HOUSE OF COMMONS LIBRARY

BRIEFING PAPER

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Small claims for personal injuries including whiplash

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Summary

This briefing paper deals with the law in England and Wales.

The small claims track

Defended cases in the civil courts are assigned to one of three tracks, one of which is the small claims track (the others are the multi-track and the fast track). The small claims track is supposed to provide a simple and informal way of resolving disputes. Although lawyers are sometimes instructed, in most cases, the court will not order legal costs to be paid by the losing party. This means that the successful party must generally pay their own legal costs and for this reason, many claimants deal with a small claim without the help of a solicitor. In contrast, in multi-track or fast track cases, the successful party would normally expect to recover legal costs from the losing party.

The small claims track limit

The financial limit for the small claims track for many types of claim is currently £10,000. A lower limit of £1,000 applies to claims for personal injury and housing disrepair.

From time to time, the Government of the day has considered whether or not to raise the small claims track limit, generally, or specifically for certain types of claim. A number of arguments have been made for and against doing so. For example, those in favour of an increase in the limit for personal injury claims have pointed to disproportionately high costs in lower value claims, and have argued that claims in lower value personal injury cases are straightforward for an unrepresented litigant to understand. Those against an increase have argued, among other things, that personal injury claims involve complex law, and that unrepresented potential claimants could be deterred from making a claim, or accept too low a settlement figure, because of the difficulties involved. They also point to a possible "inequality of arms".

Government proposals for reform

The Government has been concerned about the rising cost of motor insurance premiums and sees the number of whiplash claims, and the associated costs, as a contributing factor. The 2015 Government consulted on what it referred to as "a package of measures to crack down on minor, exaggerated and fraudulent soft tissue injury ('whiplash') claims stemming from road traffic accidents (RTAs)".

Measures intended to cap whiplash compensation payments and ban the settlement of claims without medical evidence are included in Part 1 of the Civil Liability Bill [HL] (the Bill). The Bill has completed its passage through the House of Lords and has been introduced in the House of Commons. A separate Library briefing paper provides information about the Bill: Civil Liability Bill [HL].

The Government also intends to increase the small claims track limit for personal injury claims – to £5,000 for RTA related personal injury claims, and to £2,000 for all other types of personal injury claims. This could be achieved without primary legislation.

The Government has presented Part 1 of the Bill and the secondary legislation on the small claims track limit as a package of reforms. The increase in the small claims track limit would affect claims for whiplash injuries, as would the Bill. Peers raised issues relating to the increase in the small claims track limit in debate on the Bill at all stages.

Justice Committee inquiry

The House of Commons Justice Committee conducted an inquiry into the small claims track limit for personal injury claims and published its report on 17 May 2018. The Committee considered that an inquiry focusing on this issue would assist Parliament's scrutiny of a proposal "that might otherwise receive less attention than it merited, owing to its introduction via secondary legislation effecting a change to the Civil Procedure Rules".

The Committee concluded that increasing the small claims track limit for personal injury claims, with the consequence that legal costs would not be recoverable in many more claims, created significant access to justice concerns. It considered that the reforms should not proceed unless the Government could explain how it would ensure access to justice would not be affected. The Committee thought that a lower increase, reflecting inflation, would be more appropriate, and called on the Government to have a realistic approach to the technical challenges of introducing a new electronic platform for claims.

On 17 July 2018, the Government published its response to the Justice Committee's report. Among other things, the Government confirmed that implementation of the whiplash measures, including the rise in the small claims limit to £5,000 would be delayed until April 2020, and would follow large scale testing of the online platform.

Reaction to the Government's proposals

The reaction to the Government's proposals for reform from interested parties has been mixed. In general, lawyers' groups, including the Law Society and the Association of Personal Injury Lawyers, are among those who have raised concerns about the Government's proposals, while the Association of British Insurers (ABI) has welcomed them.

1. The small claims track

1.1 Civil cases

Civil courts deal with claims between two parties – the claimant and the defendant. Either party might be, for example, an individual or a business. The Courts and Tribunals Judiciary provide this information about types of civil claim:

> Unlike criminal cases – in which the state prosecutes an individual – civil court cases arise where an individual or a business believes their rights have been infringed.
>
> Types of civil case dealt with in the County Court include:
>
> - Businesses trying to recover money they are owed;
> - Individuals seeking compensation for injuries;
> - Landowners seeking orders that will prevent trespass.[1]

1.2 The civil court tracks

Every defended civil case is allocated to one of three tracks.

The small claims track is one of three tracks to which a case may be allocated in the civil court

The tracks are:

- the small claims track - generally for lower value and less complicated claims with a value of up to £10,000 although there are some exceptions (see below);
- the fast track – generally for claims with a value of between £10,000 and £25,000;
- the multi-track - for very complicated claims generally with a value of £25,000 or more.[2]

The track that the case follows is decided by a judge and is based on the value of the claim and how complicated the case is. If a case is complex, the judge may refer it to another track for a full hearing, even if it is below the financial limit of that track. A claim's allocation to a particular track has consequences for its subsequent case management and other matters, such as costs.

1.3 The current financial limit for small claims

There is a lower financial threshold for personal injury claims and housing disrepair claims

The financial limit for many small claims in England and Wales is £10,000 (until April 2013 it was £5,000). However, the rules for personal injury claims and housing disrepair claims are different:

- A personal injury claim which has a financial value of not more than £10,000 will be allocated to the small claims track only if the value of the claim for the personal injuries themselves is not more than £1,000.
- A claim by a tenant of residential premises against their landlord for repairs, or other work to the premises, will generally be

1 Courts and Tribunals Judiciary, County Court [accessed 23 August 2018]
2 HM Courts and Tribunals Service, EX305 The Fast Track and the Multi-Track in the civil courts, 2017

allocated to the small claims track only where the cost of the repairs or other work is estimated to be not more than £1,000, and the financial value of any other claim is not more than £1,000.[3]

Litigants in person

Information is available online for people bringing or defending a claim without the help of a lawyer - litigants in person - including:

- Civil Justice Council, A Guide to Bringing and Defending a Small Claim, April 2013;
- Citizens Advice, Small claims;
- Bar Council, A Guide to Representing Yourself in Court, April 2013.[4]

[3] Civil Procedure Rules, Rule 27.1
[4] All links accessed 23 August 2018

2. The significance of allocation to the small claims track

2.1 Procedure

The small claims track is supposed to provide a simple and informal way of resolving disputes.

The Government notes that hearings are often conducted with parties sitting around a table rather than in a formal courtroom setting.[5]

2.2 Costs

Costs are not usually awarded to the successful party in the small claims track

A general principle of civil court procedure is that the loser pays the successful party's legal costs (there are rules which determine how much can be recovered, and in some types of claim there are fixed recoverable costs).

However, this principle does not apply to small claims, where, in most cases, the court will not order solicitors' costs to be paid by the losing party (although some disbursements can still be recovered). This means that the successful party must generally pay their own costs in a small claims track case. For this reason, most claimants deal with a small claim without the help of a solicitor.

5 Ministry of Justice, Reforming the Soft Tissue Injury ('whiplash') Claims Process, Cm 9299, November 2016, paragraph 69

3. Arguments for and against increasing the small claims limit

From time to time, the Government of the day has considered whether to raise the small claims track limit, generally, or specifically for certain types of claim.

In 2007, a Government consultation paper set out arguments for and against increasing the limit for personal injury claims. Some of the arguments made, at that time, by those in favour of an increase were:

- insurers cited disproportionately high costs as proof that the fast track system was not working well for personal injury claims with a value at the lower end of the scale;
- the small claims track was viewed by some as a more efficient system which would give rise to a more predictable process;
- an increase in the limit would lead to a decrease in the amount of money paid out by insurers (as they would not be burdened with paying the claimant's legal costs) which in turn might lead to a decrease in insurance premiums;
- lower value claims for personal injury, such as whiplash, were considered simple and straightforward for a claimant in person to understand;
- support and assistance was already available to litigants in person;
- the impact of inflation should be taken into account.

Some of the arguments made by those against raising the limit were:

- the complexity of personal injury claims, and the substantive law involved, often required independent legal guidance and expert evidence, the cost of which would be prohibitive if the limit were raised;
- potential claimants could be put off making a claim because of the difficulties involved, for example, in identifying the right defendant and establishing a breach of duty of care, and collating the necessary evidence;
- there could be an 'inequality of arms' as, in a vast majority of claims, the defendants to personal injury claims were insured and insurance companies could afford to be legally represented or would use expert claims handlers, even in lower value claims; if the limit was raised, the claimant would often not be able to afford legal representation and would have no prior knowledge of establishing a claim;
- access to justice could be reduced for the most vulnerable in society;
- although referred to as low value claims, a sum of £1,000 or £2,000 is a significant sum of money to a majority of the population;
- claimants in person could potentially undervalue their personal injury claims and accept an offer of settlement that was too low;

- existing provisions could already stop disproportionate costs being incurred.[6]

[6] Department for Constitutional Affairs, Case track limits and the claims process for personal injury claims, CP 8/07, 20 April 2007, pp 12-16

4. Previous consideration of increasing the small claims track limit

Summary

The question of whether the limit for small claims should be increased, generally, or in relation to particular types of claim, has been considered several times, with a number of arguments being made for and against this course of action. The limit for claims was increased generally from £5,000 to £10,000 in April 2013. However, the lower limit of £1,000 for personal injury claims and housing disrepair claims remains unchanged.

4.1 2005 - Constitutional Affairs Committee recommends reconsideration of limits

In a report published on 6 December 2005, the House of Commons Constitutional Affairs Committee[7] concluded that the small claims track limit for claims for personal injury and housing disrepair was in need of reconsideration. In February 2006, the Labour Government's response to the Committee's report stated that all the case track limits would be considered.[8]

4.2 Labour Government decision not to increase limits

On 20 April 2007, the Department for Constitutional Affairs published a consultation paper, Case track limits and the claims process for personal injury claims.[9] The paper concluded that the small claims track limit of £1,000 for personal injury cases should remain, on the basis that the claims process could be improved "to provide for fair compensation in a more efficient and cost-effective way". The paper continued: "It is considered that this approach provides a better balance between the rights of claimants and defendants".[10]

In July 2008, the Ministry of Justice published its post-consultation report, *Case track limits and the claims process for personal injury claims.*[11] It stated that the majority of respondents agreed that the small claims track limit for personal injury claims should remain at £1,000, although a minority stated that they would prefer to see the limit increased. The report further stated that a very large majority of respondents agreed that the small claims track limit for housing disrepair claims should also remain at the same level. An overwhelming majority of respondents agreed that the small claims track limit for

7 As it was then, now the Justice Committee
8 Cm 6754
9 CP 8/07
10 At p3
11 CP(R) 08/07

general claims should remain at £5,000. The Labour Government concluded that the small claims track limits should remain unchanged.

4.3 Lord Justice Jackson's review of civil litigation costs

In November 2008, amid widespread concerns that the costs of civil litigation were too high, the then Master of the Rolls appointed Lord Justice Jackson to conduct a review of legal costs. The stated purpose was "to carry out an independent review of the rules and principles governing the costs of civil litigation and to make recommendations in order to promote access to justice at proportionate cost".[12]

In his Final Report, published in January 2010, Lord Justice Jackson did not make any recommendation for raising the small claims track limit for personal injury claims at that time:

> 3.3 If a satisfactory scheme of fixed costs is established for fast track personal injury cases (both contested and uncontested) and if the process reforms bed in satisfactorily, then all that will be required in due course will be an increase in the PI small claims limit to reflect inflation since 1999.[13] A series of small rises in the limit would be confusing for practitioners and judges alike. I therefore propose that the present limit stays at £1,000 until such time as inflation warrants an increase to £1,500.[14]

4.4 Increase to general limit in 2013

In March 2011, the Coalition Government consulted on plans to simplify the civil courts. In its consultation document, Solving disputes in the county courts: creating a simpler, quicker and more proportionate system, the Ministry of Justice put forward plans to introduce a simplified procedure for more types of personal injury claim and to increase the small claims track limit.[15] It proposed increasing the small claims track limit (for claims not relating to personal injury or housing disrepair) to an appropriate figure, suggested to be £15,000. It was proposed that the figure for personal injury and housing disrepair remain at £1,000.

In its response to the consultation, published in February 2012, the Ministry of Justice stated that the general small claims track limit would be raised to £10,000, with the aim of increasing it further to £15,000 in

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12 The terms of reference for the review are set out in the Review of Civil Litigation Costs: Final Report, p2

13 This was when the £1,000 limit was restricted to damages for pain, suffering and loss of amenity, rather than to the value of the entire claim

14 Review of Civil Litigation Costs: Final Report, December 2009, Chapter 18, paragraph 3.3

15 Ministry of Justice, Solving disputes in the county courts: creating a simpler, quicker and more proportionate system: A consultation on reforming civil justice in England and Wales, Consultation paper CP6/2011, March 2011, para 39

the future after full evaluation of the increase to £10,000. [16] The limit increased to £10,000 from April 2013.

4.5 Coalition Government consultation on raising the threshold for road traffic accident claims

In its February 2012 consultation response, the Coalition Government said there would be no change to the limit for personal injury and housing disrepair claims.[17] However, on 16 May 2012, it said that it **would** consult on raising the small claims threshold for personal injury claims "to reduce the costs of challenging fraudulent cases in court".[18]

Consultation

The consultation document, Reducing the number and costs of whiplash claims: A consultation on arrangements concerning whiplash injuries in England and Wales was published in December 2012.[19] The Coalition Government proposed bringing more personal injury or whiplash claims arising from road traffic accidents into the small claims track. It presented three options:

- increase the small claims track threshold for road traffic accident (RTA) whiplash claims to £5,000;
- increase the small claims track threshold for all RTA personal injury claims (including whiplash) to £5,000; or
- retain the current threshold.

The Coalition Government considered that many small value whiplash claims were relatively straightforward and that the small claims track might be a more suitable venue in which to determine them than the fast track. Additionally, they stated, the change would provide a better framework for the challenge of fraudulent or exaggerated claims.[20]

The consultation document stated that the Coalition Government recognised three primary risks in their proposals:

- A reduction in access to justice resulting from injured parties either not claiming initially, or not challenging rejections of valid claims. This was seen as a possible unintended consequence of a claimant on the small claims track being less likely to obtain legal representation without cost to them.
- 'Inequality of arms' - given the limits on costs recovery, claimants were more likely to be self-represented in the small claims track than the fast track and there was a risk that claims would not be presented with equal skill, as the defendant was likely to be represented professionally.

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16 Ministry of Justice Solving disputes in the county courts: creating a simpler, quicker and more proportionate system: A consultation on reforming civil justice in England and Wales. The Government Response, Cm 8274, February 2012, p11
17 Ibid para 21
18 HC Deb 16 May 2012 c174W
19 CP17/2012
20 Ibid para 59-60

- Without representation, individuals with valid claims might be more likely to accept settlements of less than the amount which would provide fair compensation for the injury they suffered.[21]

Coalition Government response: no change to limit

The Coalition Government's response to the consultation was published in October 2013.[22]

The Coalition Government believed that there were good arguments for increasing the small claims track limit to £5,000 for all road traffic accident claims. However, after considering the consultation responses, and the Transport Committee's report, *Cost of motor insurance: whiplash*, it was persuaded that, on balance, it would not be appropriate to increase the small claims track limit for RTA-related personal injury claims at that stage. The Government said it would consider the impact of other reforms and would keep this issue under consideration:

> Therefore, while the Government believes that an increase in the Small Claims limit in this sector would provide additional benefits, it regards it as sensible and pragmatic to consider the combined impact of earlier reforms before embarking on any further change now. As detailed elsewhere in this response, the Government has already taken a number of significant steps to tackle the over-inflated personal injury claims market. We also wish to take further time to consider how best to mitigate any negative impacts which might arise as a result of increasing the Small Claims track limit. The Government will though keep this issue under consideration for implementation when appropriate.[23]

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21 Ibid paras 65-67

22 Reducing the number and costs of whiplash claims: A Government response to consultation on arrangements concerning whiplash injuries in England and Wales Cost of motor insurance – whiplash: A Government response to the House of Commons Transport Committee, October 2013

23 Ibid Part 3, paragraphs 38 to 45

5. Government's proposals for reform

Summary

The 2015 Government consulted on reforming the whiplash claims process and increasing the small claims track limit for personal injury claims. Measures intended to cap whiplash compensation payments and ban the settlement of claims without medical evidence are included in Part 1 of the Civil Liability Bill [HL] (the Bill). The Government also intends to increase the small claims track limit for personal injury claims - this would not need primary legislation. The Government has presented Part 1 of the Bill and the proposed increase in the small claims track limit as a package of reforms.

5.1 Autumn Statements

In the Autumn Statement 2015, the Government proposed to increase the small claims track limit for personal injury claims to £5,000 and to remove the right to general damages for minor soft tissue injuries.[24]

In the following year's Autumn Statement, the Chancellor confirmed the Government's commitment to legislate "to end the compensation culture surrounding whiplash claims, a major area of insurance fraud". He said, "That will save drivers an average of £40 on their annual premiums".[25]

5.2 Government consultation

On 17 November 2016, the Ministry of Justice launched a consultation, Reforming the Soft Tissue Injury ('whiplash') Claims Process. The consultation was stated to be "aimed at disincentivising minor, exaggerated and fraudulent RTA related soft tissue injury claims". The consultation paper stated that the cost to motorists arising from dealing with these claims was "out of proportion to the level of injury suffered" and contributed to the high cost of motor insurance premiums.[26]

The consultation paper proposed reforms including:

- the introduction of a set tariff of compensation; and
- a ban on pre-medical offers to settle RTA related soft tissue injury claims, so in future claims could not be settled without medical evidence provided by MedCo accredited practitioners.[27]

Another Library briefing paper provides information about the Government's proposals, and includes background information about the number and cost of whiplash claims, and reforms already introduced: Civil Liability Bill [HL].[28]

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24 Cm 9162, November 2015 at p125
25 HC Deb 23 November 2016 c907
26 Ministry of Justice, Reforming the Soft Tissue Injury ('whiplash') Claims Process, Cm 9299, November 2016, paragraph 1
27 Ibid
28 Number 08335, 23 August 2018

Among other things, the consultation paper proposed (at that time) raising the small claims track limit for all personal injury claims to £5,000, (by reference to the value of the pain, suffering and loss of amenity (PSLA) element of the claim). This would have the effect that the legal costs of successful claimants would no longer be recoverable from defendants in the majority of soft tissue injury claims. The paper stated that certain costs arising from litigation (for example the costs of issuing the claim) and some disbursements (for example the cost of the medical report) could still be claimed by a successful claimant.[29]

Unlike the other proposed measures, for which primary legislation would be necessary, the change in the small claims track limit would be achieved by a change to the Civil Procedure Rules (secondary legislation). It would also be necessary to amend relevant Pre-Action Protocols including the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents.

Objectives of the proposed reforms

The consultation paper set out the objectives of the proposed reforms, including:

- Reducing the number of whiplash claims.[30]
- Reducing the financial incentive to make a claim: the Government considers that, in lower value cases, shifting cases to the small claims track, where legal fees are not recoverable, would mean that claimants would have a direct financial interest in decisions about pursuing their claim, in that they would be responsible for their own costs.
- Reducing motor insurance premiums: the Government stated (at that time) that the reform package would save the industry around £1bn a year, "which will be passed on to consumers through reduced motor insurance premiums".[31]

Raising the small claims track limit

The consultation included questions on raising the small claims track limit for personal injury claims generally (the Government's preferred option), or for RTA related personal injury claims only. The Government proposed a new limit of £5,000 for the PSLA element but asked for views on whether, why, and to what level, the small claims limit for personal injury claims should be increased beyond £5,000. [32]

The Government's case for change included the following arguments:

- low value RTA related PI claims are not so complex that claimants routinely require legal representation to pursue them and they could be dealt with in the small claims track;

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29 Ministry of Justice, Reforming the Soft Tissue Injury ('whiplash') Claims Process, Cm 9299, November 2016, p5

30 Ministry of Justice, Reforming the Soft Tissue Injury ('whiplash') Claims Process, Cm 9299, November 2016, p3. The Government sets out figures and further information on pp9-10

31 Ibid p3

32 Ibid p29

- the value of the claim is only one of a number of factors to be considered when allocating a case to the appropriate court track - if a claim is more complicated the court has the discretion to move it to another track, such as the fast track;
- lawyers are often not used for such claims in other European jurisdictions;
- raising the small claims limit to cover PSLA claims of at least £5,000 would not preclude claimants from engaging legal representation, but would mean that, in future, they would be responsible for paying for their own legal costs if they chose to seek legal representation;
- there is increasingly more information available to claimants to take forward claims without necessarily needing to seek legal representation;
- the limit has not been raised for PI claims since 1991 and, in that time, the level of compensation paid for PI claims has increased, with the result that fewer cases fall under the small claims limit than was previously the case;[33]
- raising the small claims track limit for these claims would result in legal costs being no longer recoverable, thus reducing the cost of these claims and meeting the Government's objective to disincentivise minor, exaggerated and fraudulent claims.

The Government stated its belief that raising the small claims track limit was "a sensible, pragmatic and proportionate measure to be taken forward as part of a wider reform package to tackle the high number and cost of these claims".[34]

The consultation paper also asked for views on whether improvements could be made to provide further help to litigants in person using the small claims track. In addition, the Government asked whether any specific measures should be put in place in relation to claims management companies and paid McKenzie Friends[35] operating in the personal injury sector.[36]

5.3 Government response to consultation

On 23 February 2017, the Ministry of Justice published part one of its response to the consultation.[37] This deals with the Government's whiplash reform programme.

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33 The limit has not been increased for housing disrepair claims either but these are not covered by the consultation and are not in the scope of the reforms

34 Ministry of Justice, Reforming the Soft Tissue Injury ('whiplash') Claims Process, Cm 9299, November 2016, p27

35 The consultation paper includes this information about McKenzie Friends: "A McKenzie friend assists a litigant in person in a court of law in England and Wales. They don't need to be legally qualified and tend to be lay advisors who provide moral support for litigants, take notes, help with case papers and give advice on the conduct of a case. McKenzie friends cannot conduct litigation, address the court or sign court documents, their services are usually free, but paid McKenzie Friends are becoming more common", Ministry of Justice, Reforming the Soft Tissue Injury ('whiplash') Claims Process, Cm 9299, November 2016, p30, footnote 21

36 Ibid p30

37 Part 1 of the Government Response to: Reforming the Soft Tissue Injury ('whiplash') Claims Process, Cm 9422, February 2017

The Government considered that there were "currently substantial financial incentives for claimants to bring cases regarding relatively minor injury, or to exaggerate the severity of their injury" and stated that Government intervention was required to tackle this issue. The response document stated that the proposed reforms were targeted in particular at RTA whiplash claims, "where it has become culturally acceptable for claims to be made for very low level injuries".[38]

Proposed increase to small claims track limit

Among other things, the Government confirmed that the small claims track limit for **RTA related personal injury claims** would be increased to **£5,000**. The small claims track limit for **all other types of personal injury claims** would be increased to **£2,000** "in line with inflation" but would be kept under review. The Government would consider whether a further increase to £5,000 for all PI claims was required in the future.[39]

The Government said it would give further consideration to suggestions made in connection with supporting litigants in person, and would work with both MedCo and Claims Portal Limited on this issue. The Government would also discuss the potential impact on the courts and judicial resources with the judiciary and other interested parties.[40]

The Government indicated that the increase to the small claims track limit, which will be effected through secondary legislation, would be implemented at the same time as the measures requiring primary legislation.[41]

38 Ibid paragraph 33
39 Ibid paragraph 93
40 Ibid paragraph 99
41 Ibid paragraphs 116 to 120

6. Justice Committee inquiry

On 5 December 2017, the House of Commons Justice Committee launched a short inquiry into the Government's proposals for raising the small claims track limit for personal injury claims by way of secondary legislation.[42] The Committee published its report, Small claims limit for personal injury, on 17 May 2018.[43]

The Committee considered that an inquiry focusing on this issue would assist Parliament's scrutiny of a proposal "that might otherwise receive less attention than it merited, owing to its introduction via secondary legislation effecting a change to the Civil Procedure Rules".[44]

6.1 Justice Committee report

Access to justice concerns

The Committee concluded that increasing the small claims track limit for personal injury (PI) claims, with the consequence that legal costs would not be recoverable in many more claims, created significant access to justice concerns:

> 65. We received compelling evidence of the obstacles that would be faced by self-represented claimants navigating the current personal injury claims process in the Small Claims track, regardless of the value of their claim, and we conclude that this would represent an unacceptable barrier to access to justice.
>
> 66. While fraudulent and exaggerated claims must be prevented, given that the common law right to compensation for negligence applies regardless of the value of the claim, we conclude that more convincing justification is needed for the Government's policy of reducing a large proportion of claims, including for non-whiplash RTA injuries, by means of raising the small claims limit, simply because the claims are minor.[45]

The Committee expressed concern about the effect of the proposed reforms on access to justice

The Committee also concluded that the Government had under-estimated the impact of raising the small claims limit on providers of before the event insurance, with potentially adverse consequences for access to justice.

Lower increase recommended

The Committee recommended (among other things) that:

- the £1,000 small claims track limit for PI should be increased to reflect inflation, calculated from 1999.[46] "Applying the Consumer Prices Index, an increase to around £1,500 might be appropriate in April 2019";
- the Government should not increase the small claims track limit for RTA PI claims to £5,000.

The Justice Committee considered that a lower increase, reflecting inflation, would be more appropriate

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42 Justice Committee, Government plans to raise small claims limit, 5 December 2017 [accessed 23 August 2018]
43 HC 659
44 Ibid paragraph 3
45 Ibid paragraphs 65-6
46 This was when the £1,000 limit was restricted to damages for PSLA, rather than to the value of the entire claim

The Committee said that it was "deeply unimpressed" by the inability of the Ministry of Justice to quantify the impact of raising the small claims limit to £2,000 for employer liability and public liability claims and recommended that they too be subject to the lower small claims track threshold:

> Given the potential complexity of these claims for self-represented claimants and evidence of the role of litigation in maintaining safe and healthy workplaces, we recommend that they continue to be subject to the lowest small claims threshold—which we have recommended should be set at around £1,500 to take account of inflation since 1999.[47]

New electronic platform

The Committee commended the Ministry of Justice's decision to work with expert stakeholders in developing a new electronic platform for claims, and to pilot the new IT system that the platform would require. However, the Committee considered that a more realistic approach should be taken to the technical challenges that may be faced. It recommended that:

- the national roll-out of the new electronic platform—and hence any changes to the small claims limit for PI claims—be delayed until at least April 2020, with employers' liability and public liability excluded because of their complexity;

- the new claims process should be independently evaluated after three years;

- in light of the Committee's doubt that the electronic platform could overcome the inequality of arms between represented insurers and self-represented claimants, during its pilot phase, the Ministry of Justice should focus on securing financial help for claimants who cannot meet the cost of disbursements and ensuring that "online decision trees give effective support to claimants encountering defendant resistance";

- in the light of concerns about the potential deterrent effect of introducing online only applications on particular population groups, together with the risk of discriminatory impact, the Ministry of Justice should closely monitor the effect on groups of claimants during the pilot phase and take steps to address any adverse impact—for example, by providing targeted face-to-face support;

- as soon as its working group on support and guidance had reported, the Ministry of Justice should produce a stage-by-stage, costed plan for how it would fund and implement support and guidance, including any face-to-face support that the working group recommends.

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47 Ibid paragraph 81

Insurance fraud

The Report gives an indication of the differing views of witnesses on dealing with the problem of insurance fraud:

> 26. Evidence to our predecessor Committee and to our own inquiry expressed unanimous condemnation of insurance fraud, which was recognised as a crime. But the extent of the problem, and the most effective responses to it, were contested issues. Some witnesses from the claimant sector considered that the extent of fraud was exaggerated and thought it was wrong to conflate whiplash injury with fraud; and the Association of Personal Injury Lawyers and the Personal Injury Bar Association emphasised the importance of distinguishing genuine, but modest claims from those that are fraudulent. There was criticism of the ABI's wide definition of fraud that includes suspected fraudulent activity, on the basis that it could allow genuine claims to be categorised as fraudulent. We were told that claims might be dropped for a wide range of reasons—for example, a lack of corroborative evidence, or a claimant failing to notify their solicitor of a change of address. According to Access to Justice, a campaign group, insurers currently pay out on 99% of claims and witnesses pointed out that insurers had the power to refuse to settle a claim and/or defend it at trial, and could report any suspicions of fraud to the police.
>
> 27. Our predecessor Committee asked James Dalton from the Association of British Insurers (ABI) whether he could identify a pattern as to when fraudulent claims occurred within the [three year] limitation period for making a personal injury claims. In response, he said:
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> > …about 90% of cases are notified to the insurer within the first 12 months. For me, the question goes back to […] why it takes some people so long to file a claim from the date of the accident. Most people will know, albeit not the extent of the injury, that they have in fact been injured […] [W]hen you have not filed a claim, you are the target of an industry that is going to try to make you make a claim […]
>
> Mr Dalton also recognised that the recent introduction of court powers to dismiss personal injury claims where the claimant has been "fundamentally dishonest" has provided a useful tool for insurers to tackle claims that are fraudulent or exaggerated. However, in defending claims, some insurance companies considered that they needed greater support from members of the judiciary, whom they thought were often disinclined to challenge the claimant's evidence in court.[48]

The Committee said that it was troubled by the absence of reliable data on fraudulent claims and recommended that, "in the interests of accuracy, the Government work with the ABI to develop a more nuanced approach to avoid conflating innocent—if unexpected—consumer behaviour with fraudulent activity". [49]

Vulnerable road users

The Justice Committee concluded that there was no policy justification for including vulnerable road users (VRUs, such as cyclists and

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48 Ibid paragraphs 26-27, footnotes omitted
49 Ibid paragraph 30

pedestrians) within the reforms proposed for other RTA PI claimants. It recommended that VRUs be excluded from any higher small claims track limit imposed on other RTA PI claims.[50]

Other recommendations and conclusions

The Committee also recommended that:

- before introducing further changes to the PI claims process, the Ministry of Justice consider the learning from its post-legislative review of Part 2 of the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012;

- the Financial Conduct Authority should impose a cap of [no more than] 20% on the proportion of compensation that claims management companies can levy from PI claimants.

Noting the concerns of the senior judiciary about the consequences for judges and the courts system, the Committee recommended that, if the small claims limit was increased by more than the rate of inflation, the Ministry of Justice and HM Courts and Tribunals Service should work with the senior judiciary to agree in advance a framework for monitoring this impact, so that urgent steps could be taken to address any adverse impact identified.

The Committee also recommended that the Ministry of Justice ask the Civil Procedure Rule Committee to consider whether the Civil Procedure Rules should be changed to facilitate applications by self-represented claimants on the small claims track to have their case transferred to the fast track.

The Committee expressed regret that the Ministry of Justice did not consider it relevant at the consultation stage to estimate the potentially substantial impact of its proposals on the PI legal sector, and said that it was unclear why the final stage Impact Assessment assumed that the sector would be able to replace PI work with work of equivalent value.

Conclusion

In conclusion, the Committee reiterated its concerns and said that the reforms should not proceed unless the Government could explain how it would ensure access to justice would not be affected:

> We share … concerns about the access to justice implications of increasing the small claims limit for PI, including the financial barriers that claimants might face. While we recognise the laudable efforts of the Ministry of Justice to develop an electronic platform supplemented by guidance and support to compensate for claimants' anticipated lack of legal representation, we conclude that this ambitious project risks falling short of creating a claims process that guarantees "unimpeded access to the courts", as indicated by the Supreme Court's judgment in the Unison case. We consider this to be an important point of principle on which the Government should reflect; reform should

[50] Ibid paragraph 72

> not proceed unless the Government can explain how it will make sure that access to justice is not affected.[51]

6.2 Government response

On 17 July 2018, the Government published its response to the Justice Committee's report,[52] which includes the following points.

Fraudulent claims

The Government agreed on the importance of distinguishing fraudulent and unmeritorious claims from honest claims and said that its reform programme would address issues related to fraud. The Government also spoke of action it, and the ABI, had already taken.[53]

The Government said that it would continue to work closely with the ABI and other wider stakeholders from all parts of the PI sector to identify and take action against fraudulent and unmeritorious claims.

Impact of reforms on motor insurance premiums

The Government confirmed that it would develop an amendment to the Civil Liability Bill [HL] to provide an effective means for reporting on the public commitment made by the insurance sector to pass on to consumers savings made by these reforms. Noting that PI claims can be made up to three years after the date of the accident, and that the average time for a claim to be resolved is currently 12 months, the Government said that the full estimated savings would take some time to realise.

Setting the small claims limit

The Government disagreed with the Committee's recommendation that April 1999 should be used as the starting point for calculations and that the increase should be limited to £1,500.

> The Government believes that increasing the limit for RTA PI claims to £5,000 is proportionate. Around 85% of RTA PI claims are whiplash related claims and a SCT limit of £5,000 will facilitate early and expedited settlement under the proposed tariff structure, and will encourage insurers to challenge unmeritorious claims. It is the Government's view that minor low value RTA PI claims are suitable to be heard in the SCT. Claims under £5,000 are relatively minor and straightforward and are not so complex as to routinely require a lawyer. Under the proposed system a doctor will assess each whiplash claim and their assessment will be linked to a clear fixed tariff for whiplash injuries of less than two years duration. The SCT is suitable for such claims and is designed to be accessible to litigants in person. Handling these claims in the SCT will reduce the cost of these claims for all motorists.
>
> Leaving more claims in the fast track is unlikely to result in claimants receiving better settlements or increased compensation. This would undermine the Government's reforms in this area and

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51 Ibid paragraph 142
52 Government Response to the Justice Committee's Seventh Report of Session 2017–19: Small Claims Limit for Personal Injury, Cm 9649, July 2018
53 Ibid, paragraphs 9-15

> deprive ordinary consumers of much of the savings which insurers have committed to pass on.[54]

The Government also disagreed with the Committee's recommendation that the CPI should be used to calculate inflation:

> The Government is satisfied that increasing the limit for PI claims to £2,000 is in line with inflation. … The Government believes the Retail Price Index is the most appropriate measure of inflation to increase the SCT limit for this category of PI claims as this is the index used to update damage awards in the Judicial College Guidelines. The proposed limit of £2,000 for non-RTA PI claims reflects the effect of inflation since the limit was last set in 1991.

Employer and Public Liability cases

The response stated, "It is the Government's view that the more complex employer and public liability cases should remain in the fast track".[55]

Vulnerable road users

The Government said that, while sympathetic to the argument, it was still considering the Committee's recommendation, and points made by Peers in debate on the Civil Liability Bill [HL], that vulnerable road users be excluded from any higher small claims limit imposed on other RTA PI claims:

> The Government needs to ensure that any exemptions are justified, particularly with regard to those claimants to whom the increase will still apply.

Impact on the Judiciary and Courts

The Government confirmed that it would work closely with HMCTS and the senior judiciary to monitor the impact of the reforms on the judiciary and the courts. The Government would also work closely with the Civil Procedure Rule Committee "regarding any necessary changes to the Civil Procedure Rules in consequence of these reforms and in particular their understanding by litigants in person".

Implementation

The Government confirmed that implementation of the whiplash measures, including the rise in the small claims limit to £5,000 would be delayed until April 2020, and would follow large scale testing of the online platform:

> The Government has previously set out its intention to implement the reform measures as a package on 1 April 2019. The Government welcomes the Committee's views on the importance of appropriate and suitable guidance and support for both claimants and defendants, something which the Government has also discussed with stakeholders. The Government is acutely aware that the proposed approach will fundamentally transform how whiplash claims are handled and that any concerns around access to justice have to be addressed promptly. There will need to be extensive user testing in order to ensure that the system is

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54 Ibid paragraphs 23-4
55 Ibid paragraph 22

> easy to use for all user groups and that the guidance is clear. We agree with the Committee and our stakeholders that it is crucial that these reforms and the implementation of the online platform is done right rather than quickly. This is why the Government is now proposing for the platform to be ready for large-scale testing by October 2019 with the view to implementing the whiplash measures, including the rise in the small claims limit to £5,000, fully in April 2020.[56]

The Government would ensure an 'assisted digital' route "so that users that are digitally disenfranchised will be able to submit their claims".

Employer liability and public liability claims would not be in scope of the new online platform.

The Government said that it was working closely with stakeholders from different industries, such as insurers, claimant solicitors, defendant solicitors, the Law Society and third sector providers, to ensure that the necessary guidance and support would be in place when the platform goes live.

Impact on organisations assisting claimants

The Government agreed with the Committee that the issue of cold calling should be monitored "as it is causing a nuisance for people being called and fuels a claims culture", and set out what was being done.

With regard to the Committee's concerns about the impact of the reforms on the PI legal sector, the Government considered that lawyers would adapt:

> Although the Government expects that some consolidation in the sector can be seen in the future, the PI legal sector has consistently shown itself to be both innovative and adaptable to [*sic*] when faced with changing markets. We expect lawyers to continue to adapt and be fully capable of providing cost-effective services to genuinely injured claimants following the implementation of these reforms.

6.3 Follow-up letter from Justice Committee

The Chair of the Justice Committee, Bob Neill, has since written to the Justice Secretary, David Gauke, seeking further information on several points,[57] including:

- whether there would be a further delay in implementation should user testing demonstrate that the platform or user guidance needs additional development time, or should the "assisted digital" route prove inadequate to meet the needs of those who are digitally disenfranchised;
- whether all Employer Liability and Public Liability claims would remain on the Fast Track or only to those that are deemed more complex (the letter stated that the Government response is ambiguous on this point);

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56 Ibid paragraph 36

57 Justice Committee, Government delays personal injury reforms, 23 July 2018, on the Parliament website [accessed 23 August 2018]

- when and how the Government would decide whether vulnerable road users would be exempted from the higher small claims limit; and if the Government decided not to proceed with such an exemption, what was the reason for this;
- why the Government is "satisfied" that an inflation based increase to the small claims limit for personal injury should be calculated from 1991, rather than from 1999 when the limit was adjusted to exclude special damages:

  > You will be aware that Lord Justice Jackson used 1999 as the starting date when discussing this issue in the context of his review of civil litigation costs, and we find it surprising that the Government should now adopt a different approach to that of member of the senior judiciary.

- Why the Government considers that the proposed increase to £5,000 for RTA PI claims is proportionate, as no explanation had been given for this assertion.

7. Civil Liability Bill [HL]

7.1 The Bill

The Government's package of proposed reforms includes measures which require primary legislation and which are now being taken forward in the Civil Liability Bill [HL] (the Bill).

The Bill was introduced in the House of Lords on 20 March 2018 as Bill 90 of 2017-19. It has now completed its passage through the House of Lords. It was introduced in the House of Commons on 28 June 2018 as Bill 240 of 2017-19. Second Reading in the Commons is due to take place on 4 September 2018.

The Bill's progress can be followed on the Bill page on the Parliamentary website.

Part 1 deals with whiplash and would extend to England and Wales only.

In short, Part 1 of the Bill would:

- provide for a tariff of compensation for pain, suffering and loss of amenity for whiplash claims; the tariff would be set in supporting regulations via the affirmative procedure following Royal Assent;
- provide for the judiciary, in exceptional circumstances, to apply an uplift, of a maximum specified percentage, to the amount of damages payable under the tariff; the cap for exceptional payments would be set in supporting regulations;
- introduce a regulatory ban on seeking or offering to settle, whiplash claims without appropriate medical evidence.

Draft whiplash injury regulations have been published. The proposed tariff amounts range from £235 for injuries with a duration of 0-3 months, to £3,910 for injuries with a duration of 19-24 months.

A separate Library briefing paper provides information about the Bill: Civil Liability Bill [HL]: whiplash claims.[58]

7.2 Small claims track increase to be effected by secondary legislation – not by the Bill

The proposal to increase the small claims track limit does not form part of the Bill and would be achieved instead by secondary legislation (effecting a change to the Civil Procedure Rules). However, the Government has presented Part 1 of the Bill and this secondary legislation as a package of reforms. Both the Bill and the increase in the small claims track limit would affect claims for whiplash injuries (as the proposed tariff sets out levels of compensation of less than £5,000).

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[58] Number 08335, 23 August 2018

7.3 House of Lords debate

In debate on the Bill at all stages, Peers raised issues relating to the increase in the small claims track limit, including the following.

Amount of increase and access to justice

Second Reading

At Second Reading, Lord Beecham, Shadow Spokesperson for Justice, raised concerns about the amount by which the limit was to be raised:

> There is real concern about the pending increase in the small claims level, which, apart from the £5,000 limit chosen for whiplash claims—however loosely defined— will now be set at £2,000 by the Lord Chancellor. Below that figure, noble Lords will be aware that costs are not awarded. This is significantly higher than would be the case if the existing level was increased to reflect inflation. I have seen two suggested figures for that: £1,400 and £1,600, but these are still significantly lower than the £2,000 now prescribed. If we are to retain the system, should it not be on the basis of RPI or CPI, reviewed every three years as a matter of course? Interestingly, I understand that Scotland has chosen not to apply its version of the small claims regime, known as the simple procedure, to personal injury claims up to £5,000 such that, successful parties in these cases, described as "summary causes", can recover their costs.[59]

Lord Monks (Labour) also questioned the amount of the increase, referring to Lord Justice Jackson's proposal for a smaller rise in the limit.

Lord Sharkey (Liberal Democrat) questioned the effect of the proposals on access to justice:

> Legal costs are recoverable by successful claimants from the defendants. The Government say that if legal fees were not, or less, recoverable, claimants would bear more of the cost of bringing such claims, which would help to bring down their volume to a level that was,
>
> "optimal for society as a whole".
>
> Leaving aside the question of what "optimal" might mean or how it might be calculated in this context, there is the problem of access to justice, as noted by the Law Society in its comments on the Bill. The Access to Justice Foundation has estimated that the proposed new tariff would deny 600,000 people injured on our roads each year the right to legal advice when seeking compensation. The figure comes from a July 2017 study by Capital Economics. Then there is the question of whether, or more likely to what extent, making medical report costs unrecoverable impedes access to justice.[60]

Lord Thomas of Cwymgiedd (Crossbench, former Lord Chief Justice) considered that "it cannot be right to categorise a claim as for the fast track or a small claim, simply to enable fees to be recovered. Those are different points: the point of a track is the difficulty of the case".[61]

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59 HL Deb 24 April 2018 cc1485-6
60 HL Deb 24 April 2018 c1488
61 HL Deb 24 April 2018 c1511

Lord Thomas also said that it was essential for the courts to have the right IT which must be designed to deal with litigants in person.

Lord Marks of Henley-on-Thames (Liberal Democrat Spokesperson for Justice) agreed that it was necessary to deal with false claims. However, he thought it unfortunate that the Bill was being dealt with separately from the Government's proposals to increase the small claims limit, "with which this legislation is closely connected and which will have a number of significantly unjust outcomes".[62]

Committee stage

At Committee stage, Baroness Berridge (Conservative) considered that there was a "high onus to ensure that access to justice is ensured for genuine claimants". She expressed concern about how the process would operate:

> We are in a situation that we increasingly encounter: we cannot know whether the Bill will work, do justice and achieve something unless we know a considerable amount about a piece of tech that the MoJ suggests will make things easy for litigants in person to deal with. … I cannot imagine what we expect of litigants in person with busy lives. Claims will start, then stop, and the insurance companies will start talking about suspected fraud. …
>
> We need to know an awful lot more from the Minister about the progress in creating this portal before we can be satisfied that the tariff and the other sections of the Bill will achieve what the Bill wants. I am concerned about the prospect of unscrupulous insurance companies denying liability to get it out of the portal so that they are then dealing directly with claimants, as well as the issue raised in the amendments of suspending matters until we have seen what the small claims situation will be for personal injury claims.[63]

Lord Bassam of Brighton (Labour) said that small claims courts were not suitable for personal injury claims. He added two other points:

> There will be an increase in the undersettlement of claims as a product of this; and I suspect that there will also be an increase in the number of claimants with highly unrealistic expectations of the value of their claim, thus removing the possibility of early settlement and placing increased pressure on the courts system.[64]

Report stage

At Report stage, Baroness Hayter of Kentish Town, Shadow Deputy Leader of the House of Lords, moved an amendment intended to restrict the increase in the small claims limit for relevant personal injuries. The amendment proposed an increase to £1,500 when this reflected the 1999 value of £1,000 adjusted for inflation, computed by reference to the CPI.[65] (This would reflect the recommendation of Lord Justice Jackson in his review of the costs of civil litigation).

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62 HL Deb 24 April 2018 c1523
63 HL Deb 10 May 2018 c324
64 HL Deb 10 May 2018 c326
65 In 1999 the £1,000 limit was restricted to damages for pain, suffering and loss of amenity, rather than to the value of the entire claim

Baroness Hayter said that "this amendment will bring the issue into primary legislation, where it belongs".

She spoke of the widespread effect of the proposed change, which would go beyond whiplash claims, and questioned the justification for the Government's approach:

> Here we have a Bill to deal with whiplash, but the Government are taking action on the limits which flies in the face of advisers and is unrelated to whiplash or fraud, but will affect tens of thousands of people a year. Furthermore, the Government have offered no justification for increasing the small claims limit in all road traffic accidents, not just whiplash, to £5,000, which could capture perhaps nine in 10 of all RTAs, leaving them effectively without legal representation. The changes will also affect employment injury claims. Again, there is no suggestion of fraud or misuse of the courts, and the amounts are significant to low-paid workers, exactly those least able to pursue a claim without legal advice or representation.[66]

Lord Bassam of Brighton supported Lady Hayter and said that, by raising the limit in the proposed way, the Government would "seriously disadvantage those with an entirely legitimate personal injury small claim and prevent them gaining access to justice and legal advice".[67] He spoke of the potential impact:

> We all know that there are many who cannot use portals and online means of tackling these issues because they do not have the training or expertise and feel uncomfortable in the online world. The Minister may say that insurers will not fight a case which they know they are going to lose but that does not stop them playing hardball because they choose to. Why would they not, faced with a claimant on their own? Insurers also have a duty to their clients.
>
> (…)
>
> Our amendments seek to ensure that those who do not have a corporate lawyer behind them do not fall prey to another racket—the routine denial of claims by insurers, just because they can.[68]

In response, Lord Keen of Elie, Spokesperson for Ministry of Justice business in the House of Lords, reiterated that the small claims track was suitable for whiplash claims, which he described as "generally straightforward" and not routinely requiring legal advice. He said that the Government was working closely with stakeholders to develop a comprehensive package of guidance and support for users.[69]

Lord Keen set out why the Government had decided to raise the limit:

> This limit … has been set at £1,000 since 1991 and, as compensation levels have risen, the small claims track no longer covers the same breadth of claims as it once did. Following consultation, the Government believe that increasing the limit for RTA personal injury claims to £5,000 is a careful and proportionate increase, particularly having regard to the fact that the limit for other claims, with the exceptions I mentioned earlier,

66 HL Deb 12 June 2018 cc1633-6
67 HL Deb 12 June 2018 cc1636
68 HL Deb 12 June 2018 cc1637
69 HL Deb 12 June 2018 cc1640

> is now £10,000. A level of £5,000 will facilitate early and expedited settlement under the proposed tariff structure and will encourage insurers to challenge unmeritorious claims, many of which are not now challenged because of the potential legal costs.

Lord Keen considered that it would be inflexible to tie the limits into the primary legislative process. He said that it was appropriate for the Civil Procedure Rule Committee, under the leadership of the Master of the Rolls, to make procedural changes to the civil justice system. He rejected the suggestion that a claimant might recover legal expenses.

Baroness Hayter pressed for a division and the amendment was defeated by 183 votes to 169.

Third Reading

At Third Reading, Lord Monks again raised the issue of the small claims track, saying, "Those of us who have been concerned with this issue have been hamstrung by the fact that we have not managed to secure the small claims limit to be within scope of the Bill".[70] He warned that "we will return to the small claims limit issues in any way that we can".

Lord Beecham said, "we will in future seek to oppose the intended increase of the small claims limit to all RTA cases to under £5,000 and for all other personal injury claims to £2,000, when the relevant regulations are laid".[71]

Employee claims

At Second Reading, Lord Monks drew particular attention to the effect of the increase in non-RTA cases:

> The effect of this increase on non-road traffic personal injury cases—an area where the abuse is a lot less than in road traffic claims—will be profound. At present, very few are dealt with in the small claims court, but under the proposed new regime many more would fall into that court, where legal costs are not recoverable. As a result, a lot of claimants would be unrepresented or would have to find their own resources. For union members that is probably fine, as the union would cope with that; for a sound case, that is what we do; … But the many others not in a union will be made much more vulnerable. The result is deprivation of legal representation in recovering damages for injuries and losses. The number of workplace PI cases is reducing annually, and USDAW, from its own experience, calculates that the number of cases captured by the proposed lift in the small claims limit would increase fivefold...[72]

Lord Monks also considered the effect on health and safety at work:

> It should always be remembered when the House considers such things that legal claims are the primary driver for retaining and improving health and safety standards in the workplace, and that the massive reduction in the number of claims that is likely to be occasioned by these changes will have an adverse effect on health and safety standards. Deregulation in this area increases the risk

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70 HL Deb 27 June 2018 c197
71 HL Deb 27 June 2018 c201
72 HL Deb 24 April 2018 c1506

> of injury at work, and the Bill simultaneously would restrict the ability to seek redress.[73]

In Committee, Lord Bassam of Brighton (Labour) also raised concerns about raising the small claims track limit for employee claims:

> These cases can be very complicated, and they impact adversely on those who have suffered an accident at work, or the early onset of an industrial disease. …Vulnerable employees can be quite seriously injured. They are often unable to work for weeks or months and suffer considerable financial detriment and loss. With no legal assistance available to them, they will be opposing an employer—who will invariably be represented at court—without the expert advice that their injury and its implications merit.[74]

Lord Keen replied that, following consultation, the Government had modified their original proposal that the small claims track limit should be increased to £5,000 for all personal injury claims. Instead, the Government now proposed to raise the limit to £2,000 for all non-RTA related personal injury claims, including employer/employee claims.[75]

Effect of increase on vulnerable road users

At Committee stage, Lord Young of Norwood Green (Labour) said that the Bill would exclude vulnerable road users from its ambit but that the changes to the small claims track limit would catch all road traffic accident personal injury claims, including those by vulnerable road users. He indicated how many claims would be affected:

> The Government's proposal to increase the small claims limit to £5,000 for all road traffic accident-related claims will affect 70% of cyclist personal injury claims and a similar percentage of motorcyclist personal injury claims, where the general damages for pain, suffering and loss of amenity are under £5,000.[76]

Lord Butler of Brockwell (Crossbench) considered that provisions intended to deal with whiplash claims should not also extend to different types of personal injury claim:

> As has been made clear at all stages, the Government's main aim in this Bill is to tackle what they perceive as the compensation culture, and in particular fraudulent and exaggerated whiplash claims. It should not be a by-product of that that vehicle road users, including cyclists, are penalised by measures designed for a completely different purpose.
>
> Whiplash claims are brought by motor vehicle occupants, not by people riding bicycles or motorcycles or crossing the road. Nobody makes a fraudulent claim by throwing themselves off a bicycle or a motorbike or by jumping in front of a car. The point has been made to the MoJ that there is no evidence to suggest that fraudulent claims by vulnerable road users are an issue of concern—and, as far as I am aware, no evidence to the contrary has been provided by the Ministry of Justice.
>
> Whiplash claims from cycle and motorcycle collisions are almost entirely unheard of. The mechanism of the typical injury sustained

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73 HL Deb 24 April 2018 c1507
74 HL Deb 10 May 2018 c325
75 HL Deb 10 May 2018 c327
76 HL Deb 10 May 2018 c318

> is, of course, different. People on bicycles tend to be injured by hitting hard surfaces—car bonnets or the road. They sustain fractures and injuries from those impacts. It is not at all likely that they would be making a fraudulent claim. Indeed, I think it is impossible to imagine that they would.
>
> …I think that a Bill designed for whiplash claims should not accidentally spread its effect to vulnerable road users whose injuries are likely to be of a completely different nature.[77]

Lord Keen confirmed that the increase in the small claims track limit was not limited to whiplash injury cases:

> The proposed increase in the small claims limit will apply to all road users, including cyclists and motorcyclists. The Government's reasons for seeking that increase are not simply limited to whiplash claims and the claims culture that has developed there but reflect the fact that, in our view, low-value road traffic accident claims—whether whiplash or otherwise—are appropriate for the small claims track and are capable of being dealt with in that track, whether they be for whiplash or other forms of road traffic injury.[78]

Lord Keen went on to state that work was being done on the development of the small claims portal "so that claimants will find the system far more accessible". He said that, where claims were perceived to be complex, they could be moved from the small claims track to another track.

At Report stage, however, Lord Keen indicated that the Government was giving further consideration to whether vulnerable road users might be excluded from the £5,000 limit.[79]

Recoverability of cost of medical report

At Committee stage, Lord McKenzie of Luton, Shadow Spokesperson for Work and Pensions, moved a probing amendment (later withdrawn) intended to enable the court to award the cost of the medical report.

In response, Lord Keen of Elie said that the cost of a medical report in respect of whiplash injury claims would continue to be recoverable where the defendant insurer admitted any part of liability. [80]

At Report stage, Lord Marks sought clarification that the cost of obtaining the compulsory medical report would be recoverable by all successful claimants, even in the small claims track.[81]

In response, Baroness Vere of Norbiton reiterated:

> I start by reassuring noble Lords that the cost of medical reports is already recoverable in personal injury claims where the defendant insurer has admitted any part of liability. They will continue to be recoverable following these reforms, including in the small claims track following the proposed increase of the limit to £5,000.[82]

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77 HL Deb 10 May 2018 c319
78 HL Deb 10 May 2018 c320
79 HL Deb 12 June 2018 cc1641
80 HL Deb 10 May 2018 cc326-7
81 HL Deb 12 June 2018 c1628
82 HL Deb 12 June 2018 c1628

8. Reaction to Government's proposals for reform

During the process of policy development which followed the announcement in the 2015 Autumn Statement, the reaction from interested parties has been mixed. In general, lawyers' groups, including the Law Society and the Association of Personal Injury Lawyers, are among those who have raised concerns about the Government's proposals, while the Association of British Insurers (ABI) has welcomed them.

Some examples of reaction by interested parties are set out below.

8.1 E-petitions

An e-petition on the UK Government and Parliament Petitions website, which closed on 26 May 2016, called for the small claims track limit for personal injury claims to remain at £1,000. It stated that the increase would "restrict access to justice for thousands of people" and would "put firms of solicitors out of business, leading to unemployment in the legal sector".[83] The petition received 24,398 signatures.

The Government's response to this petition expressed concern about the number of whiplash claims and the impact of legal costs on motor insurance premiums. It considered the increase to be "both justifiable and proportionate". The Government thought that most claims in minor injury cases were straightforward enough to be brought without the need for legal representation, and that a revision of the small claims track limit for personal injury claims was "long overdue".

Another petition on the UK Government and Parliament's website, which closed on 3 May 2017, received 18,720 signatures. It also called on the Government to keep the personal injury small claims limit at £1,000, and to keep damages for whiplash injuries. Among other things, the petition claimed there would be mass redundancies following implementation, "possibly 60,000".

The Government's response spoke of the resilience of the personal injury market:

> The personal injury market has long proven itself to be adaptable and innovative, and it is likely that the industry will continue to provide cost effective services following the implementation of these reforms. The potential impact on solicitors will depend on a number of factors, including the volume of claims and their ability to adapt in response to a rapidly changing market. A full impact assessment which explores these issues in more detail was published alongside the consultation.

The Government reiterated that claimants could still seek legal representation in the small claims track if they so wished.

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[83] Keep the small claims track limit for personal injury claims at £1,000.00 [accessed 23 August 2018]

8.2 The Law Society

The Law Society welcomed the Government's decision not to raise the small claims track limit to £5,000 for all personal injury claims.[84] However, it raised concerns about an "inequality of arms" and the effect this might have on the operation of the courts:

> The MoJ does not appear to have properly considered the fact that this will clog up the court system creating a David and Goliath situation where people recovering from their injuries, deprived of legal advice, have no choice but to act for themselves.
>
> Those defending claims meanwhile are likely to be able to pay for legal advice. The increase in the number of litigants in person that will result from these changes will have serious consequences for the courts.

The Law Society added that fraudulent claims should be addressed by targeting the fraudsters – "not the vast majority of honest claimants who have been injured and bring genuine claims."

Separately, the then Law Society President, Joe Egan, referred to the difficulties unrepresented claimants might face:

> "The lord chancellor insisted today in a Justice Select Committee hearing that road traffic accident claims up to £5,000 'are not cases where it ought normally to be necessary to have legal representation'."
>
> "The reality is that a five-fold increase in the small claims limit - from £1,000 to £5,000 for road traffic accidents - will prevent people who've been injured through no fault of their own from recovering legal costs. This means that many people would not be able to obtain legal representation for claims when they have been injured, forcing them to fight through the courts on their own without legal help.
>
> Serious personal injuries, including certain bone fractures and some facial scarring, would be considered as 'small claims'. This increase means someone who's been injured through no fault of their own will have to instruct and pay a doctor upfront to provide a medical report. They will have to interpret what that medical report means in terms of what compensation they should get. They will need to present arguments to the court as to why the other party is liable and what they should get. It is simply not realistic to expect people to do this without advice and representation.[85]

8.3 Association of Personal Injury Lawyers (APIL)

APIL considers that the small claims track is "better suited to arguments about faulty fridges than bodily injury".[86]

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84 Law Society, Ministry of Justice plans mean victims of negligent drivers won't get legal help, 23 February 2017 [accessed 23 August 2018]

85 Law Society, Alarm over denial of legal rights for road traffic victims, 25 October 2017 [accessed 23 August 2018]

86 APIL, "Lawyers condemn 'excessive' personal injury reform", 17 November 2016 [accessed 23 August 2018]

APIL disputed the value of claims that could be considered "minor" and expressed concern about the effect on claimants of having to pursue claims in the small claims track:

> Claims under £5,000 are not minor, and an increase in the small claims limit will cover far more than soft tissue injuries. These claims could include a brain or head injury, injuries to the eyes, a collapsed lung, or fractured cheekbones. This is a disproportionate response to a stated aim of dealing with whiplash claims.
>
> Outside the small claims court a 'polluter pays' system operates in personal injury cases, which means that if the defendant who has caused the injury loses his case he pays the claimant's legal fees in the main (some of the cost is borne by the claimant). But in the small claims court the injured claimant cannot recover his costs from the wrongdoer, even if the claimant wins the case.
>
> Under the small claims proposals injured people will face a very difficult choice. They will either have to represent themselves without any legal help, leaving them vulnerable against defendants who are almost always represented by lawyers; seek legal advice from a solicitor, meaning they will have to sacrifice part of their compensation to pay for legal advice; or abandon the claim altogether, meaning they will receive no justice, and the person whose negligence caused the injury will get away scot-free.[87]

8.4 Motor Accident Solicitors Society (MASS)

Simon Stanfield, Chair of the Motor Accident Solicitors Society (MASS) MASS has questioned the Government's evidence base:

> Despite all the correspondence, conferences, roundtables and meetings, Ministers' views remain stubbornly wedded to concepts that should by now have been consigned to the rubbish bin. They claim that "most" low value RTA are fraudulent, when just about everyone acknowledges that it's probably less than 3%. They say that the number of reported serious accidents have declined so why haven't the number of claims, studiously ignoring Department for Transport estimates that some 480,000 RTA casualties go unreported each year. The logic that accidents are more likely to be at a low impact and less serious because of slower traffic and improved car safety continues to elude them.
>
> The significantly higher number of Claims Notification Forms submitted makes for a better headline number rather than using the more common sense number of claims that are actually settled at the end of the process. That this number has shown a significant decrease over recent years just doesn't fit the Government's narrative. And then, there is the fallacy that RTA claims are simple cases little different from making any other insurance claim – apart from fraud checks, liability assessment, assessment of damage, disputes over causation, evidence gathering and a host of other stages and legal concepts. Whilst RTA claims are clearly not amongst the most complex of legal cases, they will still appear bewildering and complex to LIPs [litigants in person] no matter how user-friendly the new LIP Portal may eventually turn out to be.

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87 Association of Personal Injury Lawyers Briefing: Civil Liability Bill – House of Lords second reading – April 2018, p4 [accessed 23 August 2018

> The reality is that after more than two years, the evidence base is still disputed, unreliable and is, in some areas, entirely speculative. Regulation should be proportionate and based on clear and reliable evidence, rather than a reliance upon assumptions of the consequences and a "wait and see" approach. It's still not too late to stop and think again.[88]

8.5 Access to Justice

The group Access to Justice (A2J) is campaigning against the Government's proposals. They have expressed concern about the effect on claimants:

> …Even those injured people who would be prepared to sacrifice a large chunk of their compensation – between 30-40%- to hire a lawyer and pay their outgoings will find it hard to find one. Many specialist personal injury solicitors who are able to work cost effectively through economies of scale will be forced out of business – a recipe for charlatans, the unscrupulous unqualified and higher costs bills from non specialist dabblers.
>
> The financial risk to injured persons and the stress on their nerves is singularly unattractive. So injured persons won't risk pursuing their otherwise fully justified claims, either with or without a solicitor's help. What will happen? If they are lucky, they will be approached direct by the insurers who may offer a 'take it or leave it' pittance. Ever bigger insurer profits will be made on the back of undercompensated injured victims…[89]

8.6 Association of British Insurers (ABI)

The ABI has published some "mythbusters" which include the following:

> Fiction - Raising the small claims limit to £5,000 will restrict claimant access to justice without legal representation.
>
> FACT:
>
> - The small claims limit is being raised to £5,000 for motor personal injury claims because these claims are simple and straightforward to settle, and an expensive lawyer should not be required. The Ministry of Justice is working with claimant representatives and insurers to develop a new online claims process which will to ensure that claimants receive any additional help they may need.
> - A claimant can still seek legal representation but in future they would be responsible for paying their own legal costs.[90]

8.7 Reaction to Justice Committee report

Reaction to the Justice Committee report has followed similar lines to the more general reaction to the Government's proposals.

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88 MASS website, "It's still not too late to stop and think again" [accessed 23 August 2018], (article stated to have first appeared in Modern Insurance Magazine Issue 30, May 2018)
89 A2J, Our campaign (undated) [accessed 23 August 2018]
90 ABI, Civil Liability Bill Mythbuster [accessed 23 August 2018]

For example, the Bar Council shared the Committee's concerns. A Bar Council spokesperson said:

> "Increasing the small claims limit to £2,000 in personal injury cases, and to £5,000 in road traffic cases, may deter those who are injured from making well-founded claims, as well as restrict access to legal advice and representation for genuine claimants.
>
> "Many who suffer such injuries are not in a position to afford legal help, often because an accident has resulted in a loss of income, yet they will be up against large and well-resourced insurance firms.
>
> "The Justice Select Committee rightly points out that the likely impact of raising the small claims track will be a substantial increase in the number of unrepresented litigants. This will place further strain on the resources of already stretched court services.
>
> "The Bar Council shares the Justice Committee's concern that the case for increasing the small claims limit to £5,000 in road traffic cases has not been made. There is insufficient evidence to suggest that these reforms are a proportionate response to the issue of fraudulent claims.
>
> "A small claims limit of this size offends the principle of equal treatment under the law as it creates a different system of justice for a particular category of victim.
>
> "An increase in the small claims limit for personal injury to £1,500 in line with inflation would be a more reasonable and proportionate measure."[91]

Conversely, the ABI referred to the Committee's report as being a claimant lawyer "shopping list". James Dalton, Director, General Insurance Policy, ABI, said:

> "The conclusions in today's Justice Select Committee report on the Small Claims Track (SCT) limit read like a shopping list of asks from the claimant lawyers. If accepted, these recommendations would achieve absolutely nothing in terms of reducing the number and cost of whiplash-style claims, would allow lawyers to continue to line their pockets and honest motorists would continue to pay higher car insurance premiums as a result. In addition to every £1 paid in compensation to claimants, claimant lawyers get nearly 50p.
>
> "Access to the justice system is important and the fact remains that under the Civil Liability Bill, compensation for whiplash claims will be fixed and a portal is being developed to facilitate access for people to make a claim with the support and guidance they need to do so.
>
> "We remain confident that our data provides a reliable and transparent indication of the levels of claims fraud detected by insurers and we are happy to work with Government and other stakeholders on this issue".[92]

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91 Bar Council, Bar Council backs Justice Committee concerns over increasing small claims limit, 18 May 2018 [accessed 23 August 2018]

92 ABI, Justice Select Committee Report "a claimant lawyer shopping list", 17 May 2018 [accessed 23 August 2018]

8.8 Other reaction

The following articles summarise some other reaction, both for and against the Government's proposals and the Justice Committee's report:

- Neil Rose, "Whiplash reaction: claimant lawyers vent fury at government", Legal Futures, 17 November 2016;
- Neil Rose, "ABI lashes out at MPs over small claims report as claimant lawyers urge government to act on it", Legal Futures, 18 May 2018;
- John Hyde, "Even insurers back PI reform delay, as opponents hope for full-scale retreat", Law Society Gazette, 18 July 2018. [93]

8.9 Early Day Motion

An Early Day Motion tabled by Ellie Reeves (Labour) on 23 July 2017 has 36 signatures (at 23 August 2018):

> SMALL CLAIMS LIMIT FOR PERSONAL INJURY AND ACCESS TO JUSTICE
>
> That this House expresses concern at the planned increase in the small claims limit for personal injury; regrets the small claims limit increase is not on the face of the Civil Liability Bill and unable to be debated; further regrets the proposal to increase the small claims limit by 100 per cent from £1,000 to £2,000 in all personal injury claims and from £1,000 to £5,000 in all road traffic injury cases; notes that CPI inflation from the last change in the small claims limit in 1999 would only see an increase to less than £1,500; regrets the decision to ignore Lord Justice Jackson's recommendation against any increase above £1,500; notes the Justice Select Committee's recommendation that the small claims limit for personal injury should only be increased to reflect inflation from 1999; believes that an increase in the small claims limit will have severe consequences on access to justice; and calls on the Government to withdraw its current plans for any increase in the small claims limit.[94]

93 Accessed 23 August 2018
94 EDM 1545 of 2017-19

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