

Written evidence submitted by the Association of Personal Injury Lawyers (WHI0010)

About APIL

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation which has campaigned for the rights of victims of negligence for more than 30 years. Our vision is of a society without needless injury but, when people are injured, a society which offers the justice they need to rebuild their lives.

Executive summary

- The whiplash reform programme has created a justice gap, with injured people now less likely to receive appropriate compensation or access to justice. As our detailed submission illustrates: reported road casualties are up, but the number of motor claims by injured people are down, and yet the cost of car insurance has still gone up.
- The Civil Liability Act 2018 was misguided: reforms affecting personal injury were never going to reduce premiums because they failed to tackle the real reason why premiums had been rising.
- Injured people are under-compensated by the tariff. More compensation is available for a delayed flight than for an injury which leaves people in pain for six months.
- There was a lack of preparation by the Government before the Official Injury Claim (OIC) portal was launched to make sure it could be integrated with law firms' own case management systems. This has caused technical problems at every stage of the claim process, causing settlements to be delayed.
- For every ten unrepresented claimants, more than six calls are being made to the OIC's support centre, which demonstrates that the portal is not 'user-friendly' for injured people.
- The average time it takes for claims in the portal to settle is getting longer each month.

Restriction of legal rights – and nothing in return

The Government's aim to reduce the number of whiplash claims would have been laudable had it tried to achieve it by preventing injuries from happening in the first place. Instead of

this approach, the Government decided to abandon any concept of fairness or compassion or help for people with genuine injuries by introducing the reforms in the Civil Liability Act.

The right to full and fair compensation was taken away with the introduction of a tariff, and access to justice was made more difficult through an increase in the small claims track limit. The Government and insurance industry promised the public would get something in return for these reforms, and the legislation was hailed by the Government as a “Bill to cut car insurance premiums”¹. Except this has not happened. The price of motor vehicle insurance has gone up.

Even if the cost of premiums had gone down, it would not have been justification for the restriction of our legal rights, but at least the public would have seen some benefit. Instead, the right to full and fair compensation has been taken away with one hand, while more of the public’s money has been taken with the other in higher insurance premiums.

What effect have the measures introduced within the whiplash reform programme had on the number of minor personal injury claims to date?

In 2021, when the reforms were implemented, there was a 20 per cent fall in the number of motor injury claims registered with the Government’s Compensation Recovery Unit (CRU) compared with the previous year². At the same time, however, the number of reported road casualties went up by 11 per cent³.

The national lockdown and subsequent local lockdowns throughout 2020 did, inevitably, affect the number of road casualties and motor legal claims in that year, with both falling by around 25 per cent compared with 2019, but the continued fall in motor injury claims cannot be explained by the pandemic. When the reforms were implemented in quarter two of 2021, road casualties were back on the increase, but the number of motor injury claims continued to fall. By the final quarter of 2021, reported road casualties were only seven per cent below what they had been before the pandemic, while the number of motor injury claims had fallen by 40 per cent since 2019. The evidence, therefore, suggests very clearly that it is the whiplash reform programme which has made it less likely that people injured on our roads through no fault of their own will receive the compensation to which they are entitled.

To what extent have these measures met the Government’s objective of reducing the cost of whiplash claims to the economy; and to what extent are any savings being passed on to motorists through lower insurance premiums?

¹ <https://www.gov.uk/government/news/justice-secretary-unveils-new-bill-to-cut-car-insurance-premiums>

² Information gathered after a request to CRU under the Freedom of Information Act.

³ <https://www.gov.uk/government/statistics/reported-road-casualties-great-britain-annual-report-2021/reported-road-casualties-great-britain-annual-report-2021>

Insurance companies have enjoyed healthy financial savings at the expense of injured people and the wider British public who pay for car insurance.

Data we purchased from the Association of British Insurers (ABI) showed that the total cost of injury claims settled by car insurers has reduced by 11 per cent since the Official Injury Claim (OIC) portal went live⁴. A saving of £83 million.

We were all told during the passage of the Civil Liability Act that those savings would be passed to policyholders through lower premiums. Our analysis of data from the Office of National Statistics found, however, that the price of car insurance premiums has increased by 28 per cent since the reforms were introduced⁵. Hardly the £35 saving on our car insurance we were all promised⁶.

We are not surprised. Restricting access to justice does not result in the savings to policyholders which some people seem to expect. Previous reforms by the Government to reduce the cost of injury claims were introduced in the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The insurers made savings from those reforms after the cost of settled claims fell by 24 per cent between 2013 and 2020. In the same period, insurance premiums increased by 16 per cent.

The insurance industry has started already to make excuses for why premiums have not reduced following implementation of the whiplash reforms and is now blaming the recent Court of Appeal judgment on so-called 'mixed injury claims'.

Martin Milliner, claims director at LV= told Insurance Post last month that "the ruling will undermine the intention of the whiplash reforms that were designed to pass back millions of pounds in lower premiums as a result of reduced volumes and costs of whiplash claims."⁷

In fact, this aspect of the reforms has nothing to do with reducing volumes. It is about establishing how damages should be calculated for these genuine claims, and this is a matter which the Government has given to the courts to decide.

In a briefing published in August 2018 about on the Civil Liability Bill, the ABI made a promise that 'the measures in the Bill will reduce insurance costs'. The ABI also said that

⁴ Motor Insurance - Claims - 2022Q4.xlsx – the spreadsheet is behind a paywall - <https://www.abi.org.uk/account/login/?ReturnUrl=%2faccount%2fmy-statistics%2f>

⁵ <https://www.ons.gov.uk/economy/inflationandpriceindices/timeseries/l7je/mm23>

⁶ <https://www.gov.uk/government/news/justice-secretary-unveils-new-bill-to-cut-car-insurance-premiums>

⁷ <https://www.postonline.co.uk/regulation/7952893/insurers-to-appeal-against-mixed-injuries-whiplash-judgment>

'leaders of UK insurance companies have committed to pass on cost benefits to customers if the Bill is enacted in full'⁸.

It was the promise of cheaper insurance which led the news coverage of the Bill's introduction into Parliament⁹. Injured people had their right to full and fair compensation restricted so this promise could be kept but, in fact, the promise has not been kept as the subsequent cost benefits to insurers have not been passed to customers.

The insurance industry will undoubtedly argue that the increase in premiums is the result of other increased costs, such as increased repair costs. This demonstrates, however, that the focus on injury claims was fundamentally misguided all along. Reforms affecting personal injury were never actually going to reduce premiums because they failed to tackle the real reasons why premiums had been rising.

Between 2012 and 2020, repair costs had increased by 24 per cent. Over the same period, the cost of injury claims settled by car insurers fell by 24 per cent. In 2017, for example, repair cost claims were costing insurers £769 million more than injury claims. By 2020, they were costing insurers £1.1 billion more than injury claims. Given these long-term trends in repair costs, insurers made a promise they could probably never deliver.

What have been the effects of raising the small claims track limit from £1,000 to £5,000; the ban on settling whiplash claims without medical evidence; and the fixed tariff of compensation for whiplash injuries that last up to 2 years?

The increase in the small claims track limit to £5,000 for 'road traffic accident' (RTA) claims has forced injured people into the small claims track, and not just those with whiplash-related soft tissue injuries. People who suffer with injuries to their head, injuries to their eyes, a collapsed lung, or fractured cheekbones because of an RTA will also have to use the small claims track if their injuries are valued at less than £5,000.

Traditionally, the small claims court has been used to settle disputes about faulty goods or services. Personal injury cases are very different though, and can be far more complex, with the need for medical evidence, expert witnesses, and the ability to value the claim before it can be successful.

Unlike cases outside the small claims track, claimants also have to pay for their own legal help, even if their cases are successful. This has left injured people who have to use the small claims court with a very difficult choice.

⁸ Civil Liability Bill - 2nd Reading Briefing, Fixing a broken system, helping millions of motorists – August 2018

⁹ <https://www.theguardian.com/business/2018/mar/20/every-uk-driver-to-save-35-after-new-curbs-on-whiplash-claims>

They must either represent themselves without any legal help, leaving them vulnerable against insured defendants, invariably with deep pockets, who are almost always represented by lawyers; seek legal advice from a solicitor, thereby losing some of their compensation to pay for legal advice and support; or abandon the claim altogether, meaning they will not receive justice, and the person whose negligence caused the injury will get away scot-free. It is not a surprise that when presented with this choice, some injured people have decided to forgo their right to justice.

This situation is not new, but now more people are subject to it because of the increase in the small claims limit.

Those who make whiplash claim are now under-compensated by the tariff. They are not just under-compensated compared with what they may have received before the tariff was introduced, when guidelines on compensation for these injuries were decided by legal experts at the Judicial College, but also when compared with compensation they may receive for other things.

If someone's flight is delayed, he can receive up to £520 in compensation¹⁰. Someone with a whiplash-related injury receives less than that for pain which lasts up to six months. For this injury, he would receive a tariff payment of £495. If he has to pay for legal help out of his damages, he will not even get that amount.

Whiplash injuries are commonly derided, but it is important to remember the effect those injuries can have on people. A young mother could suffer six months of pain as a result of the injury, during which she is unable to nurse her baby, while someone's else injury could mean six months of sleepless nights, which could have a wider effect on his health and wellbeing. A flight delay is inconvenient, but it is nothing compared to what those people will be going through all because of someone else's negligence.

Why most claimants continue to use legal representation when using the online portal (90 per cent since its launch)? (In this answer we also address – How widely known is the OIC and how are potential claimants made aware of its existence?)

We agree with the Government that an uptake in legal expenses insurance, which is available as an add-on to car insurance policies, has contributed to injured people still using

¹⁰ <https://www.citizensadvice.org.uk/consumer/holiday-cancellations-and-compensation/if-your-flights-delayed-or-cancelled/>

representation¹¹. There are, however, other factors which could explain why injured people still use legal representatives.

There is, for example, no evidence that the OIC portal is familiar to injured people. If the portal has a low profile, it is not unreasonable to conclude that one consequence of that is that injured people will still turn automatically to a solicitor in the first instance.

In the weeks immediately before the launch of the portal, Consumer Intelligence found that 89 per cent of people did not know about the reforms¹². Since then, the Government does not appear to have done anything to spread awareness of the portal. The Government's own website even has guidance for the public on what to do if they need to claim compensation for an injury, but there is no mention of the OIC on that webpage¹³.

If injured people were to use Google to find information on 'whiplash compensation claim', they would not be directed immediately to the OIC website, which does not appear until the second page of results. When it does come up in the results, it is not immediately clear without clicking on the page that the OIC is a free service which must be used to make certain claims.

There is guidance published by the OIC to support unrepresented claimants, but this guidance is 64 pages long¹⁴. It should not be unexpected that when presented with such a long guide, some people will be dissuaded from wanting to use the portal on their own.

Another explanation could also be the lack of trust in insurers. According to research conducted last year, only 13 per cent of consumers trust their insurance company¹⁵. If people do not trust their own insurance company, it is unlikely that they would be willing to go up alone against someone else's insurers in a claim for compensation.

Whether the OIC portal is accessible and easy-to-use for claimants and/or their legal representatives?

An accessible and efficient system has not been delivered, despite claims by the Government that "substantial work has been undertaken to ensure that the service provides a fair, accessible and efficient system for all claimants"¹⁶.

¹¹ Official Injury Claim: MoJ Operational Analysis 31 May 2021 to 30 May 2022

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1120876/oic-one-year-report.pdf

¹² <https://www.consumerintelligence.com/articles/89-of-people-dont-know-about-whiplash-reforms>

¹³ <https://www.gov.uk/compensation-after-accident-or-injury>

¹⁴ <https://www.officialinjuryclaim.org.uk/media/1141/guide-to-making-a-personal-injury-claim-nov-2021.pdf>

¹⁵ <https://www.itij.com/latest/news/consumer-trust-insurers-falters>

It was the Government's assumption that the portal would be used mainly by unrepresented claimants but, as the committee notes in its call for evidence, most claims are made by professional users. This lack of foresight meant that not enough work took place to ensure the OIC portal would integrate smoothly with the case management systems of different law firms. Without this integration, information about a claim must be entered separately into two systems. This increases the workload, which is neither efficient nor cost effective. If the work is not cost effective, law firms will be unable to continue in this area of work, which will leave injured people without legal support, which we know from the OIC's own figures they still need.

Our members have also experienced technical problems at every stage of the claims process. These include claims forms being rejected because the claimant's National Insurance number had a space included; the uploading of documents failing at random; messages being sent but not being received. Other issues have included offers to settle being sent by the insurer, but not received by the claimant, or when the offer has been received, it included an amount which was different from what was intended by the insurer.

Unrepresented claimants appear to have their own problems trying to use the portal, and there has consistently been a high number of calls made each month to the OIC's support centre. Our analysis of data published regularly by the OIC found that between the portal's launch in May 2021 and the end of 2022, unrepresented claimants made 24,478 calls for support. During that time there were only 38,438 claims made by unrepresented claimants, which means that for every ten unrepresented claimants, more than six calls are being made for support. A service which is supposed to be easy to use should surely not generate so many calls for help.

Whether claims brought using the OIC are being settled in a timely manner, if timelines could be improved upon; and if so, how?

The average time it takes for a settlement to be reached has increased each month since the portal went live. Figures from the OIC reveal that by January 2023, it was taking an average of 240 days for a claim to be settled¹⁷. This is an increase from an average of 130 days in January 2022. Unless the ongoing technical problems experienced by our members

¹⁶ <https://www.gov.uk/government/publications/whiplash-reform-programme-information-and-faq/whiplash-reform-programme-information-and-faq>

¹⁷ <https://www.officialinjuryclaim.org.uk/media/1329/oic-monthly-report-jan-23.pdf>

and other users are fixed, the average time it takes for a claim to be settled will become longer, especially as new claims enter the portal.

Whether the OIC ensures access to justice for everyone who may seek to make a claim?

The OIC, and the wider whiplash reform programme, does not ensure access to justice for injured people. The number of road casualties is up, but claims for compensation are down. It is important to remember, however, that the reforms were never about access to justice for all injured people, but about a “crackdown” on claims¹⁸. They were intended to make it more difficult to claim compensation, and for that compensation to be as low as possible. That is exactly what they have achieved.

How effective is the OIC portal in settling claims for mixed injury claims, which cannot be settled using the fixed tariff awards?

We are mindful that the insurance industry has sought permission to appeal the Court of Appeal judgment (mentioned earlier) about the issue of so-called ‘mixed injury’ claims and, therefore, we will not comment on the details of the potential case. The fact that this very issue had to go to court in the first place, however, is evidence that the portal is ineffective in settling these claims.

When the Government introduced the new tariff for whiplash claims, it failed to address the way damages should be calculated in cases where whiplash injuries are combined with other injuries which are not subject to a tariff. Justice minister Lord Wolfson of Tredegar told peers that it would be for the courts “to determine how mixed injuries are addressed”.

Injured people deserved better, and ministers should have taken more time to consider the issue. There is now uncertainty and delay for injured people while clarification of how compensation is calculated had to be sought from the courts.

Any other issues in relation to the implementation of the whiplash reform programme and operation of the OIC to date

- The OIC portal is just one of the reforms designed to digitalise the justice system, but it has been built separately from the rest of those reforms. It does not, therefore, integrate with the wider digital justice system, and still requires the use of paper for parts of the claim. This goes against the purpose of the OIC portal as a digital system, and increases delays for injured people. If, for example, a decision on liability is needed in the county

¹⁸ <https://www.gov.uk/government/news/new-crackdown-on-whiplash-claims-set-to-cut-insurance-premiums>

court, a claim leaves the portal and continues on paper, which is sent through the post. It then goes back into the portal once a decision has been made. This all takes time. If the OIC portal had been integrated with the rest of the digitalised justice system, this use of paper in what is supposed to be a digital system would not be required.

- We are not aware of any data which has ever been published to explain how the figures in the tariff were decided upon, and it has only ever appeared to be based on policy intentions, rather than what is best for injured people.
- The low amounts in the tariff have even decreased in value when compared to the rate of inflation measured by the Consumer Price Index. For a whiplash injury of 'not more than 3 months' for example, the tariff amount of £240 would have increased to £275.53 in January 2023 if it had kept up with inflation. As a result, the tariff figure for this injury has fallen by £35.53 in 'real terms'.
- The Ministry of Justice has told us that the first review, due by May 2024, will be based on data, such as how the tariff is being applied to cases, but it is not yet known how this data will be used. Transparency is important to ensure a review is based on what is best for injured people, and the ministers must set out in full how this data will be used.
- Guidance is also required on what 'minor psychological injuries' can be included in a claim for a tariff payment. Currently, there is no definition for these injuries either in the legislation or in guidance. Without guidance, there is a risk that injured people do not claim for the injury, or receive a tariff payment for what could be more than a 'minor psychological injury', and which should have been compensated in line with the Judicial College guidelines.
- Greater transparency of the operation of the OIC portal, and how it works for injured people, is needed. The OIC does release data, but these are only highlights, such as the number of claims, or how long it takes for claims to settle. Information is not published, however, on the exact problems faced by unrepresented claimants, or where the same problems or delays are occurring in the portal. Without this data, it is difficult to evaluate fully the operation of the portal.

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