QBE Business Insurance

Technical claims brief

Monthly update | January 2016

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Reform

George Osbourne's Spending Review and Autumn Statement

In a welcome statement of intent, the Chancellor proposed two key reforms to low value personal injury claims, which look set to change the current landscape quite significantly. The Conservative government have made no secret of their intention to reform a compensation system which they disagree with and believe that the benefits can then be passed-on to policyholders by reducing premiums.

The two key reforms are:

1. Raising the small claims track limit to £5,000 for personal injury claims; and
2. Removing the recovery of general damages for 'minor' soft tissue injuries.

The Chancellor says the proposals are specifically targeted at tackling the 'compensation culture' and with particular focus on minor motor accident injuries. The aims are to crack-down on the number of fraudulent claims and to reduce the costs to the motor insurance industry. There is an estimated £2bn spent by insurers per annum on whiplash claims (an average of £90 per motor insurance policy) and in the event that reforms are implemented, there is a clear signal that the government expect savings to be passed on to policyholders.

The wording of the first proposal refers to "personal injury claims" rather than to "soft tissue injuries", so it appears that the government intends to reform all such claims and not merely those for whiplash. The detail has yet to be released by the government.

The second proposal also currently suffers a degree of ambiguity, but seems to be limited to whiplash claims only. The entitlement to recover compensation for this type of claim has been the focus of the government's research and general dissatisfaction at the current system. There is currently no definition of 'minor soft tissue injury' and this will likely be the subject to debate and forthcoming consultation.

The usual arguments have been raised by the claimant lobby – that the reforms would reduce access to justice, penalise innocent victims and increase the number of unrepresented claimants. A petition to keep the small claims track limit for personal injury claims to the current £1,000 has been set up and has so far attracted over 22,000 signatories. Should this reach 100,000 signatures, the petition will be considered for debate in Parliament. Interestingly, the petition specifically states as one objection to the reforms that they would "put firms of solicitors out of business, leading to unemployment in the legal sector" and the large majority of the signatories live in the North West of England, an area that is home to a particularly high number of Claims Management companies and motor accident solicitors.

The government says it will consult on its proposals in the new year, perhaps as early as March. Whilst there are two quite separate reforms proposed, there is a good deal of overlap and so it is presumed that they will be considered and taken forward together. The Conservative government has sufficient time to implement the reforms (before the next general election), but it seems unlikely they would become law before 2017.

> "Both the government, and the Ministry of Justice, seem intent on maintaining the reform momentum established following the Jackson reforms. Those reforms left a number of loopholes, which have been exploited, most notably in relation to noise induced hearing loss claims. Closing those loopholes is overdue, whilst the government clearly sees a further opportunity to address some of the contributors to the 'claims culture'. These changes will impact the whole industry, both for insurers and solicitors who currently handle lower value and soft tissue injury claims. If the small claims limit is raised, claimant solicitors' will likely have to adapt their business practices and models, and may look to recover a percentage of the damages covered."

Liability

County court fees set to rise

On 17 December 2015, the government published its response to proposals to increase further the court and tribunal fees. It says that the existing fees are set to rise on average by 10%, alongside the introduction of new fees. No date has been given for the proposed rises, on the basis that parliamentary time will be required to introduce them through statutory instrument.

The court and tribunal system in England and Wales costs tax payers £1bn a year, so the government is looking to balance the increases, whilst ensuring that there is protection for the more vulnerable in society. At the end of November 2015, the government announced a £700m investment in the courts and tribunal system to create a swifter and more proportionate justice system, which they hope will generate savings of circa £200m from 2019-20.

The maximum court fee cap for money claims will remain at £10k—although an option to increase this to £20,000 is being kept under review. Even before court fees were increased last March, there was anecdotal evidence of claimants trying to avoid paying higher court fees, by under estimating the value of the claim when they issued the claim. The court are not bound by the claimant's estimate, but a recent judgment (*Lewis v Ward Hadaway*, see below) has provided judicial criticism of such a tactic.

The previous court fee increases in March 2015 did not impact on claims below £10k (the majority of issued personal injury claims) and across-the-board, the volumes of litigated claims are reduced marginally from where they would have been, without the increased fees. Whilst one of the aims of increased court fees is to generate income for the court service, it was hoped that they might encourage other behaviours such as avoiding the courts via alternative dispute resolution (ADR) and withdrawing claims which were unlikely to succeed. It is still too early to say whether increased court fees drive these behaviours, but further increases might help.

> The news of further increases has been met with similar dissatisfaction to that expressed in March 2015. Despite that, the government seems determined to try and bring the court system into the 21st century by providing the necessary funds to invest in technology and eliminate inefficiencies. It will come as no surprise that some of the cost will be passed onto court users, but the expectation must be that the mid-long term result will be a significantly improved service.

Deliberate understatement of claim value - *Lewis v Hadaway* (2015)

The claimants issued court proceedings in order to avoid a limitation defence. However, they remained unsure whether the claims would be pursued and so their solicitor deliberately understated the value of the claims in order to pay lower court issue fees. The solicitor's thinking was that if the claimants subsequently decided to continue a particular claim, the value of that claim would be amended and the balance of the appropriate larger fee paid. The claimants' solicitor had pursued this strategy for many other cases and had been criticised for it by two district judges in earlier decisions.

In this case, Male QC (sitting as a Deputy Judge), held that this strategy was an abuse of the court process. The solicitor had deprived the court system of fees, which should have been paid at the outset, thus resulting in a disruption to cash-flow and the administrative need to deal with two sets of fees. They could also have gained an advantage over the defendant by stopping time running where the claimants might not have been able to pay the full fee at the outset.

The judge recognised that there will be some cases when it might be possible to pursue this strategy without there being an abuse of process e.g. when a financially strapped claimant is aware that he will be receiving funds shortly and informs the defendant and seeks his agreement to paying reduced fees at the outset (whilst also informing the court).

Despite finding that there had been an abuse of process, the judge refused to strikeout the claims. The claims were not without merit and the prejudice to the defendants was limited. However, he did grant the defendants summary judgment on the basis that the claims were time-barred. That was because the claims had not been "brought" in time for the purpose of the Limitation Act 1980. The judge referred to a previous decision in *Page v Hewetts* and found that the claimants had not done "all that was in their power to do to set the wheels of justice in motion". That was because paying the "appropriate fee" does not cover the payment of a fee in circumstances where the act of payment was an abuse of process.

> "The judge was seemingly persuaded to grant summary judgment because of the deliberate nature of the decision to understate the value of the claim. It has to be correct that a solicitor who is instructed to issue a claim, should undertake a proper assessment of the value prior to saying what that value is on the Claim Form. There will be occasions when the value of the claim cannot be determined with any great degree of accuracy, but it should not be acceptable for a solicitor to deliberately mislead a defendant , and the court, by making a tactical decision to understate the value of the claim. Whilst the claim was not struck-out, judicial criticism of such tactics is necessary to deter claimants and their solicitors from following-suit."
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Claims Inflation - Severe Claims Costs Increase by 11% since 2010

The Institute and Faculty of Actuaries (IFoA) has released its 2015 report on third party motor claims and large bodily injury claims. The findings of the report are of importance for insurers who are exposed to these types of claims.

The key findings are:

1. Since 2010, the average cost per policy of the most severe claims has increased on average by 11% per annum. This is almost entirely due to an increase in the average cost of these claims, rather than any change in the frequency of large claims.
2. The average cost has not increased uniformly over this period. It is not unusual for average cost inflation to be volatile, especially for large claims. In 2014 there was an increase of 20%.
3. Generally, the frequency of large claims has been stable since 2010, with about 70 claims each year for every million vehicles insured. In 2014, this increased to 73. This is broadly consistent with an increase in the frequency of people seriously injured on the UK's roads during 2014. This is detailed in the Stats 19 data in Appendix 1 of the report.
4. The average cost per policy of claims in excess of £5m increased by more than 50% in 2014 (from £9 per policy to £13 per policy) and this was a key driver of the inflation seen. However this is an area of very significant uncertainty.

These are the results of the sixth annual report from the IFoA collating and analysing data for UK third party motor claims, provided by 18 of the top 20 UK motor insurers in 2014.

The report is clear evidence that Insurers are facing increasing annual claims inflation on their severe injury claims and whilst the government are taking steps to control the cost of small claims, the larger awards are usually determined by case law. The trend in the last couple of decades is for significantly higher awards to those who suffer serious injury.

The recent introduction of the Serious Injury Guide has the aim of improving the compensation system for dealing with these types of claim. Whilst the intention isn't, and shouldn't be, to reduce the level of compensation, any opportunity to improve the final outcome for a claimant, should help to reduce inefficiencies and unnecessary disputes.

> “Whilst the data and focus of the report relates to third party motor claims, the increased costs are likely to be comparable to large bodily injury claims in casualty. The figure of 11% is broadly consistent with previous estimates of annual claims inflation for these type of claims, albeit the 2014 figure of 20% is perhaps more reflective of the growing cost of care, prosthetics and increasing life expectancy. The results show the year-on-year trend of increasing claims inflation, far in excess of the RPI or CPI inflation rates.”

Claim for damages rejected due to joint criminal enterprise

The Court of Appeal has refused the claimant's application for permission to appeal against the rejection of his damages claim. The claimant, Grant Smith, suffered severe head injuries when a car, in which he was a back-seat passenger, span out of control and hit a parked car in Leeds in January 2011. The accident happened after the driver accelerated away from a police patrol car. After the accident, several packets of cannabis were discovered inside and immediately outside the car.

Mr Smith claimed in excess of £1m damages for his injuries, initially from the driver of the car, but they declined to provide cover.

Mr Smith's lawyers then brought a claim against the Motor Insurers' Bureau (MIB), which compensates victims of uninsured drivers. The MIB refused the claim, despite acknowledging the driver's negligence, saying Mr Smith should not be compensated as he was involved in a 'joint enterprise criminal activity' before the accident.

A judge at Leeds District Registry dismissed the compensation claim in June 2014 on the same grounds.

The claimant applied for permission to appeal the decision. Unsurprisingly, the claimant denied that he was involved in drug-dealing, and made the point that, although four people were in the car, none had been prosecuted for drug offences.

On 8 December 2015, in the Court of Appeal, William Featherby QC (acting for the MIB) said the District Registry judge was right to reject the damages claim, submitting that the correct test for the court was the civil liability test of the 'balance of probabilities'. In applying that test, the question was whether the claimant, and his three associates, were involved in a joint enterprise of street-dealing cannabis from a car.

Sitting in the Court of Appeal, Lord Justice Laws and Lord Justice Moore-Bick, refused permission to appeal the decision and said: "I consider that the inferences drawn by the judge were open to him and correct. The judge was entitled to find that all four were involved in a joint criminal enterprise."

> "The Court of Appeal decision correctly identifies the difficulty of overturning a first instance finding of fact. The judge had heard all the evidence and was best placed to decide whether the claimant was involved in drug-dealing. Appellant judges are very reluctant to interfere with findings of fact. The decision will also 'strike a moral chord' with most – the claimant put himself in that position due to the pursuance of an illegal activity and public policy demands that he should not benefit by claiming damages."

Fraud

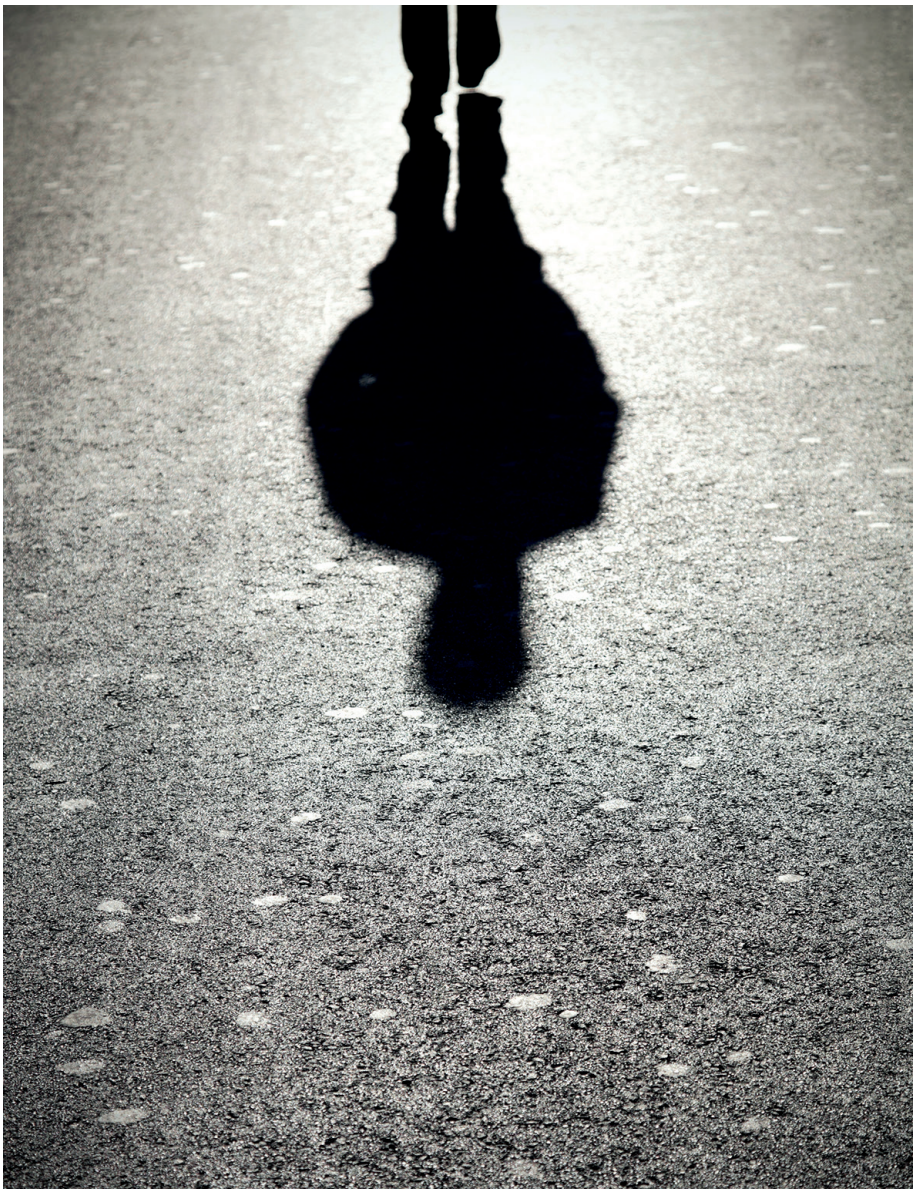
Insurance Fraud Taskforce Report: The Fight Against Fraud Continues

The government's Insurance Fraud Taskforce has produced its recommendations to reduce the level of insurance fraud, in order to ultimately lower the cost of insurance and protect honest customers. The Taskforce was established in January 2015 and is comprised of representation from industry and regulatory bodies and has been supplemented by a specialist personal injury sub-group (with both insurer and claimant representation).

The key recommendations are:

- The government should review how fraudulent late claims can be discouraged through changes to court, costs and evidence.
- The government should consider introducing a fixed recoverable costs regime for noise induced hearing loss (NIHL) claims.
- The insurance industry should strive to improve the quality and quantity of data available in fraud databases and data sharing schemes:
- In light of the establishment of MedCo and the accreditation of MROs which has made the medical evidence process much more robust the ABI should discourage the inappropriate use of pre-medical offers.
- The insurance industry as a whole should consider following the established good practice of some insurers in defending court proceedings where they believe the claim is fraudulent.
- The SRA (Solicitors' Regulatory Authority) should take a tougher approach to combatting fraud
- The government should develop and deliver a coherent regulatory strategy to tackle nuisance calls that encourage fraudulent personal injury or other claims.

The report recommends that a "legacy vehicle" is established to ensure that the Taskforce's recommendations are implemented. It should be made up of industry representatives similar to that of the Taskforce and should continue the dialogue between different stakeholders. It is recommended that it report to government on the recommendations and fraud developments generally, once a year, initially for three years.



"This is further evidence of the sustained momentum in the fight against insurance fraud and justification for the government to keep the problem high on their reform agenda. QBE embraces the report:

"The taskforce recommendations are welcomed both in the context that they recognise the hard work insurers have undertaken and achieved to date but also that there is still more to be done to revive consumer confidence within the industry. It further supports the Chancellor's Autumn Statement concerning possible reforms to spurious low value injury claims that are unnecessarily increasing the costs of insurance for honest customers.

"We look forward to seeing how the proposals are taken forward and the opportunity of working with industry bodies during the consultation process."

Rob Smith-Wright, Claims Manager of QBE's Special Investigation Unit."

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