



DAS White Paper

Reforming the soft tissue injury
(whiplash) claims process



FIRST FOR JUSTICE

The release of the whiplash consultation from the Ministry of Justice in November 2016 created many concerns for different groups who could be affected. Consumer groups focused on proposed slashing or removal of compensation for those injured in car accidents. Personal injury lawyers raised concerns about access to justice for the man in the street and the spectre of job losses. The motor legal expenses insurance industry focused on price rises. The exact impact will not be known until the final paper is published, currently proposed for April 2017.

The proposed reforms seek to either end the right to compensation for injury or to place a cap on the amount that injured parties can recover, together with an increase in the small claims limit from £1000 to £5000. The right to pursue associated losses and expenses would remain.

The paper does show a clear desire to reduce the level of compensation paid to those injured in motor accidents. The overwhelming majority of those injured in an accident will be affected if compensation is reduced and the threshold for the small claims track is raised to £5,000. However, the paper has little detail around how it proposes to solve some of the issues these changes would have on an injured party's access to justice. This paper explores some of the challenges that injured parties could face. The starting point for those injured in a road traffic accident is that the injured party must prove negligence; that the other driver was responsible for causing the accident.

If proven, the injured party is currently entitled to recover a sum for the pain and suffering caused by the accident, and any associated financial losses.

Small Claims Track limit

A rise in the small claims limit would remove the ability to claim legal costs for claims under a value of £5000. This would impact the majority of all personal injury claims, leaving injured parties with a choice of:

- Representing themselves,
- Incurring the costs of legal representation or
- Abandoning their claim altogether

For many, representing themselves to pursue a claim for compensation will be a daunting prospect against an insurer. It will involve personally funding the costs of a claim with little or no knowledge of the litigation process. The injured party may be reluctant to take on a well-resourced insurer and their legal representatives.

These individuals could incur the cost of legal representation but, for most, these costs will be prohibitive and may exceed any sums that they receive under the proposals by way of compensation.

Liability

The reforms do not change the need to prove liability. In some cases, fault will be quickly admitted. In other cases, there will be a denial of liability or allegations of contributory negligence or low velocity impact.

If disputed, the claim will no longer proceed on the portal and will fall into the small claims track litigation process.

The injured person will need to put together evidence to prove fault but may not know how to do so. They may need a police report, witness statements or engineering evidence. Access to contact details for witnesses often relies on access to a police report. Where a police report or engineering evidence is needed, the injured party will need to pay a fee, which is currently funded by legal representatives.

Where liability continues to be disputed, the injured party will need to issue court proceedings and incur the cost of that. The cost of issuing court proceedings is linked to the value of compensation being claimed, up to £205 for cases with a value of less than £5000.

Once court proceedings are issued, the injured party will need to comply with the requirements of the Civil Procedure Rules.

If liability or other arguments continue, the injured party will need to pay a hearing fee so that a judge can determine who was to blame. The hearing fee is also linked to the value of the compensation claimed, currently up to £335 for cases up to £5000.

At the final court hearing the injured party will need to put forward legal arguments about responsibility for the accident, the injury and losses and expenses; likely against an insurer who has legal representation.

Medical evidence

The injured party will need to obtain a medical report in support of the injuries sustained in the accident utilising the Medco portal and will be responsible for the VAT inclusive fee of £216. This is currently funded by the injured party's legal representatives.

The expert will address the whiplash injury and all other soft tissue injuries sustained. Depending on the injured party's age, the type of injury, pre-existing conditions, lifestyle and employment, assessing the extent of the injuries attributable to the accident can be complex and will involve an analysis of medical terminology. It may involve an apportionment of accident related injury as against pre-existing conditions.

An expert may not be able to provide a final prognosis for the injured party's symptoms. Obtaining medical notes and records or diagnostics (such as an MRI scan or x-ray) may be required, the cost of which must be borne by the injured party. A further medical report from the same expert or an alternative discipline may be required.

Under-settlement

If the reforms are adopted, there is a risk that legitimate personal injury claims will be under-settled with individuals not recovering the amount of compensation that they are entitled to receive, because individuals may not know how to value and present their claim and may be unaware of all items that they are entitled to claim.

Special damages

For those who have lost earnings, the complexity of reclaiming those earnings will depend on the employment status. For employed individuals, payslips can be used to calculate the loss of net earnings, although seasonal payments, overtime or bonuses will all need to be taken into account.

For those who are employed and paid during the period of absence, there may be contractual sick pay to claim, failing which an individual may be personally liable to reimburse the employer.

For the self-employed, accounts and tax returns will need to be considered, perhaps with the involvement of accountants or HMRC. It may require an injured party to obtain statements relating to work patterns, oral business agreements or contracts.

There may be a requirement to include the cost of private healthcare in the claim or other subrogated losses. If the injured party does not know about this obligation or include these claims, they may again be personally liable.

An individual may not understand how to calculate a claim for any care and assistance provided by others during the period of incapacity.

The cost of private rehabilitation can be claimed, if the injured party has the financial means to pay for this, although the proposals will see rehabilitation being more difficult to access despite being the best way to support a medical recovery and to help an injured person return to work.

Conclusion

The value of legal expenses insurance, which funds legal representation, may be even more significant and valuable than it is today. It can allow injured parties to receive expert advice and recover the compensation that they are entitled to, without incurring the upfront costs of medical report fees, court fees and other costs necessary to pursue a claim.

In the absence of legal expenses insurance, the reforms jeopardise access to justice on behalf of the injured party.

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Experience: Samantha has over fifteen years' experience dealing with a wide range of personal injury claims, including road traffic accidents, workplace accidents, occupational disease claims and slips and trips. She has dealt with and successfully secured compensation for people who have suffered severe debilitating injuries.

Speciality: Extensive experience in high-profile, high-value compensation claims for serious road traffic accident victims and those who have had accidents at work. She has successfully represented those who have suffered serious spinal injuries, brain injuries or loss of limbs and represents the families of those killed in fatal accidents. She is also an accredited Senior Litigator member of the Association of Personal Injury Lawyers, a not-for-profit campaign organisation that is dedicated to changing the law, protecting and enhancing access to justice, and improving the services provided for victims of personal injury.