreement. The claimants should be entitled to recover those sums for procuring medical reports and medical records, irrespective of whether they do so directly or through the agency of an MRO. The fixed maximum costs for obtaining medical reports and medical records should be regularly reviewed by the Costs Council".

48. Aviva is of the view that the Board created (ref Question 2) could be responsible for this rather than a Costs Council with the Board fulfilling the same function.

Question 6: *Should the Small Claims track threshold be increased to £5,000 for RTA related whiplash claims, be increased to £5,000 for all RTA PI claims or not changed?*

Comments: Aviva would opt for 2. RTA Related PI

49. Aviva is firmly of the view that the Small Claims Track threshold should be increased not to £5,000 but to £10,000 for all RTA related PI claims. This is because "whiplash" is not easy to define. While many low value RTA personal injury claims are framed as "whiplash" this can include neck, shoulder, back and low level "psychological" symptoms such as travel anxiety.

50. Aviva believes that only by increasing the Small Claims Track limit to £10,000 for all RTA related PI claims would the Government manage to cover all potential scenarios and avoid satellite litigation over (for example) what constitutes a road traffic accident whiplash injury as opposed to a neck or lower back strain or minor psychological damage which would undoubtedly arise if a "whiplash" provision were included.

51. To restrict the increase to one type of injury would risk a shift in claimant behaviour to alternative injuries simply to get around the process. For example claimants submitting psychological injuries would potentially *increase* costs as further medical evidence would be required simply to show that the injury was not purely "whiplash" and therefore should be cost recoverable. We believe this will simply drive the wrong behaviours and potentially exacerbate current problems.

52. Aviva further questions why the limit only be raised for RTA claims? Aviva believes that £10,000 should be the injury threshold for the Small Claims Track across the board.

Question 7: *Will there be an impact on the RTA Protocol and could this be mitigated?*

Comments: Yes, Aviva believe this would impact the RTA protocol

53. There will undoubtedly be an impact upon the RTA Protocol. This is because if costs are no longer recoverable in <£5,000 (or <£10,000 in our preference) cases some solicitors will not be interested in pursuing such claims. Aviva however does not think this is an impediment to access to justice and that the impact can be mitigated.

54. We say this because:

55. The LASPO Act 2012 enables solicitors to act on Damages Based Agreements (DBA) which can operate in such instances. A claimant who wishes to use a solicitor can do so and the solicitor be adequately rewarded in such circumstances by signing a client up to a DBA agreement and taking a % of the eventual damages

(currently up to 25%) which adequately reflects the work which needs to be done. For instance in a "typical" whiplash claim of £2,500 the solicitor could earn £625 if signed up to a 25% DBA. This is a greater sum than is proposed by the MoJ for the RTA Protocol claims <£10K. Aviva has adduced evidence to the MoJ that the actual time/cost for a solicitor in handling such a claim taking account of the efficiencies in technology and communications which have developed over the last 10 years is between £150 and £350.

56. *Legal Expenses Insurance*—most insurers offer Legal Expenses Insurance (LEI) as an "add on" (or in some cases a free service) provision to their motor policies. Aviva UK Direct Insurance offers LEI as an additional cost added on to comprehensive motor policies (usually c£25) and up take is generally around 75% of all policies. LEI policies provide cover (usually up to £25K or £50K) for legal costs incurred in bringing a claim for personal injury. Cover will usually extend to any person who was carried in the vehicle at the time of an accident.

57. The FSA has recently visited Aviva and discussed LEI concluding it is a value product which offers consumer benefit. Aviva suggests that LEI be made more available to consumers as a standard part of a motor policy. This would give injured parties direct access to legal advice and assistance following a RTA and representation to bring a claim if appropriate—all covered by insurance sold at point of sale.

58. *Unrepresented Claimants*—in 2012 Aviva settled c8% of all its personal injury claimants without a solicitor being involved. Aviva is able to offer nearly 5,000 claimants a complete end to end service whereby all their needs following a road traffic accident are fulfilled—repair of vehicle, mobility, rehabilitation and compensation for their personal injury. This complete "end to end" service is not one which claimant solicitors can offer.

59. Insurers who deal with claimants who do not have a solicitor representing them comply with a formal code of practice—the ABI Code Of Practice for Third Party Assistance. A copy of this is attached. This code ensures a claimant is treated fairly. To put matters into further context, on an average whiplash claim in 2012 Aviva paid *more* in General Damages (c£2,600 as opposed to c£2,300) to unrepresented claimants than to represented claimants.

60. *Rehabilitation*—Aviva has undertaken a consumer survey to evaluate public views of whiplash injuries. This survey has been managed by Opinion Matters and was a survey of 2,437 adults who drive conducted in December 2012. This survey indicated that 85% of motorists interviewed believe that people who are involved in minor road traffic accidents suffering minor whiplash only should not receive compensation—simply treatment for their symptoms. Rehabilitation is the answer to this.

61. Aviva states openly here that it owns 30% of a company (HCML Ltd) which provides rehabilitation services to injured parties—including those injured in Road Traffic Accidents. This forms an important part of Aviva Healthcare strategy.

62. Rehabilitation companies such as HCML can provide fast, efficient treatment to people who have suffered minor injuries such as whiplash. Aviva's experience with HCML indicates more than 30% of injured parties do not need physiotherapy or actual treatment. They merely need information about how to long to expect symptoms to last/typical recovery times and self exercise techniques.

63. We summarise the Aviva : HCML offering to claimants as follows:

- Applies to all *unrepresented* claimants.
- Is offered to claimants where *liability is admitted.*
- Day 1—Aviva handler makes assessment in conversation with claimant and offers rehabilitation.
- *HCML offer a web based instruction portal* which can be accessed by Aviva handlers and also the claimant.
- HCML *often contact claimant within 2 hours* of instruction.
- HCML will undertake (*within 24 hours* of instruction) a full *Immediate Needs Assessment Report (INA).*
- *Contact* with claimant is initially *via telephone* but always *by a trained physiotherapist with a clinical background* who can offer assistance and practical advice.
- *Claimant is advised on what to expect from his injury*—managing expectation is key service.
- A *DVD containing practical information* about whiplash neck/back pain is sent to the claimant.
- If the INA requires it, *treatment will be arranged* eg up to three sessions of physiotherapy.
- Claimant can book treatment via web portal at a local treatment centre and *access injury information and exercise guides via web site* www.hcml.co.uk .
- *Regular contact* (weekly minimum) with the claimant is maintained and recovery targets are set and reviewed.
- More serious injuries are referred to specialist treatment.

64. Aviva is of the view that this level of service should be made available to all claimants who suffer genuine whiplash injuries which would in many cases move a claim which currently focusses purely on cash compensation to one which addresses the claimant's genuine injury and recovery.

65. *Liability Dispute*—Aviva recognises that liability in road traffic accidents can in some circumstances be disputed. Professor Fenn's data indicates that around 15% of claims submitted via the RTA Portal drop out at Stage 1 due to liability dispute. Aviva's own data shows an exact match with Prof Fenn's data.

Reason	*%*
Stay In Process	64%
Liability Denied	15%
Liability Split	3%
Delayed Liability Decision	6%
Unable to Contact Insured	3%
Low Speed Impact	2%
Potential Fraud	7%

66. This shows that c18% of claimants will find a liability dispute when notifying a claim. In such circumstances Aviva suggests that a Liability Fee similar to the MOJ FRC Stage 1 fee could remain payable to a claimant to engage a solicitor. The fee would become payable only if the insurer subsequently admits liability to the claimant in whole or in part.

67. Aviva suggests this "Liability Dispute" advice fee could serve as an incentive for the insurer to admit liability where appropriate as quickly as possible. There would be no Stage 2 Fee if the injury is then below £5,000.

68. *Mediation*—Aviva is aware of many companies now offering mediation services in low level motor claims. Some of these are innovative telephone based or on line solutions which offer cheap mediations or alternatively arbitrations. Aviva can envisage use of independent mediators or arbitrators where the parties submit basic information and a decision is made quickly. Insurers would have to agree to be bound by such an agreement and undertake to meet the costs of the mediation however volume would undoubtedly reduce cost.

Question 8: *What more should the Government consider doing to reduce the cost of exaggerated and/or fraudulent whiplash claims?*

69. The cost of motor insurance premiums is largely driven by the cost of providing cover for the insured party's potential liability for damages and legal costs where they are at fault. These costs have increased considerably in recent years because of the separation of liability for cost control and cost liability in supply of services, insofar as those advising the claimant have every incentive to maximise their income (whether from referral fees or legal costs) and no reason to exercise restraint.

70. The following table illustrates how premiums are calculated and what costs are incurred. It can be seen that the largest component of premium/claims cost is targeted at providing cover for the Consumers liability or potential liability for damages and legal costs (51%), whilst a much smaller proportion is targeted at providing cover for any loss or damage occasioned to the insured vehicle (28.8%).

UKDI Car Comprehensive 2012 Q3	*Claim Ratios*
Accidental Damage	26.4%
Fire	0.3%
Windscreen	2.1%
Third Party Property Damage	14.8%
Third Party Bodily Injury	36.2%
Expenses, Commission & Profit	20.10%
Total	**100.00%***

*Does not include affect of Recoveries

71. It is possible to separate out attritional claims (ie <£250k) from large claims ie >£250k) within the Third Party Bodily Injury component. Attritional claims cost Aviva c27.6% and large claims c8.6% of the premium collected (2012). Drilling further into attritional claims (ie <£250k), it's possible to say that for the <£5k claims—assumed to be Whiplash types—Aviva paid out £142 million out of a total for all Bodily Injury claims of £488 million or 30% (2011). Aviva estimates that some 45% of this £142 million cost went to claimant lawyers, rather than the injured party or £64 million. Of the remaining spend (£346 million), Aviva estimates that only 18% or around £62 million is in relation to claimant lawyer costs.

72. This means that 30% of Aviva payments for Bodily Injury in 2011 were for Whiplash and the legal costs created by these claims was the same as the remaining 70% of our more serious, or demonstrable, rather than soft tissue claims.

73. These additional and largely unnecessary costs serve only to drive up premiums. The only way to tackle this is to incentivise some form of settlement before legal costs are incurred. Aviva is therefore calling upon the Government to undertake a review of the Road Traffic Act 1988 to that end.

74. The insurer of the fault party, who will ultimately be responsible for the damages and legal costs payable to the claimant, ought to have an opportunity to right the wrongs done before legal costs are incurred. This will involve giving him first opportunity to provide redress for any necessary repairs, mobility or personal injury. The legal framework should therefore incentivise settlement—by dramatically increasing costs for at-fault insurer if they don't settle.

75. Aviva does not suggest that the claimant should be precluded from taking legal, advice where the fault Insurer delays, or there is a real dispute on liability or indeed where the injury sustained is demonstrable and legal advice is necessary to ensure an equality of arms.

76. Aviva does suggest however that in the 10% of accidents which give rise to an injury, that the majority of those claims, perhaps as many as 85%, ought to be amenable to a proposal where the fault Insurer provides the rehabilitation and compensation without legal costs being incurred.

77. Introducing standardised medical reporting which will facilitate consistent and agreed valuations for pain and suffering, and loss of amenity will mean that the claimant receives a quasi-contractual service without being put to the aggravation of having to approach solicitors. The damages paid by the fault Insurer will remain the same but their associated legal costs will reduce. This will help Insures maintain a downward pressure on premiums.

78. Given that many of these claims will not be cost bearing if the Small Claims Court limit is increased to £5,000, the frequency of such claims is likely to reduce but genuine claimants will still be able to secure redress from the fault Insurer direct.

Question 9: *Do you agree with the equality impact assessment published alongside this document? If not, please explain why.*

Comments: Yes we agree

Question 10: *Please provide evidence of any ways in which the procedure under current arrangements affects people with different protected equality characteristics*

Comments

Aviva has no comment to make on this question.

Question 11: *Do you consider that the introduction of independent medical panels to assess whiplash injuries will affect people with protected equality characteristics? If so, please give details*

Comments

79. No**,** Aviva is not of the opinion that the introduction of independent medical panels will have any appreciable impact upon anyone with protected equality characteristics.

Question 12: *Do you consider that an increase in the small claims limit for Whiplash/RTA personal injury claims from £1,000 to £5,000 will affect people with protected equality characteristics? If so, please give details*

Comments

80. No, Aviva is not of the opinion that the increase in the Small Claims limit for RTA Personal Injury claims will have any appreciable impact upon anyone with protected equality characteristics.

April 2013

Written evidence from AXA Insurance (WL 27)

1. Executive Summary

This call for evidence is welcome and we are pleased to submit our response.

A culture of claiming for "whiplash" following a road traffic collision is now engrained in the public mind and radical reform is required if Government is to meet its stated objective of reducing premiums for motor insurance.

An entire industry has been created in respect of "farming" and presenting of "whiplash" claims which, at present, is self perpetuating and bringing the civil justice system into disrepute.

"Whiplash" is highly subjective with medical diagnosis largely dependent on self reporting of symptoms. At the very least a more robust approach to medico-legal reporting is required. The suggested reforms by the

Ministry of Justice in this regard are a step in the right direction. However, although the Ministry of Justice's recent consultation and possible reforms are most welcome, in themselves they may not go far enough to fully address the "whiplash" issue. We believe that ultimately a more radical approach may be required which might include amongst other things not compensating non-demonstrable "whiplash" injury, an examination of the impact of emerging Alternative Business Structures and restrictions on entering into Damages Based Agreements in respect of low value claims following road traffic accident.

2. Introduction

2.1 AXA Insurance is part of the global AXA Group; one of the largest insurers in the world. In the UK it is the 5th largest general insurer and, as such, writes large numbers of motor policies. In 2012 we insured some 1,500,000 motor vehicles belonging to private individuals and businesses which produced some 17,500 personal injury claims. Our average cost in respect of damages and legal costs for personal injury claims following a road traffic accident (excluding those claims over £100,000) was slightly in excess of £7,000. The vast majority, 80%, of these personal injury claims will have been for so called whiplash injury.

2.2 AXA has a significant interest in the level of damages paid under the civil justice system; in 2012 we paid in excess of £391 million in compensation, damages and legal costs arising out of claims made against our policyholders. This compares to the total claims paid and reserved figure for all motor claims of £590.8 million and a premium income of £791.5 million. By the time operating costs, reinsurance, commission and other business expenses are taken into account, we made a loss of £32 million on our motor insurance accounts.

2.3 Insurers have no issues with compensating genuine injured claimants. However, "whiplash" is open to fraud and exaggeration. Claiming for so called "whiplash" is so deep rooted in society that otherwise law abiding citizens see nothing wrong in submitting claims even when no injury has occurred or where symptoms amount to little more than neck discomfort such as that sometimes experienced after sleeping awkwardly. These comments are not meant to belittle the pain and discomfort experienced by some, where, in the minority of cases, symptoms can persist for six months or more.

2.4 This submission is made on behalf of AXA Insurance: the author, has over 30 years experience in the industry and of handling personal injury claims at all levels as well as submitting responses to various consultation papers including Ministry of Justice consultation CP17/12—"Reducing the number and costs of whiplash claims." This submission draws heavily on our response to that consultation, a copy of which is appended.

3. Factual Information and Evidence

3.1 Based on DWP Compensation Recovery Unit statistics there has been an increase in the number of claimants registered following a motor accident from 518,821 in 2006 to 828,489 in 2011–12. Although not all of these relate to so called "whiplash injury," the majority are likely to. Conservatively, this means that more than one percent of the population suffers from, and makes a claim for, "whiplash" annually.

3.2 "Whiplash" claims are said to account for 75% of ALL personal injury claims in the UK. This position is not mirrored in the rest of Europe; in France the figure is less than 3%. Also attached is a paper commissioned by AXA which reviews the position in other jurisdictions. Our own estimation, based on our management information, is that over 80% of the motor injury claims we receive relate to whiplash. We believe the figures above justify the UK being called the "whiplash capital of the world."

3.3 Promoting access to justice and ensuring that genuinely injured claimants are compensated is important. However, seeking compensation following a road traffic collision is endemic and now engrained in the public mind. Quite rightly, making a claim for compensation has never been easier though we would suggest that motorists involved in a road traffic collision now regard compensation as a right, irrespective of the severity of impact or injury received. Our experience is that for each accident involving a claim for whiplash injury there are, on average, 1.59 claimants. There is a need for a readjustment in the public mindset as the number and cost of so called "whiplash" claims is bringing the civil justice system into disrepute. The term "whiplash" is now synonymous with road accidents and a new term such as cervical strain/neck sprain should be used.

3.4 "Whiplash" is a self limiting condition that usually resolves within six months. In a survey carried out on behalf of the Association of Personal Injury Lawyers, 38% of respondents said their symptoms had resolved after a couple of weeks; 62% said symptoms had resolved within a couple of months and 25% reported symptoms beyond six months.[18] Studies of low-velocity rear-end collisions involving volunteers have also shown a percentage of subjects to report short-lived symptoms.[19] However, this situation is seldom reflected in medical evidence presented in support of a claim. Prognosis periods are typically 12–24 months from date of examination (which itself can be six months post accident) or from the accident. The greater the prognosis period, or the longer the period of disability, the higher the level of damages.

[18] APIL (2012). "The Whiplash Report 2012" p.2

[19] Castro, W H; Meyer, S J; Becke, M E; Nentwig, C G; Hein, M F; Ercan, B I; Thomann, S; Wessels, U *et al* (2001). "No stress—no whiplash? Prevalence of "whiplash" symptoms following exposure to a placebo rear-end collision". *International journal of legal medicine* **114** (6): 316–22. Following collision 17.6% of subjects in study reported symptoms falling to 9.8% after four weeks, though of this latter percentage, 40% did not ascribe ongoing symptoms to the collision. This study also highlights that psychological, and not bio-mechanical, factors are a big determinant of outcomes.

3.5 Medico-legal reporting is central to the issue. Diagnosis of "whiplash" occurs through a patient history and head and neck examination. Exceptionally, x-rays and imaging may also be used. Where examination takes place within a few days of the accident muscle spasm or reduced deep tendon reflexes might be noted. Often, though, diagnosis is based on patient history at best combined with minimal examination without checking for any contra indicators. One doctor encountered on another matter advised that in addition to working four days per week as a GP and having a private cosmetic procedures clinic, he conducted 2,000 medico-legal examinations a year. Having regard to other commitments the amount of time spent on examinations and report writing must have been limited. We doubt that this situation is in any way unique. Today, over 50% of medical examinations are accounted for by two large medical agencies, Premier Medical and Premex. Firms of solicitors are increasingly setting up their own medical reporting agencies. Both trends raise questions as to the full independence of medico-legal reporting. The issue of both the quality of medical reports and the independence of medico legal reporting needs to be addressed.

3.6 The Ministry of Justice consultation on "whiplash" and their ideas as to how medico-legal reporting can be improved are welcome. A more forensic and robust approach to medico legal reporting is required. Doctors undertaking medico legal work are there to guide the courts. However, they have been criticised by the courts when they have sought to challenge the claimant's version of events as that is the role of the court.[20] Nevertheless, examining doctors should systematically look for contra indicators of injury as "whiplash" injury at Quebec Task Force modified scale classifications[21] I and II are impossible to prove or disapprove. A thorough review of medical notes is also required in more cases than not; this seldom occurs. Civil Procedure Rules provide for the medical experts to be instructed by the claimant's solicitors. This means that the examining doctor only hears the claimant's version of events, whether direct from claimant or their solicitor. They do not hear the defendant's version of events or evidence relating to the extent of vehicle damage. Were they to do so, they might be better able to discharge their duties to the court. The fact that the expert is instructed by the claimant solicitor also means that medical evidence can be obtained at a time of their choosing so as to maximise period of recovery and potentially, in so doing, increase damages and, in some instances, their own costs. The RTA portal also requires the claimant solicitor to obtain and submit medical evidence. Notwithstanding their duty to the court as an expert witness the decision in *Jones v Kaney* may make experts even more reticent of saying anything that undermines the claimant's case.[22]

3.7 Welcome as the MoJ consultation is, we consider it unlikely that any further reforms introduced will significantly alter the landscape with regards to "whiplash" claims. Even with an increase in the Small Claims Court to £5,000, a number of factors will serve to negate the impact of the proposed reforms:

(i) Damages Based Agreements (DBAs); with reduced Portal fees, a solicitor is likely to earn more acting for "whiplash" claimants on a DBA. Thus, he will continue to have a vested interest in acquiring and presenting such claims. Further, as the amount recovered represents a percentage of damages, the solicitor will have an incentive to seek to increase the level of damages recovered.

(ii) The Referral Fee ban will encourage Claims Management Companies to modify their business model so that they handle, as well as acquire, the claim. They will replace referral fee income lost from claimant solicitors by acting for the claimants under a DBA that will not be constrained by the Damages Based Agreement Regulations 2013. It remains unclear as to how effective the referral fee ban will prove to be in practice.

(iii) The ability to pay referral fees has been said to be responsible, at least in part, for the rise of the "compensation culture." It is now said that some firms of solicitors are paying acquisition costs of one form or other of some £200. The ability to do so would suggest that the fixed costs figure proposed by the ABI of £300 was a realistic level of remuneration for the claimant lawyer handling low value motor claims.

(iv) Alternative Business Structures will encourage CMCs and law firms to merge. This will help reduce costs by streamlining processes and continue to make "whiplash" claims profitable. It is said that the "referral fee" now payable is £200 which suggests that the reduced Portal fees of £500 that will be introduced after 30 April still allow scope for profit and acquisition costs.

(v) Alternative Business Structures will also enable insurers to enter into arrangements with law firms; such as Admiral's arrangement with Lyons Davidson and Cordner Lewis and Ageas Insurance's venture with New Law. These arrangements will effectively mean that the insurers will replace referral fee income by taking the legal work "in house" and share in any profit with the law firm concerned.

3.8 Despite the best endeavours of the Government we do not see the "whiplash" issue as reducing in the next few years. Indeed, if Claims Management Companies move into claims handling following the referral fee ban and possible increase in Small Claims Court limit, it is possible that the problem will actually increase. With the likelihood of the claimant lawyers being removed from the picture, a check and balance that presently exists will be removed. There will be some claims a solicitor will at present reject that at a Claims Management

[20] See first instance decision in Charnock v Rowan December 2011

[21] Sterling M, Man Ther. 2004 May;9(2):60–70. A proposed new classification system for whiplash associated disorders—implications for assessment and management

[22] Jones v Kaney [2011] UKSC 13

Company would not. In making this comment, we should emphasise that we are not arguing against an increase in the Small Claims Court limit. The point is made to emphasise the dynamic nature of the "whiplash" industry and that a more far reaching and radical solution is required to address the issue.

3.9 We advocate such a radical solution. If, in the main, "whiplash" is a non-demonstrable injury, where diagnosis largely depends on the story relayed by the claimant, then, by its nature it is open to abuse. This is the position that we find ourselves in now. We would argue that exaggerated and fraudulent "whiplash" claims account for up to 80% of the total number of "whiplash" claims received. However, by the very nature of fraud, this figure is difficult to substantiate. We would advocate that unless there is demonstrable injury, damages should not be recoverable in "whiplash" claims. In the absence of any means of identifying demonstrable injury, conditions that fall within the definition of Quebec scale classifications I and II, should not be compensatable. They should be regarded as being, in effect, de minimis. We understand that there are some types of "force analysers" now available that claim to be able to detect whether a reported loss of function or loss of movement is genuine. If such tools stand up to medical scrutiny they would assist in removing those injuries that are fabricated. Such devices are not able to establish whether loss of function is due to an accident or some other cause; that would be matter of causation and evidence.

3.10 Hitherto, legal costs have been so out of kilter to damages that seeking to address the problem through the courts has proved to be costly and frequently an unsuccessful exercise.[23] Examples are provided below for illustration purposes. This has led insurers to develop counter strategies to contain legal costs. One such example is so called "pre-medical" offers where an insurer will make an offer, following submission of a claim for "whiplash", without medical evidence. Typically, such offers range from £1,600–£2,000. Made early such offers help to control legal costs. In addition, as the quality of medico-legal reporting in "whiplash" claims is generally of low quality, and as rebutting a claim for "whiplash" based on medical evidence is exceptional, it has been seen as a "low risk" strategy. However, it also means that it becomes known that a claimant may well receive an offer of compensation without any medical assessment no matter how perfunctory such an assessment may have been.

3.11 A subsidiary of AXA Insurance referred over 300 cases to our own solicitors last year for fraud investigation. 125 of the cases were litigated. Many other cases would have been addressed internally. The reserves of these cases totalled over £7.5 million. To the end of 2012 our costs on these cases amounted to £650,000. Another part of AXA Insurance dealing with private motor claims identified and recorded savings in excess of £8 million from detected fraudulent claims.

3.12 *Effect on Premiums*

The ABI have stated that whiplash claims cost over £2 billion a year and account for £90 of the average car insurance premium. Largely as a consequence of type of vehicles involved, road miles travelled and purpose of journeys, there is a difference between the claims experience between commercial and private car books of business. In respect of our Private Motor account our attritional, or low value, injury claims amount to 29.4% of premium with "whiplash" accounting for 80% of these claims. This means that 22.1% of premiums can be attributed to paying for "whiplash" claims. Our average premium on Personal Motor is £334 and therefore this suggests that "whiplash" costs equate to £73.65 of every policy. Once the type of business we write and size of our account is taken into account, we would suggest that this figure is not that far from the ABI figure of £90 across the market as a whole. As we do not write insurance for younger drivers, our average premium will be lower than the combined market average and as a consequence we believe the ABI figure is robust.

Commercial Motor produces a different accident pattern to private car accounts and tends to produce lower volumes of low value claims and a greater number of larger claims. Our experience is that attritional claims account for 14% of commercial motor premiums with whiplash accounting for some 10.5% to 12.5% of the premium charged.

4. Recommendations

4.1 *Medical Evidence*

The Ministry of Justice proposals in respect of some form of independent national accredited panel of experts is welcomed and should be further developed. Any such panel must have appropriate governance and be fully independent of all parties involved in the claims process.

Medical reports should be standardised so as to include both claimant and defendant version of accident circumstances and supporting evidence such as that relating to the extent of vehicle damage. Reports should comment on the accident mechanics and also include comment on the presence or absence of contra indicators.

Medical reports should not be permitted to support prognoses that inflate damages. Prognoses that we see now seem to fly in the face of received medical opinion.

The cost of medical reports should also be fixed and fall within the range of fees laid out in the Civil Procedure Rules.

[23] Recent examples would include Shah v Ul-Haq & Ors [2009] EWCA Civ 542; Charnock V Rowan CA (Civ) [2012] EWCA Civ 2 and Hussain v Hussain CA (Civ Div) [2012] EWCA Civ 1367

4.2 *Recoverability of damages for non demonstrable injury*

Medical reports should categorise whiplash in accordance with the Modified Quebec Task Force scale. Conditions falling within Quebec I and II should not be compensatable.

4.3 *Fraud*

Fraud is a real concern. The law adopts a different approach dependent on whether fraud is perpetuated in support of a claim under a contract of insurance as opposed to a claim for damages. To all intents and purposes the courts condone fraud and exaggeration in personal injury claims. The cases cited above are but a few examples; a further stark example is Fairclough Homes Ltd v Summers [2012] UKSC 26. If any part of an insurance claim made by a policy-holder is tainted by fraud, the whole claim fails. The same position should apply in respect of personal injury claims.

4.4 *Small Claims Court Limit*

The proposed increase in the Small Claims Court limit in respect of motor claims is welcomed and should be implemented. However, such an increase will not serve to fully address the "whiplash" issue.

4.5 *Alternative Business Structures and Damages Based Agreements*

In our opinion we believe that these developments will militate against the effectiveness of other measures being introduced to tackle "whiplash" claims. As highlighted above we are already seeing ABS's being set up so as to develop income streams on the back of road traffic collisions and, to ensure appropriate behaviour by insurers who become involved with ABS's (particularly around referral of exaggerated "whiplash" claims to their own law firms), we would expect some form of "code of conduct" to be developed—perhaps in conjunction with the ABI. Damages Based Agreements will also enable solicitors to be remunerated even if the Small Claims Track increases as proposed to £5,000. There should be restrictions on the establishment of ABS's in this area and a ban on the use of DBAs in low value motor claims.

4.6 *Support for direct claimants*

In tandem with any increase in the Small Claims Limit there must be support to enable claimants to bring claims directly, without legal representation. In our opinion the so called "MoJ Portal" could easily be developed to facilitate this as could other initiatives such as the ABI Code of Practice in respect of direct claimants.

4.7 *Support for other initiatives*

Other initiatives we would highlight here are:

(a) Thatcham Research's work in respect of improved seat design so as to reduce the likelihood of whiplash type injury.

(b) Effectiveness of use of Force Analysers in identifying loss of function following road traffic collision and "whiplash." If effective, this would allow objective assessment of loss of function and could greatly assist medical experts.

(c) Young Driver safety; although not directly linked to the "whiplash" issue, young drivers remain one of the largest groups at risk of accident and injury. 40% of 17 year olds are involved in an accident within one year of passing their driving test. The Department for Transport's intention to publish a Green Paper on this issue is welcome.

5. Examples where Seeking to Tackle Fraud through the Courts

(a) The number of occupants in a vehicle was disputed following a road traffic collision. Our insured was adamant that there was only the driver and that there was no passenger. The matter went to trial, we lost and each of the two occupants was awarded £1,900. Claimant's costs totalled £44,894.

(b) In this example we sought to challenge that the claimant, who had been involved in a number of previous accidents, had deliberately braked so as to cause an accident. Even though the claimant withdrew a credit hire of some £8,000 and changed his story we were unable to prove fraud at trial; damages of £2,000 were awarded with claimant's costs totalling £56,976.

(c) Our insured reversed into a stationary vehicle. Whiplash was claimed by the occupant of that vehicle. Although liability was admitted, causation was disputed. The matter settled the day before trial at £1,000 with claimant's costs exceeding £30,000.

Further examples of cases where there was actual or suspected fraud are appended at Appendix 3.

6. Appendices [not printed]

April 2013

Written evidence from Direct Line Group (WL 47)

About us

Direct Line Insurance Group plc (Direct Line Group) is headquartered in Bromley, Kent; it has operations in the UK, Germany and Italy.

Through its number of well known brands Direct Line Group offers a wide range of general insurance products to consumers. These brands include; Direct Line, Churchill and Privilege. It also offers insurance services for third party brands through its Partnerships division. In the commercial sector, its NIG and Direct Line for Business operations provide insurance products for businesses via brokers or direct respectively.

In addition to insurance services, Direct Line Group continues to provide support and reassurance to millions of UK motorists through its Green Flag breakdown recovery service and Tracker stolen vehicle recovery and telematics business.

Executive Summary

Direct Line Group (DLG) welcomes the opportunity to respond to the Transport Select Committee's call for evidence on reducing the number and costs of whiplash claims.

We consider that the UK does face a significant problem with regards to whiplash claims. The Government's recently closed consultation on the issue (CP17/2012) contains many positive proposals that would, if implemented, lead to improvements in the civil justice system through reduced costs in low value claims and improved medico-legal reporting. This could help reduce exaggerated or fraudulent claims, have a positive impact in terms of claims costs and ultimately premiums. However, we believe there is more that could be done and have made recommendations below.

In addition, we welcome the announcement made by the Department for Transport (DfT) on the 25th March 2013 that it will be consulting on measures to reduce the number of accidents for young drivers. A reduced risk of accidents would positively impact insurers' assessment of risk for younger drivers with a consequent impact on premiums.

DLG are happy to support the work of the Transport Select Committee on this issue and provide oral evidence if required.

TSC Questions

1. *Whether the Government is correct in describing Great Britain as the "whiplash capital of the world"*

Whilst we do not have specific evidence on the point, previous evidence from the ABI suggests that the UK has a very high frequency of whiplash claims compared to the rest of Europe, and other data sources suggest the problem has increased since 2006.

In 2008, the ABI produced a report: "Tackling Whiplash—Prevention, Care, Compensation" www.abi.org.uk/content/contentfilemanager.aspx?contentid=24986

This referenced figures produced in a report in 2004 by the Comite Europeen des Assurances (now Insurance Europe) that highlighted that at that time the UK had the highest proportion of whiplash claims as against the total number of bodily injuries—76%. This was ahead of Italy at 66%, Norway at 53% and at the other end of the spectrum France with 3%.

Whilst this data is 9 years old, we consider that the high whiplash frequency in the UK is still a problem and has been exacerbated following the growth of Claims Management Companies (CMCs) in the last 10 years.

This view was supported by the release in October 2012 of the "Updated Report on Third Party Motor Claims", published by the Institute and Faculty of Actuaries.

http://www.actuaries.org.uk/news/press-releases/articles/data-institute-and-faculty-actuaries-shows-whiplash-type-claims-continu

This report highlighted a number of significant concerns including the fact that whilst there was a 20% decrease in the number of injuries reported to the police in accidents between 2006 and 2011, there was a 40% increase in the number of third party injury claims over the same period. This discrepancy between the Police and Market data was illustrated on page 4 of the report.

The report also highlighted the correlation between geographical location of CMCs and the frequency of third party injury claims.

In addition, we have concerns that there is a prevalent "Claims Culture" which is further aggravating claims frequency and encouraging the exaggeration and fabrication of claims. In April 2013 DLG commissioned research which questioned 2,004 adults via an online survey. This revealed a wealth of information around insurance claims and attitudes. Some of the key points are detailed below.

— *19% of those who had been in a car accident had made a personal injury claim.*

— *Of which 12% either fabricated or exaggerated their injuries to a greater or lesser degree.*
  — *23%* of 18–34 year olds have either fabricated or exaggerated their injuries;
  — Only *7%* of 35–54 year olds and *5%* of 55+ years olds have fabricated or exaggerated their injuries.
— *Men are more likely than women to exaggerate/ fabricate an injury claim (15% compared to 9%).*

These figures are of concern, as they detail a high proportion of those surveyed who have made claims, have fabricated or exaggerated them. Further our study revealed where someone has previously made a claim they are more likely to fabricate or exaggerate a subsequent one. This is suggestive of a deeper issue where exaggeration or fabrication of a claim is not considered a "wrong", but is deemed socially acceptable. Indeed this point was borne out by the answers to one of the other questions in the research. The question posed was:

"Has anyone you know ever exaggerated or fabricated an injury to be able to claim compensation?"

In response to this, 17% said that they knew someone who had done that, and of that 17%, 12% were either relations or friends.

The above points suggest that the UK has an issue with whiplash claims, which is in part driven by societal attitudes and for some people exaggerating or fabricating injuries is not a "wrong" and is felt to be justified in some circumstances.

2. *Whether it is correct to say that the costs of whiplash claims add £90 to the average premium and, if so, what proportion of this additional cost is due to "exaggerated, misrepresented or fabricated" claims*

The figures are provided by the ABI, and link to a press release issued on the 5th March 2013, and accompanying report "Lifting the bonnet on car insurance- what are the real costs?"

http://www.abi.org.uk/Media/Releases/2013/03/Lifting_the_bonnet_report_uncovers_the_real_cost_of_motor_insurance_.aspx

This report highlighted that in 2011 the average insurance premium was £440, and 20% of that premium covered "whiplash" claims costs (not including associated staff costs and overheads). Whilst we have not been able to conduct a definitive assessment of our "whiplash" claims costs as a proportion of total premium, we believe that the 20% figure quoted by the ABI is broadly correct.

In terms of the proportion of such claims/costs that are attributable to exaggerated, misrepresented or fabricated claims, the challenge in providing an empirically based figure, lies with the lack of objectivity, transparency and rigour in medical assessments and the difficulties of disproving whiplash claims, a point previously evidenced to the All Party Parliamentary Group on Insurance and Financial Services in November 2011. [*see 17/11/11 entry*—http://www.postonline.co.uk/blog/appgifs-blog/page/9]

However, whilst there is a lack of objective empirical evidence, estimates from the Insurance Fraud Bureau suggest that up to one in seven personal injury claims are linked to suspected fraudulent "crash for cash" claims. Most of these will be low severity whiplash.

http://www.insurancefraudbureau.org/files/press_release_pdfs/crash_for_cash_-_putting_the_brakes_on_fraud.pdf

This figure would not include any exaggerated claims figures, so the true figure may be higher. This view is supported by the actuarial data referenced in Question 1 which shows increasing claims frequency, notwithstanding reducing accident reporting to the police.

3. *Whether the proposals put forward by the Government, in relation to medical evidence of whiplash and incentives to challenge fraudulent or exaggerated claims, are likely to reduce motor insurance premiums and, if so, to what extent*

We and other interested parties have responded to the Government consultation with our views on the proposals and how we believe the Government should look to address the issues raised.

If implemented as we propose, and if the appropriate level of technical expertise and independence is ensured as part of the whiplash diagnosis process, then it follows that some of the existing fraudulent or exaggerated whiplash claims would not proceed and consequently there would be reductions in claims costs. This is because neither damages nor legal costs would be paid in respect of those claims. It is difficult to estimate the precise effect that would have as it would depend on an effective implementation, the timing of any reforms, and in terms of the beneficial impact of that, there may be other non whiplash inflationary matters (eg increasing costs of repairs) that may offset some of that benefit. However, if implemented appropriately there would be a benefit.

We would go beyond the proposals within the consultation itself, and call for an open and public debate about the rights of claimants to be awarded compensation for general damages as against the majority who do not claim, but end up paying higher premiums. In this regard we are not referring to compensation for special damages, genuine costs for rehabilitation or care, or compensation for those who suffer significant injuries, but

the right to compensation for a typical low severity whiplash injury, which is not supported by objective evidence.

This echoes a point made recently by the ABI on the levels of compensation, when it called for a broader debate as to how these should be approached (see below).

http://www.lawgazette.co.uk/news/insurers-turn-guns-compensation-payments

A good starting point for the debate is a comparison with the levels of compensation and eligibility criteria where an injured party, who is the victim of a crime, makes a claim to the Criminal Injuries Compensation Authority (CICA). As noted on Page 66 from the CICA link below, the amount of compensation one can expect from a disabling whiplash injury of more than 13 weeks is £1,000.

http://www.justice.gov.uk/downloads/victims-and-witnesses/cic-a/how-to-apply/cica-guide.pdf

This raises two relevant points. Firstly, a whiplash injury lasting 13 weeks or less would not attract compensation as it would be considered too minor. Secondly, the injured party would only recover £1,000 for a "disabling" injury for 14 weeks and above. Currently where a whiplash claim for 14 weeks injury settles following a road traffic accident (involving one GP visit and eight physiotherapy appointments), the DLG compensation payment for the injury can be in a range of up to £1,700.

One could argue that the rationale for the difference in this approach is that the purpose of the CICA is different, that a balance has to be reached between fairness and the impact on the public purse. The compensation must reflect how much society can afford to pay, which in the case of the CICA that is determined by Government. There is an analogous argument in the insurance sector in terms of fairness versus the public's purse (in terms of how much premium policyholders can and should pay).

In looking at the level of compensation, the survey we conducted on whiplash (referenced in question 1) also highlighted differences in terms of compensation and the amounts achieved, compared to perceptions of what the "appropriate" level should be.

Whilst the mean compensation for <£5K personal injury (typically whiplash) claims of those surveyed was £1,888, this was higher than the amount expected from those surveyed, who had not had not claimed.

Of the 310 UK adults who had been involved in a car accident since 2001 but had *not* made a claim for a personal injury, they believe someone with moderate whiplash injury should be compensated £1,312 on average. This difference between perception and reality underscores the benefit of a broader debate in this area.

We would echo the ABI's call for a wider debate on the question of levels of compensation, and where the correct balance should be drawn.

4. *The likely impact of the proposals on access to justice for claimants who are genuinely injured*

We were conscious of the points made by the Government in the consultation (CP17/2012) of the needs to address the three primary "access to justice" risks highlighted in paragraph 65 of the consultation. These were:

> *Risk 1: Reduction in access to justice if a claimant's valid claim is rejected by an insurer, and they don't challenge that rejection.*
>
> *Risk 2: Risk of access to justice due to inequality "of arms". If insurers have legal representation and claimants don't there is a risk that claimants won't be able to present their claims as well, and they may be prejudiced as a consequence.*
>
> *Risk 3: Risk that without representation, claimants will settle for less compensation than they are entitled to.*

Whilst we recognised these concerns, we proposed straightforward solutions to address or allay them. These we detail below:

> Risk 1: For this we proposed that liability scenarios could be tariffed so that for the majority of accident scenarios, a predetermined liability outcome would arise (ie 50/50, 70/30 or 100%). Calibration of this would need to be agreed as it would be necessary to have claimant and defendant agreement. Such scenarios (once agreed) would need to have statutory effect. Once in place 90%+ of liability scenarios could be published and explained. Liability disputes over points of law (rather than disputes based on fact) would be much reduced. Guidance on the correct liability scenarios could easily be created.
>
> Risk 2: The equality of arms issue (as highlighted above) could be dealt with directly by the proposals we make in Risk 1 and 3, but is also something that could be addressed both through the more informal operation of the Small Claims Track (SCT) generally, and through increased guidance. A recent example of the latter can be seen by the guidance published by the judiciary regarding the SCT for the Patents Court. If an individual can choose, with appropriate guidance, to pursue their own "intellectual property" dispute through the Patents Small Claims Court, then a similar approach could be adopted in whiplash/low value bodily injury claims.
>
> http://www.justice.gov.uk/downloads/courts/patentscourt/patents-court-small-claims.pdf.

By way of further illustration, in April 2013 both the Bar Council and the Civil Justice Council (CJC) created detailed guidance to assist litigants in person. The Bar Council's guide is a more general guide but the CJC material is specifically targeted at users of the Small Claims Court. A similar approach could be adopted for personal injury claims were the small claims court limit to be increased.

http://live.barcouncil.netxtra.net/media/203109/srl_guide_final_for_online_use.pdf

http://www.judiciary.gov.uk/JCO%2fDocuments%2fCJC%2fPublications%2fOther+papers%2f Small+Claims+Guide+for+web+FINAL.pdf

Risk 3: Research undertaken by the ABI which was referenced in their consultation response, suggests that this is not a widespread issue across the industry.

However to address the risk, we supported the idea of the introduction of "predictive damages" for compensation, where compensation would be determined "automatically" following the medical assessment/ prognosis. The approach operates in certain European countries where the doctor determines the injury in such a way that aligns with a compensation amount.

In Italy, France and Spain the systems operate so that doctors diagnose an injury and then convert that assessment to points on a scale, which equate to levels of compensation (this was something Lord Justice Jackson looked at in his 2010 Preliminary Report at pages 233–239 & 243–246). If a single, independent doctor diagnosed an injury, and either that was fed into damages assessment software which helps accurately quantify damages (eg Claims Outcome Advisor (COA)/Colussus) or were given points on a published scale as in Italy, which were calibrated to damages, then a claimant can decide whether to instruct a lawyer while understanding the position regarding recovery of such costs.

Key to this will be true independence in medical reporting, and appropriate calibration. In terms of calibration this would be needed both with regards injury parameters and compensation levels. When calibrating the levels of settlement for such injuries, regard must be given to actual settlement levels achieved by claimants (ie settled prior to litigation as well as after). These settlement details are readily available. It would be artificial if the calibration were undertaken with reference solely to judicial awards or to the levels set out in the Judicial College guidelines. Once calibrated for the first year of introduction, a review mechanism to adjust levels in subsequent years would need to be built in.

5. *Whether there are other steps which the Government should be taking to reduce the cost of motor insurance*

DLG has attended all three motor insurance summits held firstly with the Prime Minister at No.10 Downing Street and then at the DfT. The fact that there have been three such summits is testament to how important the issue of rising motor premiums has become for consumers. We welcome the announcements made by the DfT following the most recent of these summits on 25 March 2013. The announcement that they will be consulting on measures to reduce the number of accidents involving young motorists is something we wholeheartedly support. Road safety is an issue we are committed to in itself as a responsible business. At the same time, we must recognise that fewer accidents will lead to lower premiums. A large proportion of the most severe and costly accidents that occur on our roads involve young and often inexperienced drivers who are taking greater risks than any other drivers on the UK's roads.

Whilst the green paper has not yet been published, the indications from Transport Secretary Patrick McLoughlin are that the following points would be considered:

- A minimum period of learning before candidates can take their driving test.
- Letting young drivers have lessons on motorways, and encouraging lessons in more difficult driving conditions.
- Increasing the current probationary period from two years to three years, within which a driver's licence will be revoked if they receive 6 or more penalty points.
- Introducing a more rigorous driving test, to ensure new drivers are ready for unsupervised driving.
- Incentives to encourage young drivers to have additional training after passing their test.
- Improving the training of driving instructors.
- Possible options of imposing temporary restrictions on newly qualified drivers.

DLG welcomes the opportunity to respond to this forthcoming consultation. If the right measures are taken to reduce the risk that young drivers pose on the UK's roads, we believe the cost of motor insurance premiums would be reduced.

One other area which is causing serious inflation to premiums for consumers is fraud. The most worrying and catastrophic of the many types of insurance fraud today is whiplash and the Transport Select Committee are right to raise this as a single issue that needs to be addressed. There are though many different types of fraud, that all have an impact. "Cash for crash" is no longer a victimless crime after a group of men were

convicted of the death of a young lady during a botched attempt to commit serious fraud. These gangs are operating all over the UK and the trend is growing. This costs the industry millions every month that it goes on.

There are less dangerous, but equally as damaging cases of fraud being committed every day by otherwise "responsible citizens" who feel that lying about a claim, the name of a car's main driver or worse still, driving without insurance, is socially acceptable. Attitudes to this need to change. If that aim is achieved, we would also see a drop in the price of premiums. This is a cultural and societal problem in the UK (as seen from our survey data in Q1). Fines need to be higher. Enforcement needs to be stronger and the judiciary as the moral backbone of any society, need to take a harsher view on insurance fraud.

April 2013

Written evidence from the Law Society of England and Wales (WL 21)

INTRODUCTION

1. The Law Society of England and Wales ("the Society") is the independent professional body, established for solicitors in 1825, that works globally to support and represent its 166,000 members, promoting the highest professional standards and the rule of law.

2. The Government's stated objective is to reduce fraudulent and exaggerated whiplash accident claims. However, there is no evidence to show that there is a disproportionate level of fraudulent or exaggerated claims.

3. Fraudulent claims are abhorrent and, whilst it would be impossible to eradicate them entirely, more must be done to resolve the problem. The Law Society has offered to help on several occasions and has had discussions with the Insurance Fraud Bureau but, regrettably, nothing positive has been forthcoming from any insurance organisation indicating that working together would assist.

4. The Society accepts that whilst the number of road traffic accidents may have fallen, the level of claims has risen. This is likely to indicate that more people involved in accidents are making claims and does not prove that many of the claims are fraudulent or exaggerated. The reasons are likely to be far less sinister than insurers have led the Government to believe. The most likely reason is the profusion of advertising campaigns by claims management companies which have developed since 2005.

5. The evidence is clear: the vast majority of whiplash claims are genuine. Exaggeration of claims might be an issue, but this needs to be addressed by the medical experts and if there is complicity by some medical and legal professionals then this needs to be eradicated by their respective regulators.

6. The Government's present proposal for addressing the issue, raising the small claims limit for whiplash injuries, or indeed any other type of injury claim, does nothing to deter fraudulent claims while penalising all of those genuine accident victims and denying them the means to pay for legal advice and/or representation which is essential in these matters. This will create an uneven playing field as those victims who represent themselves will be confronted by insurers and their lawyers who specialise in contesting personal injury claims without adequate representation themselves. This will have a seriously detrimental effect on access to justice for genuine accident victims.

WHIPLASH CLAIMS

7. In its recent consultation *Reducing the number and costs of whiplash claims*[24] the Ministry of Justice referred to comparative data from 2004 to support its contention that Great Britain had the highest whiplash claims rate in Europe. As the Society pointed out in its response to that consultation,[25] even if data from a 2004 study was relevant today, it cannot be used in isolation to other statistics from the European insurance industry.

8. In January 2013 Insurance Europe produced its Statistics Report No. 46: *European Insurance in Figures.*[26] The British Insurers' European Committee, which represents the UK in Insurance Europe, consists of the ABI, the Underwriting Association of London and Lloyd's. The report contains the following facts:

8.1 In 2011 motor premiums in the EU totalled 129 billion Euros (a 4% growth over 2010);

8.2 Motor premiums rose by 3.6% in Germany, 3.5% in France and 14.1% in the UK in 2011 compared to 2010;

8.3 Motor claims paid out in the EU in 2011 totalled 100 billion Euros (a decline of 2% over 2010);

8.4 In 2011 UK insurers reported a decline of 6% in claims paid out, compared to 2010. German Insurers reported an increase of 2% and in France claims paid out remained stable;

8.5 In 2011 Germany's share of European Insurers total motor claims expenditure was 20%. By comparison France was 13% and the UK was 14%.

[24] Ministry of Justice, (2012), *Reducing the number and costs of whiplash claims,* London: Ministry of Justice.
[25] Law Society (2013), *Reducing the number and costs of whiplash claims: Law Society response,* London: The Law Society.
[26] Insurance Europe (2013), *Statistics No. 46: European Insurance Figures,* Brussels: Insurance Europe.

9. These published facts, which the ABI have not disputed, paint a very different picture of the UK insurance industry than the one it has portrayed publicly. The Law Society therefore believes that any data provided or assurances given by insurers must be looked at critically and treated as potentially unreliable and/or inaccurate.

The Insurance Market

10. In May 2012 the Office of Fair Trading (OFT) provisionally decided to refer the private motor insurance market to the Competition Commission after it found evidence that insurers compete in a dysfunctional way that may push up premiums for drivers by £225 million a year.[27] The OFT's market study provisionally found that the insurers of drivers responsible for an accident ("at-fault" drivers) appear to have little control over the way repairs and replacement vehicles are provided to the "not-at-fault" driver. The OFT report stated:

> "the following practices appear to inflate the cost of replacement vehicles provided to not-at-fault drivers, making it on average £560 more expensive each time:
>
> — After road traffic accidents, many insurers of not-at-fault drivers, brokers and repairers, refer those drivers to credit hire organisations that tend to charge higher daily hire rates, in exchange for a referral fee of between £250 and £400 per car hire.
>
> — Not-at-fault drivers appear to receive replacement vehicles for longer periods than necessary, leading to inflated bills for the at-fault driver's insurer to cover."

11. The report also stated:

> "that the following practices appear to be inflating the cost of repairs to not at-fault drivers' vehicles, by £155 on average each time:
>
> — Certain insurers receive referral fees and rebates from repairers, paint suppliers and parts suppliers. It appears that the cost of paying these referral fees and rebates to insurers increases the repair bills being passed to the at-fault driver's insurer.
>
> — Certain insurers have agreements with their approved repairers to charge higher labour rates when repairing the vehicle of the not-at-fault driver which they insure, leading to higher bills being passed to the at-fault driver's insurer."

12. These conclusions paint a damning picture of insurers. Indeed, the OFT itself concluded that... "This is an inefficient way for the sector to operate, raising the total costs for providing private motor insurance which drivers end up paying."

13. Therefore, based on the OFT findings, for every 100,000 accidents insurers are paying, on average, £71.5 million in inflated and avoidable costs. This is a staggering statistic which insurers have chosen to ignore bearing in mind that, even on a conservative estimate, there are more than 400,000 road traffic collisions each year being reported through the RTA claims portal. These additional and unnecessary costs are passed onto the consumer. The conclusion is clear: rather than tackling their own "in house" problems, insurers have, instead, chosen to attack the victims of whiplash.

What other steps can be taken?

14. Two priority areas are: (1) increased criminal penalties for fraud, and (2) mandatory training for legal and medical professionals to enable them to identify cases of fraud and exaggeration more easily. However, these are likely to be a more long term solution. Furthermore, mandatory training for professionals would require the appropriate regulators to become more engaged with the problem.

15. Closer liaison between the legal profession and the insurance industry in identifying potential fraudulent claimants would eradicate many problems in the short term. It is understood that both the ABI and the IFB maintain data which is used to identify possible fraudulent claims but such data is used for their own purpose and is not accessible to, or shared with others. The Law Society has suggested to both organisations that sharing of some data with the legal profession would assist solicitors in identifying the possibility that a client may be making a fraudulent claim. These suggestions have been rejected. The Law Society has urged the Government to exert its influence and force the ABI and IFB to work with it in providing solicitors with secure access to relevant data which is readily available and can be used in reducing fraudulent and exaggerated claims.

16. Another important matter to consider is that if potential claimants are steered towards unregulated entities and away from solicitors then those entities are less likely to decline to represent claimants who they suspect of fraud or exaggeration.

17. A point to note which has similar potential is the practice of third party capture. This describes a situation where insurers contact the third party driver or passenger direct on receiving notification from their own insured of an accident. Many claims are settled within a few days, sometimes even hours, of an accident without any medical evidence to substantiate an injury, and, in some cases, without the third party having any intention of making a claim. This practice is, to the greater extent, unregulated by the Financial Services Authority (FSA) and the potential for fraud, exaggeration and spurious claims are limitless in the absence of medical evidence.

[27] Office for Fair Trading, (2012), *Private Motor Insurance: Report on the market study and proposed decision to make a market investigation reference,* London: OFT.

The practice of third party capture should therefore be reviewed with a view to full regulation, a mandatory requirement for medical evidence and a requirement that third parties must be fully aware of their legal rights and potential value of a claim before agreeing a settlement which is binding.

18. A mandatory requirement for written proof that any RTA personal injury has been reported to the police before being accepted by insurers as a potential claim would, we suspect, eradicate a significant proportion of fraudulent claims.

April 2013

Written evidence from the Association of Personal Injury Lawyers (APIL) (WL 16)

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation with a 20-year history of working to help injured people gain the access to justice they need and deserve. Our 4,700 members are committed to supporting the association's aims, and all are signed up to APIL's code of conduct and consumer charter. Membership comprises mostly solicitors, along with barristers, legal executives, paralegals and some academics.

We welcome the opportunity to provide evidence to the Transport Committee on the number and cost of whiplash claims. While this written evidence includes elements from other documents written on this issue (such as the Ministry of Justice consultation *Reducing the number and costs of whiplash claims*, and the *APIL Whiplash Report 2012*) it has been developed specifically for the Transport Committee.

Is the Government right to describe Great Britain as the "whiplash capital of the world"?

1. The Government's only source for this assertion appears to be a report from the Comité Européen des Assurances (CEA) which is nine years old and relies on figures which are even older than that. The figures were compiled from a survey conducted by a European insurance body using what appears to be largely estimated data provided by national insurance representative bodies. There are also basic factual errors in the report, including a reference to the legal mechanism of the reversal of the burden of proof in the Netherlands, which does not actually exist in that country.

2. A more recent report, from the World Bank in 2008, shows that the UK has 79% more vehicles per kilometre of road compared with the European Union average. This is higher than Germany, the Netherlands, and almost twice the number than in France. Logic dictates that, if UK roads are busier, and towns more congested, low-speed accidents generating relatively minor injuries are much more likely to be prevalent than high-speed crashes causing catastrophic injuries and death.

3. The Government's own Compensation Recovery Unit statistics on the number of whiplash-related claims show that claims fell by almost 24,000 during 2011–12. While the figure may still be considered high, it is important to recognise that the number has decreased on the previous year which suggests that the situation is not "spiralling out of control" as is often claimed.

4. The assertion that Britain leads the world in whiplash claims has been made popular by the insurance industry, in its efforts to restrict these claims, cut costs, and increase profits for insurers and their shareholders. It is extremely disappointing that the Government appears to have accepted wholesale an argument which is based entirely on an outdated, inaccurate and biased report.

Is it correct to say the costs of whiplash claims add £90 to the average premium and, if so, what proportion of this additional cost is due to "exaggerated, misrepresented or fabricated claims"?

5. Obviously, APIL has no access to this data, which is held by the Association of British Insurers (ABI) so we cannot comment on its accuracy. We do, however, query the way this figure is often interpreted.

6. According to the ABI's recent report *Lifting the bonnet on car insurance—what are the real costs?* the average car insurance premium in 2011 was £440. Twenty% of the premium cost was accounted for by whiplash claims according to the report, which equates to £88, a figure which is usually rounded up to £90. We would submit that this is not, in fact, an "additional" cost but an integral part of the insurance premium which is, in actual fact, perfectly reasonable. The largest proportion of road traffic claims for personal injury are for whiplash which reflects, as already discussed, the state of the UK's roads, the impact of improvements in car design and the compulsory use of seat belts. All these factors contribute to the fact that whiplash injuries far outweigh catastrophic injury claims (which account for nine% of the premium). No-one could argue that this is a bad thing. £88 is, therefore, a reasonable proportion of the premium to pay for the likelihood of suffering a whiplash injury. This reflects what the premium is designed to be used for: to pay compensation for injuries and damage.

7. The figure which we submit should be subject to real opprobrium is the £242 (ie more than half) of the average premium which is used to pay for repair costs and replacement vehicles (an aspect of claims which the Office of Fair Trading has branded "dysfunctional") combined with staffing and overhead costs, which account for 29% and 26% of the premium respectively. Having found evidence that insurers' approach to car

repair and replacement "may push up premiums for drivers by £225 million a year", the Office of Fair Trading referred the UK's private motor insurance market to the Competition Commission for investigation.

8. The OFT also said there are "features of the private motor insurance market that prevent, restrict or distort competition" and that the market would work better if insurers were to stop focusing "on gaining the competitive edge through raising rival insurers' costs and increasing their own revenues".

9. We do not have statistics about what proportion of the £90 is related to fraudulent claims. We accept that there are some fraudulent cases although, according to the ABI's own assertions, 93% of road traffic cases are genuine (see paragraph 22).

Are the proposals put forward by the Government, in relation to medical evidence of whiplash and incentives to challenge fraudulent or exaggerated claims, likely to reduce motor insurance premiums and, if so, to what extent?

10. We are highly sceptical about the extent to which these proposals would result in lower motor premiums for several reasons outlined below. It is also worth noting at the outset that insurance premiums can go up or down for many reasons other than the claims picture in itself: the nature of the market, the impact of petrol prices on the length and number of journeys etc.

11. The Government has recently announced that lawyers' fees for handling road traffic claims through the special electronic process known as the "RTA portal" are to be reduced by more than half, following negotiation with the insurance industry. At an insurance summit held with the Prime Minister in February 2012, it was noted that insurance companies would pass on savings of approximately £1.5-£2 billion from reforms to legal fees and whiplash claims. Yet in an email exchange between the ABI and the Cabinet Office just five days earlier[28] the ABI said "We absolutely cannot commit to a percentage .....Furthermore, we cannot agree to a timeframe".

12. In February this year, Direct Line published its annual financial statement which was widely reported to say "the effect of the package of civil justice reforms should be at least "net neutral" for the group in the medium term". This does not generate confidence that Direct Line premiums will fall.

13. At broadly the same time, John O'Roarke, managing director of the insurance company LV=, was reported warning the public not to expect vastly reduced premiums as a result of the new fixed costs. In the *Law Society Gazette* on 6 March he was reported as saying: "'[I expect] a 3% reduction in premium, but generally we have already seen reductions in premiums of 12% and I am not hopeful there will be much more to come.'"

14. With this lacklustre level of commitment from the insurance industry, claimant representatives surely cannot be blamed for being sceptical that any savings made from the Government's proposed changes to whiplash claims will be passed on to the public.

15. Furthermore, while the ABI pays lip service to the need to compensate people with genuine injuries, its agenda is clearly more focussed on cutting as many claims out of the system as possible, as became clear in a note of the insurance summit from February 2012 which said: "The ABI responded that ....insurance companies wanted to continue to pay out for genuine injury, but .....if minor personal injury claims were taken out of the equation, more than 10% could be taken off premiums."[29]

16. The biggest incentive the Government is offering to challenge fraud is to force whiplash claimants into the small claims court on the basis that it would be more economically viable for insurers to challenge claims in a system in which both sides bear their own costs. The idea that this will be effective is, frankly, ridiculous.

17. Once fraud is alleged in the small claims court, the judge will be obliged to tell the claimant and the case will be allocated to a different court which has the facility to deal with claims of fraud, so a fraudulent claim would not be dealt with in the small claims court in any event.

18. We believe there is a strong likelihood that allegations of fraud could be used tactically by insurers to drive up costs and deter the genuinely injured claimant from proceeding with the case at all.

19. Furthermore, people who cannot afford to pay for independent legal advice may shy away from taking a claim through fear of the court system. Alternatively, they are highly likely to turn to claims management companies (CMCs) to conduct their claims. A window of opportunity will therefore be opened to CMCs.

20. Representing people in the small claims court will become their next business model, as work representing people who claim for the mis-selling of payment protection insurance (PPI) starts to decrease. The texting and advertising which is an intrinsic part of CMCs' approach will focus on encouraging people to make claims for whiplash. This has the potential to drive up the number of fraudulent claims, rather than help to reduce them.

[28] R on the application APIL and MASS v Secretary of State for Justice [2013] CO/904/2013
[29] Ibid

21. It should be remembered, as well, that there are already checks and balances in the system to help prevent fraud, but these are not always used by insurers. It is now routine practice for insurance companies to make offers of compensation without even seeing medical reports, which is clearly inviting abuse of the system.

22. We are, of course, used to reading insurance industry rhetoric about whiplash being the "fraud of choice" but no evidence has, to date, been offered to support this. In September 2012, the ABI issued a press release saying that seven% of road traffic claims had been found to be fraudulent. This included so called "crash for cash incidents" among other types of fraud. APIL does not condone fraud and we believe it must be tackled, but the way it is dealt with must be proportionate. Most claimants are honest and do not deserve to have to deal with the problems which they would encounter in the small claims court.

23. We put great value on good, independent medical advice, but we believe the Government's proposal for the creation of a panel of medical experts would create more problems than it would solve. The panel clearly could not be controlled by any insurer representative, such as the ABI, as this would lead to bias. But who would control the panel? Who would register experts to it and control entry to the panel? What would the appeal process be?

24. To ensure that a monopoly of service providers is not created, and to allow the claimant a free choice of which medical expert to use, accreditation is preferable as a method of regulating those who offer to provide medical reports. If claimants do not have legal advice, it is even more important that the medical expert is wholly independent and the process is transparent.

25. As a method of ensuring that experts are not incompetent or fraudulent, APIL supports the idea of a register of accredited medical practitioners. There are already accreditation schemes in place and we have no objection to accredited schemes being adopted for the benefit of all parties; but we are concerned that these schemes should be independently run.

The likely impact of the proposals on access to justice for claimants who are genuinely injured

26. APIL has been very clear about its views on the impact of these proposals for injured people. Hundreds of thousands of cases would be forced through the small claims system, and this is a court which is designed for people to represent themselves. The small claims court is traditionally used for settling disputes about faulty goods and services. Personal injury cases are different. They all require an ability to gather the right evidence and, at the very least, have a knowledge of the value of their claim.

27. Injured people will have to choose whether to pay for legal representation out of their own pockets (which they don't have to do at the moment) or face the defendants (who usually do have legal representation) in court themselves, or not claim at all.

28. APIL's independent research found that 70% of claimants would not want to pursue a whiplash claim without the help of an independent solicitor.[30] The Ministry of Justice published a review in June 2011, on research into litigants in person in the civil and family courts which found that "litigants in person could face problems in court, such as understanding evidential requirements, identifying legally relevant facts and dealing with forms. It was suggested that the oral and procedural demands of the courtroom could be overwhelming." Further, "the weight of the evidence indicates that lack of representation negatively affected case outcomes", and there was also evidence that litigants in person create extra work for court staff and the judiciary.[31]

29. In cases dealt with in the small claims track the claimant would have to prepare for the disclosure of relevant documents and prepare a witness statement. A claimant would not know when and if to disclose the documents. APIL's independent research also found that 70% of people who provided a definite answer would not know how much to claim for their whiplash injury,[32] and so would be at an immediate disadvantage arguing their cases against an experienced defendant representative.

30. APIL has also conducted research to investigate by how much insurers are likely to under-settle claims where there is no independent legal representative involved. The research clearly shows that for claims involving whiplash, instructing a lawyer ensures that the claimant receives, on average, 200% more than if the injured person had accepted the first offer made to him. The converse of this is that unrepresented claimants risk accepting offers of around £1,000 from insurers rather than the average sum of £3,173 to which they are entitled, to ensure they are adequately compensated.

31. Furthermore, there are likely to be unintended consequences in any move to increase the small claims court limit. A potentially huge influx of unrepresented claimants could cause the small claims system to grind to a halt. Evidence from family law cases, where there has recently been a huge increase in people representing themselves, shows that so-called "litigants in person" can cause serious delays to the system. Without a legal "buffer" to help people understand the system, litigants struggle to comply with court rules and judges are frequently obliged to halt proceedings to explain the legal process.

32. In addition, and as mentioned earlier in this evidence, the gap in legal advice is highly likely to be exploited by CMCs which have a reputation for marketing through intrusive and unwelcome cold calling and

[30] http://files.apil.org.uk/campaigns/the-whiplash-report-2012.pdf
[31] Ministry of Justice Research Summary 2/11 "Litigants in person: a literature review" June 2011
[32] http://files.apil.org.uk/campaigns/the-whiplash-report-2012.pdf

text messaging. These practices are likely to become more prevalent, reflecting what has recently been seen in relation to the mis-selling of PPI. The Government's proposal effectively represents a business opportunity for CMCs to run claims for injured people in the same way they have taken on PPI claims—the fact that CMCs involved in the PPI scandal account for the vast majority of consumer complaints received by the Ministry of Justice speaks for itself.

33. CMCs are not, of course, bound by the Solicitors' Code of Conduct, so there is likely to be an influx of people who are unqualified seeing a cash bonanza in unrepresented people. They will do what they do best—openly tout for claimants, run very large numbers of what could be potential dubious claims, and engage in negotiations with insurers on claimants' behalf when they are not qualified to do so. The result will be an increase, rather than a decrease, in fraudulent claims and a haphazard, slapdash way of dealing with the claims which injured people, who represent the vast majority of claimants, do not deserve.

Are there other steps the Government should be taking to reduce the cost of motor insurance?

34. The Government has already taken a significant step in terms of cutting lawyers' costs, which is said will lead to lower premiums although, for reasons mentioned earlier in this document, whether and when any savings resulting from this move remains to be seen. For reasons already expressed, forcing injured people to use the small claims court is not an appropriate way to reduce costs while maintaining access to justice.

35. There are better ways to tackle fraud, which could help to cut costs, and what is required now is a universal commitment to this. APIL has developed a series of ideas for reducing fraud as follows:

1. Free and prompt exchange of information between the road traffic accident (RTA) claims portal and the Insurance Fraud Bureau to facilitate identification of fraudulent behaviour at the earliest possible opportunity.
2. Claimants to be subject to a standard, written statement of truth which must be explained to them by their solicitors. A document to be signed by either the claimant or the solicitor to confirm that the claimant understands the commitment behind the statement of truth. Breach of the statement may amount to fraud and may make the claimant liable to prosecution.
3. Insurers to be banned from making offers of compensation before a medical report has been seen: the medical report is a critical factor in ensuring a claim has merit and that accurate compensation is paid.
4. The rules governing the conduct of solicitors, insurers and claims management companies to be amended and standardised to prevent offers of gifts or cash inducements being made to potential clients.
5. Robust enforcement of the imminent ban on the sale of claimants' personal details by the defendants' insurers.
6. Any party who instructs an expert to give the other party a list of the names of one or more experts he considers are suitable to instruct beforehand, to ensure the expert is accepted as credible by both sides.
7. Development of guidance to assist medical experts to identify and understand whiplash claims. The guidance should be developed in conjunction with the relevant medical organisations.
8. Photographic identification of the claimant to be required by the medical expert: if this cannot be produced, the omission will be included in the expert's report.
9. The claimant's solicitor to organise access to relevant medical records where a medical expert is to be instructed.
10. "Spam" or "cold" texting to be banned.

April 2013

Supplementary written evidence from the Association of Personal Injury Lawyers (APIL) (WL 16A)

1. Further to written evidence submitted on Thursday 11 April 2013, the Association of Personal Injury Lawyers (APIL) has since received information from the Department for Work and Pensions about the number of whiplash claims, which we would like to submit to the committee for consideration as part of its inquiry into whiplash claims following road traffic accidents.

2. A Freedom of Information request from APIL was made on 3 April 2013 to the Department for Work and Pensions' Compensation Recovery Unit (CRU) asking for the following information-

3. "Claims type by local authority area/country; whiplash, mesothelioma-only; occupational deafness/noise-induced hearing loss (NIHL)—only claims broken down by claim type and local authority/county".

4. A response was received on Tuesday 23 April 2013, which revealed that there were 488,281 whiplash claims in Great Britain registered by the Compensation Recovery Unit in 2012–13. This latest figure represents a decrease of 59,124 claims between 2011–12 and 2012–13.

5. Any enquires in respect of this supplementary memorandum should be addressed, in the first instance, to Lorraine Gwinnutt, Head of Communications at APIL, on 0115 943 5426 or lorraine.gwinnutt@apil.org.uk.

April 2013

Written evidence from the Forum of Insurance Lawyers (FOIL) (WL 33)

FOIL (The Forum of Insurance Lawyers) exists to provide a forum for communication and the exchange of information between lawyers acting predominantly or exclusively for insurance clients (except legal expenses insurers) within firms of solicitors, as barristers, or as in-house lawyers for insurers or self-insurers. FOIL is an active lobbying organisation on matters concerning insurance litigation.

FOIL represents over 8000 members. It is the only organisation which represents solicitors who act for defendants in civil proceedings.

This response has been written specifically for the Committee. Any enquiries in respect of it should be addressed initially to:

Shirley Denyer, Shirley Denyer LLP, FOIL Knowledge Services (Consultant)

shirley.denyer@foil.org.uk

Sinclair House, 2D Park Avenue, Eccleston Park, Prescot, Merseyside, L34 2QZ

Executive Summary

— Whilst vehicles have become safer and the number of road traffic accidents is reducing, claims volumes continue to increase. This is the result of a dysfunctional system created on the back of referral fees and difficulties in diagnosing whiplash. Fraud is a significant problem.

— Some of the reforms to the provision of medical evidence which the Government is proposing have the potential to improve the accuracy of diagnosis and prognosis and reduce damages and costs. This in turn could reduce motor premiums.

— An increase in the Small Claims Track limit would not impact upon fraudulent claims. It is unlikely to reduce costs (therefore limiting the opportunity for a reduction in premiums) and has the potential to increase them.

— Other steps could be taken to reduce the cost of claims, and therefore, potentially, motor premiums: legislation to address the issue of third-party fraud; and a reduction in the limitation period for RTA claims.

Introduction

1. FOIL members have significant experience of handling, for defendants and insurers, a wide range of civil claims arising from road traffic accidents, including claims for whiplash.

2. Research and development over recent years has significantly improved vehicle safety, meaning that cars are safer for drivers and passengers than they have ever been. Coupled with these improvements, statistics produced by the actuarial profession[33] show that accidents giving rise to third party claims are reducing, with third party damage claims frequency reducing 11% in 2011, the most pronounced drop in five years.

3. At the same time, however, there was an 18% increase in the proportion of third party accidents resulting in a personal injury claim in 2011, the biggest increase the Institute and Faculty of Actuaries has seen since it began compiling statistics. The Faculty notes that this increase alone increased the cost to insurers by £400 million "*and as a result it is likely that motor insurance premiums will rise*".

4. FOIL believes that the increase in personal injury claims arising from road traffic accidents over recent years has been encouraged by two specific aspects of the claims process:

— A regime of referral fees and excessive legal costs has created a dysfunctional system. Potential claims have become a valuable commodity, leading to unprecedented marketing by claims management companies, pressuring would-be claimants to commence claims for personal injuries. Offers of up-front payments and gimmicks such as free iPads and other consumer gifts upon notification of a claim, coupled with social acceptance of whiplash claims, have incentivised claimants to see damages as a natural consequence of every vehicle shunt or bump, ultimately leading not only to invented and exaggerated claims of injury but the invention and staging of accidents.

— The lack of an objective test for soft tissue injuries, including whiplash, leaves medical experts dependent upon the claimant's account of the accident and injury to diagnose whiplash and provide a prognosis. With no test to "prove" that whiplash has occurred it is very difficult to disprove.

[33] The 2012 report on third party motor claims and periodical payment orders (PPOs) from the Institute and Faculty of Actuaries.

5. Fraudulent claims for compensation are a significant and increasing problem. Whilst access to justice must be preserved for the genuinely injured, exaggerated, misrepresented or fabricated claims are a blight on the compensation regime and cannot be allowed to go unchallenged. Through the work of its own Special Interest team on Fraud, FOIL is concerned to address practices which allow fraudulent and exaggerated claims to be pursued and to work with other organisations, wherever possible, to discourage fraud and exaggeration in civil claims and improve detection.

6. FOIL is supportive of the Jackson package of reforms, and has welcomed the steps taken by the Government over the past three years, since the publication of the final Jackson Report, to rectify the problems within the system and enable it to operate effectively. FOIL believes that the reforms underway will contribute to a more balanced claims regime, providing access to justice to both claimants and defendants. In particular, it welcomes:

- The banning of referral fees, taking out a layer of cost.
- The provisions within LASPO to remove recoverability of success fees and ATE premiums, giving claimants a direct interest in the costs incurred in their names.
- The introduction of QOCS, with the exception for claims which are "*fundamentally dishonest*".
- The development and proposed extension of the protocol and portal process, introducing a more streamlined, cost-effective claims process.

7. Together, these reforms will play a part in directly reducing costs and creating incentives for claimants to exercise control over their own legal expenditure. With costs taken out of the system claims will become less of a commodity, with less incentive for claimants to be provoked into making claims, which should result ultimately in a reduction in inappropriate and fraudulent claims. This would reduce costs and, potentially, in turn, motor premiums.

8. The current reforms together represent a sea-change in the handling of personal injury claims. FOIL believes there are further steps which could be taken to improve the claims process (including through improvements in the provision of medical evidence in whiplash claims) and to reduce fraud. However, FOIL is cautious at the prospect of the further major changes that would be introduced if the Small Claims Track limit were to be increased: firstly, on the basis that the further changes would be against a background of very significant reform which has yet to be introduced and bedded-down (which further change could affect adversely); and, secondly, on the basis that FOIL does not believe that the reform will achieve the stated Government objective of reducing fraudulent claims.

FOIL wishes to address two of the five points upon which the Select Committee has requested evidence, on which it has appropriate experience and expertise:

ISSUE 3

Whether the proposals put forward by the Government, in relation to medical evidence of whiplash and incentives to challenge fraudulent or exaggerated claims are likely to reduce motor insurance premiums and, if so, to what extent?

Improved Medical evidence

9. In its consultation paper the Government proposes that, in future, medical reports for whiplash injury claims should be supplied by independent medical panels, using a standard report form.

10. For FOIL, the main issue to be addressed here is one of independence. The growth of MROs in recent years has improved the provision of medical evidence in low value RTA claims. The current system is unrecognisable from that in place several years ago when reports were routinely obtained from orthopaedic consultants, involving significant cost and delay. As the use of MROs has become the norm, it is very unusual for a claimant to obtain a medical report from his or her own GP. MROs have been instrumental in delivering improved service standards.

11. It is important that the providers of expert evidence are independent and clearly seen to be so. Company structures which bring MROs under the same ownership as claims management companies or ABS are a challenge to this and therefore create a concern.

12. Medical reports are already prepared using a standard format. There is a balance to be struck: standardised reports ensure the information is easy to analyse and facilitate the use of case management software but too much standardisation can lead to a tick-box approach which provides little assistance when settling a claim. Careful thought should be given to the nature of the examination and the exact information to be provided in the report, to ensure it is effective without building in unwarranted costs. It is important that the process is kept proportionate. The cost of medical evidence should be fixed in the CPR.

13. A major defect in the current regime is that reports are usually based entirely on evidence from the claimant, with the medical expert not even having the benefit of the defendant's account of the facts surrounding the accident. The medical expert is therefore hampered by a lack of information on the type of vehicles involved, the speed and the circumstances of the accident, which can encourage misdiagnosis. It may also be useful in some situations for the medical expert to be provided with engineering evidence or information from

WITkit, to give a more rounded picture of the circumstances of the collision. This would assist in identifying claims in which examination of medical records would be helpful.

14. In considering the alternatives models for the independent medical panels put forward by the Government, FOIL believes that an accreditation scheme would be beneficial. It would be keen to see training improved for medical experts focusing on low value RTA claims and for an accreditation system to provide a means of challenging experts outside the court process, to maintain standards. It is important that the system has teeth.

15. FOIL believes that if the reforms set out above were implemented it would be harder for claimants to obtain medical evidence in support of a fraudulent or exaggerated claim. This would deter non-genuine claimants from commencing a claim and help in identifying fraud and exaggeration as claims progressed. It is more likely that medical evidence obtained would accurately identify the diagnosis and prognosis for in injured individual, creating a firmer footing for compensation awards. It is likely that all of these effects would reduce the damages and costs paid by insurers which could in due course result in lower premiums.

Increase in the Small Claims Track limit, either for whiplash or for all RTA claims

16. Significant reforms to the civil justice system for personal injury claims are about to be introduced. FOIL believes it would be inappropriate to make further changes to the civil justice process by increasing the Small Claims Track limit before the current package of reforms has been introduced and the impact on the market and the civil justice system has been identified.

17. FOIL has called consistently for the implementation of Lord Justice Jackson's reforms as a package. It is well-known that Sir Rupert rejected calls for the Small Claims Track limit to be increased substantially and instead recommended an increase based on inflation.

18. With respect, FOIL believes that a smaller increase to the limit than that proposed, to more than £1,000 but less than £5,000 would bring with it significant problems. The combination of the higher than average increases in PSLA damages in the latest edition of the Judicial College Guidelines and the 10% increase in damages under *Simmons v Castle* have already raised damages levels significantly. With the average whiplash claim settling currently for around £2,500, the above factors, coupled with claims inflation driven by a desire to recover legal costs, could very easily push the average claim to more than £3,000, and, without a very significant stretch, to over £5,000. Such a development would compound the problems many of the recent reforms have sought to address. It would be disastrous to have reforms in place to reduce cost, only to find that the effect is neutralised by higher damages and, in some cases, higher costs, than can be recovered at present.

19. By the end of July, the protocol and portal system will handle RTA claims worth up to £25,000, bringing within the streamlined process the vast majority of RTA personal injury claims. With reduced FRC within and outside the portal the regime is poised to become much more cost effective. There is a danger that an increase in the Small Claims track limit will adversely affect this development, driving more claims away from the portal, to be handled in a manner which will be administratively more expensive for defendants.

20. FOIL believes that an increase in the Small Claims Track limit will have an adverse effect on the operation of the RTA portal, by removing from it claims which would have benefited from its reduced-process, reduced-cost regime. Whilst it may be possible to amend the portal process to allow it to be used by individual claimants either directly or through a third party, the benefits of the portal system come from the process itself, not from the software. Without strict adherence to the rules, which could not be expected from lay claimants, the system would lose its effectiveness with claims dropping out of the system to be handled through the courts in an expensive, ad hoc fashion.

21. With an increased Small Claims Track limit claimant representatives would be likely to develop a service to handle claims under Damages Based Agreements, taking a 25% cut of damages. On a £3,000 claim that would equate to £750, significantly more than the new FRC under the portal. Claimant firms would be incentivised to bring lower value claims once more and increase the value of them, requiring insurers to face the cost of handling and paying more claims, and passing on higher costs to injured individuals.

22. FOIL does not believe that increasing the Small Claims Track limit will reduce the incidence of fraud or exaggeration. Any incentive to bring claims and maximise damages, as identified above, will inevitable also increase the number of fraudulent and exaggerated claims. Such claims are expensive to challenge under the present regime because the issues are complex and time-consuming. In reality, such claims would not be handled within the Small Claims Track but would be transferred to a costs-bearing track. The anticipated "virtuous circle" of fraudulent claims being challenged and therefore deterred would not occur. Increasing the limit is unlikely to decrease costs, and has the potential to increase expense, with more litigants in person in the system and more insurer resource absorbed in handling small claims. This would not assist in reducing motor premiums and could, potentially, create circumstances in which they have to increase.

ISSUE 5

Whether there are other steps which the Government should be taking to reduce the cost of motor insurance

The judicial response to fraudulent claims

23. FOIL has campaigned for some time for third party fraud to be treated in the same way as policy-holder fraud: for a finding of fraud to lead to dismissal of the entire claim, not just the fraudulent elements.

24. This issue has long been within the domain of the judiciary, which has, in general, calibrated the test for fraudulent behaviour at a very high level. In the judgment in *Widlake v BAA Ltd*, EWCA Civ 1256 (November 2009), for example, Ward LJ commented as follows:

> "Given the judge's findings of dishonesty in this case, [a punitive sanction] may be appropriate here. I sound a note of caution: lies are told in litigation every day up and down the country and quite rightly do not lead to a penalty being imposed in respect of them. There is a considerable difference between a concocted claim and an exaggerated claim and judges must be astute to measure how reprehensible the conduct is".

25. The issue came before the Supreme Court more recently in the case of *Summers v Fairclough Homes Ltd*, [2012] UKSC 26. In that case the court held that the court is able to strike out a fraudulent claim in its entirety but only in "*very exceptional circumstances*". In that case, a claim which had been inflated ten-fold was held not to fall within the circumstances which would have allowed the whole claim to be struck out. Such decisions undermine any message that fraud in personal injury claims is not to be tolerated.

26. FOIL has previously called for the issue of the appropriate response to third party fraud in personal injury claims to be considered by the Law Commission but was informed, following the publication of the eleventh programme of reform in 2011, that the issue was not to be included as the Ministry of Justice did not consider there was sufficient support for a change in the law. In the light of the decision in *Summers v Fairclough Homes,* which has made it difficult to prevent fraudulent claimants from still recovering damages, FOIL believes it is time for a change in the law through legislation.

Late claims

27. Whiplash claims brought just before the expiry of the limitation period present a real challenge for defendants and this is becoming an enormous problem. Medical reports which merely record the claimant's account of an injury suffered and a recovery made some months later, provide no support to the claimant's case and offer the defendant no assistance in handling the claim.

28. A reduction in the limitation period for RTA claims would require claimants to pursue claims in a timely fashion, whilst allowing the judiciary to take further issues into account to extend the limitation period in cases of more serious injury where delay can be justified.

April 2013

Written evidence from the Motor Accident Solicitors Society (MASS) (WL 34)

SUMMARY

1. There is undoubtedly opportunity for fraud in the current whiplash claims system which needs to be addressed urgently. Fraudulent claims are one of many factors that have contributed to the rising cost of motor insurance for consumers in recent years, although it is slowly falling. The problem is complicated and has many contributing elements: the under-regulation of Claims Management Companies (CMCs) encouraging claims; the inability of regulators to limit the growth of unwanted SMS and cold-calls to consumers; third-party capture and pre-medical offers from the insurance industry; the behaviour of some solicitors in encouraging claims; distrust of the wider legal community; and societal attitudes towards claims and insurance fraud. The system does need to be reformed and opportunities for fraud eliminated.

2. We are, however, deeply concerned by the growing myth that whiplash is not a genuine injury. It is real and there is a wealth of evidence that demonstrates its potentially debilitating impact and long-term consequences. Preventing legitimate accident victims (93% according to the ABI, with 7% fraudulent[i]) from being able to claim compensation regardless of the evidence on causation would be a draconian measure and have far reaching implications for not only personal injury law, but justice in general. Suggestions from the insurance industry that the process will be improved (and costs reduced) by effectively removing independent legal advice are wrong, plain unfair and are simply about minimising the amount of money paid by insurers to genuine accident victims and maximising profits.

3. Some of the proposals for reducing the number and cost of whiplash claims are poorly thought through and will entirely benefit the insurer by tipping the legal scales in their favour and increasing profits, and not necessarily benefit the policy holder via lower premiums. In particular, raising the small claims limit would restrict the number of genuine accident victims who could find independent legal advice, leaving them with the choice of pursuing their own claim against an insurance company or not bringing a claim at all.

4. We agree with many of the areas the Government is seeking to tackle, including improving regulation of CMCs, reducing the opportunity for fraud and taking action against unsolicited marketing that encourages fraudulent claims. We also agree that there should be an increased role for medical examinations in the claims process. If managed properly this could help to reduce the levels of fraud by both stopping people who are making a fraudulent claim and acting as a deterrent to those who are considering it. At the same time, preventing insurers from making a pre-medical offer to save them money would go a long way to discourage people from making spurious or exaggerated claims.

What are the costs of whiplash claims and what proportion are due to "exaggerated misrepresented or fabricated" claims?

5. Fraud is regrettably endemic in the UK across all walks of life. In 2011 the National Fraud Authority estimated that fraud is costing the UK over £38 billion a year, with all insurance fraud adding up to £2.1 billion.[ii] According to latest figures from Experian, cases of general insurance fraud have more than doubled in the past five years. Between 2006 and 2012, insurance fraud increased by more than 600%. Experian's figures revealed that 12 in every 10,000 insurance applications and claims in 2012 were fraudulent, a 7% increase on 2011. In 2006, this could be said of only 1.85 out of 10,000 applications.[iii]

6. Fraud in the motor accident is undoubtedly part of this and cannot be condoned. Research commissioned by Gocompare.com suggests that over 1.7 million (6%) UK motorists would consider making a claim for a personal injury after a road accident, even if they knew they were not badly hurt.[iv] The Insurance Fraud Bureau (IFB) has suggested that the figure is higher at 10%.[v] The harsh reality is that motor insurance fraud is seen as relatively easy and, incorrectly, as a victimless crime.

7. Professional criminal gangs undoubtedly contribute a large proportion of fraudulent claims. The IFB says that it is investigating between 30 and 40 so-called "cash for crash" organised criminal gangs at any one time and that these criminal enterprises are costing £392 million per year.[vi] Insurance law firm, Keoghs, has warned that cash for crash gangs are now so numerous in all cities, towns and rural areas that no driver is safe from their criminal activities.[vii] Insurer LV= has observed that staged car accidents are at a record high with 6% of motorists surveyed believing that they have been the victim of a staged accident in the past two years (2009–10).[viii]

8. Any fraud in the system is to be condemned and we must take action to address it. However, there is little reliable data on its extent. Unfortunately insurance industry figures must be regarded with caution as they group data together, which blurs the edges between outright criminal fraud such as staged accident claims, exaggeration or malingering where there is an initial minor injury, and cases which are abandoned simply because insurers raise the allegation of fraud.

9. The costs attributed to whiplash vary greatly and are largely unsubstantiated (although they have been broadly adopted by the media as fact). The ABI first used the figure of £90 per motorist in February 2012 and this has been used extensively since without any evidence as to its validity. It has further suggested that 20% of motor insurance costs are due to whiplash.[ix] Aviva has suggested that whiplash and other claims add £118 per driver and that reform, including money "wasted on legal fees", would reduce car insurance bills by an average of £60 per head.[x]

10. The exaggeration of claims is undoubtedly an issue but it is a complicated area. Certain personality types will always exaggerate while others might try to play down their symptoms. The legal position is that anyone who pursues an exaggerated claim will be penalised in costs and there has been substantial case law in recent years where claimants have been heavily penalised for pursuing exaggerated claims. If insurers think claimants are exaggerating, the tools for them to put pressure on claimants are already there—getting their own medical reports and using Part 36 settlement offers to put claimants at risk (more information is available on this if the Committee would find it helpful). Examinations by independent medical experts will undoubtedly help address the issue of exaggeration.

11. There is an opportunity for fraud in the current system and this has contributed to driving up claim numbers and premiums, but it is often forgotten that insurers are partly responsible for this via:

(a) *Third party capture*: insurers contact accident victims directly just on the chance that they might be considering making a claim and offer them money. This is usually around £1,000 and is offered on the basis that it will be cheaper to pay out £1,000 to the accident victim than to have to pay a higher sum plus solicitors' costs if they do decide to make a claim. Most genuine claimants would be entitled to more than £1,000 in damages for their injuries.

(b) *Premedical offers*: Once a claim has been made insurance companies will often make a relatively low offer to settle a claim before they have seen any medical evidence that the whiplash claim is genuine. This practice encourages abuse of the system and must stop if we are to reduce the incidence of fraud. A MASS survey of 2520 accident victims suggests that that 33.4% were made an offer by the other driver's insurance company *before* they had a medical examination.

12. Insurers say they make pre-medical offers because the medico-legal report process is flawed and always results in a report stating that the claimant is suffering from whiplash injury. The reality is that they do the

maths and have concluded that it is cheaper to pay out £1,000 to 10 claimants, two or so of whom might not ultimately have made a claim, than pay-out £4,000 including costs to three or four claimants. The maths has obviously worked, but a perhaps unintended consequence has been the knock-on effect with other individuals prone to fraudulent behaviour observe how relatively easy it is to get money for little risk. This trend has undoubtedly played a major role in driving the mindset that every accident results in a whiplash claim. This is of course not the only factor and we discuss these throughout this submission.

13. In recent years motor insurance premiums have sky-rocketed, and only more recently have they started to fall (5.6% in H1 2012), but then only by small margins following massive increases in 2009–10 (+13% in 2009 and +38% in 2011).[xi] The reforms that will be implemented this year will undoubtedly further reduce costs. Law firm, Irwin Mitchell, has concluded that of the increase (in the cost of insurance premiums) since 2006, 10.3% was from an increase in whiplash claims and 26.3% was down to inflation, but the vast majority of the rise, 63.4%, is unexplained.[xii]

14. The question about whether legal costs will come down is no longer relevant. Legal costs have been falling for ten years and the reforms now being introduced in April 2013 mean that costs will fall further, this time by as much as 60%. But premiums will obviously only fall if insurers start passing the savings on to policy holders. Despite these potentially massive savings, there has been no commitment by insurers that they will pass the savings in full onto the consumer through reduced motor premiums. Insurers have committed in general terms to reducing premiums, but this could be by tiny amounts compared to the potential savings from the Government's reforms. There has been no commitment to pass the savings on in full through reduced premiums—they must be held to task and consumers must see the difference.

15. It is difficult to predict exactly how much the insurance industry will save as a result of the changes to the personal injury claims system being introduced in April 2013. MASS estimates that it will be as much as £1.4 billion (£310.5 million from the end of recoverability of success fees from at fault insurers, £207 million from end of Recoverability of After the Event Insurance premiums from at fault insurers and £844.5 million from the revised costs).

16. In opposing many of the Government's reforms, solicitors are accused of simply seeking to preserve their profitability. This is an accusation that could equally be levelled at insurers who, despite protestations, are continuing to make good levels of profit:

- *Admiral* made £6 on every vehicle it insured in 2012 through personal injury referral fees; earned £18.6 million (2012) and £24.5 million (2011) from selling customers' details to personal injury lawyers. Increased profit before tax from £299.1 million in 2011 to £344.6 million in 2012. Turnover, which takes into account revenue from referral fees, was £2.2 billion last year, up from £2.19 billion in 2011. UK car insurance delivered a profit of £372.8 million—up 19% on 2011's result of £313.6 million, primarily driven by higher net premiums.[xiii]
- *Prudential* said pre-tax profits rose to £2.8 billion in 2012, a 54% increase on the previous year.[xiv]
- *Direct Line Group*, the motor insurer spun out of Royal Bank of Scotland, said it made a better-than-expected profit last year as it raised prices and withdrew cover from riskier drivers. Britain's biggest car insurer reported a 2012 operating profit of £461.2 million, up 9.3% on the year and ahead of the £454 million expected by analysts. In its first set of results since its stock market debut last October, Direct Line said the improvement reflected a turnaround in its core insurance business, which swung to a profit of £28.2 million from a £72.3-million loss in 2011.[xv]

Is Great Britain the "whiplash capital of the world"?

17. Describing the UK as "the whiplash capital of the world" may or may not be accurate but it does not appear to be based upon any reliable, current data. This phrase has become a convenient campaign headline—good public policy making must be evidence based.

18. In March 2013 the ABI published figures,[xvi] stating that whiplash claims accounts for 70% in the UK, 47% in Germany, 32% in Spain and 3% in France. These figures are from a 2004 report[xvii] produced by a European insurance organisation (now called Insurance Europe). Unfortunately these outdated statistics have now been used by the Ministry of Justice and the Department for Transport.

19. Whilst it is of course absolutely necessary to determine the facts around a subject—particularly an area as complex as whiplash and personal injury claims—it is simply disingenuous and misleading to present 2004 figures (9 years old) as having direct relevance to a current debate about an important area of public policy without correct attribution. Changes to public policy must be evidence-based and if that evidence is lacking it should be sought before proceeding. The presentation of these figures as independent, current and factual only serves to mislead the media and public further about the real issues behind the whiplash debate.

20. According to www.fullfact.org, who have also highlighted the problem of using data from 2004 to justify current public policy, neither the ABI or the European Insurance and Reinsurance Federation are able to provide more recent statistics.

21. Unfortunately, accurate and comparable international data have been notoriously difficult to obtain. Legal systems are very different across jurisdictions and the terminology/classification of accidents or injuries varies greatly. No-one knows for certain, but there may be other reasons why the UK has an apparently high incidence of whiplash injuries that are worth considering.

22. Whilst the number of deaths from road accidents has been steadily falling over the last decade (3,450 in 2001 down to 1,901 in 2011,[xviii] the lowest level in the EU), with the number of reported accidents also falling, the total number of road casualties (including those not reported to the police) is estimated by the Department for Transport to be significantly higher—somewhere between 660,000 and 800,000 with a central estimate of 730,000.[xix] Average car speeds (due to congestion) in the UK are amongst the lowest in Europe and so minor accidents are more common (the number of road deaths per million population in France is double that of the UK (France—61 per million, UK—30 per million), in Germany more than 50% higher (49 per million) and double in Italy (63 per million).[xx] In short, the number of fatal and serious accidents may have decreased, but the number of less severe injuries has increased with more accidents.

23. Careful consideration of the terminology and definitions is needed when accurately comparing figures internationally. Significantly more accidents occur in France, Germany and Spain that do not involve cars but bikes or mopeds, which do not result in whiplash injuries.

24. Combined with average speeds in the UK generally being lower than many countries, the UK also has some of the highest concentration of vehicles on our roads in the world (the UK has 77 vehicles per kilometre of road, compared to an EU average of only 43).[xxi] The UK also has a higher average occupancy of cars than many countries, so if an accident does occur, more people are likely to be injured.

25. With slower but busier roads and crowded cars, it follows that low velocity accidents with more minor injuries are more likely to occur in the UK rather than high-speed, more serious injuries. These accidents are more likely to be rear end collisions which are more likely to result in whiplash injuries. A number of academic studies (eg. Gordon Bannister, Prof of Orthopaedic Surgery at Bristol University) have shown that 90% of RTA's occur at speeds of less than 14mph and others that a collision speed of just 5mph produced neck pain (MASS's own survey of 5042 accident victims suggests 54.8% below 15mph).

26. In a 2008 report,[xxii] the ABI observed that whiplash could be prevented by the use of anti-collision technology, correct head restraint adjustment and protective vehicle seat design, as well as improving driver behaviour (such as reducing "tailgating"). Studies have suggested that a correctly fitted head restraint can reduce the chance of sustaining a whiplash injury by 24%,[xxiii] whilst cars fitted with advanced whiplash prevention systems have a 50% lower risk of sustaining long-term whiplash injuries than those in others cars.[xxiv]

27. More recently this view has been supported by insurer AXA UK, who said in July 2012 that better designed head restraints and car seats could lead to a reduction of over 370,000 claims and save around £1.3 billion,[xxv] a large proportion of the "nearly £2 billion a year in claims for whiplash" claimed by the ABI.[xxvi]

What will be the impact of the Government's proposals on reducing motor insurance premiums?

Raising the small claims limit

28. We strongly oppose the proposal to raise the small claims limit from £1,000 to £5,000, agreeing with Lord Justice Jackson that it would be inappropriate at this time, and given the reach of the reform package he proposed, to consider raising the small claims limit. Any increase would severely limit access to justice for genuine accident victims. Raising the small claims limit has serious implications that go far beyond just whiplash fraud. It will exclude many genuine claimants from receiving the legal support and compensation they deserve after an accident and dangerous drivers will not be held to account.

29. Examples of the types of injury that could be valued at less than £5,000[xxvii] include: Minor brain or head injury—£1,575 to £9,100, Less severe PTSD—£2,800 to £5,875, Minor eye Injuries—£2,800 to £6,250, Slight hearing loss or tinnitus—Up to £5,000, Collapsed lung with full recovery—£1,575 to £3,825, Significant hip/pelvis injury—Up to £5,500, Loss of part of finger—£2,800 to £5,600, Fractured nose with surgery—£2,800 to £3,650, Loss of two front teeth—£3,100 to £5,430.

30. Under the small claims track (SCT) costs that can be recovered from the other side are limited and no costs can be claimed for legal representation or for services of a lay representative. As a result, if the small claims limit increased it would mean that claimants will not be able to find legal support for their case, as they will not be able to claim back the cost of doing so. A genuine accident victim will then have three options:

(i) Pursue their claim on their own as a litigant in person against an insurance company and their solicitor;

(ii) Pay for legal assistance out of their own pocket; or

(iii) Not bring their claim, even if they were injured and entitled to compensation.

31. Raising the small claims limit to £5,000 would have implications that go far beyond whiplash fraud. It would:

- exclude many genuine claimants from receiving the legal support and the compensation they deserve after an accident;
- effectively marginalise and render obsolete the RTA Portal in the majority of RTA cases;
- increase the burden on the courts both for the judiciary and the court staff finding themselves dealing with cases in the Small Claims Court;
- increase the cost to the public purse (a potential loss of nearly £40 million in revenue for the DWP and NHS through no longer being able to claim state costs, such as social security benefits or use of the NHS, back from the insurer or paying party);
- encourage Claims Management Companies (CMCs) to fill the gap left by a lack of independent legal advice or support;
- actually increase the chances of a rise in the number of claims being made (through CMCs);
- increase cold calling and spam text messages from CMCs;
- undermine the testing and vetting of potentially fraudulent cases in the absence of solicitors (as officers of the Court);
- mean self-represented claimants being at an unfair disadvantage ("equality of arms") against experienced insurers or representatives for the defence;
- produce large savings for the insurance industry, with no mechanism in place that guarantees the return of the savings to consumers; and
- increase the risk of insurers offering lower settlements, exploiting consumer ignorance of the process and the true value of their injury/claim.

32. When the proposal to increase the small claims limit was rejected in 2008 the Government introduced the RTA Portal to help keep costs to a minimum while ensuring victims could have access to justice. In April 2010 a new protocol and electronic portal system was introduced for dealing with RTA personal injury claims, up to a value of £10,000. Since its introduction, over 1.7 million claims have been submitted through the electronic portal system. The Portal is working well and the Government is looking to extend it.

33. MASS believes there has been insufficient consideration given by the Ministry of Justice to how the portal system would be affected and possibly continue if the small claims limit was raised. Raising the small claims limit would mean that the vast majority of RTA cases could not be taken through the Portal. Only claims valued between £5,000 and £10,000 would remain in the Portal, despite the fact that most soft tissue injuries fall below this.

Medical examination

34. We agree with the Ministry of Justice that medical expertise has an important role to play in tackling fraud and believe strongly that no claim should be settled without a medical examination. In fact, we would go further. We believe that no compensation should be paid without a full medical assessment—no medical, no damages.

35. Requiring reports to be obtained only from wholly independent, approved experts and a principle of no-medical, no damages would help to address the problem of pre-medical offers being made by insurers. This is a process whereby an insurance company will make a relatively low offer (providing a financial saving) to settle a claim before they have seen any medical evidence that the whiplash claim is genuine. This practice encourages abuse of the system and must stop if we are to reduce the incidence of fraud. Preventing pre-medical offers would also help to reduce the volume of whiplash claims, deterring fraudulent claimants who will know they must prove their injury.

36. We do not believe that formal medical panels would improve the system. The proposal of creating new independent medical panels would no doubt be expensive, bureaucratic and unnecessary as there are already independent medical panels which carry out the same function. MASS does not regard the current system to be open to large-scale abuse. Less than 1% of medical reports are obtained from family GPs by either the claimant or the defendant.

37. Measures that moved towards standardised reports might have the perverse effect of making it easier for determined fraudsters to research and rehearse "correct" responses. MASS believes that to have a set of further strict objective tests which the claimant has to pass or fail is inappropriate and in addition may well lead to an increase in fraudulent claims once those "objective tests" are public knowledge.

38. The MoJ should take the opportunity of this review to ban pre-medical offers to help reduce fraud. MASS would suggest that the MoJ discuss with the medical professions' governing bodies the opportunities available for learning and developing skills in diagnosing whiplash injury. We would recommend a system of accreditation should be introduced instead to ensure that all medical agencies are regulated to a common, high standard.

What will be the likely impact of the proposals on access to justice for claimants who are genuinely injured?

39. As set out in paragraph 30–31 we are deeply concerned that the proposed changes will reduce the availability of independent legal advice, exclude many genuine claimants, putting them at an unfair disadvantage.

What other steps should be taken to reduce the cost of motor insurance?

40. MASS has introduced the "MASS Motor Claims Code" which identifies areas that cause concern and proposes actions to address them. By working collaboratively we believe that the PI industry can be "cleaned up" and improved, without reducing access to justice for the genuine accident victim. MASS believes that a much stronger "stance" on fighting fraudulent claims needs to be taken, where cases are not settled early, even when fraud is detected or suspected, because it is quicker and more economical to do so.

(I) Better co-operation between all affected parties to clean up the sector. We need a holistic approach involving government, insurers, the car industry, accident victims, medical professionals and legal professionals.

(II) Compulsory medical examinations. No whiplash claim should be settled without a medical examination—no medical, no damages. This would help to reduce fraudulent or exaggerated claims.

(III) Robust regulation of claims management organisations. This would reduce the negative impact they have on the industry. Action must be taken to prevent the cycle of firms who have been shut down from re-opening under a different name and with different directors.

(IV) Better enforcement of data protection legislation. This would prevent the misuse of customer data, which concerns consumers and brings the industry into disrepute. It would also curtail the use of unsolicited marketing to encourage people to take up fraudulent or exaggerated claims.

(V) Better regulation of insurance companies is needed to stop sharp practices such as third party capture (pressuring claimants to settle before the case has been fully considered).

(VI) More collaborative approach to combating fraud, particularly around sharing information and data; MASS has been in discussions with the ABI for over a year on developing a system for improved data sharing to combat fraud. MASS urges the MoJ to allow this process to develop to implementation before taking the more drastic measure of raising the SCTL.

(VII) Work with medical organisations to develop better knowledge and understanding of what soft tissue injuries can be caused by motor accidents and making sure medical examinations and reports are substantive and objective.

(VIII) Continued improvement in vehicle safety to reduce and prevent head and neck injuries.

41. In addition, technology such as telematics could have a role in reducing fraud and bringing down the cost of motor insurance in the future, but it is not a panacea. These schemes are currently unproven and cannot be relied upon as an absolute measure when all circumstances and individuals are different.

42. We also believe that better designed head rests and seats could play a major role in reducing the number of soft-tissue injuries caused. From studies, the factors involved appear to be height (shorter or taller people impacted by a badly adjusted headrest), gender (studies suggest that females are twice as likely to suffer from whiplash as males), vehicle size/weight and headrests (more elastic seat backs and high head rests positioned to reduce posterior excursion of the head contribute to a reduction of claims by approximately 50% in vehicle fitted with such seats (Kullgren Report).

43. There is no one silver bullet that will solve the issue of whiplash or general fraud. Whilst the current system is not perfect, there are many safeguards in place to protect the accident victim. However, MASS believes that time is needed for the current wave of reforms to bed in and evolve in order to truly ascertain their effectiveness. Furthermore, as indicated in the "MASS Motor Claims Code", we believe that the industry as a whole should work collaboratively, taking a more holistic approach to address the few problems that do exist. Consequently we would strongly urge that no further changes are implemented to allow the industry to work together and the new reforms to evolve.

April 2013

References

[1] Page 5, Association of British Insurers, "No Hiding Place—Insurance Fraud Exposed", September 2012, http://www.abi.org.uk/Publications/63750.pdf

[2] National Fraud Authority, "Fraud costs the UK over £38 billion", 27 January 2011, http://www.insurancefraudbureau.org/files/press_release_pdfs/rls_-_annual_fraud_indicator_-_main_final_2011–01–26_pdf.pdf

[3] Insurance Times, "Insurance fraud more than doubles in five years", 9 April 2013, http://www.insurancetimes.co.uk/story.aspx?source=itSubscriberAlert&storycode=1401943

[4] GoCompare.com, "Over 1.7 million drivers would consider making a personal injury claim after an accident even if they weren't badly hurt", 18 March 2013

[5] IFB, "Crash for Cash—putting the brakes on fraud", 22 November 2012, http://www.insurancefraudbureau.org/files/press_release_pdfs/crash_for_cash_-_putting_the_brakes_on_fraud.pdf

[6] http://www.insurancefraudbureau.org/files/press_release_pdfs/crash_for_cash_-_putting_the_brakes_on_fraud.pdf

[7] Insurance Times, "Cash for crash spreads to the countryside", 26 February 2013, http://www.insurancetimes.co.uk/story.aspx?source=itSubscriberAlert&storycode=1401282

[8] LV=, "Crash-for-cash cheats hit innocent drivers", 11 February 2011, http://www.lv.com/about-us/press-media/article/crash-for-cash-cheats

[9] ABI, "Lifting the bonnet report uncovers the real cost of motor insurance", 5 March 2013, http://www.abi.org.uk/Media/Releases/2013/03/Lifting_the_bonnet_report_uncovers_the_real_cost_of_motor_insurance_.aspx

[10] The Guardian, "Whiplash add £118 to your car insurance bill", 16 February 2013, http://www.guardian.co.uk/money/2013/feb/16/whiplash-car-insurance-bill

[11] Confused and Towers Watson Car Insurance Price Index

[12] Irwin Mitchell, "Civil Justice Plans To Leave Consumers Short-Changed, Experts Warn", 12 March 2013, http://www.irwinmitchell.com/newsandmedia/2013/march/Civil-Justice-Plans-To-Leave-Consumers-Short-Changed-Experts-Warn

[13] Reuters, "Insurer Admiral's price website boosts profit", 6 March 2013, http://uk.reuters.com/article/2013/03/06/admiral-results-idUKL6N0BY26Y20130306

[14] The Daily Telegraph, "Prudential increases dividend as profits rise", 13 March 2013, http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/insurance/9926358/Prudential-increases-dividend-as-profits-rise.html

[15] Reuters, "Insurer Direct Line profit up on higher prices", 28 February 2013, http://uk.reuters.com/article/2013/02/28/uk-directlineinsurance-brief-idUKBRE91R0AI20130228

[16] ABI, "Fair, independent, objective—ABI publishes proposals to curb the UK's whiplash epidemic", 13 March 2013, http://www.abi.org.uk/Media/Releases/2013/03/FAIR_INDEPENDENT_OBJECTIVE__ABI_PUBLISHES_PROPOSALS_TO_CURB_THE_UKS_WHIPLASH_EPIDEMIC_.aspx

[17] 2004 report from the Comité Européen des Assurances (CEA), the European insurance organisations (renamed Insurance Europe in 2011) *(http://www.insuranceeurope.eu/publications/329/72/Minor-Cervical-Trauma-Claims/?cntnt01hideAllFilters=1*

[18] Department for Transport, Reported casualties by severity, Great Britain, 2001–2011, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/10148/ras30003.xls

[19] Page 7, Department for Transport, Reported Road Casualties in Great Britain: 2010 Annual Report, http://webarchive.nationalarchives.gov.uk/20120926002851/http:/assets.dft.gov.uk/statistics/releases/road-accidents-and-safety-annual-report-2010/rrcgb2010–00.pdf

[20] House of Commons Library, "Reported Road Accident Statistics", 12 March 2013, http://www.parliament.uk/briefing-papers/SN02198.pdf

[21] The World Bank, Vehicles (per km of road), 2008–12, http://data.worldbank.org/indicator/IS.VEH.ROAD.K1

[22] ABI, "Tackling Whiplash", November 2008, http://www.abi.org.uk/content/contentfilemanager.aspx?contentid=24986

[23] Farmer C M, Wells J K, Werner J V, Relationship of head restraint positioning to driver neck injury in rear-end crashes, Accident Analysis and Prevention 31, p722, 1999

[24] Kullgren A, Kraft M, Lie A, Tingvall C, The effect of whiplash protection systems in real-life crashes and their correlation to consumer crash test programmes, 2007

[25] Axa UK, "Poor head restraints put two thirds at increased risk of whiplash and may add £1 billion plus to claims costs", 6 July 2012, http://newsroom.axa.co.uk/media-releases/2012/poor-head-restraints-put-two-thirds-at-increased-risk-of-whiplash-and-may-add-%C2%A31bn-plus-to-claims-costs/

[26] ABI, "Britain's pain in the neck culture must be reduced says the ABI", 19 May 2011, http://www.abi.org.uk/Media/Releases/2011/05/Britains_pain_in_the_neck_culture_must_be_reduced_says_the_ABI.aspx

[27] 11th Edition Judicial College Guidelines

Written evidence from the Personal Injuries Bar Association (PIBA) (WL 56)

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; and

(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 four years between 2006–10. 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 2009–10: *674,997* and 2010–11: *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[34] 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:[35] 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 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 two 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, eg 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.

[34] Emerg Med J 2002;19:499–506;

[35] 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.*

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; and

— 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; and

— 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;" and

— 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 four 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[36], surely one of the most useful methods for encouraging honesty in civil litigation.

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

— *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.

— *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*[37] to ask whether the evidence for a genuine whiplash claim was sound.

— *There would be no Requests for Information*[38] 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*[39] 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".

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.

[37] CPR 35.6 is excluded from SCT cases by CPR 27.2(1)(e).
[38] CPR Part 18 is excluded by CPR 27.2(1)(f).
[39] CPR 31 is excluded in its entirety by CPR 27.2(1)(b).

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.

[Appendices not published]

May 2013

Written evidence from the National Accident Helpline (NAH) (WL 20)

SUMMARY

1. National Accident Helpline (NAH) is pleased to respond to the Transport Committee's inquiry into whiplash.

2. This document has been prepared specifically for the Committee and will therefore focus on its areas of inquiry:

— Whether the Government is correct in describing Great Britain as the "whiplash capital of the world".

— Whether it is correct to say that the costs of whiplash claims add £90 to the average premium and, if so, what proportion of this additional cost is due to "exaggerated, misrepresented or fabricated" claims.

— Whether the proposals put forward by the Government, in relation to medical evidence of whiplash and incentives to challenge fraudulent or exaggerated claims, are likely to reduce motor insurance premiums and, if so, to what extent.

— The likely impact of the proposals on access to justice for claimants who are genuinely injured.

— Whether there are other steps which the Government should be taking to reduce the cost of motor insurance.

INTRODUCTION TO NATIONAL ACCIDENT HELPLINE

3. National Accident Helpline (NAH) is the UK's leading advisory service for people who have suffered an injury as a result of an accident. We help these people seek redress to aid their recovery through our national solicitor network. National Accident Helpline is authorised by the Ministry of Justice in respect of regulated claims management activities and is a registered company, incorporated in the UK.

4. NAH was formed in 1993, in advance of both the introduction of conditional fee arrangements and the Access to Justice Act. We were formed by a group of solicitors who saw the advantages of pooling resources and advertising through a national brand—NAH—to help people frightened of approaching solicitors directly to obtain advice and, where appropriate, pursue their rights to claim for personal injuries suffered by them.

5. NAH provides marketing, contact centre and other services to a network of specialist solicitor firms from England, Wales, Scotland and Northern Ireland and is highly regarded across the industry. Our panel firm members pool resources to advertise as a gateway for thousands of personal injury victims who are seeking an entry point into the legal system.

6. Each year NAH receive over 200,000 enquiries from consumers who are injured through no fault of their own and who want advice and help. On behalf of our panel firms, our UK based, legally trained contact centre staff, take initial enquiries and filter out spurious and weak claims. Last year we passed around 75,000 vetted claims to our specialist solicitor firms who have a geographic or specialism link to the consumer. This includes over 20,000 road traffic accident claims, with the remainder made up of a mix of employers' liability, clinical negligence, public liability and other claims types.

7. The law firms to whom NAH provides services are leaders in this sector and have industry leading insight, information, and evidence relating to all aspects of personal injury claims.

NAH RESPONSE

Is the Government in correct in describing Great Britain as the "whiplash capital of the world"?

8. According to recent media reports the number of whiplash claims has spiralled to around 550,000 a year, or 1,500 a day, landing insurers with a compensation bill of £2 billion. Whilst there is no basis to challenge CRU data which provides clear evidence of an increase in whiplash claims—this does not mean that this has been driven by an increase in fraud or exaggeration. There is a large amount of speculation as to the cause of the increase in whiplash claims and as set out in our evidence to the select committee in 2010 the increase is

wholly unrelated to the ethical marketing activities undertaken by NAH. Prior to the high profile campaign by Jack Straw, NAH suggested that the increase in whiplash claims was the result of insurer activity and CMC's aggressively targeting consumers who had reported motor accidents. Often CMC's would be provided data sold to them by insurance companies and consumers would be cold called and encouraged to bring a claim. The suggestion made largely by insurers that the increase in whiplash claims is due to TV advertising or online marketing is a myth designed to conceal their activity in this area.

9. Evidence provided by the Compensation Recovery Unit, when compared with our own market data, indicates that while the number of RTA claims reported to the CRU increased from 53% to 78% of all PI claims between 2005–10, the percentage of RTA enquiries generated by NAH has remained relatively constant at around 30% of total enquiries . The percentage of RTA claims compared to all claims generated by NAH's TV and internet marketing has since 1993 been in the region of 30%.

10. We have also conducted a more recent analysis of our enquiries which demonstrates that the percentage of whiplash claims generated by NAH's TV and online marketing activity has actually declined. We have defined whiplash cases as RTA claims reported to us as whiplash or which feature neck, shoulder or back related soft tissue injury. The percentage of whiplash enquiries reported to us as percentage of all enquires has dropped from 26% to 22% from 2009–12. Please see the table below.

	2009	*2010*	*2011*	*2012*
Personal injury Enquiries (England & Wales)	43,899	48,434	58,451	62,259
RTA enquiries	16,496	16,758	19,854	20,083
Whiplash enquiries	11,590	11,887	14,171	13,806
% of PI claims defined as Whiplash	26%	25%	24%	22%

11. Our data demonstrates that there is no correlation between the general increase in whiplash claims reported to the CRU and TV and online marketing .The evidence demonstrates that the percentage of whiplash claims generated via TV and internet marketing has decreased. It is abundantly clear that the increase is primarily due to insurer activity and CMC's who capture information (from a variety of sources) about consumers involved in road accidents and aggressively target and encourage them to bring claims.

12. As the Association of Personal Injury Lawyers argued in their recent publication *the Whiplash Report 2012* "the number of compensation claims for whiplash injuries is falling. According to the Government's Compensation Recovery Unit, claims for whiplash have fallen by almost 24,000 in the past 12 months." Furthermore, "more than a third of people with whiplash injuries recovered within a month, around one in five had symptoms for more than a year."

13. We would also encourage the committee to properly explore and understand how whiplash claims are generated (eg cold calling consumers who have provided information to their insurer) and whether these mechanisms are more likely to fuel fraudulent claims.

Is it correct to say that the costs of whiplash claims add £90 to the average premium and, if so, what proportion of this additional cost is due to "exaggerated, misrepresented or fabricated" claims?

14. We are deeply concerned about this £90 figure used to illustrate the cost of whiplash. This lumps all whiplash claimants into the same basket, blaming genuine victims of long-term, complex injury, for rising insurance premiums. The figures from the Association of British Insurance (ABI) estimate that seven% of whiplash claims are fraudulent or exaggerated.

15. We are extremely concerned about the validity of self serving claims made by the insurance industry about the extent of fraud. We would strongly encourage the committee to forensically examine any data provided by insurers to support the claims made about the extent of fraud in this sector. The claim that 7% of whiplash claims are fraudulent is not supported by our panel firms and data around success rates of RTA claims. The figure would appear to be wholly out of proportion with the percentage of cases which proceed to trial where a finding of fraud is made by a judge.

16. NAH has worked with Allianz Legal protection in developing a market leading ATE insurance product covering tens of thousands of cases. There are, of course, claims which are found to be fraudulent and under the terms of ATE policies—cover is withdrawn if fraud is found. Withdrawal of cover due to a finding of fraud is rare and bears no relationship whatsoever to the headline figure of 7%. If it would assist the committee NAH could consider investigating this point in more detail.

17. From our perspective it is simply not in NAH's interest to encourage claimants to exaggerate any claim. In contrast with other referral based models, there is no incentive whatsoever for NAH to pass weak, fraudulent or spurious enquires to panel firms. Doing so would not generate any additional revenue for NAH as we are paid for providing marketing and call handling services. The remuneration we receive is not in any way related

to enquiry volumes. It would be utterly counterproductive to our relationship with firms who have no interest in pursuing weak, spurious or fraudulent claims.

Are proposals put forward by the Government, in relation to medical evidence of whiplash and incentives to challenge fraudulent or exaggerated claims, likely to reduce motor insurance premiums and, if so, to what extent?

18. We welcome the Government's proposals in relation to independent medical panels as we believe it would lead to greater consistency of service for claimants and higher quality reports. At NAH we recommend that our panel firms use agencies that are members of the Association of Medical Reporting Organisations (AMRO) as we think it is essential that medical professionals who provide evidence in personal injury cases understand the complexities of the field, the reporting and legal requirements, and are independent of both the claimant and instructing law firm. NAH supports any initiative which improves the quality of service to the consumer.

19. NAH sincerely hopes that the Government's recent raft of policies, through LASPO and other Jackson proposals, intended to "crack down" on fraudulent claims will lead to lower insurance premiums but we fear that the motor insurance industry will fail to reduce the cost of insurance for the consumer. We hope the Committee will be able to get a guarantee from the insurance industry, on the record, that they will reduce insurance premiums for the consumer.

What is the likely impact of the proposals on access to justice for claimants who are genuinely injured?

20. We are particularly concerned about the threat to access to justice if the Small Claims Track threshold in relation to claims in the personal injury sector were raised. As the Law Society argued in its submission to the 2009 Jackson Report:

21. *"Raising the PI small claims limit would deprive many injured people of legal advice. It would also lead to more litigants in person representing themselves, which would overload the already under-resourced civil courts. The Law Society states that the results of a survey on small claims undertaken in 2006 showed that 99% of solicitors said that their clients would not have pursued the claim without the help of a solicitor."*

22. Those claimants who proceed unrepresented through the small claims system will be overwhelmed by the legal representatives used in almost all cases by defendant insurers. The small minority of injured people sophisticated enough to bring their own claims are likely to be unfairly persuaded to withdraw their claims or settle for far less than the true value of their claim.

23. Furthermore, there appears to be a perception that only trivial injuries will be impacted by this change. The JSB guidelines make it clear that injuries such as minor head/brain injury can fall below £5,000. The increase is likely to catch many significant injuries involving symptoms for up to two years. It is not right that someone with a minor brain or head injury should not be allowed representation and have to fight their case alone against an insurance backed defendant represented by counsel. Raising the Small Claims Track represents an attack on access to justice for injured people at an unprecedented level.

Are there other steps which the Government should be taking to reduce the cost of motor insurance?

24. With specific regard to the personal injury sector, we have long argued that the Government should be tackling the unscrupulous activities undertaken by the less ethical companies that tarnish our sector including:

- — Claims and accident management companies who coach claimants to exaggerate their symptoms.
- — Insurance companies that aggressively and persistently encourage policy holders who report accidents to pursue claims.
- — Insurance companies that sell on accident data.
- — Organisations that cold call, cold text and approach consumers in public places.
- — CMC's and solicitors firms that offer financial inducements in breach of existing regulations.
- — Third party capture.
- — Contractual arrangements with Medical Experts that mean that the expert has a vested interest in the outcome of the claim.

25. However simply focusing on this sector is too simplistic and the Government should look at:

- — A dedicated police unit—paid for by the insurance industry—should be established to tackle the problem of fraud.
- — The driving test should be tougher so drivers are less likely to have accidents and this means they are less likely to claim on their insurance.

26. We look forward to seeing the LASPO reforms in practice and hope that they, with the Competition Commission's work, will force the motor industry to drive down car insurance premiums.

CONCLUSION

27. In NAH's opinion, we believe that it is important when looking at whiplash to consider the needs of the genuine victim. They must not be penalised or hindered from seeking rightful justice due to unscrupulous activities undertaken by some CMCs and insurers. We therefore call on the Government to crack down on bad practices of some less ethical companies that tarnish our sector whilst ensuring that the insurance industry meets these efforts with lower premiums for consumers.

28. NAH would be extremely happy to discuss this issue further with the Transport Select Committee.

April 2013

Written evidence from Exchange Information Services (WL 40)

BACKGROUND

This response reflects the opinions and representations of 21 geographically dispersed reputable claims management companies, law practices and Insurance Brokers, collectively employing c.4115 people in England and Wales. The companies have operated in the industry for over 20 years.

In preparation to this response, the group solicited extensively the views of the following:

— Barristers.
— Insurance companies.
— Claimant management companies.
— Solicitors.
— Car Hire companies.
— Insurance Brokers.

SUMMARY

1. The Group would like to reiterate that long standing reputable CMCs have a vested mutual interest in stamping out fraudulent or exaggerated claims and propose that tougher regulatory laws and sanctions are far more effective measures than simply increasing the small claims limit. Increasing the small claims limit will unjustly deny bona fide victims fair compensation and have little impact on the unscrupulous fraudulent claims which work on a percentage hit ratio and will flourish in the absence of vetting carried out by solicitors or reputable CMCs.

2. The Group emphatically embrace the Jackson Reforms and feel that the level of exaggerated and fraudulent claims will significantly diminish the compensation culture and curb the sharp practices exercised by some currently in the industry.

3. However, the Group strongly question the basis on which it is alleged by insurance companies that average motor insurance premium rises of £90 are wholly attributable to the "whiplash epidemic" and remain sceptical whether average motor insurance premiums will materially fall in the event of a reduction in whiplash claims.

4. For instance, insurance companies' revenues from referral fees will no longer exist post reforms (eg. Admiral's referral fees for 2011 amounted to £32.2 million, 5.6% of profits; an average £7 of referral fees were earned on every vehicle it insured). Thus, fundamentally the Group cannot understand the underlying basis for the argument that motor insurance premiums will fall.

5. The Group's experience of the level of fraudulent processed claims is significantly lower than that alleged by Insurance companies. Robust databases, collaboration with the police and the courts and very stringent regulatory control around the set up and running of CMCs will reduce these incidences further.

6. Instead, it is in the Group's experience that a fundamental cause of extraneous costs of motor insurance lies in the causes of exaggerated claims. We would strongly encourage the implementation of initiatives to crack down in these areas particularly—Insurance company collusion with car repair firms and to a lesser extent, provision of compromised medical evidence.

7. We strongly believe that a quick win that will result in a material reduction of costs in the industry lies in regulation seeking to reduce delays caused by Insurance companies in settling claims more speedily.

Question 1: *Whether the Government is correct in describing Great Britain as the "Whiplash Capital of the World"*

1.1 The justification for describing Great Britain arises from figures released by the Transport Committee; there has been a 70% increase in the number of personal injury motor claims in the last six years. Conversely, there has been a 23% drop in the number of casualties actually injured through road traffic accidents. These discrepancies have caused MPs to suggest that there is a large rise in the number of fraudulent whiplash claims. These figures are significantly greater than in Europe.

1.1.1 Other mitigating factors maybe at play: the number of road regulations. We understand that the government scrapped 3,000 regulations last year but as a Group are not in a position to comment expertly on the likely causes for these differences.

1.2 Furthermore, there is evidence that the reforms into the sector—which of course will be more pronounced this year post the Jackson reforms, are impacting on the number of claims.

1.2.1 The government's own figures showed that the number of claims fell by almost 24,000 last year. Records uncovered by the Association of Personal Injury Lawyers (APIL) showed 547,405 claims for whiplash in 2011–12, compared with 571,111 in the previous year, a fall of 4.2%.

1.2.2 Also, looking anecdotally at the larger insurance companies reported results there is further evidence that claims are falling. For example, Admiral Insurance, which insures more than one in 10 cars on Britain's roads, reported a fall in injury claims in the second half of 2011.

1.3 In the Group's experience there are a minority of unscrupulous claimants with the majority representing bona fide claimants. These minorities of claimants are overwhelmingly screened out by the systems adopted by reputable companies. It is a commercial imperative that they are stamped out as fraudulent claims result in serious losses to the CMC (on average £4–5k per claimant). [The costs arise from CMCs bearing upfront car hire costs and reports].

1.4 APIL has released the results of an independent survey, commissioned by the group, which show almost 40% of people with a whiplash injury have never claimed compensation for it. Whiplash claims are not less complex than other personal injury claims and the proposals will only discriminate against bona fide victims. Indeed because such an injury is not visible on X-ray or MRI scans it is arguable that they are more complex in terms of proving such a loss. Medical research estimates that 95% of all RTA's will result in some form of whiplash injury due to the inherent mechanics of the accident—that is, the sudden deceleration of speed.

Question 2: *Whether it is correct to say that the costs of whiplash claims add £90 to the average premium and, if so, what proportion of this additional cost is due to "exaggerated, misrepresented or fabricated clamis"*

2.1 The Insurance Fraud Bureau estimates that there were over 30,000 fraudulent motor accident claims in 2009 and that fraudulent motor insurance claims cost the industry around £350 million per year. Furthermore, the UK insurance industry estimates that the total cost of all whiplash injuries, including compensation and associated legal costs, is some £2 billion per year, £90 for each insurance policy. We are very sceptical of whether the costs of whiplash claims do indeed add £90 to the average motor insurance premium and would strongly encourage a robust activity cost based substantiation of this figure from the respective insurance companies.

2.2 Furthermore, the picture is far more complex given that Insurance companies, with the greatest access to claims, pass these onto CMCs generating referral fees for themselves. Thus for example, Admiral Insurance which insures 1 in 10 cars in Britain derived 5.6% of its reported profit from referral fees last year—£32.2 million (£18.6 million from personal injury referral fees and £13.6 million from credit hire referral fees). This equates to an average £7 of referral fees were earned on every vehicle it insured It is not unreasonable therefore to assume that this loss of revenue post the ban on referral fees itself will exert an upward pressure on motor insurance premiums.

2.3 From our considerable collective experience operating in this sector over 20 years, we would estimate the percentage of fraud claims as a percentage of the total claims do not exceed 0.1% of cases we handle, a figure significantly lower than that purported by the insurance companies. This figure in part reflects our proactive strategy of cross checking claims across databases which filter out potential fraudulent claims—we reject on average a 25% of the claims from inception. Indeed in a recent ABI conference, held on 6th March 2013, Craig Budsworth, Chairman of the Motor Accident Solicitors Society, cited that ABI's own estimates approximated 7% of cases as being fraudulent.

2.3.1 Many of the claims referred to by Insurance Companies emanate from unscrupulous operators who will almost certainly be driven out of business by the banning of referral fees. It is noted that although there is an increased effort by the MOJ to clamp down on these operators, since the changes we have already been forced to complain about the activities of certain companies who are dressing referral fees up in other terms. We are yet to receive a response from the MOJ.

2.4 We are aware that some insurance companies categorise claims as fraudulent differently. For example:

2.4.1 In circumstances where the actual money settled is less than the claimant had initially claimed for. (This is not fraud and can often be explained for perfectly good reasons)

2.4.2 Also, in genuine cases where a claim is lost on liability on grounds that the judge has chosen on balance, the defendant's evidence given the claimant's authentic inability to recollect accident details, the claim is erroneously recorded as fraud by insurers.

2.4.3 Furthermore, it is common practice for some insurers to record claims as fraudulent in cases where claimant wins, but part of the claim is reduced such as loss of earnings.

2.5 Currently all cases that are ruled as fraudulent necessitate Judges to inform the police. Anecdotally, we believe that thus far no more than 50 cases have been so reported over the last year.

2.6 Given the relatively small size of fraudulent claimants, it is not unreasonable in our opinion to assume that a large percentage of the additional costs are attributable to so called exaggerated claims.

2.7 Essentially, there are three potential sources for exaggerated claims: in providing medical testimony, in the settlement of costs for vehicle hire or in the repair costs to the vehicle. These sources do not ordinarily involve CMCs, but arise in liaison with the medical profession and insurance companies.

2.8 As a Group we would encourage greater enforcement in this area with respect to clamping down on practices where the cost of repairs or car hire are over inflated by virtue of collusion with the car repair company and the insurance companies.

2.8.1 By way of illustration we would like to highlight cases such as the Royal Sun Alliance who were found guilty by the Court of Appeal six—nine months ago to be inflating the cost of repairs in order to recover higher fees from other insurers.

2.8.2 Car Hire rates can only be higher than they should be if Insurance Companies fail to settle claims in good time and as such are outside the control of CMCs but the Group believes that the solution lies in greater efficiency by Insurance Companies. Insurers have claimed that car higher rates are in some instances too high and point to the ABI scale rates. However this Group would like to highlight the common issue experienced by claimants who are unable to be charged ABI rates from approved garages. Indeed, in the Court of Appeal case (Clarke v Ardlington) the court ruled against RSA on the grounds that ABI rates are not available to the man in the street but rather reflect a commercial arrangement between Insurance companies and their preferred suppliers.

2.8.3 In respect of Medical Reports the inference is that the Doctors reports are to be questioned this is clearly a serious allegation however we favour the establishment of independent medical panels to allay such concerns.

2.9 We therefore, feel that the cost of insurance could be reduced massively by insurers dealing (and settling) claims at the earliest stage thereby saving legal fees and tighter regulation around the potential sources of exaggerated claims. Government regulation requiring early settlement or tightening of controls should be easily achievable.

Case Study 1: Over the last five years, Exchange Insurance Services have arranged Insurance for 38532 claims of which 42 were found to be fraudulent claims (15 of which were found fraudulent in court the remainder found by solicitor acting and discontinued). This is due to the rigorous pre-acceptance fraud screening process. Average rejections of cases at outset are 25–30% and the fact that Claims Management companies regularly share databases information with their own insurers assists the process of detecting fraud. It is not in the interest of CMC's to run dodgy claims as they have to fund the claim for the duration and if it loses they have to bear the loss. Motor insurance companies should be encouraged to share information on the history of previous accidents.

Case Study 2*:* In 2012 Armstrongs Solicitors based in Liverpool handled 5,042 claims; of these nine were found to involve some level of fraud of which six were discontinued by Armstrongs when they discovered it and three were lost at court when new evidence was uncovered.

Question 3: *Whether the proposals put forward by the Government, in relation to medical evidence of whiplash and incentives to challenge fraudulent or exaggerated claims, are likely to reduce motor insurance premiums and, if so, to what extent*

> *"As a defendant insurer, we consider that the current situation sees claims of little value going through the court process with the only real outcome being increases in claimant costs. One of the changes proposed in the MOJ reforms was to increase the small claims limit for RTA personal injury claims from £1,000 upwards. Various upward numbers were "talked about" with £5,000 or £10,000 being mentioned in various unofficial forums. While there are definite advantages in raising the small claims limit, we would urge the MOJ to consider the downsides as well.* ***If the limit was to be increased, we would almost certainly see claims being brought by Claim Management Companies whose credibility in the marketplace is already questioned.*** *Without the services of a solicitor to "vet and supervise" the authenticity of a claim, it is probable that the current situation of multiple claimants and those of questionable injury will increase. Without the protection of the Court process, a defendant would have little ammunition with which to dispute dubious claims. Therefore, MOJ is urged to consider the ramifications of changes to the small claims limit for personal injury and if it is to be increased, what safeguards need to be built into changes to ensure the new landscape is not abused."*
>
> Bob Still, Claims Director, Tradex Insurance Company Limited
> *(One of the leading non-standard motor and taxi insurers in the UK)*

3.1 The proposed rise in the small claims limit will increase the number of fraudulent or exaggerated claims as there will be no vetting carried out by solicitors or reputable CMCs .The market will be dealt with by litigants in person (often advised by others who are non-qualified) and "Claim farmer companies"

3.2 In terms of the introduction of medical panels we feel this may have some, albeit limited, impact. To facilitate the basis of our view it is important to understand the current procedure.

3.2.1 Stage 1 Claimant has accident.

3.2.2 Stage 2 Claimant attains a report from a pool of medically qualified experts who are obliged to file a declaration/statement of truth under part 35 of the Civil Procedural Rules in which he/she declares that the evidence that he/she gives is independent of any influence by the person who has instructed them or paid them. The procedure also includes ten tests for inappropriate responses.

3.3 We do not feel that claims are being permitted by "compromised" GPs as all reports are obtained from a pool of medically qualified experts. However, given this procedure is a potential source of exaggerated claims as a Group we remain supportive of initiatives that may curb such practices.

3.4 However, we would like to reiterate that whiplash injuries are inherently complex, difficult to diagnose and it has been estimated that 95% of all RTA will result in some form of whiplash injury. Furthermore, all medical research shows that whiplash is an inevitable injury in car crashes due to the inherent mechanics of the RTA ie the deceleration of speed suddenly. These findings are corroborated by the report survey of the Whiplash society.

Question 4: *The likely impact of the proposals on access to justice for claimants who are genuinely injured*

> *"There is a fundamental issue in terms of access to justice. We strongly believe that people who suffer serious, debilitating accidents through no fault of their own will find it harder to claim compensation. When that compensation does come, it will be less than the claimants deserve. For example, people with poor command of English or who are poorly educated will find themselves excluded from the process and in the main they are the very ones in most need of it."*
>
> *David Bennett, Head Of Chambers, Liverpool Civil Law*

4.1 There are significant implications for those claimants who will be reluctant to take matters to the Small Court (and indeed the Whiplash survey cited 70% less likely to do so) against well-equipped insurance companies ("equality of arms")

4.2 This Group strongly believes that this government will be indirectly endorsing discriminatory practices where these claimants may have to employ someone to conduct their cases on what is already a small sum of money.

4.3 On a fundamental level, a self-represented claimant is unlikely to have the comprehensive knowledge legal, or otherwise to understand the complexities of causation and for instance the legal maxims of "res ipsa loquitor" or the "egg shell skull rule". In this country the legal principle is one of "restitutio in integrum "and putting the claimant back into the position the claimant would have been had the accident not happened. His access to justice should not be fettered by the Legislature and he has a right to a fair and just hearing. That is the role of the Judiciary.

4.4 For instance for negligence claims, how will the man in the street know that it will be his obligation to recover the charges listed on the NHS site and in fact how will he also know that if he receives benefits as result of an accident he has to claim for them too? At present the DWP issues a certificate but how will the claimant be aware of what it's for and what he has to do with it? The claimant lawyers obtained £139 million for the DWP in 2011. The case law on a self-represented claimant is that he should know the law and ignorance of the law is no excuse! Insurance companies of course will use their lawyers against these individuals.

4.5 Specifically, our experience has shown that the proposed reforms will materially affect claimants who are not equipped (by virtue of language, understanding of procedure) to make representations to the small Courts. In some areas for instance 90% of claimants are from ethnic groups who do not have English as their first language. To assist, many law firms handle small claims. Given their language barrier they will be significantly disadvantaged in their ability to proceed with a claim as they will require translation and other ancillary services. To avoid this discrimination interpreters and other assistance will have to be provided by the court and the public expense.

4.6 The service currently provided and subsidised by the companies represented in this Group would cease to exist should the small claims limit increase. For example, each year Armstrongs solicitors Liverpool handle 5,000 claims: 3–400 of these are handled in the small claims portal where recoverable costs are limited to £80 + reports (limited to £200).The true cost of handling these cases is far higher and as a result they are effectively subsidised by the other claims the firm handles were full costs are recoverable.

4.7 Other groups that will be adversely affected and unfairly penalized include minors and those with learning difficulties

Question 5: *Whether there are other steps which the Government should be taking to reduce the cost of motor insurance*

5.1 Further collaboration with insurance companies especially with respect to the sharing of databases and active participation in the Government industry wide fraud database initiative will ensure that the level of fraudulent and exaggerated claims will diminish significantly. Currently reputable CMCs are prepared to share their databases but Insurers are not. With respect to the police, the Group regularly liaise with them.

5.1.1 At a recent ABI conference held in March 2013, Mr. Budsworth also urged insurers to share their fraud data with claimant lawyers—"we won't stamp it out if we don't speak," he said—and called on them to stop making pre-medical offers, a practice he said "stinks" and drives poor behaviour

5.2 Enhancing and sharing of best practice of those reputable CMCs that experience low fraudulent claimant rates. As reiterated earlier in the report this Group experience very low fraudulent rates. This is wholly attributable to the rigorous fraud filtering process that these companies undertake in tackling questionable claims.

5.2.1 By way of illustration, fundamentally three fraud filters are adopted by reputable CMCs.

5.2.1.1 CMC vets claim using sophisticated databases.

5.2.1.2 Claim forwarded to solicitors who perform their own checks.

5.2.1.3 Claim forwarded for ATE Insurance for further vetted by insurers using their data bases.

5.3 Individuals can hold the view that fraudulent or exaggerated claims against insurers are justifiable and victimless. In reality, those actions might be criminal, and add to the cost of motor insurance for all individual policy-holders. This group would be delighted to assist the Government, insurers and other interested groups on measures to tackle these perceptions, building on current notable examples, such as the work of the City of London Police's Insurance Fraud Enforcement Department by sharing the relatively sophisticated databases that the Group uses to proactively deter fraud.

5.4 It is categorically not in the Group's financial or reputational interest to get tied up even inadvertently with fraudsters. The problem lies in those companies who group together potential claimants and then sell them on to less reputable law firms and small car hire companies who do not vet them. They are known in the industry as "claims farmers" and their identities are well known. They don't risk their own money at all, and it is generally believed they will be driven out of business by the reforms introduced by the Jackson report. However, we would urge the Claims Management Regulator to review the criteria required to set up CMCs with the imposition of financial requirements akin to other companies operating in financial services.

5.5 We would also support the imposing of stiffer penalties for fraudulent claimants AND the blacklisting of those CMC firms that knowingly assisted in the perpetration of the fraudulent claim. Reputable CMC's are being lumped together with disreputable firms who are well known to the insurance industry. This is tantamount to linking Aviva Insurance with the now bust Independent Insurance Co whose CEO has served 6 years in Her Majesty's Prison.

5.6 Institute measures to curb multiple purchases of insurance policies purchased on the internet using false identities or stolen credit cards.

5.7 Implement the "no medical/no insurance" policy and prevent the current practice of insurers making pre–medical offers flies which may encourage fraud as claimants

5.8 The cost of insurance could be reduced massively by insurers dealing (and settling) claims at the earliest stage thereby saving legal fees. Government regulation requiring early settlement is easily achievable.

5.9 Stop the practice of insurer's intervention to injured parties unless the claimant makes contact first.

5.10 Why shouldn't CMC's be regulated in the same way as all other insurance operations (including loss adjusters) by the FCA? By this we could ensure that only fit and proper people operate such companies.

SUBMISSION GROUP

Company	*Address*	*Est. FTE at risk of closing from proposal of increasing SCL*
Armstrongs	Liverpool	100
Coyne Learmonth	Liverpool	35
The Skemp Partnership	Manchester	18
Beardsells	Stockport	35
Kippax Beaumont Lewis	Bolton	5
Davies Gribbin	Ormskirk	14
A2 Solicitors LLP	Manchester	10
Recovery assist	Bury	8
Lamb and Co	Hoylake	22

Company	*Address*	*Est. FTE at risk of closing from proposal of increasing SCL*
Optimum Law	Bootle	10
Dylan Nair	Preston	3
Easthams	Blackpool	34
Hattons	St Helens	39
Goodmans	Liverpool	50
Direct Accident Management Ltd	Ormskirk	350
McCams		
Exchange Insurance Services Ltd	Liverpool	25
Liverpool Civil Law	Liverpool	12
Goldsmith Williams	Liverpool	170
Camps Solicitors	Birkenhead	350
Abacas Law	?	5
Large law firm (who wish to remain anonymous)	Throughout England and Wales	2,820

April 2013

Supplementary written evidence from the Association of British Insurers (ABI) (WL 43A)

Thank you for the opportunity to appear before the Transport Select Committee on 17 June. During the course of my evidence, I undertook to provide the Committee with further information on a number of matters. Please find this information below, in addition to providing clarification on issues raised during the course of the insurers' evidence session. I refer throughout to the uncorrected Hansard transcript.

How the Cost of Whiplash is Calculated

During the evidence session, the ABI was asked for further information on how the £90 figure, which represents the average proportion of a whiplash claim per premium, was calculated. The industry paid out approximately £10.6 billion in claims in 2011. Of this, just over £2 billion represents the cost of whiplash claims (compensation awards and legal costs combined). The average premium in 2011 was £440. As there is a direct link between claims cost in one year and the cost of premiums the next, we calculate that whiplash claims represent approximately £90 of the average premium. For further information on the claims costs facing insurers, the ABI has published *"Lifting the bonnet on car insurance"*.[40]

Falling Motor Insurance Premiums

I was asked during the evidence session whether car insurance premiums had fallen, and whether they would fall further, if the Government's proposed reforms were introduced. The industry made a very public commitment following the Prime Minister's Insurance Summit in February 2012 to pass savings resulting from improvements to the civil litigation system onto customers. Although these changes have not yet been fully implemented, average premiums fell in the past year. The AA shoparound premium index shows that the average quoted premium has decreased by 1.4% in the past quarter (Q1 2013) and by 4.1% between Q1 2012 and Q1 2013. A number of factors lie behind these reductions but they can be explained in part by insurers factoring into their pricing the anticipated savings from the civil litigation reforms. Further reductions in premiums can be anticipated depending on the nature and extent of any further reforms the Government introduces, especially for young drivers who have a proportion of the cost of whiplash claims incorporated into the high premiums they pay.

Institute and Faculty of Actuaries Report

Today, the Institute and Faculty of Actuaries (IFoA) released their fourth annual report on third party motor claims.[41] The report found that 90% of all motor insurance third party (TPI) claims in England and Wales in 2012 were for small, whiplash like claims. IFoA data also showed a 5% increase in the proportion of third party accidents involving bodily injury from 2011 to 2012 at a time when Police data shows that the number of motor accidents involving casualties has decreased.

Exaggerated and Fraudulent Claims

There are two comments, one from Peter Gradwell and one from Andrew Ritchie QC that I would like to comment on.

[40] The report is available at: https://www.abi.org.uk/~/media/Files/Documents/Publications/Public/Migrated/Motor/Lifting%20the%20bonnet%20on%20car%20insurance.ashx

[41] The Institute and Faculty of Actuaries report can be found here: http://www.actuaries.org.uk/sites/all/files/documents/pdf/13062013-ifoa-research-shows-whiplash-increase-2012–2.pdf

Page 34 of the transcript states:

> **Q315: Chair:** Mr Gradwell, is that something on which you have any assessment?
>
> ***Peter Gradwell:*** Yes; only on the difference between fraud and exaggeration, which is merrily being rolled together by the insurers. Unfortunately, if insurance claims were all absolutely correct and submitted, then we would not need to have loss adjusters or claims departments of insurance companies. You would put your claim in and say, "I have lost £600," and they would just send you £600 back. We all know they don't do that. Exaggeration can't be classed as fraud. It is a matter of opinion on many occasions. Somebody's cost of something is arguable by another person. That cannot be classed as fraud.
>
> Mr Gradwell's comments on exaggeration and fraud are ill-informed and are typical of those who do not recognise the serious nature of insurance fraud. Mr Gradwell attempts to defend exaggeration in whiplash claims, stating that, in effect, exaggeration is a legitimate "matter of opinion". While it is impossible to quantify the levels of exaggerated claims, especially for low-value whiplash, insurers believe that claims exaggeration is one of the largest drivers behind the increase in the value and number of insurance claims in recent years.

In addition, page 25 of the transcript states:

> **Chair:** Have the judiciary been unduly lenient in dealing with whiplash claims?
>
> ***Andrew Ritchie QC:*** I will deal with that briefly. In the cases that are taken before the courts, if it is proven on the balance of probabilities that there is an exaggeration, then the damages are lower. The House of Lords said in the Summers case that the way the insurers protect themselves is by making a relevant offer. In that case, where £80,000 was awarded but a lot more was claimed, if the insurers had offered £80,000 or £85,000 or £90,000 or £95,000, they would have got their costs and they would have been fine. They didn't so they made an error of judgment.
>
> This worry about exaggeration is dealt with properly by the courts. If the judge finds that the claimant has intentionally exaggerated—and there are a number of cases where that has happened—what happens is that insurers bring proceedings in effect for misleading the court. It is contempt of court. There are two of three cases over the last two of three years where people have been imprisoned for it. One got four months and one got six months. That needs to be better advertised and better utilised.
>
> I fear that what happens is that the portal is cheap; the claimant bungs in one medical report; the insurers don't even put in a medical report but say, "Well, we'll chuck £3,000 at that; it is cheap and we can't be bothered."

Mr Ritchie's explanation of the *Summers* case is not incorrect, but requires clarification. The reason why no offer to settle is likely to have been made is not because the defence lawyers made an "error in judgment" but rather because the claimant would, in all likelihood, have accepted the offer and would have got an automatic entitlement to costs on top of that. Given the view that insurance fraud was highly likely to have been committed, this would have been an unjust and undeserved outcome.

When a claim is made, an insurer might have a strong suspicion that it is exaggerated, but they may take the view that the cost of investigating the claim is disproportionate to the amount claimed. There is no objective test for whiplash, and this makes it almost impossible to fight a whiplash claim an insurer believes to be exaggerated as this will involve accusing the claimant of fraud. An accusation of fraud requires proof to the criminal "beyond reasonable doubt" standard of proof rather than the civil law "balance of probabilities" test. Insurers will therefore usually only fight cases where there is clear evidence of fraudulent behaviour. Mr Ritchie's proposed solution to the problem of exaggeration is unfortunately an overly ambitious and unrealistic one in too many cases.

Insurers take the view that the judiciary need to take a stricter approach to exaggerated whiplash claims especially in light of the industry's experience when it has sought to fight these cases. For example, in *Armstrong v First York (2006)* the judge effectively ruled that even where the medical evidence establishing the injury is inconclusive (that is, two experts disagree) the general presumption is that an injury has been caused and that the disputing party has potentially missed something. A similar position was recently affirmed in the case of *Charnock v Rowan (2012)*. A tougher approach by the courts to needlessly exaggerated claims would reduce claims inflation and lead to lower car insurance premiums.

Insurers Investing in Tackling Fraud (IFB/IFED)

During the evidence session, I undertook to provide the Committee with further information on how the industry is working to tackle fraudulent claims in the form of their investment in the Insurance Fraud Bureau (IFB) and the Insurance Fraud Enforcement Department of the City of London Police (IFED).

The Insurance Fraud Bureau (IFB) is a not-for-profit organisation established by the insurance industry in July 2006 to provide a tactical solution for the detection and prevention of organised, cross-industry fraud, supporting the wider ABI's industry fraud strategy. The IFB leads and co-ordinates the industry's response to the identification of criminal fraud networks—mainly involved in organised motor insurance fraud—and works closely with the Police and other law enforcement agencies. There have been more than 750 IFB assisted arrests since 2006 which have resulted in excess of 200 years of imprisonment for organised fraudsters. More

than 130 million insurance records have been interrogated by IFB analysts to identify organised fraud patterns. In 2012, more than 1,700 intelligence alerts were issued to the IFB's member insurers. The IFB is currently managing 53 live police operations valued in excess of £67 million in potential fraudulent losses to the industry. The IFB's projected growth could see that portfolio increase to £160 million by 2014.

The Insurance Fraud Enforcement Department of the City of London Police (IFED) is a dedicated police unit funded by the insurance industry devoted solely to tackling insurance fraud. By the end of April 2013, IFED had made 309 arrests, with a further 121 suspects making a voluntary attendance at a police station. IFED has secured 24 court convictions and has issued a further 91 cautions. It currently has around £16 million of fraud under investigation. Tackling organised motor fraud is a strategic priority of IFED and it works closely with the IFB to bring organised motor fraudsters, including those making false whiplash claims, to justice.

In March 2013, IFED secured its first "crash for cash" conviction after the driver of a Porsche admitted targeting a council van in a £100,000 motor insurance scam in which he tried to claim for vehicle damage, replacement car hire and whiplash. The judge gave the driver a 6 month jail term, suspended for two years and ordered him to complete 140 hours community service. A number of cases have since followed. At the end of April, two men who defrauded £25,000 from two insurers by staging car crashes and making claims for whiplash, repairs and storage were sent to prison for 14 months and six months respectively and ordered to pay compensation to the insurers who they had defrauded. Two other fraudsters were given suspended jail sentences. Most recently, a fraudster was sentenced at the Old Bailey to 18 months imprisonment for making false insurance claims, including for whiplash, under assumed names.

Together, the IFB and IFED serve an important role in tacking insurance fraud in the UK and demonstrate the industry's commitment to tackling this pernicious crime.

Access to Fraud Data for Claimant Lawyers

During the second evidence session, the issue of access to insurer's fraud data for claimant lawyers was raised. The ABI is in discussions with the Association of Personal Injury Lawyers (APIL), the Motor Accident Solicitors Society (MASS) and the Law Society on an initiative to share data in order to help claimant lawyers identify fraudsters earlier in the claims process. We have agreed to the principle of data sharing and are working with claimant lawyer representatives on the detail of the solution. One of the main challenges is agreeing exactly what data we can usefully share with claimant lawyers without exposing insurers to unnecessary risk. For example, it is crucial that the data we provide is not used to "claims farm" for potential new whiplash claimants. Unfortunately, claimant lawyers informed us earlier this month that the parameters for data sharing that we had agreed at a meeting in April are no longer satisfactory. Therefore the work that we had begun on costing the solution has had to stop while we revisit what the solution will look like. We are hoping to have a clearer idea of next steps by the end of July.

Cost Savings to Insurers as a Result of the Reduction in Fixed Legal Fees

During his evidence, Craig Budsworth stated: "As a result of the changes from April, there have been nearly £1.5 billion of savings straight away to the insurance industry by the reduction in costs from £1,200 to £500 for a portal case".

This is factually incorrect. As part of their consultation on reducing the fixed recoverable costs (FRCs) in the RTA Portal, the Ministry of Justice produce an impact assessment which showed that reducing FRCs would lead to savings for insurers of £200 million.[42]

I hope you find this information helpful as you take forward your inquiry. If you do have any questions, please do not hesitate to get in touch.

July 2013

Printed in the United Kingdom by The Stationery Office Limited
07/2013 031558 19585

[42] https://consult.justice.gov.uk/digital-communications/extension-rta-scheme/results/rta-response-ia.pdf