

Dispelling fears of a crisis for liability insurance

Tom Jones responds to claims by insurers that legal costs in liability claims are creating a crisis in for the insurance industry: and society

The personal injury insurance industry declares itself in crisis and claims that lawyers are to blame. The industry is pushing for legal reforms, including an increase in the small claims limit for personal injury claims. This article argues that any 'crisis' is of the insurance industry's own making and rather than continue to push for legal reforms, which would be detrimental to genuine claimants, insurance companies should stop deliberately delaying claims and focus on fighting irresponsible and extravagant claims.

Thompsons Solicitors only works for claimants in an adversarial personal injury legal system. It is claimant against defendant and, as we see it, the innocent injured against a powerful insurance industry. We want to get the maximum for our client: when we win, we get paid. We also understand that the insurer does not want to pay out if they can avoid it.

A crisis?

Employment Liability Compulsory Insurance (ELCI) and motor claims are the only sectors of the insurance market where insurers have someone who they can blame for the cost of settling cases. The bogeymen in ELCI and motor insurance claims are the claimants and their lawyers.

Insurers are claiming that legal costs in both motor and employers' liability insurance are creating a 'crisis' for their industry. It is a 'crisis' that they say goes to the heart of what we are and want to be as a society.

There is no crisis. They are wrong to present their predicament as the result of increased compensation claims. And they are wrong to assert that only fundamental reform of the civil justice system will resolve this so-called crisis.

The insurers are right that in some cases the current civil justice system costs too much and takes too long. The real issue is why? We suggest that the answer lies pretty firmly at the insurance industry's door. Of course we would say that, but we believe the analysis below backs this up.

A have a go culture?

A frequent complaint is that we live in a 'have a go' culture, but insurers and Government figures show claim numbers are dropping. If insurers don't like a claim, or think it is a try-on, then they should fight it. Rather than dwell on 'crazy' examples, as claimed by Zurich Municipality,¹ they should fight poor cases, because they will win. That way the foolish or poor quality lawyers who bring them will give up.

Access to justice

Access to justice was the key principle of the 1999 Woolf reforms. And indeed there has been plenty of access, although we wouldn't applaud the examples of Claims Direct or The Accident Group who ripped off their clients. 'No win no fee' has increased the gateways to legal claims and the insurers have been pushing their legal expenses (LEI) and Before the Event (BTE) insurance as never before. They sell the personal injury cases it brings in onto a panel of law firms.

In order to open up the market, The Access to Justice Act 1999, introduced recoverable insurance premiums in personal injury cases and success fees for lawyers, additional costs the insurers still resent having to pay.

The rules were adjusted to speed up cases with the introduction of, for example, the pre action protocol and Part 36 offers. But the insurance industry has consistently kicked against these changes and failed to follow the rules.

Today claimants have lots of access, but in our experience it is too often of mediocre quality and bogged down by insurance industry delays. Rather than openly examine issues of quality and delay we have seen everyone else but the insurers get blamed. Particularly those easy targets, greedy lawyers.

Compensation culture?

It was, we were told, 'the compensation culture' that was behind soaring liability insurance premiums. But the Better Regulation Task Force pointed out that the Compensation Recovery Unit's statistics showed that the number of accident claims registered fell by nearly 60,000 in 2003-04.²

The real reasons behind rising liability insurance premiums are the madness of the market and the feeble regulation of the UK insurance industry that has allowed years of suicidal pricing as insurers sold employer liability policies at less than the actual cost.

Thompsons and The St Paul insurance company submitted a joint response to the Department of Work and Pensions' review of ELCI claims.³

Table 1. European Comparison, EL as a percentage of payroll, 1999

Country	Contribution rates 1999 (percentage of payroll)
Austria	1.40
Finland	1.40
France	2.25
Germany	1.33
Italy	3.00
Spain	2.00
Sweden	1.35
United Kingdom	0.20

Source: Greenstreet Berman – HSE report 'Changing Business Behaviour'

Together we agreed that the 'crisis' had arisen from historical 'bundling' of liability insurance, poor prediction of future trends and an over-reliance on investment income.

In asbestos claims insurers failed to make proper provision through the 1970's and beyond, even though the risks and predicted death rates were well known.

Assumptions about investment income (blown apart by the 1987 stock market collapse) resulted in insurance premiums being rated significantly below cost. Indeed a comparison of affordability for the Health and Safety Executive shows that in 1999 employer liability insurance represented a lower proportion of the wage roll in the UK than in any other European workers' compensation scheme (see Table 1).

In 2001 there were two high profile casualties of the chase to the bottom – Chester Street and Independent Insurance. The latter had been writing business at unsustainably low rates, undercutting the opposition in its drive to get new business. Despite the dangers inherent in this strategy, everyone descended to the Independent's level.

Self-serving delay

Incentive for insurers to delay and deny is built into the system. Claimants have up to three years to submit their personal injury claim and almost all take a minimum of six to twelve months to settle, and during that time the premium invested goes on earning interest.

The St Paul added a line to our 2003 document, which was breathtakingly honest: any time saved between claim and settlement results in less time for the insurer to 'bank' their premium profit.

How else (other than perhaps inefficiency) do you explain delays in an ongoing case we have for a widow whose late husband worked at a factory where asbestos corrugated sheeting was produced?

Yet the insurer, Norwich Union, has refused point blank to deal with us unless we disclose evidence of asbestos exposure – in a factory

making asbestos sheeting! We have been forced to trace former employees and interview them about asbestos levels. The insurer's records would have shown that there had been another claim against their insured. We therefore think this claim should have concluded in weeks rather than the months or even years it could now take to settle.

We may have to run up disproportionate costs as a result. But we didn't choose this route and the widow, unsurprisingly, doesn't want it.

Costs can be challenged

It is irrefutable that increased costs under the present system have a direct relation to attempts by employers and insurers to resist claims. There is a simple answer to excessive costs – challenge them.

If delay is down to the claimant's lawyer the costs claimed can be assessed by a court and will be reduced if they are not 'reasonable', 'necessary' and 'proportionate'.

Improving the current system

Thompsons doesn't think there is anything fundamentally wrong with the system. However, we certainly don't oppose making improvements, especially if they better incentivise compliance with the rules and earlier admission of liability.

Professional qualifications

Perhaps part of the problem lies with inexperienced and poorly trained claims handlers who are reluctant to make a decision.

The Chartered Insurance Institute recently admitted that of the 300,000 people working in the insurance industry just, 90,000 have relevant formal qualifications.⁴

A misjudged attempt by the industry to keep its wage and training bills down too often results in a cycle of increased costs for both parties, with the claim either going on far longer than necessary or with lawyers instructed to defend the indefensible.

Take out the lawyers?

The key principle of Lord Woolf's 1999 reforms was that compensation claims could be made, irrespective of the injured person's financial circumstances and ability to pay, or of the claimant's ability to understand legal processes, or of the complexity of the case.

Yet the Association of British Insurers (ABI) has been pushing very hard for the small claims limit in personal injury to be increased from £1,000 to £5,000. Below this limit there is no cost recovery whether you win or lose, so this would automatically leave the majority of personal injury claimants choosing between no legal representation, or a slice of their compensation going to their lawyers. Research Thompsons commissioned jointly with the trade union UNISON⁵ showed that 63 per cent of respondents would either not have proceeded with their case or would not have felt confident about going before a judge without legal representation.

The ABI has recently tried to go even further in its campaign. Relying on research from Frontier Economics⁶, which claimed to show that unrepresented claimants in employer liability and motor claims received more compensation than those with legal representation, they assert that claims worth under £25,000 need not involve lawyers.

But incredibly for a much-trailed report relied on extensively by the ABI, the results are unreliable and meaningless. Analysis of the research⁷ reveals no like-for-like comparison of claims, that important variables influencing outcomes were ignored, and that no account was taken of case type, severity of injury or damage done. Other research by the Association of Personal Injury Lawyers in fact shows the benefits of legal representation.⁸

We suggest real reform is to remove those who don't know what they are doing on both sides, of personal injury litigation. Not every lawyer is a personal injury expert and they shouldn't be allowed to claim that they are.

Real quality

With the Compensation Act, the Government has sought to regulate claims management firms. These are the bucket shop boys of the personal injury industry, who have encouraged unmeritorious claims, in order to sign up claimants to high interest loans and insurance products. This has stoked the myth of the compensation culture on which the insurance industry and media have relied on to thrive.

But in just regulating claims firms, the Government is missing an important opportunity to reform the civil justice system in ways that few could disagree with.

The Government shouldn't just be forcing claims firms (and we hope liability insurers too) to comply

with regulations that will prevent injured people being given poor advice about their claims and ultimately ripped off. It should be insisting on, and finding a way to regulate for quality.

Access to justice is all very well, but it should be access to high quality justice. Reform should be for the sake of improving quality, not just to make claims faster and cheaper.

The average consumer doesn't know the value of their claim and has had little to do with lawyers before. And yet the system requires them to choose between a law firm (with no quality standards to measure them against) or have their case sold by an insurer onto a panel law firm, which they know nothing about and which may be focussed on settling quickly to recoup their costs.

The Government should require law firms and claims firms and insurance companies who sell LEI or bolt BTE onto their policies to keep records and report annually on turn down rates, average damages recovered by type of case, and turn around rate according to outcome. And complaints should be shown as a percentage of the total case load. The Compensation Act and Legal Services Bill are perfect vehicles to do this.

Reward good employers

Insurers too should be obliged to reward employers with good health and safety records by offering them lower premiums. The direct link between health and safety and the number of claims has always been denied by the insurance industry, but AXA recently put its head above the parapet with a survey which showed that as many as one in ten people are injured at work, and warned employers of the financial consequences of poor health and safety procedures.⁹ For example, the print industry has started to operate a system that rewards good health and safety behaviour with lower premiums.¹⁰

But they can go further: insurers can penalise employers with high industrial injury rates by charging them a proportion of the compensation paid by the insurer to their injured staff.

And finally

Whatever we may hear about the hardships facing insurance companies, the rise in profits has been relentless. Norwich Union/AVIVA, who despite their claim about the need to increase premiums, to downsize and to move jobs abroad, had first half-year profits in 2006 of £1.7bn¹¹, up by 27 per cent.

We have no problem with that; they have shareholders to answer to. But we cannot accept the insurance industry's argument that their attempt to increase those profits still further is not self interested, or is a commitment to the interests of society let alone that it is in the interest of the claimant.

REFERENCES

- [1] *Honest Guv! That's how it happened...Zurich Municiple Exposes Spurious Claims*. Zurich Municiple. December 2005. Press Release available at: http://www.zurich.co.uk/Municipal/Newsroom/Current+Press+Releases/Schools/Spurious_Claims.htm (accessed 06/10/06).
- [2] *Better Routes to Redress*. Better Regulation Task Force. May 2004. p11. Report available at: <http://www.brc.gov.uk/downloads/pdf/betterroutes.pdf> (accessed 06/10/06).
- [3] Thompsons and The St Paul response to the Department for Work and Pensions review of Employers Liability Compulsory Insurance. February 2003. For further details see: <http://www.thompsons.law.co.uk/ntext/rel.php?id=117> (accessed 11/10/06).
- [4] Observer 17 September 2006 Insurance Special Report.
- [5] *Small Claims, Big Deal. A report into trade union legal services*. Unison. March 2005. Available at: <http://www.thompsons.law.co.uk/ltext/dload/smlclbide.pdf> (accessed 06/10/06).
- [6] Frontier Economics: Outcomes for legally represented and unrepresented claimants in personal injury compensation: a report to the ABI. July 2006. A summary of the report is available at: http://www.abi.org.uk/Display/File/Child/578/RPT-In-impact_of_legal_representation-stc2-070706.pdf (accessed 06/10/06)
- [7] Analysis by Brian Critchley, a lecturer in the Business School an Faculty of Law, Governance and International Relations at London Metropolitan University. His analysis can be read at: <http://www.thompsons.law.co.uk/ltext/critique-thompsons-solicitors-frontier-economics.htm> (accessed 06/10/06).
- [8] Research among the Association of Personal Injury Lawyers (APIL) in January and February 2005 showed that insurers' first offers in cases valued at up to £5,000 were on average 50 per cent lower than the final settlement, suggesting that if claimants were to accept the first offer, without legal advice, they would be under compensated. MORI poll evidence for APIL suggested that 73 per cent of respondents would be unable to work out the value of their claim without legal help.
- [9] One in ten employees injured at work. Survey for AXA Insurance. 30 August 2006. Available at: http://www.axa4business.co.uk/files/document/92192_3_319760797997_Formatted_Accidents.pdf (accessed 06/10/06).
- [10] British Printing Industries Federation health and safety management scheme launched 2002. www.britishprint.com (accessed 06/10/06).
- [11] 'Norwich Union Cuts 4,000 UK jobs'. BBC Online. Available at: <http://news.bbc.co.uk/1/hi/business/5344450.stm>