

The impact of the increase to the personal injury small claims limit and the removal of general damages for Road Traffic Accident soft tissue injuries on Legal Expenses Insurance and the personal injury market

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Executive Summary

Until recently, the personal injury market has been primarily concerned with adapting to the introduction of LASPO in 2013, however proposals announced by the Chancellor George Osborne in November 2015 promise to bring an even bigger shift to the personal injury landscape by raising the small claims limit and removing general damages for claimants involved in a road traffic accident who experience a soft tissue injury.

Although these proposals claim to reduce insurance premiums by targeting fraudsters, they are going to have significant consequences for genuine claimants. Lower insurance premiums are unlikely to offer much consolation to claimants if legal costs are not recoverable between parties and the right to financial compensation for any soft tissue injuries suffered is removed. For many victims, the costs accrued in bringing a case will far outweigh the potential benefits. The proposed changes will not only affect claimants, but also legal expenses insurance providers and personal injury firms as the number of personal injury cases decreases.

It's therefore essential for personal injury firms to be proactive in their actions to adapt in order to stay both profitable and relevant.

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With a Ministry of Justice consultation on the proposals imminent, change is just around the corner. This means that personal injury firms will need to act quickly in order to stay ahead of the curve.

Context

On 25th November 2015, Chancellor George Osborne made the following statement:

“We’re going to bring forward reforms to the compensation culture around minor motor accident injuries. This will remove over £1bn from the cost of providing motor insurance. We expect the industry to pass on this saving, so motorists see an average saving of £40-50 per year off their insurance bills.”

This heralds the biggest legal change to affect personal injury firms since the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) came into effect in April 2013.

LASPO originated from Lord Justice Jackson’s review of civil litigation costs in 2010. It introduced far-reaching changes which aimed to put a stop to rising motor insurance premiums, reduce the number of claims and eradicate the so-called ‘compensation culture’ which insurers say encourages people to make claims for minor injuries or create fictitious claims which are hard to dispute. In the eight years leading up to 2013, the number of road accidents in the UK fell by nearly one-third, but soft tissue injury claims rose by more than 60% (Farrell, 2015). For further information on the key changes implemented by LASPO, see Appendix 1.

Following the LASPO legislation, the number of cases registered with the Compensation Recovery Unit (CRU) fell for the first time in many years in the year 2013-14, down 3% from the previous year (see Appendix 2). Whilst this is no doubt a welcome boost for the insurance industry, there are arguments that this indicates a reduction in access to justice for claimants, who now face more stringent barriers to claiming for compensation.

In response to the prospect of 3% fewer cases, leading to lower fee income, fewer claims and shrinking profit margins, personal injury firms have also been forced to adapt, not only by re-engineering their processes to be compliant with the changes set out in LASPO, but also by sharing and outsourcing their back-office functions in an effort to become more efficient.

Following LASPO, only the most efficient personal injury firms can now operate profitably, with some firms being forced to leave the sector (e.g. Delta Legal), and many looking to professional consulting, restructuring and business process experts for assistance.

The Chancellor’s Autumn Statement proposals continue to pursue the same aims as LASPO, namely reducing civil litigation costs. Whilst insurance premiums did indeed fall in 2013, they have been on the rise again since, against a backdrop of a nine-year low of insurance pay-outs. It should also be noted that as the government continues to tackle what it calls a ‘fraud and claims culture’ within the industry, it is yet to produce any independent evidence to verify this. Whilst the Association of British Insurers claims that insurance firms uncovered 130,000 fraudulent claims worth £1.32 billion across all products in 2014 (Association of British Insurers, 2016), there were just 475 arrests and only 85 prosecutions for such offences in the three years lead up to and including 2014 (Association of British Insurers, 2014).

A closer look at the proposals

George Osborne's speech included two key proposals which the government hopes will deter allegedly fraudulent personal injury claims, thereby deflating motor insurance premiums by about £40-50 per year. Both proposals will have a big impact on the legal sector, with some consumer law firms even seeing share prices half in the aftermath of Mr. Osborne's announcement (Farrell, 2015).

Proposal 1: small claims limit increase to £5,000

Firstly, it was pledged that the small claims limit be increased from £1,000 to £5,000. Whether this applies to all types of personal injury claim or motor claims alone is currently under review by the Ministry of Justice.

As the majority of personal injury claims are settled for less than £3,000, this will mean the majority of these cases will now fall within the small claims criteria, where it is intended that cases are brought without need for legal representation, thus leading to a reduction in amount of work available for personal injury firms.

For those which do seek legal assistance, the vast majority of Road Traffic Accident (RTA) soft tissue injury claims currently attract legal costs in the region of £500 whereas employers' liability and public liability claims generally attract costs of £900. Going forward, if the small claims limit increase applies to all types of personal injury claim, under LASPO these costs will not be payable by the compensator but will be the responsibility of the injured party. It follows then, that if the claimant does not have Legal Expenses Insurance (LEI), many injured parties will be deterred from making a claim.

The LEI cover offered by The Co-operative, for example, covers a policyholder for up to £50,000 of legal costs without any excess being payable (apart from nuisance and trespass claims where the excess is £250). The vast majority of claims dealt with by The Co-operative Legal Services are currently received under the Motor LEI policy, with costs currently paid by the losing party at no cost to The Co-operative. However, with the increase to the small claims limit, costs will no longer be payable between the parties with responsibility for the cost of legal advice transferring to the insurer under the terms of the policy. This shift in the landscape will not only affect The Co-operative Insurance but the whole LEI industry.

Proposal 2: soft tissue injuries compensated by rehabilitation rather than financial means

Secondly, the Chancellor pledged to end the right to cash compensation for those suffering from minor soft tissue injuries (usually whiplash) as a result of a road traffic accident.

Instead, the Chancellor proposes that those suffering soft tissue injuries should be offered rehabilitation to speed up their recovery. Claimants suffering such injuries will only be able to claim for "special damages", including the cost of medical treatment for their injuries and any loss of earnings

As whiplash is estimated to make up 80% of RTA injury claims (Frontier Economics, 2015), it is anticipated that there will be a decrease in the number of claimants for whiplash due to deterrents such as the aforementioned liability of the claimant to pay their own legal costs whilst within the small claims track.

If whiplash rehabilitation is the only redress and the option of compensation is removed, potentially 620,000 claims will be removed from the compensation system (see Appendix 3), meaning less work is available to personal injury firms.

Summary

The proposed changes will have a significant impact on personal injury law. Going forward, the vast majority of compensation claims will fall within the small claims limit where costs are not recoverable between the parties. In the short term, claimants will be expected to fund the cost of legal advice from any damages recovered. There will be a consequent impact on LEI, with insurers ultimately being liable to pay the claimant's legal fees. If the objectives of the proposals are achieved, insurance providers will benefit, as if the so-called fraudulent claims are removed they will have lower costs, which will enable them to provide lower insurance premiums. Measures, however, will need to be put in place to ensure that insurers are passing on these lower pay-out costs to consumers.

What happens next?

Timeline

The Chancellor himself has given no indication of the likely timing for the introduction of the reforms, but recent indications are that the proposed changes are likely to be implemented in 2017 (Hyde, 2015). The Ministry of Justice has recently confirmed that a consultation on the implementation of the proposals will be launched in the spring of 2016 (Hyde, 2016) and that one of the issues to be considered is whether the small claims limit increase should be restricted to RTA claims or whether it will apply to all types of personal injury claim.

Key considerations

In the aftermath of LASPO, Liverpool law firm O'Connors reported that nearly a fifth of law firms in the north-west of England that specialise in personal injury work considered closing (Rozenberg, 2013), but this does not mean that there is no future for personal injury law. Now is the time for firms to start thinking about how to adapt to this proposed legislation; it is essential to be proactive in order to maintain profitability within this increasingly regulated sector.

Integral to maintaining profitability will be how firms embrace technology and business process improvements. As LASPO and the Chancellor's proposed reforms aim to cut the bureaucracy and costs out of personal injury law, firms need to look at their processes and procedures in the same way. By becoming as efficient as possible, firms can keep their profit margins stable.

The first step for firms aiming to reach an optimum operating model is to gain an in-depth understanding of their current processes and how these proposals will affect them. Mapping 'as-is' processes is a powerful activity that can unearth hidden truths and inefficiencies about existing procedures and pinpoint areas where 'quick wins' as well as longer-term solutions can be had.

From a technology perspective, firms should ensure that they are getting the most out of their case and document management systems. Just as the government's Claims Portal aims to simplify claims, case management systems should be simplifying case management. By integrating technology and processes, firms will reduce manual overhead and enable its fee-earners to get more out of their working day.

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Appendices

Appendix 1: LASPO legislation impact

The LASPO proposals introduced the following:

- Banning of the recoverability of success fees from the losing party, i.e. successful claimants can no longer claim success fees from the losing party, effectively putting an end to 'no win no fee' services. Successful claimants without Legal Expenses Insurance may be expected to pay a success fee to their legal representative from any damages recovered.
- Introduction of Damages Based Agreements (DBAs), where fees to legal representatives are now paid by the winning side from damages recovered. DBA's are not currently widely used with claimant firms preferring to rely on Conditional Fee Agreements. If the reforms are implemented as expected, it is anticipated that the use of DBA's will become more widespread.
- Ban on referral fees, so law firms and claims management companies can no longer pay fees to insurance companies and others for referred cases or potential clients.
- Cuts to the scope of, and eligibility for, legal aid for personal injury cases. Legal aid has also been withdrawn from most clinical negligence cases.
- After-the-Event Insurance (ATE) premiums; if insurance is taken out after 1st April 2013, the premium can no longer be recovered from the losing side by the winning side, instead the claimant will be responsible for the cost of the premium in successful cases.
- On 31st July 2013, a further change occurred when the scope of low-value personal injury cases that could be processed via the Claims Portal was expanded both horizontally and vertically. All Road Traffic Accident, Employers Liability accident and Public Liability accident cases with a value of £25,000 and below are now processed via the Claims Portal.

Appendix 2: Cases with compensation payments registered with the Compensation Recovery Unit between 2009 and 2014

Year	Cases	% change
2009-10	861,325	+6.0
2010-11	987,381	+14.6
2011-12	1,041,150	+5.4
2012-13	1,048,309	+0.7
2013-14	1,016,801	-3.0

Source: Compensation Recovery Unit (Department for Work & Pensions)

Appendix 3: Claims registered with the Compensation Recovery Unit: breakdown by personal injury type

	Clin neg	Employer	Motor	Other	Public	Not known	Total
2009-10	10,308	78,744	674,997	2,806	91,025	3,445	861,325
2010-11	13,022	81,470	790,999	3,855	94,872	3,163	987,381
2011-12	13,517	87,350	828,489	4,435	104,863	2,496	1,041,150
2012-13	16,006	91,115	818,334	17,695	102,984	2,175	1,048,309
2013-14	18,499	105,291	772,834	14,467	103,578	2,132	1,016,801
<i>% of cases in 2013-14</i>	1.82%	10.36%	76.01%	1.42%	10.19%	0.21%	

Source: Compensation Recovery Unit (Department for Work & Pensions)