Response to the Ministry of Justice Consultation

on

Reforming the Soft Tissue ('Whiplash') Claims Process

Introduction

Cycling UK (formerly CTC, the Cyclists' Touring Club), is the national cycling charity. We have 68,000 members and promote the interests of cyclists and would be cyclists throughout the UK.

We are responding to this consultation on behalf of our members given our significant concerns regarding the implications for cyclists, and those who might consider cycling, of the proposed changes to civil compensation claims. Whilst this consultation was published as a consultation on reforming the soft tissue (whiplash) claims process, the implications extend far beyond whiplash claims by car occupants.

Prior to submission of this response we launched our Road Victims are Real Victims campaign in December, in partnership with RoadPeace, the national charity for road crash victims, and Living Streets, the national charity for every day walking. The catalyst for our collaboration with those charities was our shared concern that this consultation ignored the

interests of road crash victims, and particularly pedestrians and cyclists, referred to generically within this response document as vulnerable road users (VRU).

Over 6000 people have responded to our Road Victims are Real Victims campaign, and emailed the Ministry of Justice (MoJ) to outline their opposition to these reforms, principally to the proposed increase in the small claims limit, which disproportionately affects VRUs. Seventy per cent of cyclists' compensation claims are under the proposed new £5000 limit.

We would hope that the MoJ will now consider the concerns expressed by cycling, pedestrian and road victim charities, and their members and supporters, and reflect upon the implications of the proposed changes for VRUs, who are road users who extremely rarely pursue compensation claims that include a whiplash element.

Summary

As will be seen from our response to the numbered questions below, we understand that some of the proposed reforms are aimed at soft tissue personal injury claims brought by the occupants of motorised vehicles, rather that VRUs outside such vehicles. We are however concerned about the general direction of travel and the apparent minimisation of and disregard for the injuries and suffering sustained by victims of road collisions.

Throughout the consultation document reference is continually made to road traffic accidents. We cannot correct this term every time it is used, but have to make the general point at the outset that organisations such as Cycling UK and RoadPeace seldom refer to collisions as accidents. It is disrespectful to many casualties of such collisions.

Where there is fault, and where a collision could have been avoided, the incident is by definition not an unavoidable accident. These proposals appear to ignore the fact that those referred to as claimants are in fact often victims of another's actions, be they negligent actions or worse. We would submit that the MoJ should reflect not merely on how these reforms impact on insurance costs, but how they affect the rights of victims, many of whom will be VRUs.

The key points we would make in response to this consultation, outlined in further detail in answer to the specific questions, are:

1. The consultation document makes it abundantly clear that the main aim is to tackle what the government perceives to be the 'compensation culture', and both fraudulent and exaggerated whiplash claims. We will leave other respondents to comment upon whether such a culture exists, the level of exaggerated and fraudulent claims, and the particular problems with whiplash claims. Whatever those

problems are, VRUs should not be penalised as a consequence of measures the government implement to address them. Whiplash claims are brought by motor vehicle occupants, not be people riding bikes or crossing the road. The government should ensure that any reforms that it does implement address whiplash claims, and do not impact on non-whiplash claims by VRUs.

2. We have responded in detail within question 1 to the question concerning the definition of road traffic accident-related soft tissue injuries, however in summary that definition should not apply to cyclists, pedestrians, or anyone who was not a driver or passenger in a motor vehicle.

3. Our primary concern relates to the proposed increase in the small claims limit to £5000 (or higher). As outlined, particularly in response to question 13, cyclist and pedestrian claims often involve disputed liability and contributory negligence arguments, which mean they need legal advice. The small claims limit should not therefore be raised at all for claims by VRUs, and in any event an increase for any personal injury claim to £5000 is far too high. To the extent that there is any increase for any personal injury claims that should be limited to an inflationary increase, not a quintupling of the existing limit.

4. The proposed tariff system is unfair and significantly below the Judicial College Guidelines. There is no need to change the methodology for the assessment of general damages as this has been carefully considered by the Judicial College.

Our response to the questions within parts one to five of the consultation document are set out below.

Part 1: Identifying the issues and defining road traffic accident-related soft tissue injuries

1. Should the definition in paragraph 23 be used to identify the claims to be affected by changes to the level of compensation paid for pain, suffering and loss of amenity from minor road traffic accident related soft tissue injury claims, and the introduction of a fixed tariff of proportionate compensation payments for all other such claims?

The paragraph 23 definition of soft tissue injury claims is limited to claims “brought by an occupant of a motor vehicle”. Accordingly, as currently drafted, claims by vulnerable road

users would not appear to be affected by the proposed changes to the level of compensation paid for pain, suffering and loss of amenity (PSLA) from what the MoJ refer to as minor road traffic accident (RTA) related soft tissue injury claims.

We are however aware that the para 23 definition mirrors that within para 16(A) of the Pre-Action Protocol for Low Value RTA Claims. That wording, drafted for the purpose of Medco to ensure that a certain type of medical report is obtained, was deliberately drafted to be wide enough to cover other types of soft tissue injury aside from whiplash, including injuries perhaps more typically sustained by VRUs in collisions with motor vehicles, including injuries to wrists, knees etc.

Throughout the consultation document the MoJ repeatedly stress that the aim of the reforms is to "reduce the unacceptably high number of whiplash claims", yet the para 23 definition may, either now or at some future point, be interpreted or extended to incorporate injuries other than whiplash. In those circumstances we could foresee a scenario where the question was posed as to why the occupant of a motor vehicle sustaining a fractured wrist should receive lower compensation than a pedestrian or cyclist with the same injury.

We would therefore suggest that, as the MoJ have clearly identified whiplash claims as the primary concern, and communicated this consultation to the public as reform of the whiplash claims process, that the para 23 definition is tightened up to limit the impact to whiplash claims only.

2. Should the definition at paragraph 23 be extended to include psychological trauma claims, where the psychological element is the primary element of a minor road traffic accident related soft tissue injury claim?

No. As a cycling charity we are aware that some people, who are involved in collisions with motor vehicles whilst cycling, subsequently struggle to regain the confidence either to cycle again on public roads, or become fearful about any mode of transport on the public highway. That can restrict their mobility, lifestyles and opportunities, and cause genuine trauma.

We would therefore oppose any changes which sought to limit the ability of any class of road user to claim compensation for psychological injury, as occupants of motor vehicles involved in collisions can similarly suffer genuine psychological injuries. The burden of proof remains on the complainant in all such cases to produce compelling medical evidence.

If the para 23 definition is extended to include psychological trauma the Government should be honest about their intentions and publicly acknowledge that they do not consider victims of road crashes to be real victims, but merely a secondary class of victim entitled to reduced

compensation, whose psychological trauma is not to be judged by medical evidence and standards, but by insurance driven policy decisions. That would of course be inconsistent with the Government's own Road Safety Statement.

3. The government is bringing forward two options to reduce or remove the amount of compensation for pain, suffering and loss of amenity from minor road traffic accident-related soft tissue injury claims. Should the scope of minor injury be defined as a duration of six months or less?

Whether a claimant takes six or nine months to recover from a whiplash injury, which appears to be the premise of the proposals and this question, is unlikely to be an issue of concern to many VRU's as they rarely claim for whiplash.

We are however concerned about the principle that claims, and their value, should be defined simply by the duration of the injury. The seriousness of an injury should be determined by a range of factors, which includes the impact upon the claimant's life. Put another way, is the MoJ saying that severe and consistent pain for five months should attract less compensation than inconsistent and moderate pain for seven months, because the duration of symptoms is the determining factor?

The Judicial College Guidelines (JCG) recognise that duration of symptoms is important, but only one of a number of factors they identify as relevant. We are concerned therefore that using duration of symptoms to determine compensation undermines the JCG. The MoJ have stated that they want to deter fraudulent and exaggerated claims. Without commenting upon the evidence as to extent of such claims, we would question how the replacement of a range of factors within the JCG, simply with a duration of symptoms question, will not deter the fraudulent claimant or those prone to exaggeration?

4. Alternatively, should the government consider applying these reforms to claims covering nine months' duration or less?

Please see response to question three above. Determination by duration of symptoms is a flawed concept.

Part 2: Reducing the number and cost of minor road traffic accident-related soft tissue injury claims

5. Please give your views on whether compensation for pain, suffering and loss of amenity should be removed for minor claims as defined in Part 1 of this consultation?

We appreciate that, applying the para 23 definition (see Q1), these proposals are directed at car occupant claimants. Nevertheless, we are concerned that restricting or removing compensation for so-called minor RTA claims would in due course be extended to RTA claims by other roads users who are not car occupants, including VRUs.

Within the consultation document the MoJ refer to the level of RTA related personal injury claims having increased over the last ten years, "despite extensive improvements in vehicle safety and a decline in the number of reported accidents". The improvements in vehicle safety referred to have generally improved the safety of car occupants (air bags, crumple zones etc). They have not had the same impact upon the safety of road users outside vehicles, which partly explains why the general trend revealed by STATS19 data is that the number of car occupants killed or seriously injured (KSI) has been falling, whilst for cyclists KSI figures have broadly plateaued.

Accordingly, the suggestion that claims are increasing as our roads and vehicles are getting safer is too broad a generalisation. Firstly, the roads may be getting safer for some road users, but not all. Secondly, improvements in vehicle safety design often mitigate the impact of collisions (air bags for example), but do not necessarily prevent the collision, meaning that a similar collision can lead to a compensation claim for a less serious injury than might have been the case 15 years ago.

If occupants of vehicles are prevented from claiming compensation for PSLA for minor claims, we suspect that the question might then be asked as to why pedestrians and cyclists can recover compensation for minor injuries, when passengers in vehicles cannot, despite the fact that these reforms were triggered by concerns about whiplash claims. As outlined, these are claims which VRUs rarely claim, and the medical evidence regarding VRU injuries (fractures, stitches etc), does not present the evidential problems (in terms of challenge by defendants) associated with whiplash claims.

Cyclists knocked off their bikes often have injuries which the MoJ seem to class as minor. They may not be life altering, but a broken wrist is a real injury for the person who sustains it. We are therefore concerned by the general direction with these reforms, which is to classify and refer to injuries which are not life changing as minor injuries, and limit or exclude compensation for such injuries.

If the MoJ do proceed with a limitation or exclusion on damages as suggested, we would argue that it should be clear that this applies to whiplash claims only, however our fundamental position is that road victims are real victims, whatever their mode of travel, and denying or restricting compensation for injuries others class as minor is a clumsy way to deal with a concern about the level of whiplash claims.

The current proposals reflect a sledgehammer approach, which will inevitably leave some innocent victims either under-compensated, or without any compensation.

6. Please give your views on whether a fixed sum should be introduced to cover minor claims as defined in Part 1 of this consultation?

Please see answer to question five above.

7. Please give your views on the government's proposal to fix the amount of compensation for pain, suffering and loss of amenity for minor claims at £400 and at £425 if the claim contains a psychological element.

In relation to the principle of limiting compensation to a fixed sum please see the answer to question five above.

In relation to the suggested levels of £400 and £425, we would add the following observations.

Faced with the prospect of arguing with a defendant's insurers, potentially chasing an insurer who is reluctant to engage or respond, and ultimately paying a court fee to commence proceedings without legal representation (which would not make economic sense due to the proposed small claims limit changes), all to potentially recover £400, many potential claimants will either choose not to seek compensation, or give up when they encounter a resistant insurer.

Deterring claimants injured by the negligence of other road users from pursuing a claim might sound attractive to the insurance industry. Motorists might also like the promise of reduced insurance premiums. The message however that it doesn't matter if you cause a collision whilst driving, and that another person's consequential personal injury is irrelevant or a trifling issue, is a dangerous road safety message for a Government with manifesto commitments regarding road safety to promote.

Discouraging claims against at fault drivers gives a message to at fault drivers that the consequence of their bad driving is less likely to be reflected by increased insurance premiums, because there is less likely to be a claim against them. Making it more difficult

for innocent victims of road collisions to claim compensation, whilst deterring claims against at fault drivers, does not promote road safety.

8. If the option to remove compensation for pain, suffering and loss of amenity from minor road traffic accident related soft tissue injury claims is pursued, please give your views on whether the 'Diagnosis' approach should be used.

No, the existing prognosis approach should be used.

Again, we are concerned that any change to the diagnosis approach would ultimately be more widely applied to claims involving VRUs. Early rehabilitation is vital in helping many claimants recover as quickly as possible, thus limiting the impact the injury has on their life, and potentially reducing the compensation sum that is paid.

Genuine claimants typically want to move on with their lives as quickly as possible. If the Government are serious about tackling exaggerated claims, moving to the diagnosis approach will do nothing to deter the claimant who is minded to exaggerate their claim, it will just delay matters for genuine claimants.

9. If either option to tackle minor claims (see Part 2 of the consultation document) is pursued, please give your views on whether the 'Prognosis' approach should be used.

Please see answer to question eight above.

10. Would the introduction of the 'diagnosis' model help to control the practice of claimants bringing their claim late in the limitation period?

We do not understand how the introduction of the diagnosis model would prevent people bringing claims late in the limitation period, and are uncertain why this is perceived to be 'a problem'.

There are various reasons why people do not pursue claims immediately, including a reluctance to do so because they hope that their symptoms will improve. A cyclist knocked off their bike, who sustains a back or knee injury, might initially have little interest in pursuing a claim. If two years later they still can't ride a bike, and their knee or back problem prohibits physical activity, their view about pursuing a claim late within the limitation period might well change. That is not 'a problem' that needs to be addressed, and if it were, the diagnosis model would not prevent it.

Part 3: Introduction of a fixed tariff system for other road traffic accident-related soft tissue injury claims

11. The tariff figures have been developed to meet the government's objectives. Do you agree with the figures provided?

No. We believe that tariff systems inherently present a risk of under-compensation.

The same injuries affect people differently. That is recognised within the JCG, the wisdom of which the MoJ appears to be ignoring.

If the fixed tariff approach is extended to other RTA injuries, including to VRUs, the consequences of collisions for individuals will be largely ignored. A 20 year-old fit and confident young man, hit by a car driver whilst cycling, might sustain the same injury as a 75 year-old in similar circumstances. The implications for the 75 year-old might be far more serious. The JCG recognises this. A fixed tariff system would not.

12. Should the circumstances where a discretionary uplift can be applied be contained within legislation or should the Judiciary be able to apply a discretionary uplift of up to 20% to the fixed compensation payments in exceptional circumstances?

As already outlined, we oppose a tariff system. If, however, such a system is imposed, there must be some discretion to deviate from the strict tariff. Limiting that discretion to an additional 20% on the tariff figure, in exceptional circumstances, would effectively mean that the only cases where an uplift would be applied would be those cases which proceeded all the way to trial. Accordingly, it would be more appropriate to allow judges to award an uplift on the tariff, without an arbitrary 20% cap on that uplift, and without limiting the exercise of that discretion to 'exceptional' circumstances.

Part 4: Raising the small claims track limit for personal injury claims

13. Should the small claims track limit be raised for all personal injury claims or limited to road traffic-accident related claims only?

The proposed increase in the small claims limit is the reform which causes Cycling UK the most concern. This would impact disproportionately on VRU's, who rarely claim compensation for whiplash, the type of claim which triggered this consultation.

Slater and Gordon (UK) LLP (S&G) are the lawyers who deal with the personal injury claims for Cycling UK's 68,000 members. Leigh Day Solicitors (LDS) similarly deal with the personal injury claims for British Cycling's 125,000 members and London Cycling Campaign's 12,000 members. S&G and LDS have both confirmed that 70% of the cyclists' personal injury claims that they deal with are within the £1000 to £5000 bracket, and would therefore be affected by and move within the small claims procedure.

As previously outlined, whiplash claims from cycling collisions are almost unheard of. The mechanism of the typical injuries sustained is different. Cyclists hit hard surfaces (bonnets, tarmac etc). They sustain fractures and injuries which are usually readily diagnosable, can be evidenced through medical reports, and challenged where necessary.

Considering the 70% of cyclists' claims that would be affected by this change, they would include non-life changing injuries which, ignoring the terminology and classification used by the MoJ and lawyers, most people would not dismiss as 'minor'. Examples of such sub £5000 injuries often sustained by cyclists would be a fractured collarbone, broken wrist, and fractured ribs. All of these are injuries merit compensation and should not be disregarded or minimised due to a sense of suspicion, meritorious or otherwise, regarding whiplash claims.

The consultation document states that the "government considers that most minor PI cases are straightforward enough to be brought without the need for legal representation". It is further claimed that "Most minor PI claims result from RTA, in the vast majority of which the issues of causation and liability are admitted early in the process – those claims which proceed to court hearings do so in order to settle issues of quantum." This is, again, a misleading generalisation.

Liability in PI claims brought by cyclists and pedestrians is often contested. Insurers will often claim that cyclists should not have been filtering through traffic, were not visible, were riding too far from the kerb etc. Where liability is not disputed, contributory negligence arguments are common in relation to whether or not the cyclists was wearing high visibility clothing and / or a helmet, had their lights on, were riding two abreast etc. Similarly, in pedestrian claims there are often issues raised, either in terms of liability or contributory negligence, regarding where pedestrians crossed the road, whether they took sufficient care for their own safety, and whether they were clearly visible. The suggestion that liability in these cases is seldom disputed is simply wrong.

The small claims track was designed to deal with cases where litigants could bring cases themselves without lawyers. Many cyclists' claims will involve detailed arguments concerning what can appear to be conflicting Highway Code rules, with national Bikeability training standards and advice (endorsed and promoted by the Department for Transport) also in issue. A litigant in person would need to be able to deal with all those issues together with the legal arguments surrounding contributory negligence.

Within the consultation document a false parallel is also drawn with various European countries which have procedures in place to support claimants in resolving their soft tissue

injury claims without legal representation. All of the countries stated have a form of presumed liability insurance rules, where the larger vehicle is presumed to be responsible for any collision, unless the contrary is proved, or motorised vehicle users are held strictly liable for injuries to non-motorised road users. That type of system operates throughout Europe save in the UK, Ireland, Malta, Cyprus and Rumania.

Comparing how countries with a presumed liability system manage claims is misleading. In Finland, Spain and Sweden, (mentioned in the consultation document), cyclists and pedestrians pursuing compensation claims commence such claims with a presumption that the driver is liable, a presumption that does not apply in England and Wales.

Cycling UK have long campaigned for the introduction of a presumed liability system here, and will not repeat the arguments for this within this consultation response, save to point out that the lack of such a system means that VRUs pursuing claims for compensation here face additional hurdles to VRUs throughout most of Europe.

If we had presumed liability here, it might be easier for unrepresented VRUs to pursue PI claims within the small claims track, as happens in some European countries, but we don't. Moving 70% of cyclist claimants into the small claims track, together with a large percentage of pedestrian claims, on the basis that they can manage their cases themselves, without representation, should not be entertained without consideration of whether the insurance rules should move to presumed liability, something which is not currently being entertained.

Under our current insurance system, a PI claimant in the small claims track is likely to have to deal with a representative from a well-resourced insurance company. Given the complexity of many VRU PI claims, that would present many claimants and potential claimants with huge difficulties pursuing their claims. Some would be deterred from pursuing legitimate claims.

There is of course the option of paying for legal advice, without recovery of legal costs if the claim succeeds, but few will consider that an attractive option with a claim valued at £2000 to £3000. Given the cost implications there would be no equality of arms between claimant and defendant. Under these proposals, it may well be in the interests of insurers to adopt a policy of opposing all claims, including meritorious claims, on the basis that discouraging claims through a 'never admit liability' approach is cost effective, even if they have to bear the cost of losing a few cases where a determined litigant is prepared to represent himself or herself all the way to trial, or pay for legal representation regardless of whether that exceeds the compensation they may recover.

Accordingly, the proposals to increase the small claims limit would present an uneven playing field between claimants and defendants, and a present a daunting claims process for unrepresented claimants. The 73 year-old cyclist with a fractured collarbone, frightened to get back on his bike, with his mobility now restricted, might take the view that arguing contributory negligence and highway code rules in court with the lawyer instructed by the insurance company is not something he is confident enough to do. In his case therefore, the

increased small claims limit would penalise him, benefit an insurer, and potentially allow a negligent driver to avoid the likely insurance premium increase that would otherwise have accompanied his careless driving.

Whilst we oppose the increase in the small claims limit in principle for all PI cases, if there is to be an increase it should not apply to cyclists and pedestrians. Any increase should be restricted to claims brought by the occupants of motor vehicles, which tend not to involve the disputed liability issues already referred to in VRU claims. Additionally, a large percentage of claims by occupants of motor vehicles involve whiplash, which was of course the catalyst for this review. It would be wholly wrong to penalise VRUs, whose claims are generally more complex, and who rarely claim for whiplash injuries, because of concerns regarding the level of whiplash claims by motor vehicle occupants.

14. The small claims track limit for personal injury claims has not been raised for 25 years. The limit will therefore be raised to include claims with a pain, suffering and loss of amenity element worth up to £5,000. We would, however, welcome views from stakeholders on whether, why and to what level the small claims limit for personal injury claims should be increased to beyond £5,000?

Whilst the small claims limit has not been raised for some years, the proposed increase, which amounts to a quintupling of the limit, far exceeds any inflationary increase. Calculating what would be an inflationary increase depends on which figures are used, from which date, but in round terms an inflationary increase would see the limit rise to somewhere in the region of £2000.

We submit that in the event that there is an increase in the limit, which we oppose for the reasons already outlined, and in the event that such an increase applies to PI claims by VRUs, that any increase should be merely inflationary, and not to £5000.

Seventy per cent of cyclists' claims would move to the small claims track if the limit increased to £5000. If the limit was increased beyond £5000, the scope of the cases claimants were expected to litigate themselves would extend to ever more serious injury cases. In such circumstances the government would be prioritising the interests of insurers over those of road crash victims, and effectively saying that unless they were life-changing, injuries to people on our roads was not a concern to government.

15. Please provide your views on any suggested improvements that could be made to provide further help to litigants in person using the Small Claims Track.

The Court Service no longer offer a counter service at many courts. District Judges struggle to deal with the existing increase in litigants in person following various legal aid reforms. Neither the Court Service or the District Judges have the resources or time to assist litigants in person using the small claims track. If we were to suggest improvements they would merely be a sticking plaster, unless the government is prepared to completely overhaul the

operation of the court service, the number of judges available to deal with cases, and the funding available. A court service and system that supports litigants in person is beyond the scope of the current system.

16. Do you think any specific measures should be put in place in relation to claims management companies and paid McKenzie Friends operating in the personal injury sector?

We have no comment to make on this issue.

Part 5: Introducing a prohibition on pre-medical offers to settle for road traffic accident-related soft tissue injury claims

17. Should the ban on pre-medical offers only apply to road traffic accident-related soft tissue injuries?

We have no comment to make on this issue.

18. Should there be any exemptions to the ban?

We have no comment to make on this issue.

19. How should the ban be enforced?

We have no comment to make on this issue

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