HOUSE OF COMMONS

Justice Committee

Oral evidence: Small claims limit for personal injury, HC 659

Tuesday 16 January 2018

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Watch the meeting

Members present: Robert Neill (Chair); Bambos Charalambous; David Hanson; John Howell; Gavin Newlands; Victoria Prentis; Ellie Reeves.

Questions 1 - 128

Witnesses

I: Jason Tripp, Operations Director, Coplus; Steve Mitchell, Deputy Head of Legal Services, Union of Shop, Distributive and Allied Workers; Nigel Teasdale, former President, Forum of Insurance Lawyers; and Shirley Denyer, Technical Director, Forum of Insurance Lawyers.

II: Mrs Justice Simler; and His Honour Judge Nigel Bird.

III: Rt Hon Lord Keen of Elie QC, Ministry of Justice Spokesperson in the House of Lords; and David Parkin, Deputy Director for Civil Justice and Law, Ministry of Justice.

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Examination of witnesses

Witnesses: Jason Tripp, Steve Mitchell, Nigel Teasdale and Shirley Denyer.

Chair: Good morning everyone, and welcome to our evidence session on the small claims limit. By way of background, people will recall that we previously did an inquiry and heard some evidence in relation to soft tissue injury and whiplash. There is obviously some overlap in the evidence that we have received on those points. We specifically wanted some oral evidence about the Government's proposals on the small claims limit, in relation to both the insurance sector and road traffic injuries, and more generally.

I will ask the panel to introduce themselves, but before they do we will declare our interests. It is a standard procedure that Committee members have to do. I am a non-practising barrister and consultant to a law firm.

Ellie Reeves: I am a non-practising barrister.

Bambos Charalambous: I am a non-practising solicitor.

Victoria Prentis: I am a non-practising barrister.

David Hanson: I am a member of USDAW and have been for 38 years. I am chair of the USDAW group of MPs.

Q1 **Chair:** Now I can ask our first panel to introduce themselves.

Shirley Denyer: I am Shirley Denyer, the technical director of FOIL, the Forum of Insurance Lawyers.

Nigel Teasdale: I am Nigel Teasdale, the immediate past president of the Forum of Insurance Lawyers. I am also a member of the MOJ steering group on the whiplash reforms and, in so far as it may be relevant, a director of MedCo.

Jason Tripp: My name is Jason Tripp. I am a director of a company called Coplus, which is a provider of motor legal expenses insurance and other forms of legal expenses insurance.

Steve Mitchell: My name is Steve Mitchell. I am the deputy head of legal services at USDAW, the shop workers' union.

Q2 **Chair:** Thank you all very much. We know that the Government's proposal is to increase the small claims limit to £5,000 for road traffic accidents and £2,000 for other claims. The factual suggestion, from either Thompsons or USDAW, was that, depending on how you calculate inflation since 1991—it is nearly 26 years since the limit was set—it would take you to more or less £1,500 or £1,600. Do people accept that as a factual basis?

Jason Tripp: Yes.

Shirley Denyer: There is also an issue on how you look at inflation. It is more than just looking at the measure, and the difference between CPI and RPI. It is relevant to look at the inflationary effect on damages over that period, because obviously that is the direct equivalent. Perhaps that could be something that is taken into account.

Q3 **Chair:** Against that background, it is an increase beyond inflation on the arithmetical figures. There may be a broader point.

Steve Mitchell: USDAW suggests that the date it should run from is not in fact 1991 but 1999. In 1999, there was the removal of special damages from the small claims limit. Most commentators accept that in real terms that represented a 25% increase in the small claims limit at that time. That is the date Lord Justice Jackson used when he was discussing the civil reforms. He went from 1999 instead of 1991.

Chair: He recognised that.

Steve Mitchell: If you look at that and you apply CPI, which is applied in other areas of the law, the figure does not bring you to £1,500; it is less than £1,500.

Q4 **Chair:** What does it come to?

Steve Mitchell: I believe it is £1,460, or something along those lines. It is there or thereabouts. It has certainly not triggered the £1,500 or the £500 increase that Lord Justice Jackson suggested.

Q5 **Chair:** We seem to be in the position that nobody agrees on even the base figure. Is that right?

Jason Tripp: I think we can all agree on the maths.

Q6 **Chair:** It would be helpful if we could agree on the maths. Against that background, what is your view of the Government's proposal for increasing to £5,000 and £2,000?

Nigel Teasdale: I think the background and the rationale is different for EL and PL versus motor. Do not forget that motor is separated almost into whiplash/soft tissue versus general RTA claims. In terms of RTA claims, the CRU figures seem to be the most reliable data that we have for the actual volumes of claims. For the period from 2000 to 2005, they were broadly consistent at about 400,000 claims per annum. From 2005 onwards, they have risen. They are now at about the level of 700,000 to 800,000, so they have doubled in that period.

What happened in 2005 was that referral fees were made lawful. At that point, the claimant in some areas ceased to be a claimant and became a commodity to be bought and sold, and passed around. It became about profit rather than access to justice. There was then an effect on premiums and a cost to society in terms of the reputational impact we have in the UK. This is about trying to put the genie back in the bottle, which is a very difficult task. How do you go back to a correct level of claims?

Q7 **Chair:** How would you characterise that reputational impact?

Nigel Teasdale: I suppose it is similar at the moment to gastric illness. It is the reputational impact on the UK. If we have either excess whiplash claims or excess gastric illness claims, that is what I am talking about in terms of reputational impact.

Q8 **Chair:** This is the suggestion sometimes made by some commentators and politicians that the English and the Welsh seem to have weaker necks than anyone else.

Nigel Teasdale: Exactly. I am desperately trying not to use the phrase "compensation culture."

Q9 **Chair:** But do you think there is something in that?

Nigel Teasdale: Yes, there is something in that.

Q10 **Chair:** Can you quantify how serious it is?

Nigel Teasdale: As I say, the statistics on the increasing level of claims are perhaps a decent guide.

Q11 **Chair:** Just for the record—we have it in writing—how would you quantify the level?

Nigel Teasdale: The level of claims, using the CRU data, has increased from 2005. The average from 2000 to 2005 was about 400,000 claims per annum. The average over the last five years is 780,000 claims per annum.

Jason Tripp: I would like to make a distinction between two very distinct personal injury markets in the UK. The primary market is characterised by before-the-event legal expenses insurance. These are personal injury claims that arise from accidents when first reported by the driver to their motor insurer. That is quite a different market from what I like to call the secondary market, which is the after-the-event market, where personal injury claims are procured by CMCs marketing for PI claims months, often years, after the date of the accident.

The two markets behave quite differently. The Government's proposed reforms are intended to tackle characteristics of the secondary market. It is the secondary market where the risks of exaggerated and fraudulent claims are more prevalent. It is that market that has led to the increase in personal injury claims that my co-panel member described.

The primary market runs well. It is much better behaved and is less of a contributor to the growth in personal injury claims that we have seen. My concern with the reforms is that they are a one-size-fits-all approach. While they are meant to be effective in tackling the secondary market, I believe they will lead to an unintended detrimental effect on the primary legal expenses market.

The reason that is a problem for England and Wales is that the primary legal expenses market is the primary method of access to legal services for motorists in the UK and, more importantly, access to legal representation. In the absence of legal aid, drivers with legal expenses insurance have access to an expert solicitor. Were the reforms to go ahead and legal cost recovery to be removed for 95% of personal injury claims, it would cast doubt over the ability of legal expenses providers to use expert legal representation as the standard service in personal injury claims. The question, in my opinion, is not so much the value of the small claims limit as the degree of complexity in personal injury claims, and at what point a claim is capable of being handled by an individual, by themselves, and at what point they need legal representation.

To conclude on this point, we survey our customers regularly, and they tell us very clearly that they want and need legal representation. They do not understand the operation of the insurance market. They do not understand the parties involved and how those parties fit together. In the absence of representation and expert advice, they would be left very unclear as to how to proceed. The consequence of that is that they would be more likely to turn to CMCs to fill that gap in support and advice.

Q12 **Chair:** Do you have a specific view about the figures of £5,000 and £2,000?

Jason Tripp: At present, the majority of personal injury claims are valued at over £1,000. Very few claims fall under the £1,000 limit. There is very little distinction in complexity around causation, negligence and medical evidence. There is very little distinction in complexity between a claim valued at £1,500 or at £5,000. They behave the same and they are treated the same way by lawyers. They all require expert legal support in order to see that the claim is conducted effectively, efficiently and in the customer's best interest.

Steve Mitchell: USDAW tends to agree with the new Lord Chancellor when he says that justice is the cornerstone of our democracy and a key part of a fairer society. That is precisely the reason why we are opposing these reforms. We think that the reforms, and the increase in the small claims limit in particular, are unfair and unjustified. It will unnecessarily restrict access to justice for huge numbers of people who have sustained injury and losses through no fault of their own.

The justification given for the proposals is not the volume of cases. There is some evidence to suggest that the volume of cases is not going up but that in the recent past it is going down. That is certainly the case with workplace injuries. The justification is based on unsubstantiated claims of an epidemic in motor fraud. The only evidence provided for that is from the ABI. The ABI's evidence at the hearing conducted last year in relation to the £5,000 was that the justification for increasing it from £1,000 to

£5,000 was based on something they referred to as "damages inflation." That seemed an untenable argument to me, because I am not so sure that damages have increased 500% since 1999, or even 1991.

The proponents of the reforms may think that £2,000 is a low-value claim. It is not low value to our members. For some of our members, £2,000, or in addition to that, is two or three months' net earnings. If they have to go without that, it can cause them serious difficulties. Those are not low-value claims to them.

We have looked at the figures for last year for claims brought through our legal service. I agree with Mr Tripp that there are very few cases that go through small claims or settle for less than £1,000. That is why small claims are not, in the main, used for personal injury actions. If the small claims limit was increased from £1,000 to £2,000, we estimate that a fivefold increase in our members' claims would be captured by the small claims limit.

Q13 **Chair:** I understand that. Help me with this, Mr. Mitchell. You said that the justification was a reference to an epidemic. Purely in terms of numbers, it does seem that there are a lot more claims for what could be characterised as whiplash in England and Wales, in the UK, than in other comparable countries. Why do you think that is?

Steve Mitchell: I am not so sure that it is true that there are more comparable claims than in other countries. In places like Italy and other European countries, there have been studies that suggest the level is higher. As I see it, the issue is that, if people have genuine claims, why should they not receive compensation for the injuries they have sustained? If there is an epidemic, and I dispute that there is, even on the ABI's own figures, the level of proven fraud is only 0.17% of all claims. If people have genuine claims, first, why shouldn't they be able to recover damages for them, and, secondly, why should they have to take something from those damages to pay for the legal advice? Ultimately, damages are designed to put the person back in the situation they would have been in had they not been injured. They are not a windfall, as they have sometimes been described by the proponents of the reforms.

Q14 **Chair:** Mr Teasdale, would you agree with Mr Tripp's characterisation of the two types of market? I got the impression that you were not necessarily disagreeing with that point in this evidence.

Nigel Teasdale: Yes, I would agree with that.

Q15 **Chair:** Would you also agree that the real issue is around the secondary part of the market, or is it bigger than that?

Nigel Teasdale: Clearly, CMCs are an area of concern and probably have been a driver in the increase in claims we have seen. We have proposed legislation that will, hopefully, tackle the claims management companies through the financial guidance and claims process. There is a danger in seeing this as just about CMCs being the root of all evil and that everything would be fine if they were regulated.

Touching a bit on my personal experience through MedCo, we see evidence of MROs—medical reporting organisations—creating shell companies to increase the number of times they appear and the number of instructions they get. There are solicitors who manipulate the search results to try to get the expert they want. We see medical experts who carry out examinations without seeing someone in person; it is just over the phone. We sometimes see claims for rehab that has not actually taken place. Those are not CMC driven. They are an indication of a market that is dysfunctional.

Q16 **Chair:** Ms Denyer, you suggested that CPI and RPI were not really the whole picture around inflation. You talked about other types, and there was a reference from Mr Mitchell to damages inflation. Do you have any comments on that?

Shirley Denyer: It is relevant to look backwards over the period since the small claims track was last increased. Looking at the figures, on my maths, RPI comes out at nearly £1,700. Alongside that, the damages have risen above inflation. It is quite difficult to make comparisons, because the definitions of injuries have changed over the years. To pull out one example—the definition and damages for minor injuries between 2012 and 2017—over that period damages rose by 20%, while over the same period RPI was 5.5%. There has been an above-inflation increase in damages. There are various other examples that I could mention that show the same pattern. Just looking at straight RPI or CPI is not the complete picture.

Chair: If any of the witnesses on the panel wants to submit a written schedule of figures that might be more digestible, we would be very happy for you to do so.

Q17 **Bambos Charalambous:** This is a follow-up question from what Mr Tripp and Mr Mitchell said. If my understanding is correct, increasing the limit is using a sledgehammer to crack a nut. That is in relation to the after-the-event claims in the insurance market. If that was tackled, there would not be much need to deal with an above-inflation increase in the small claims limit. It seems that gastric illness and whiplash are the main causes of the increase in claims. Do you have any thoughts on that?

Jason Tripp: I agree that it is a sledgehammer to crack a nut. It is a one-size-fits-all approach that has an unintended impact on before-the-event legal expenses insurance. I agree with Mr Mitchell that the growth in personal injury claims has tailed off in recent years, albeit that comparing it with a decade ago there has been an increase.

In my opinion, the issue lies in the regulation and control of the activities of CMCs. Steps can be taken—I know that some are proposed in the guidance Bill—to deal with that particular issue, but the sledgehammer to remove legal representation from the majority of personal injury claims achieves only that; it removes the very expert representation that our customers tell us they want and need to look after their interests after an accident.

Q18 **Ellie Reeves:** Mr Teasdale, you talked about a compensation culture. We have received submissions to our inquiry that suggest that employers' liability claims have fallen from 103,000 in 2013 to 73,000 in 2016. It seems that there is not that culture at all and that claims are going down rather than up. What do you say about that?

Nigel Teasdale: I was talking about the motor side. My figures were purely motor. I think that relates to the one-size-fits-all approach.

Q19 **Ellie Reeves:** But these reforms apply to employers' liability as well as motor reform. Why, if there has been a reduction in employers' liability claims, do you think the limit for employers' liability should increase?

Nigel Teasdale: I take the point, and that is what I was just going to come on to. I do not actually think it is a one size fits all. What we are talking about are three different areas of reform. One is EL and PL, where we are talking about an increase from £1,000 to £2,000 for the small claims track. The second area is RTA claims in general, where we are talking about a rise from £1,000 to £5,000. The third area is whiplash or soft tissue, however you want to define it—I hope we will get more clarity on how it is defined—where we are talking about a tariff being brought in. We are talking about changes to the whole process of how those claims are brought. That is really the area. I suppose there are three different areas to focus on.

Q20 **Ellie Reeves:** In light of that, do you think that in relation to employers' liability the limit should stay at £1,000?

Nigel Teasdale: In relation to employers' liability, we are talking about an inflationary increase, which we can argue—

Q21 **Ellie Reeves:** But it is more than that.

Nigel Teasdale: It is more than an inflationary increase, but equally if the rate is not changed for 20 years, there may be an element of future-proofing. For EL and PL, we are talking about almost maintaining the status quo as it was in 1999, rather than ripping up trees and changing the process.

Q22 **Chair:** Mr Mitchell, you were nodding.

Steve Mitchell: In relation to the idea of compensation culture, I was of the view that that had been put to bed by Lord Young's report in 2010, where it was stated that compensation culture was a perception rather than a reality.

As far as the link between workplace cases and these reforms is concerned, at USDAW we fail to see how increasing the small claims limit for people injured in the workplace can in any way reduce motor fraud or reduce insurance premiums. The two are completely unrelated. Injury cases are far more complex. As I have already stated, as far as we are concerned there is no justification for increasing it at all.

Q23 **Ellie Reeves:** Picking up on the motor insurance issue and fraud that you have just mentioned, my understanding is that insurance companies have a duty to report to their shareholders if there is a material risk of fraud, but no insurers have told their shareholders that there is a material risk of fraud. Again, doesn't that suggest that the idea of a compensation culture does not really exist?

Nigel Teasdale: I could not comment on the insurance position.

Q24 **Ellie Reeves:** Mr Mitchell, if claimants with employer liability claims have to represent themselves in the small claims court, what difficulties do you envisage?

Steve Mitchell: A litigant in person will have difficulties generally in pursuing a claim, even in a road traffic accident. In relation to an employers' liability case, the difficulties are magnified, mainly because the cases are often more complex and difficult. It seems to be accepted, from what I can gather, by everyone that that is the case. The Government seem to accept that in their consultation document.

There are additional pressures. Pursuing a claim against your employer presents its own difficulties, particularly if you are not represented by a union. A lot of the evidence suggests that only a small minority of people who are injured at work take action against their employers.

It might be useful to give the Committee some examples of the type of complexities involved in EL and PL cases. There are relatively straightforward injuries like a dog bite. We have some members who have been bitten by dogs. They have to manoeuvre the requirements of the Animals Act, which present all sorts of complex legal arguments and have given rise to lots of case law that even lawyers struggle to deal with. That is an example where a relatively straightforward or not serious injury can attract complex legal matters that, without proper advice and support, a litigant in person would really struggle with.

Another example is a Highways Act case, where someone has sustained injury after tripping on a defective pavement. That sounds like a relatively straightforward case, but issues that arise in those cases have again created a lot of case law around whether or not it is an actionable defect that has caused the injury and whether the defendants have a statutory defence. If all those issues have to be addressed by a litigant in person, the reality is that those cases will not proceed.

Q25 **Ellie Reeves:** My understanding is that, although the injury element of the damages might be less than £2,000, there could, for example, be a big loss of earnings claim that could result in the claim actually being of quite large value but still ending up in the small claims court. Is that right?

Steve Mitchell: That is exactly right. My understanding is that the general damages are what is referred to, as I have already alluded to, in relation to the limit. If someone is in a manual job, a relatively modest injury that attracts general damages of less than £2,000 could put them off work for a considerable period.

Q26 **Ellie Reeves:** What sort of injury?

Steve Mitchell: Back strain. If we have a member who works at a checkout and has developed back strain as a result of an injury in the workplace, they will not be able to go into work because it would necessarily involve movements that would aggravate the condition and could actually lead to a longer period off work. If our members are just paid statutory sick pay, or the sick pay expires, it can have huge consequences for them. The importance of those sorts of case to our members is why we oppose the changes. Although £2,000 may not appear to be a great deal, it can involve cases up to £5,000. As I understand it, the limit in the small claims court is £10,000, so it is anything up to and including that.

Q27 **Ellie Reeves:** They are quite high value. In relation to the industrial and social consequences of transferring some of these employers' liability claims to the small claims track, what concerns might you have about that in relation to health and safety?

Steve Mitchell: Quite a few, but the primary one as a trade union is that you remove the ability of injured workers to pursue claims against their employers, which is what these changes will effectively do. The threat of litigation is now the main driver for maintaining health and safety in the workplace. That is with cuts to the HSE and lack of local government inspections. It will be particularly bad for low-paid workers with unscrupulous employers, working in non-unionised premises.

We believe the changes will render low-paid workers more vulnerable to injury because in times of austerity there will be less focus by employers on health and safety. There will be a double whammy of making them less able to seek redress after they have been injured. As far as we are concerned, there is a broader issue, and that relates to health and safety.

There is also a consequence for society. As a lawyer, I know there is not a great deal of sympathy out there for lawyers, but one thing that has not been looked at is the number of jobs that will be lost as a result of this within the legal sector. It has been estimated in the tens of thousands. That is clearly something that needs to be borne in mind.

You mentioned a sledgehammer to crack a nut. My concern generally is that we are dealing with a tiny percentage of fraud cases. My advice to the insurance industry and my colleagues in FOIL is to deal with those problems. Do not adopt this broad-brush approach. The vast majority of people injured either in the workplace or in a road traffic accident have genuine injuries for which they should be compensated.

Q28 **Ellie Reeves:** Mr Teasdale and Ms Denyer, you have heard concerns about people having to represent themselves in what might be complex cases. There are concerns about the erosion of health and safety in the workplace if these reforms go through. What do you have to say about those issues?

Shirley Denyer: Perhaps I could address the issue of process. It is the case that RTA claims are different from EL claims. They involve different issues and they cannot be put into the same category. Overall, we are looking at a new process for the handling of lower value claims, rather than its being a matter of coming through the small claims track. FOIL has looked in detail at the issues that arise when individuals bring their claims through the small claims track, and it does not work very well. The process is very flexible and very ad hoc. It is difficult to guide people through the process. Everything tends to happen at the last minute and it is hard to prepare. The impact on court resources would be quite considerable, with a very large number of claims coming through the court process.

FOIL has looked at and taken into account the work that has been done on a portal and the work done by Lord Justice Briggs to look at an online court. It is very much a new process that will take into account new technology. It will enable individuals to bring those claims with considerable assistance. It is completely different from the small claims track as it exists at the moment. We think that Lord Justice Briggs has looked at a process for claims worth up to £25,000, with the aim of its being a process developed for individuals without lawyers.

We have looked at that in detail, and we believe that an electronic platform can be developed to make it work, so that individuals will not need legal representation for relatively low value claims. We think that can deliver access to justice in a modern way, which recognises the way people live. You do not need to go to court. You do not need to spend a day at a trial. These matters can be dealt with in a much more streamlined fashion, with appropriate support, and still deliver proper access to justice for injured individuals.

Q29 **Ellie Reeves:** Mr Teasdale, do you have anything to add?

Nigel Teasdale: I think that is certainly recognised by the Ministry of Justice in the work they are putting in to make sure that there is a new process, with full support for litigants in person, and guidance and education around that.

Q30 **Ellie Reeves:** Mr Mitchell and Mr Tripp, do you have any views on how that online system might affect any of these changes?

Jason Tripp: Sometimes parallels are drawn between the existing RTA portal for fast-track claims and the development of the type of technology that has just been described. The two things are quite different. The RTA portal is a method of exchanging information between expert parties—between solicitors and insurance companies. The proposal to build a solution that will work for the lay person is admirable, but it is fraught with challenge and very difficult to deliver. If we take some learning from the experience in PPI claims, it has always been the case that individuals can bring their own claims, yet they continue to use CMCs. I think that will be the likely outcome were you to remove legal assistance from the majority of personal injury claims. They will turn to CMCs because it is just easier.

Steve Mitchell: I return to my earlier point. Just because a claim has limited value, it does not mean that the substance of the claim is not complex and does not require legal advice. Whether it is an online system or the system that exists today—whatever the system may be—I would suggest that you cannot avoid the fact that a lot of these claims, particularly employers' liability claims, involve complex issues. It is wrong not to allow people to do that, whatever the case may be.

On that point, the insurance industry talks about providing safeguards in an online system that allow litigants in person to use it. My own view is that the best safeguard for protecting access to justice and the interests of people who have been injured is to allow them access to independent legal advice and support. You cannot avoid that.

Q31 **Gavin Newlands:** Mr Tripp, you have already set out a distinction between the before-the-event and after-the-event markets, or primary and secondary, as you called them. Could you set out in a bit more detail what impact this reform would have, in your opinion, on the before-the-event market, and if you think it can react and adapt to the changes over time?

Jason Tripp: Post reforms the customer is left with a choice, which would be to seek legal expenses insurance that funds small claims work, to pay for legal services on demand or to abandon their claim. The problem I have with that is that it is an informed choice and requires a degree of understanding of the market that the customer just does not have. Public awareness of these matters is extremely low. There has been no information campaign to advise the public of the consequences for them of the reforms.

Before-the-event legal expenses insurers also have a choice and it is quite stark. Number one is to step away from funding small personal injury claims that would fall into the small claims track. That would effectively dumb down legal expenses insurance to make it arguably of much less value to the consumer.

They could fund small claims work with legal representation, which would make the product more expensive. That again leads to a stark choice for the consumer at the point of renewal of their legal expenses insurance. Do they purchase the cover at much higher cost or do they look for a product with lower coverage or lower value because that is less expensive? Neither of those choices is good for the consumer. On the one hand, you have customers paying more for access to legal representation when they need it, or they are left without legal representation at the point of claim.

The take-up of legal expenses insurance has fallen recently. Regulatory pressures from the FCA, coupled with the rising cost of insurance premiums, has made legal expenses an additional cost of around £25 or £30 per year. It is modest in its own right, but that additional cost is starting to become prohibitive. That becomes a problem for the market post reforms because we want consumers to have access to legal expenses insurance with full cover post reforms.

I fear that legal expenses insurance will become less prevalent, leaving customers without access to legal representation. As I said before, they may have the opportunity to use an online solution but more likely will turn to CMCs to provide them with an at-a-cost solution at that time. It is important to understand that the solution provided by CMCs is unlikely to include legal representation.

Q32 **Gavin Newlands:** I should have declared that I am currently in an ongoing insurance claim at the moment for an accident that occurred four months ago. I should add that it is a non-fault claim, for a change, but I am still inundated by after-event phone calls from CMCs, which is frustrating, to say the least.

Do the rest of the panel share those views on the before-the-event market? Are you optimistic as to its adaptability?

Shirley Denyer: At FOIL, we support the use of BTE, but it has been considered in the context of other reforms. Lord Justice Jackson anticipated that BTE would be acting in a completely different world after the LASPO reforms, but in fact the CJC report on before-the-event insurance published in November indicated that the market did not change at that stage. It is very hard to predict what effect changes will have on the market. Even the CJC working group, which produced a very long and detailed report, was not able to predict what effect these changes would have on the market.

It may well adapt. It is much more advanced in Europe. For example, European individuals are prepared to pay more for cover. It may be that new products will emerge to cover the risks. It will change and it is likely to develop. It is like all aspects of this market; it is likely to adapt to meet the needs that arise.

Q33 **Gavin Newlands:** Are you concerned that those who cannot afford it will be priced out of this particular market?

Shirley Denyer: It will be an optional purchase. In a sense, the cheapness of BTE is because costs are recoverable. Obviously the costs that are recoverable are also paid by motorists, so there is a broader picture. The cost of BTE is not separate from the cost of motor insurance in general and the cost of paying recoverable costs. It is part of the same picture. Although the cost of motor insurance in general is a matter for the insurance industry, it too needs to be part of the picture of where the costs lie.

Steve Mitchell: I share Mr Tripp's pessimism as to whether BTE insurance will be able to fill the gap left by lawyers in advising people who have sustained injury. The other issue, which you quite rightly point out, is affordability. A consequence of these reforms, as Mr Tripp said, is that the cost will increase. It will necessarily have to, because it will be covering greater costs itself. At the moment, I suspect that take-up is low among the workers we represent. I do not know for certain, but I think I can say with some confidence that, if the value went up to the sort of figures Mr Tripp mentioned, our members would not have the disposable income to get that sort of cover, and it would not be a priority for them. Therefore from our point of view, and the people we represent and want to protect from these reforms, BTE insurance is not a solution.

Nigel Teasdale: It is important to see it as a package of reforms. There is a view that, if the BTE market suffers, you are left without legal representation. We are talking about improving the process for low value motor claims, so you do not need legal representation. Then it is said, "What about CMCs? CMCs will come into it." The Financial Guidance and Claims Bill is tackling the CMCs. We should not just be looking at one aspect, which is raising the small claims limit. There is a wider package of reforms, all designed to promote a solution that actually works.

Q34 **Victoria Prentis:** Has anybody got a good word to say about CMCs?

Steve Mitchell: Any reforms that throw injured parties into the hands of CMCs are, by definition, inherently flawed because they do not represent the interests of their clients in the way that a solicitor is required to represent the best interests of their client. They are there to make money, and they shamelessly do so. As a result, there are practices that we have all probably encountered with CMCs that would make you shudder.

Q35 **Victoria Prentis:** Mr Teasdale, you were fair enough to say earlier that there are other abuses of the system that are not CMC related. Are you happy to stick up for them further?

Nigel Teasdale: Like any other part of our industry, there are good and bad practices. There is the poorer end of the market and the better end of the market. I do not think we should necessarily tar every CMC with the same brush, but probably the bigger propensity to farm claims comes from the CMC area.

Q36 **Victoria Prentis:** Would you hazard a prediction as to how CMCs might try to adapt to cope with a higher limit?

Nigel Teasdale: Again, the concern is that they will swoop into the market that will become available if it is harder for solicitors to operate, perhaps because of concerns about BTE. That is why, most definitely, we need to look at solutions that tackle claims management companies. One of those is the transfer to the FCA, which has a much stronger regulatory background, experience and powers. They will institute a fit and proper person test to stop the problem we have sometimes with the owners of CMCs just closing them down and opening another one.

We have the transfer of CMC regulation to Scotland, which is very important because we have seen some adverse behaviours there. The only point for me is that the Financial Guidance and Claims Bill is introducing a cap on the percentage of money that CMCs can take for financial claims. In terms of personal injury claims, it is introducing a power to cap rather than an actual cap. If they could extend that and actually cap the amount that CMCs can charge, it would be beneficial.

Q37 **Victoria Prentis:** That is very helpful. Does anybody else have any other specific ideas, apart from bringing them within the remit of the FCA, which might help to control some of the abuses we have seen?

Steve Mitchell: This is not an idea; it is just a comment about their involvement—swooping into the market, as Mr Teasdale said. I am sure that will inevitably happen. Far from resolving the problems that these proposals seek to address, I think we can probably all agree—although I do not want to assume that—that following these reforms and the increased involvement of CMCs, the epidemic will be not fraudulent claims but cold calling. There will be an increase in that. There will be an increase in fraudulent or exaggerated claims as people are encouraged by CMCs to bring claims they would otherwise not have brought. The volume of claims is likely to increase. Creating a space for CMCs to operate in is, in our view, going to worsen the situation rather than improve it.

Jason Tripp: I agree with Mr Teasdale. It is wrong to tar all CMCs with the same brush. There are many fine, large, nationally operating CMCs that provide legal services under the current rules to people without before-the-event legal expenses insurance. The problems are confined to cold calling and the promotion and exaggeration of certain claims. We must be clear about that.

Mr Teasdale spoke about general issues around personal injury claims—medical reporting and so on. Legal expenses insurers have panels of solicitors. Those solicitors are audited and controlled. There is competition between solicitors to make it on to legal expenses insurers panels. That drives up quality and standards. That, combined with FCA regulation of legal expenses insurers and SRA regulation of solicitors, drives up quality.

Q38 **Victoria Prentis:** Without SRA regulation, would you suggest something similar for CMCs, such as some form of panel?

Jason Tripp: Yes. Moving to FCA regulation, the approved person regime would be a very powerful step in that direction.

Q39 **Victoria Prentis:** That is going to happen.

Jason Tripp: Yes, and we would support that. We think that is a good thing. The higher quality CMCs will move on and work within that regime. For me, it is not so much a case of CMCs swooping in and a proliferation of such; it is the general reduction of legal representation that concerns me, and the notion that consumers can survive without legal representation against a backdrop of a lack of awareness of these matters.

CMCs are very agile. They are very nimble. They will reinvent their business models almost overnight. Legal expenses insurers, on the other hand, need 18 months' notice to rewrite policy wordings and to put that out to insurance retailers in order for them to capture the renewals process. That needs to be 12 months ahead for the expiry of existing policies. We have talked about this being a package of reforms. That is very important. Good, clear sight of the reforms must be available in order that the wheels can be put in motion 18 months in advance of the changes coming in.

Nigel Teasdale: A point I forgot to add on CMCs is that the Government have confirmed that the Bill will introduce a ban on cold calling.

Q40 **Chair:** I come back to where we started. I understand, and a number of you made the point, that you do not think that the money value of a claim is necessarily the measure of the complexity and so on. If we have a money value for the small claims limit, as we do at the moment, is it in principle unreasonable to uprate that limit from time to time, or whatever, to reflect changes in the value of money?

Jason Tripp: The problem there is that—

Q41 **Chair:** Can we have a direct answer to that question please, Mr Tripp? Is there an objection in principle to uprating the limit to reflect the changes in the value of money?

Jason Tripp: Yes, only if the financial value can be calibrated against complexity.

Q42 **Chair:** Anyone else. Your point is complexity, isn't it?

Steve Mitchell: Yes. The other issue is if it restricts access to justice by doing so.

Nigel Teasdale: No, I do not think it is unreasonable, but if you can accompany it by process reform I think that is much more important.

Chair: Thank you all very much. We are very grateful for your time and for your evidence. If there is additional information you want to submit, particularly around figures and calculations, we would be very grateful for it. Thank you very much for coming to give evidence to us today.

Examination of witnesses

Witnesses: Mrs Justice Simler and His Honour Judge Nigel Bird.

Q43 **Chair:** Good morning, and thanks to both of you for coming to give evidence to us. We are very grateful to you. Perhaps you would introduce yourselves for the record.

Mrs Justice Simler: I am Ingrid Simler, Mrs Justice Simler, a judge of the High Court. Judge Bird, who will introduce himself in a moment, and I are both members of the civil executive team. That is a team established by the Master of the Rolls in his capacity as head of the civil judiciary. We report to him and support him on civil matters, and provide him with judicial oversight over the current reform programme.

His Honour Judge Bird: My name is Nigel Bird. I am a circuit judge. For most of my time, I sit in Manchester at the very busy civil justice centre there. I do a relatively broad range of work. I am a member, with Mrs Justice Simler, of the CET. I was also a member of what Lord Briggs described as his working group in preparing the civil court structure review.

Chair: Thank you both very much. Mr Howell will start.

Q44 **John Howell:** Thank you; it is great to see you both here. I want to start by looking at the impact on judicial and other staff resources of raising the small claims limit for PI claims, and to find out whether you think the limit should be raised at all. The civil executive team has made some trenchant comments—let us put it that way—on the potential impacts on the courts of raising the small claims limit. I think you referred to the impact as creating a "serious level of dismay." Can you summarise those concerns?

Mrs Justice Simler: Yes. Let me make it clear that the report did not seek to address the merits or otherwise of the Government's proposals head on, although we made the obvious point that there is an access to justice issue raised in relation to genuine but modest PI claims in a proposal that would remove over 90% of RTA, EL and PL claims from the fast track where costs are recoverable, causing many claimants to be self-represented; and that is against insurers who are able to engage lawyers. The principal purpose of our response, which was prepared following consultation with the designated civil judges both at circuit and district bench level, who are dealing with these claims at the coalface, was to consider the serious judicial and court resource implications. We made the following points, and I can deal with them in summary.

First of all, the proposal was based on an assumption that 90% of the aggregate of those claims, which are currently in the fast track and which therefore go through the portal as it currently exists and have fixed legal costs recoverable, would move into the small claims track without access either to costs or to the portal. That would mean that PI claimants with claims valued up to £5,000 would be unable to obtain legal representation other than by buying before-the-event insurance at probably—we have heard it confirmed today—much higher premiums than currently charged. Their claims would therefore be dealt with as litigants in person.

The existing portal can only be accessed by claimants' solicitors and by insurers, and does not permit direct access by litigants in person. We were concerned by the absence of any evidence to support the assumption that the portal could or would be redesigned to accommodate litigants in person, either at all or in as efficient and effective a manner as it currently operates.

We were concerned that the pre-action protocols that exist are not easily understood by litigants in person. We were concerned that, even if the portal can be redesigned, there was no evidence to support the assumption that future settlement rates would be at least maintained at the high rate that is being achieved through the portal. Some of the things we worried about were that litigants in person with no legal advice about their prospects of success, or the likely level of quantum, would be unlikely to trust insurers and would have less incentive to settle through a redesigned portal. I think you have heard evidence that rather supports some of those concerns.

Q45 **Chair:** To interrupt you very briefly, there is a risk that people would pursue unmeritorious claims, to their detriment and the detriment of the system.

Mrs Justice Simler: Possibly. We thought, given the high claims volumes and high settlement rates currently achieved, that even a small percentage drop in the number of settlements would lead to an increase in the number of claims coming into the court system. Paragraph 12 of our report described how we thought that greater burden was likely to play out for judges and the courts. I do not know if you want me to go through those things, but they are set out at paragraph 12. We estimated that the per case burden of a case in the small claims track would therefore be at least double, if not possibly treble or quadruple, the burden of a case in the fast track. We discussed the funding implications of that.

Q46 **Chair:** It is sometimes thought that there is no judicial burden through the small claims track. That is not right, is it?

Mrs Justice Simler: It is not right. Ms Denyer described to you how different those claims are. They are very ad hoc, things go wrong and papers are missing. Judges are involved inevitably in identifying the issues and making sure that there is a focus on the issues and that bundles are ready. There is a significant resource implication. Whereas cases in the fast track that actually get into the court system are generally dealt with in 15 minutes—20 cases a day—a small claims track case at trial can take one to two, if not three, hours. That is if the case is complete and does not have to be adjourned in order to provide further information, with all the resources consequent on that.

Q47 **John Howell:** Has anything happened in the past year to influence your views on this?

Mrs Justice Simler: I think you know that the civil executive team met representatives of the MOJ who are working on these issues in July last year. We were told that a steering group had been set up. We understand that that, together with representatives from Claims Portal Ltd and MedCo, is working towards creating a redesigned portal that would be accessible to litigants in person dealing with claims valued at not more than £5,000.

If that is capable of being achieved, and it is a very big if—some of the problems highlighted by Mr Tripp this morning will no doubt have to be considered—it would absorb those cases rather than displacing them to the court system in the small claims track, with all that entails. If that could be achieved, it would go a long way to dealing with our concerns.

Q48 **John Howell:** Mr Bird, do you have a comment?

His Honour Judge Bird: May I just add a little in relation to judicial resources. It is absolutely right to say that small claims hearings place a very real burden on the judges who hear them. They also place, of course, a burden on those who hear appeals from those cases. The burden is not simply concentrated in the hearing; there is a knock-on effect. There is also a burden on the court staff who deal with the issues that we have heard about, such as preparing bundles and making sure that documents are in place so that the judge can hear cases effectively.

Q49 **John Howell:** Do you feel that the small claims limit should be raised at all?

Mrs Justice Simler: I think you know that the CET response did not consider the more conceptual question of whether there should be a rise at all but was limited in the way I suggested. In the event, as we know, following a wide consultation, the Government have decided to raise the limit to £2,000 in relation to most claims, but to £5,000 in relation to RTA claims. In those circumstances, we do not think it is appropriate for us to comment on that proposal.

Q50 **John Howell:** Lord Justice Briggs has brought forward his online court proposals. I understand that those are being piloted at the moment. There has been much discussion of the possibility of the online court being used, particularly by litigants in person, for personal injury claims. Do you agree that there is a role for the online court? If so, what would it be?

His Honour Judge Bird: If I may, I will start with a brief description of the online solutions court. First, in relation to the pilot you mentioned, there is not as yet a pilot of the fully conceived online solutions court. Rather, there is a pilot and some early development and testing of various elements of what will eventually come together to form the online solutions court.

It is perhaps important to take a step back and remember the genesis of the online solutions court. In short, it was to fill a gap that Lord Briggs, as he now is, identified in his examination of the civil justice system in this country. That gap was that the civil justice system is expensive and risky in terms of costs exposure, and it is not really designed for comfortable use by litigants in person—those who come without legal support. The rationale for the online solutions court was not, as a number of people have assumed, that it will be an entirely digitally based court, but rather that it will be a court that addresses that deficit in access to justice.

May I also correct another perhaps common misapprehension? The online solutions court is not intended to be what some have called a lawyer-free zone. It will certainly be able to accommodate claims with lawyers on one or both sides. As I will explain very briefly, you will have seen that there is some element of cost shifting.

In summary, the online solutions court, which I think is very important in the context of your inquiry, is designed to meet access to justice. As you will appreciate, that is a subject very dear to the civil justice system, and indeed to judges.

It is difficult to say as things now stand, because the development and testing of the elements of the court are at a very early stage, to what extent the online solutions court will be able to help with this difficulty. As we say in the paper, we certainly accept that there is potential for that to happen. It is right to say that the work necessary to realise that potential will be quite demanding and on occasion really quite complex. May I relatively briefly make five points?

First, the most obvious difficulty will be the need to create online guidance for PI claims. It may well be the case, as we have heard today, that online guidance for RTA claims will be relatively straightforward. I would not want the Committee to think that, when I say relatively straightforward, I mean but a moment's work. It remains a relatively complex procedure, but our view is that the work needed to prepare online guidance for EL and PL claims will be much more pronounced. We have heard this morning that the number of those claims may be diminishing, but of course that does not in any sense alter the nature of the task that lies ahead.

The creation of the online guides is practically a way to take those who use the court through a series of questions, the answers to which will be fed through what some have called a decision tree. The decision tree will end up allowing litigants in person to produce what is essentially the nuts and bolts of their claim. Lord Briggs described it as a process that will tease out the "legally relevant nuts and bolts of a party's claim." That means that defendants and the court will be able to deal with the claim, we hope, in a far easier way. That design is quite a hurdle.

The second point, which we have touched on, is the relationship between the online solutions court and the new portal. One of the points that we raised in our paper was that there was an assumption that the portal would simply be able to adapt its services so that litigants in person could freely and efficiently use them. Assuming that to be the case, some quite high level thought will need to be given to the interaction between the online solutions court and the portal.

Two obvious questions arise. At what stage would a claim that falls out of the portal enter the online solutions court? Would it come in at stage one, the triage process I have described that would take a user through the decision trees, or would it come in perhaps at stage three where the matter is ready for a trial? That really depends on how the online portal is designed. That interaction will have to be thought through very carefully. I should emphasise, of course, that there has been discussion this morning and in the papers of an online method for dealing with these claims. Whatever that online method is, from an access to justice point of view, it must always allow for a fallout into the court system. The online solutions court is an option. The small claims track is another option.

The second question is whether the journey of a personal injury claim through the online solutions court will be precisely the same as the journey of what we have described as a money claim. We simply do not know the answer yet to those questions.

More briefly perhaps, the third point, which I think you have already, is that it is likely, because of the involvement of litigants in person, that fewer cases will settle through the new portal. The introduction of a tariff for RTA claims may help to reduce the number, but it seems to us that the possibility of a 20% uplift in exceptional circumstances may to some extent reduce the benefit of a tariff because litigants in person may wish to argue, as they would be entitled to do, that the circumstances of their case are such that the 20% would apply. You have seen from our paper that we have some practical experience of this. If one compares settlement rates in the small claims track with settlement rates in the fast track, the fast track settlement rates are around 25% higher.

Fourthly, and it is important to mention this point, there will be some cost shifting in the online solutions court. We felt that that was a very important part of ensuring access to justice and a way of dealing with the unmeritorious claims that we described this morning. The cost shifting will not be as generous as the fast track cost shifting, but it will allow the very important step that litigants in person can have both advocacy assistance at trial and early assistance on the merits, in the hope that unmeritorious claims will not get through.

The final point, which I know the Committee has, is that the need for a medical report and the almost certain cradle-to-grave legal support that the defendant will enjoy makes PI claims not a terribly easy fit at the moment.

Q51 **John Howell:** The online court pilot you have described uses staff for face-to-face meetings when people cannot cope with the online system. Is that sustainable as a model for the future?

His Honour Judge Bird: That particular model within the context of the pilot may not be quite the model that is rolled out in due course, but a great deal of work is being done by HMCTS, with the co-operation, supervision and involvement of the judges, on a very broad project called assisted digital. You may be very well aware of that. Mrs Justice Simler and I are both members of the civil judicial engagement group. One of our functions is to question and scrutinise how that work is going on.

Bearing in mind that the online solutions court in particular is all about access to justice, you can rest assured that the judicial engagement group and other engagement groups—a litigant in person engagement group is also actively involved—realise that without adequate support for those who are, as some people say, digitally disenfranchised, or even those who choose not to trust a digital way of approaching the courts, the whole high idea of access to justice clearly goes out of the window. We are very keen to observe that closely. As we understand it, HMCTS is working with the third sector. That is referred to in Lord Keen's evidence. HMCTS, again as we understand it, have just entered into an agreement with the Good Things Foundation, which is charged with, and very experienced in, helping digital access.

Q52 **John Howell:** Has the Ministry of Justice been able to reassure you over the concerns you have raised about the online court?

His Honour Judge Bird: Our view is that the Ministry of Justice is certainly paying attention to what the civil executive team and the judges have had to say. If we may say so, we think that the clearest example of that is in the collaborative efforts being made to create the new portal, and in particular the fact, as Lord Keen says in his written evidence, that the five working groups involved bring together senior representatives from all sides.

The MOJ has kindly taken time to come to discuss and update these matters with the civil executive team. One of the points that would be hugely helpful to the continued development of the courts and would really ease the difficulties that are being faced is the enactment of the primary legislation that is working its way—

Chair: The courts Bill.

His Honour Judge Bird: Yes. Once we have the courts Bill, certain of the blocks in developing the online court will be removed. I know you will forgive me for taking this opportunity to mention it.

Chair: We have managed for nearly 10 minutes without the courts Bill being raised; that is not bad going.

Mr Charalambous, are there any points that you think have not yet been covered? I know that some of the points you were going to raise have been covered.

Bambos Charalambous: I think they have been covered. I have concerns about the support that litigants in person will receive from the courts. You may get a situation where you are asking the defendant's solicitors or the defendant to prepare the trial bundles, which may also disadvantage the litigant in person. I take on board fully what you said about support.

Chair: Thank you very much for your time, Dame Ingrid and Judge Bird. We are very grateful for your evidence.

Examination of witnesses

Witnesses: Rt Hon Lord Keen of Elie QC and David Parkin.

Q53 **Chair:** Lord Keen, it is very nice to see you again.

Lord Keen: Thank you, Chair. I am accompanied by David Parkin, the recently appointed deputy director for civil justice at the Ministry of Justice.

Q54 **Chair:** Thank you very much. Mr Parkin, it is nice to meet you, and welcome to giving evidence to the Committee. I get the sense, Lord Keen, that you are retaining responsibility for this area of work.

Lord Keen: That appears to be the case.

Chair: That is very judiciously put, if I may say so. Apologies if we have over-run a little; we have had a pretty legal panel of witnesses. It was either the witnesses or the lawyers on the panel, I am not sure which.

We have the written evidence, which the Ministry submitted, and for which we are grateful. Mr Hanson wants to start.

Q55 **David Hanson:** Good morning, Lord Keen. We want to look as a Committee at the rationale of the Government's proposals. One of the rationales that you put forward is that many claims are straightforward and do not require legal representation. Could you help the Committee in understanding that rationale?

Lord Keen: Yes, indeed. There are two aspects to this, of course. There are road traffic accident claims, and there are EL and PL claims, which will have different limits in respect of the small claims track—£5,000 in respect of road traffic and £2,000 in respect of other claims. As regards what are sometimes termed whiplash claims, that term is somewhat misleading, as whiplash is a cause; a soft spinal injury or neck injury is the effect. Most of those are relatively straightforward in the context of causation, for example. In other words, liability is not normally a significant issue; the issue is the extent of injury and any consequent loss in the context of wage loss and other things. Those can, we believe, be adequately dealt with under the small claims procedure, particularly as it is being further developed. That is why we consider it appropriate to increase the limit to £5,000, which would cover about 95% of all claims.

With regard to employers' liability claims and public liability claims, rather different issues arise, because we are dealing with issues of health and safety, and that can lead to complexity. That is why we have retained a lower limit of £2,000 for that type of claim. Let's be clear: for many years, since 1991, such claims, up to the value of £1,000, have been dealt with under this procedure without any real difficulty. In the event that even a minor claim raises complex issues of causation or statutory liability, which can happen, it can be removed to the fast track, which is a different process altogether. Either the judge or the party can suggest that there has to be a move.

Q56 **David Hanson:** I think the Committee would be very interested as to why you think that legal representation is not needed. For example, the Management of Health and Safety at Work Regulations 1999 comprise 30 clauses and two schedules. Is an injured party at work expected to know that without legal representation?

Lord Keen: They are not precluded from taking legal representation. They may take legal advice as to whether or not they have a cause of action and then proceed on the small claims limit.

Q57 **David Hanson:** What is the level of the minimum wage at the moment? Do you know that?

Lord Keen: I cannot give the precise figure, but I am sure that the Committee can be made—

Q58 **David Hanson:** Many of the people who work in areas that might well be subject to personal injury might be on the level of the minimum wage, and, if they cannot afford legal representation, how are they supposed to manage their way through the Management of Health and Safety at Work Regulations 1999, with its 30 clauses and two schedules?

Lord Keen: Well, there are various ways in which such a person can take advice, whether it be from citizens advice bureaux, from a union representative, or otherwise.

Q59 **David Hanson:** What about people who are not in trade unions or who do not know their rights?

Lord Keen: If people do not know their rights, there are means by which they can seek advice as to what their rights may be. I mentioned CAB as a simple example.

Q60 **David Hanson:** Do you think the Provision and Use of Work Equipment Regulations 1998, or the Control of Major Accident Hazards Regulations 2015, or the Factories Act, shops and railways regulations 2009 are things that people at work are expected to know without legal representation, which they can claim back under the current proposals?

Lord Keen: I do not expect people to know the detail of those regulations, but I expect people to know when they have suffered an injury, first of all, and I also expect people to know when they have suffered an injury that they consider was not their fault. The detail of how you establish liability is a separate question.

Q61 **David Hanson:** I am interested in what evidence the Government have to support their conclusion that people do not require legal representation for many of these claims.

Lord Keen: We can start with the fact that, since 1991, such claims have been dealt with up to a limit of £1,000 on the small claims track without any obvious difficulty.

Q62 **David Hanson:** In the impact assessment you produced in November 2016, you concluded that there was likely to be a reduction in the volume of low level employer liability and public liability claims. Could you quantify that for the Committee?

Lord Keen: No, I cannot quantify it.

Q63 **David Hanson:** Why can't you quantify that for the Committee?

Lord Keen: Because it is a qualitative assessment, not a quantitative assessment.

Q64 **David Hanson:** If you are basing policy on that statement, why can't you quantify the number of claims that have been potentially lost?

Lord Keen: Because it is a qualitative assessment, not a quantitative assessment.

Q65 **David Hanson:** Do you expect to do a post-analysis, if the proposals go ahead, as to how many claims are reduced?

Lord Keen: We will keep this under review, as we always do.

Q66 **David Hanson:** Do you think it is fair that claims for some of those people are going to be reduced? You have indicated that there will be a reduction in low level employer liability and public liability claims. Do you think that will undermine health and safety at work legislation in general?

Lord Keen: No.

Q67 **David Hanson:** How can you say therefore that people who currently have claims that are being accepted, which have gone to court and are being paid, and which under your assessment you cannot quantify, are not going to be able to do that? How can you justify that to the Committee?

Lord Keen: We are not actually saying that they are not going to be able to do that. We are saying that people may take a different view as to the prospects of success with regard to such claims, for example, and therefore may not bring them.

Q68 **David Hanson:** So at the moment you cannot tell us how many potential claims will not progress as a result of these proposals.

Lord Keen: It would be impossible to do that.

Q69 **Chair:** Lord Keen, you said that it was possible, in the event of the complexity that arises in some cases and not in others, to remove the claim from the small claims track and put it into the fast track.

Lord Keen: Absolutely.

Q70 **Chair:** Does the Department have any evidence as to how often that happens? Can you give the Committee a quick idea as to how that process works in practice, if you are a litigant in person?

Lord Keen: At the moment, it happens only in a small number of cases, which may reflect the fact that the small claims track limit is so low. The process involves either the party making an application to the court or the court itself deciding of its own accord that there is an element of complexity in the case that would merit its going on to the fast track. A simple example would be where the person complained against makes a suggestion of contributory negligence.

Q71 **Ellie Reeves:** No doubt you are aware of the recent judgment on employment tribunal fees brought by Unison. The Supreme Court emphasised in that case that people must in principle have unimpeded access to the courts. Don't these proposals run the risk of falling foul of that judgment, with claimants not being able to pursue claims, particularly employers' liability claims, where there is likely to be huge inequality of arms between parties?

Lord Keen: No, I don't agree with that. May I say that I think that Lord Reed's speech in the Unison case is an exemplary piece of judicial work? The way in which he analysed the issue of access to justice and the common law right of access to justice is, I think, as clear as it could ever be. However, when we talk about access to justice, it is not an absolute; we are talking about an issue of proportionality. The Unison case turned on the level of fees in order to access employment tribunals. One has to move away from the particular facts of that case and look more generally at the question of access to justice.

When we look at access to justice in the context of the small claims track, we are talking about a situation in which, if the small claims track limit is increased to £5,000, the online fee for commencing action on the small claims track will vary between £25 at the lower limit to £185 at the upper limit. Those levels of fees are considered proportionate and appropriate in that context. In a very small claim, the fee would be £25. However, before you even commence your claim on the small claims track, you will, under our revised scheme, go into the pre-action protocol. At present, that is used by insurers, claims management companies and the like, but we are addressing the pre-action protocol to make it user-friendly for a party litigant. Cases where there is no argument over causation or liability and a fairly straightforward and modest claim are settled under the pre-action protocol, without the need to resort to the small claims track itself.

Q72 **Ellie Reeves:** Okay. There is a more general point, though, isn't there? It is not just about the fees for going to court; it is about the broad principles of that judgment in relation to access to justice. In a situation where someone might want to bring a claim against their employer, but because the legal issues are complex, and because it is a case in the small claims court they cannot find anyone to represent them, doesn't that impinge on access to justice?

Lord Keen: No, because if the legal issues are complex it will not remain on the small claims track; it will go to the fast track, where legal representation is not only available but is also on a cost recovery base. One has to remember that you are perfectly entitled to have legal representation on the small claims track; the difference is that you cannot recover the cost that you have incurred for that legal representation.

Q73 **David Hanson:** Can I just ask one final question? The Minister mentioned that the CAB, for example, would give advice to people in the absence of legal representation being able to be claimed. Have you made any assessment? Have you discussed that with Citizens Advice and assessed any potential increase in cost to them?

Lord Keen: We have discussed these proposals with various stakeholders. I cannot say that there has been a specific discussion with the CAB. I gave it simply as an example. What I would seek to emphasise is this, Mr Hanson. You referred to the detail of various regulations over health and safety at work. One does not reach that point until one has first of all determined that there has been an injury, determined that it was not your fault, and considered that it was the fault of your employer. The detailed analysis of why it was the fault of your employer and why he has incurred statutory liability is a secondary consideration in that context.

Q74 **David Hanson:** But the key point is that the litigant in person, who is then going to face court without the potential for financial compensation, will face a legal team that may well be far better prepared to deal with those complexities than a shop worker or a factory worker.

Lord Keen: That has not been the experience over many years. Indeed, the question of those limits was looked at in 2003-04, and at that time the analysis indicated that parties were not finding it difficult or encountering an inequality of arms at that level of court procedure.

Q75 **David Hanson:** You indicated in your impact assessment that there is likely to be a reduction, but you cannot quantify that reduction. We need to get to the bottom of the rationale for not requiring legal representation and the fact that there is going to be a reduction. Why is the reduction going to take place, and by how much?

Lord Keen: Because people will pause and think about the merits of their claim before they make it. It will be the same with regard to whiplash cases, where people instinctively decide to pursue a claim because, essentially, it is a no-cost option.

Q76 **David Hanson:** What evidence have you got of that?

Lord Keen: It is a quantitative assessment, not a qualitative assessment.

Q77 **David Hanson:** So you have made an assessment.

Lord Keen: We have carried out discussions with stakeholders to reach a view as to what the impact of these changes will be.

Q78 **David Hanson:** I ask you again, Lord Keen, what evidence can you put to the Committee that that reduction will take place, and why?

Lord Keen: You could not put forward evidence that a reduction will take place. It is a qualitative assessment as to how the changes will impact on future conduct.

Q79 **Chair:** Lord Keen, we had evidence earlier today from our judicial witnesses that settlements in the fast track are about 40% higher than in the small claims track. I take your point that anybody knows if they have suffered an injury and it was not their fault. I understand that, but how that case is then pursued, and what the appropriate level is at which to bring it and, perhaps, then to settle it, is something that is rather better done if you have legal advice, isn't it? Isn't there a risk that, if you increase the limit, you will lose that higher level of settlement, which is not desirable?

Lord Keen: You have to remember what the drivers are of higher levels of assessment in that context. One of the principal drivers with regard to higher levels of assessment in the fast track is the point that legal expenses are recoverable. Therefore, insurers, for example, will look to the fact not only of the value of the claim but that if they fight it on its merits they will incur another X thousand pounds of legal expenses. That is reflected in the compromise settlements achieved in those circumstances.

Q80 **Chair:** In fairness, I may have slightly misled you by the way I phrased the question, Lord Keen. The evidence we had was that the volume of settlement was 40% higher, so it is much more likely to be settled when you have lawyers involved.

Lord Keen: But again, that is for the same reason, because you are incurring not only the risk of having to pay for the claim itself but an increasing liability for legal expenses as the claim goes on. You reach a point where, from the insurer's perspective, it makes sense simply to compromise rather than incur further legal expense.

Q81 **Chair:** Has any research been done as to what extent it may be a result of the lawyer acting for the claimant and giving them sound advice that it is not worth their while pursuing a claim, or that the quantum is X and it is a fair offer?

Lord Keen: I am not aware of any such research.

Q82 **Chair:** Mr Parkin, can you help on that?

David Parkin: I am not aware of any. No.

Q83 **Chair:** Is that a matter of concern? In other words, sometimes there is the suggestion that the lawyer could be a gateway to settlement.

Lord Keen: The pre-action protocol is a gateway to settlement, and a very effective one. Of course, when you have a lawyer on board, he can also advise as to the prospects of success. I accept that. But when a case is complex so far as causation and liability is concerned, it is not likely to remain in the small claims track.

Q84 **Victoria Prentis:** I hear what you say most recently about its not being likely to remain in the small claims track, but you have heard our concerns about the way in which cases will be handled. What solutions have you come up with in your working groups, for example, about ways in which medical reports, liability disputes and settlements can be dealt with in the small claims track?

Lord Keen: That is actually a work in progress, if I may say so. I think I mentioned the five groups in a letter to the Committee earlier this year, and I shall not repeat the terms of the letter, obviously. We are working, through those five groups, to identify the most appropriate way forward on all these issues, including access with regard to MedCo and independent medical reports, and the question of how those who are not digitally inclined can make sure that they can access the pre-action protocol and the claims process. We would be happy to report further to the Committee once that work has been completed, but at the moment it is a work in progress.

Q85 **Victoria Prentis:** We are worried about older people in particular, who might not use computers as naturally as younger people. His Honour Judge Bird gave us some evidence about how charities have been engaged to assist with that. Is there anything further you can tell us?

Lord Keen: It is a very real question that we need to address and are addressing. We have organisations such as the Good Things Foundation, which receives Government funding, that supports those who are termed digitally excluded. That might include myself, I have to confess. They have a network of over 5,000 local community helpers who are available to assist in that context. As I say, it is a work in progress and we need to draw it together to ensure that we are not excluding people from the process.

Q86 **Victoria Prentis:** Are you going to pilot these programmes?

Lord Keen: I do not understand that the increase in the small claims limit will be piloted in any sense. It will be a universal increase both in regard to road traffic and in respect of other personal injury.

Q87 **Victoria Prentis:** It strikes me that you still have quite a lot of work to do.

Lord Keen: It is work in progress, in that context, but I do not understand that we are going to pilot it.

David Parkin: The IT system will be piloted, yes, but not the increases.

Q88 **Victoria Prentis:** Are you going to pilot the IT system widely?

David Parkin: We are still developing our proposals for piloting, but we will happily return to the Committee with what they are.

Q89 **Victoria Prentis:** It would be very helpful to know.

Chair: Yes.

David Parkin: To return to the point on working groups, I chair the overall steering group, and digital exclusion and the particular sectors of the population, particularly the elderly, who may be digitally excluded, is something we are particularly concerned about. We are discussing it with all areas of the industry to see whether we can offer certain support to certain groups.

Q90 **Victoria Prentis:** In practice, how would that work? If an older person wishes to bring a claim, how would they know that they could get digital support?

David Parkin: I cannot fully answer that at the moment. It is something we will have to work through with those who represent those groups; they will put their concerns to us and we will develop the support and guidance that they need.

Q91 **Chair:** Ignore the bells for the House sitting—nothing terrible is going to happen.

Lord Keen: It depends which House it is.

Q92 **Chair:** I think it is ours, Lord Keen. You are not alone in being digitally excluded, I might add. But can you help me on one point? We had evidence from judicial witnesses, and you have seen the written response from the Judicial Office. When the senior judiciary talk about "a serious level of dismay" about a proposal, it is clearly not something that any Government would ignore or take lightly.

Lord Keen: Absolutely.

Q93 **Chair:** What has the Ministry done to address those levels of dismay and the issues that were raised?

Lord Keen: Again, as David indicated, that is something that is being addressed by the five working groups and is a work in progress. We are taking account of all representations. As I say, we met earlier with various stakeholder groups. I have had a number of round-table meetings with stakeholder groups. They have diverse views on the issue. I quite understand that, but we are attempting to take account of their views and the concerns expressed by the judiciary and others.

Q94 **Chair:** The Association of Fee Paid Judges made particular reference to the very poor state of preparation of many cases that come to the small claims court, for example.

Lord Keen: That is understood. However, it requires us to address, first of all, the extent to which we can simplify the claims process in order that preparation can be more advanced. Also, it may require judges to take a rather more proactive approach to the determination of cases than they have done historically.

Q95 **Chair:** But does that perhaps run the risk of actually increasing the burden on judicial time rather than reducing it? How then will the Department budget for that?

Lord Keen: We will have to see the extent to which it does impact on judicial time. As I say, the primary mover is to simplify the claims process and the pre-action protocol.

Chair: I understand. Mr Charalambous, do you want to come in on this point before I move on?

Q96 **Bambos Charalambous:** I wanted to ask about the working group that looks at guidance and support. I am assuming that more of that is needed. Who will provide it and how will it be funded?

Lord Keen: At the moment, it is very difficult for me to answer that, because it is work in progress. I do not know whether David can elaborate, because he chairs the overarching guidance group. At the moment, we are just trying to assess the way forward.

Q97 **Bambos Charalambous:** Do you envisage that there will be a requirement for face-to-face contact with litigants in person to advise them? Do you see that being a support and guidance role?

Lord Keen: I think that the Good Things Foundation, for example, has support networks, which may be able to do that.

David Parkin: We hope to have a full suite of guidance and support, including online guidance. I cannot yet specify what the requirements of that guidance and support will be.

Q98 **Gavin Newlands:** Lord Keen, the impact assessment assumed that take-up of before-the-event insurance would remain the same, despite higher premiums, although it accepted that demand could go down. We have heard evidence today from Coplus, supported by USDAW, about the impact on the BTE market and, therefore, their customers, and the time it would take for that market to adjust. Do you plan to do any further research on this before the reforms are introduced?

Lord Keen: We are not planning to do that. There have been suggestions that, for example, premiums for before-the-event insurance may rise or that the take-up of before-the-event insurance may drop. Our experience has been that the personal injury market in general is extremely adaptable and flexible, with various players, such as CMCs, solicitors and insurers, involved. We would like to monitor how it develops. We do not anticipate at present that there will be any major rupture in the BTE market.

Q99 **Gavin Newlands:** With respect, that is not the experience of the market itself; it expects that premiums will rise. Do you agree or accept that the impact may be detrimental for those with least—those who are priced out of the BTE market?

Lord Keen: No, because it is not based on their experience. It is what they anticipate. We would rather wait and see how the market develops.

Q100 **Gavin Newlands:** Would you accept that, if there is low take-up of BTE insurance, it would create more opportunities for claims management companies? Would it not be preferable for us to support the BTE market rather than CMCs?

Lord Keen: I would not make that binary judgment. Good CMCs look after their customers, and if the claims management companies move into this market it could be beneficial. Of course, we are extremely concerned about the behaviour of some rogue CMCs, and we are increasing regulation in that area. But there is no reason to suppose that substituting CMCs for BTE insurance is a bad thing.

Q101 **Gavin Newlands:** It is entirely supposition by the Government that there will be no detrimental impact on the BTE market. That is the judgment you have made.

Lord Keen: We anticipate that the market is so flexible that it will adjust to changed circumstances. It has in the past and we see no reason why it would not in future. It may mean that claims management companies come into a part of the market they have not been in before; that is not of itself a bad thing.

Q102 **Chair:** You rightly distinguish between CMCs that operate well and effectively and those you rightly describe as rogue. One of the concerns we have heard is that, for example, rogue CMCs frequently retain people who are really self-employed McKenzie friends. Effectively, they are paid McKenzie friends, which rather disguises their link to the business. Should the regulation come down clearly and prohibit the use of paid McKenzie friends in court?

Lord Keen: It is an interesting point. Of course, McKenzie friends can play an important role in helping and supporting litigants in person. The judiciary are currently looking at this, as I understand it, and the judiciary can control the level of engagement that McKenzie friends have with the court. We are going to consider their views in due course, but they are looking at this at present. There is room for abuse—let's be clear. Effectively you can have, as you say, a paid McKenzie friend who is, to all intents and purposes, operating as a claims manager without regulation.

Q103 **Chair:** That clearly would be an entirely undesirable state of affairs.

Lord Keen: We are alive to that risk.

Q104 **Chair:** Understood. Another suggestion that has been made is that we are likely to have a ban on cold calling, as I understand it. Is it the intention to include a ban on cold calling in the new Bill?

Lord Keen: That is already in the Bill.

Q105 **Chair:** The Financial Guidance and Claims Bill.

Lord Keen: Indeed so.

Q106 **Chair:** So that we will have.

Lord Keen: Actually, effectively stopping cold calling is an immensely complex process, because cold calling nowadays is carried out by unregulated entities from outwith the United Kingdom. We have instances of it being carried on in south America to target the UK. They then spoof their telephone numbers—as it is termed—so that it is impossible to trace the origins of the call. Therefore, it is a problem that we are looking at and constantly monitoring. We are legislating to try to control it. In so far as CMCs in the UK are engaged in that practice, we have pursued them, and the CMR, which regulates them at present, has imposed fines on a number of CMCs for that sort of conduct. I am not going to pretend that we have a complete answer; it is really quite a complex problem.

Q107 **Chair:** But clearly one that the Government take very seriously.

Lord Keen: Absolutely.

Q108 **Chair:** The final suggestion that we have had on CMCs is that the Bill, which is welcomed on all sides, includes a 20% cap on CMC costs as a proportion of compensation claimed in relation to PPI claims. Why not extend that to PI claims?

Lord Keen: Because we are transferring regulation to the Financial Conduct Authority, which will have the power to impose such a limit. We want to see how the changes with regard to road traffic injury cases and personal injury cases bed in before we decide whether or not to encourage the idea of such a limit being introduced. The Financial Conduct Authority would be in a position to do that and would have the power to do it, once we see those changes bed in.

Q109 **Chair:** I understand. Finally, the Government have taken a view about increasing the money value of the small claims limit in the way you have described. Let's take the £2,000 limit for non-RTA claims. It is beyond the rate of inflation. What is the reason for going beyond the rate of inflation?

Lord Keen: Since 2013, the rate for small claims, other than for personal injury and housing, has been £10,000. We have to remember that, and it has worked. The level for personal injury has not changed since 1991. There are various views about the inflation-linked result. We say that it is about £2,000. Others have said that it is about £1,700. We do not feel that there is a material difference between setting it at £1,700 today and seeing it drop behind inflation next year, and setting it at £2,000 without the need to review it again for a number of years.

Q110 **Chair:** Would it be desirable perhaps to have a mechanism for annual or perhaps triannual upratings in the way that often happens in other areas?

Lord Keen: That has not been proposed, and I suspect that it would be regarded as rather too intrusive to the system. We would rather see the system working. It could lead to confusion among litigants, particularly litigants in person, as to where they are, because the limit has suddenly increased over the past 12 months.

Q111 **Chair:** I understand that. What is the justification within accident claims for £5,000 as opposed to £2,000 for RTAs?

Lord Keen: We are trying to deal with a particular problem related to whiplash injury or soft tissue neck and spine injury. We have between 780,000 and 800,000 RTA claims a year, of which 85% to 90% are either whiplash or soft tissue injury cases. Many of those are fraudulent.

Q112 **David Hanson:** How many?

Lord Keen: We do not know exactly.

Q113 **David Hanson:** How can you say that then?

Lord Keen: Because we have an indication from data. You have to make qualitative assessments in this context.

Q114 **David Hanson:** With due respect, Lord Keen, you just said, "Many of those are fraudulent." Then I asked you how many and you said, "We do not know." It is worth putting on the record how many in your assessment, qualitatively, are fraudulent.

Lord Keen: As I said, it is not a quantitative assessment. What we have is clear evidence. Let me give you a simple example. We have a situation in which the safety of vehicles in this country has improved enormously in the last 10 years. The Thatcham assessment of safe car seats, which is relevant to whiplash injury, has moved from a new car number of about 12% in 2006 to 88% in 2016. There has been a vast improvement in the safety of vehicles. In the same period, the number of road traffic accidents has dropped by more than 25%. In the same period, the number of claims for whiplash-related injury has not moved in a downward direction at all; it remains at about 85% to 90% of all road traffic claims, and the numbers remain at a very high level. That is regarded as indicative of the fact that there is a claims culture with regard to whiplash injuries, and part of that is fraudulent or exaggerated claims and set-up claims. They exist.

Q115 **Chair:** To be devil's advocate, is a problem with the quantitative amount that you are not generally going to have a piece of data that says, "The judge found against this claimant because they were fraudulent"? It is not likely to be recorded in that way, I suppose.

Lord Keen: The present situation is such that those claims do not get to the judge, because the legal expenses to be incurred by an insurer are so high in comparison with the value of the claim that they simply settle them on a nuisance basis. That happens particularly in situations where no medical report has been obtained, which is why we are also legislating to make it compulsory to have a medical report.

Q116 **Chair:** I understand. Do you have data from the insurers as to what percentage of those claims are suspect?

Lord Keen: We have data from the insurance industry, the ABI, about the way in which these claims are handled.

Q117 **Chair:** Do you regard that as reliable data?

Lord Keen: We take account of that data as we do other data, but we have no reason to suppose that the ABI is giving us data that it does not regard as reliable.

Q118 **David Hanson:** I am interested in how many accidents are reported to the police, and whether that figure has dropped.

Lord Keen: Between 2006 and 2016, the number of road traffic accidents reported to the police dropped by in excess of 25%.

Q119 **David Hanson:** I am genuinely interested, Lord Keen. I want to leave this meeting knowing how many cases the Government believe are fraudulent.

Lord Keen: You cannot make that calculation because of the way in which the claims industry is developing and being operated at the present time.

Q120 **David Hanson:** The driver for Government policy, as you indicated to the Committee, was that very fact.

Lord Keen: One can take an overall view of what has happened with regard to whiplash claims over the last 10 years and look at the way in which they have remained at a high level over that 10-year period, having increased dramatically from previous years. One can also draw comparators with other countries where the proportion of whiplash claims as a percentage of road traffic accidents in general is far lower than it is here. It is not as if we have thinner necks than those of our European counterparts.

Chair: We are nearly at the end, Lord Keen. I am conscious of the time, but that point was raised in earlier evidence.

Q121 **Bambos Charalambous:** Surely, the issue is for the insurance company to take on the fraudulent claims by challenging them in court, by going to trial and winning and getting costs against the claimants. That should shut them up. We are talking about a boiler room industry whereby people are just issuing claim after claim. There must be a number of companies that are doing that, who are the bad guys, yet we have Government legislation that is based around trying to solve that problem, rather than looking at the wider issue of access to justice for people who have valid claims. Maybe you are approaching it the wrong way around.

Lord Keen: No, we are trying to balance all those interests. To look at claims from the perspective of the insurers, they receive a mass of claims. If they decided to fight every single one, the legal expenses they would incur would be out of all possible proportion to the actual value of the claim. You talk about fighting them to a conclusion and then recovering your costs. Very often, the persons pursuing those claims are in no position to meet a liability in costs.

Q122 **Bambos Charalambous:** But you can get a costs award against those bringing fraudulent claims.

Lord Keen: Again, when you have to address the question of fraud and prove fraud in a court of law, it becomes very difficult. There is clear macro-evidence to indicate that there is a claims culture going on.

Q123 **Bambos Charalambous:** I think it needs to be addressed differently from a way that puts people who have valid claims out of scope.

Lord Keen: But we are not putting them out of scope.

Q124 **Chair:** The test for fraud is much higher in court.

Lord Keen: We are demanding that they produce a medical report, for example.

Q125 **Chair:** Has the ABI given the Government assurances that there will be a reduction in premiums as a result of this?

Lord Keen: Two of the major motor insurers, Aviva and LV, have said publicly that they will reflect any savings in reductions in insurance premiums. The motor insurance industry in the UK is highly competitive, and, if such leading players in the market reflect those reductions in their premiums, we anticipate that others will follow, simply to maintain competitiveness in that market.

Q126 **Chair:** And if they did not reduce the premiums?

Lord Keen: We would have to look at that, but we have received public statements from major insurers and responsible insurance companies, and we are prepared to accept those public assurances.

Chair: Lord Keen, thank you very much for your time and your effort.

Q127 **Gavin Newlands:** Sorry, Chair, I want to go back to one point. The proposal has been described as a sledgehammer to crack a nut. I was in a car accident four months ago and since then I have had 21 cold calls urging me to seek a personal injury claim. Obviously, I have ignored all of them. I hear what you say about the Financial Guidance and Claims Bill, and I very much support its aims, but would you not accept that the problem with whiplash that you described could be fixed by the remedy of an effective ban on cold calling? Therefore, the other reform would not be required.

Lord Keen: You cannot have an effective ban on cold calling for the reasons I sought to outline earlier. It is carried out by unregulated bodies, many of them based outwith the United Kingdom, which are untraceable and unregulated.

Q128 **Chair:** You would say that the Government do what they can within the UK jurisdiction, but you cannot deal with those outside. I think that we are all agreed on the vice that is to be tackled; it is how we do it. Lord Keen, thank you very much for your time and your evidence.

Lord Keen: I thank the Committee for their attention and their questions.