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“The Whiplash Capital of the World”: Genealogy of a Compensation Myth

Ken Oliphant

One of the most persistent refrains in the current debate about the so-called compensation culture¹ is that the UK has become ‘the whiplash capital of Europe’ – or even, on some accounts, ‘the world’. This article explores the origins of the claim and subjects it to critical analysis and provides some wider reflections on the rhetoric employed. But it begins by placing the claim in the context of the wider debate and the UK’s ongoing civil justice reforms.

I. Context: the Road to Whiplash Reform

A. Whiplash becomes an issue

In retrospect, it is remarkable how recent a phenomenon the problematisation of whiplash has been, notwithstanding the recognition of its prevalence for quite some time. In 2002, when the Association of British Insurers (ABI) responded to an Insurance Europe questionnaire on ‘minor cervical trauma claims’,² it reported that these made up 76% of all motor bodily injury claims in the UK,³ but the focus of the measures it described as having been taken by insurers was on injury avoidance (more efficient head-rest systems) and the prevention of long-term complications,⁴ rather than on problems associated with routine, low-value claims, which have been the main focus of the current debate. In 2003 and 2004, the market intelligence firm Datamonitor reported that whiplash was the most common type of motor personal injury claim, with between 80 and 90 per cent of all motor personal injury claims being for whiplash-related injuries, mostly for relatively low amounts of compensation.⁵ But this information was presented purely descriptively, without any indication that

¹ See generally Kevin Williams, ‘State of Fear: Britain’s “compensation culture” reviewed’ (2005) 25 LS 499; Richard Lewis, Annette Morris and Ken Oliphant, ‘Tort Personal Injury Claims Statistics: Is There a Compensation Culture in the United Kingdom?’ (2006) 14 *Torts Law Journal* 158; Annette Morris, ‘Spiralling or Stabilising? The “Compensation Culture” and our Propensity to Claim Damages for Personal Injury’ (2007) 70 MLR 349; Richard Lewis and Annette Morris, ‘Tort Law Culture in the United Kingdom: Image and Reality in Personal Injury Compensation’ (2012) 3 *Journal of European Tort Law* 230; Richard Lewis and Annette Morris, ‘Tort law culture: image and reality’ (2012) 39 *Journal of Law and Society* 562; Annette Morris, ‘The Compensation Culture and the Politics of Tort’, in: TT Arvind and Jenny Steele (eds), *Tort and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (2013); Richard Lewis, ‘Compensation culture reviewed: incentives to claim and damages levels’ [2014] JPIL 209.

² The results were published as Comité Européen des Assurances (CEA), ‘Minor Cervical Trauma Claims: Comparative Study’ (2004) [hereafter *CEA Study*]. The document no longer appears to be available on the CEA website but is available online at www.svv.ch/sites/default/files/document/file/CEA_HWS-Studie_englisch.pdf. Insurance Europe is the current English name for the organisation then known as the Comité Européen des Assurances.

³ *CEA Study*, p 6.

⁴ *CEA Study*, p 23.

⁵ Datamonitor, *UK Personal Injury Litigation 2003 - Where Does the Industry Go From Here?* London, 2003, p 45; id, *UK Personal Injury Litigation 2004: Trial and Error*, November 2004, p 38.

whiplash as such was a problem. More strikingly still, in 2005, when the ABI presented a set of proposals for reforms to improve the compensation system, there was no mention whiplash at all.⁶ And even Lord Justice Jackson's *Final Report* into the costs of civil litigation, published in December 2009, contains just a single reference to whiplash and that only in evidence presented to the judge⁷ and not in his own analysis of issues of concern.

It was only around this time that insurers came to problematise whiplash claims as a category. In 2008, the ABI published a dedicated report on the issues raised: 'Tackling Whiplash: Prevention, Care, Compensation'.⁸ The report highlighted that the number of whiplash claims was rising even though the Government's road casualty statistics suggested that British roads were getting safer.⁹ This was followed up by further news releases by the ABI,¹⁰ reinforced by media interventions by its officers. Under the headline, 'The UK's pain in the neck culture must end', James Dalton, the ABI's then Head of Motor and Liability, was quoted as saying: 'If whiplash was an Olympic sport, the UK would be gold medallists.'¹¹ In a BBC interview, the ABI's Rob Cummings referred to 'a whiplash epidemic' gripping the UK.¹²

The ABI's membership took up the same refrain – most notably in a significant 'Whiplash Report' published by AXA Insurance in July 2013,¹³ which explicitly sought to identify 'lessons from overseas' with a view to reforming UK law on the basis of best practice from elsewhere in Europe.¹⁴ In a report by Aviva the following year, whiplash – and specifically claims for minor, short-term whiplash injury – was identified as the main reason why the UK's system for dealing with motor bodily injury claims needed reform.¹⁵ The Aviva report summarised the outcomes of research the insurer had commissioned which again highlighted the prevalence of whiplash and soft tissue injury claims as the main driver of increases in the number of road traffic accident (RTA) personal injury pay-outs.¹⁶

⁶ ABI, *Care and Compensation: Delivering a Fair and Efficient Compensation System* (December 2005).

⁷ The Rt. Hon. Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report, 2009* [hereinafter *Jackson Report*], ch 21 para 3.12.

⁸ ABI, 'Tackling Whiplash: Prevention, Care, Compensation' (November 2008) [hereinafter *Tackling Whiplash*].

⁹ *Tackling Whiplash*, p 1.

¹⁰ ABI news release, 19.05.2011 ('Britain's pain in the neck culture must be reduced says the ABI'), available at <https://www.abi.org.uk/News/News-releases/2011/05/Britains-pain-in-the-neck-culture-must-be-reduced-says-the-AB>

('the UK's pain in the neck culture... has made the UK the whiplash capital of Europe!'); ABI news release, 13.03.2013 ('Fair, independent, objective – ABI publishes proposals to curb the UK's whiplash epidemic'), available at <https://www.abi.org.uk/News/News-releases/2013/03/Fair-Independent-Objective--Abi-Publishes-Proposals-To-Curb-The-Uks-Whiplash-Epidemic>

('UK must lose its title of Whiplash Capital of Europe'); ABI news release, 22.04.2013 ('Brace yourself – UK is the biggest pain in the neck in Europe'), available at <https://www.abi.org.uk/News/News-releases/2013/04/Brace-Yourself--UK-Is-The-Biggest-Pain-In-The-Neck-In-Europe>.

¹¹ James Dalton, ABI's Head of Motor and Liability, quoted in ABI news release, 24.04.2012 ('The UK's pain in the neck culture must end says the ABI')

¹² Rob Cummings (ABI) interviewed for BBC television news: *Is the UK in a whiplash claim epidemic?* online at <http://www.bbc.co.uk/news/business-21769907> (13.03.2013).

¹³ AXA, 'The AXA Whiplash Report' (July 2013), available online at

<http://www.publications.parliament.uk/pa/cm201314/cmselect/cmtran/117/117vw56.htm>.

¹⁴ *Ibid*, 16 ff.

¹⁵ Aviva, 'Road to Reform: Tackling the UK's Compensation Culture' (July 2014) p 3 ('The main reason we need these changes is to reduce the impact of minor, short-term whiplash claims')

¹⁶ Frontier Economics, 'Motor insurance compensation systems with a focus on whiplash and soft tissue injuries: A report for Aviva' (March 2015).

B. Shaping the political debate

These interventions decisively shaped the political debate. In October 2010, the House of Commons Transport Committee launched an investigation into the cost of motor insurance in the light of reported rises in average premiums in the preceding year (estimated to be 29.9% by the Automobile Association, AA) at a time when the number of road accident casualties was decreasing.¹⁷ In its written evidence to the Committee,¹⁸ the ABI highlighted whiplash claims as a significant factor in the cost rises, claiming that 20% of motor premiums was paid out against such claims every year¹⁹ and urging the adoption of measures to address the problem by improving driver awareness of the risk and practical precautions such as adjusting car head restraints properly and keeping a safe distance.²⁰ This constituted only one of a set of seven proposals advanced with a view to the better controlling of motor insurance costs: others included the implementation of the recommendations of the *Jackson Report* on civil litigation costs, measures to reduce the incidence of uninsured driving, and facilitating greater data sharing between the insurance industry and the public sector in order to tackle fraud.²¹ It was only in oral evidence provided by ABI Director Nick Starling that the ABI suggested that the problems of whiplash and fraud were inter-related, Starling saying: 'Whiplash... is a soft tissue injury. There is no physiological evidence, as I understand it, that you've got that injury. I think people are put in temptation's way to a large extent and people are encouraging them to make these claims.'²² Others giving evidence to the Committee linked whiplash and fraud more explicitly, especially in connection with so-called 'cash for crash' scams.²³ The Committee itself noted these concerns without expressly endorsing them²⁴ but perhaps had them in mind when stating that the wider access to justice that was a welcome consequence of the introduction of conditional fee agreements (CFAs) 'should not provide an opportunity for people to make fraudulent claims for compensation for non-existent or pre-existing aches and pains.'²⁵

After the Committee's Report was published on 11 March 2011, a number of discrete threads of development became intertwined. In September 2011, the Government published its Response to the Report,²⁶ without a single reference to whiplash or soft-tissue injuries or problems created by claims for such injuries. Instead, the Government's main focus was on the implementation of the Jackson proposals to reform CFAs and other measures to reduce the cost of civil litigation

¹⁷ House of Commons Transport Committee, *The Cost of Motor Insurance*, 4th Report of 2010-12, HC 591, 11 March 2011 (2 volumes) [hereafter *Cost of Motor Insurance*], vol 1 paras 1 and 7. The Report noted (para 6) that there were 163,554 road accidents involving personal injury in 2009, the most recent year for which figures were available, which was 31% fewer than the average figure for the years from 1994 to 1998; this was part of a longer term trend, the number of casualties per 100 million vehicle kilometres having fallen by 75% since 1967.

¹⁸ *Cost of Motor Insurance*, vol 1, Ev 50 ff.

¹⁹ *Cost of Motor Insurance*, vol 1, Ev 52 para 3.14.

²⁰ *Cost of Motor Insurance*, vol 1, Ev 50 para 2.1.

²¹ *Cost of Motor Insurance*, vol 1, Ev 50 para 2.1.

²² *Cost of Motor Insurance*, vol 1, Ev 14 Q100.

²³ See eg *Cost of Motor Insurance*, vol 1 Ev 1 Q2 (oral evidence of AA President, Edmund King), vol 2, Ev w20 (written evidence of RBS Insurance).

²⁴ *Cost of Motor Insurance*, vol 1 paras 14 and 16.

²⁵ *Cost of Motor Insurance*, vol 1, para 22.

²⁶ House of Commons Transport Committee, *The cost of motor insurance: Government Response to the Committee's Fourth Report of Session 2010-12*, Fifth Special Report of Session 2010-12, HC 1466.

generally,²⁷ though it also endorsed the Committee's recommendations about the tackling of fraud through joint initiatives with the insurance sector.²⁸

C. Proposals for targeted whiplash reform

Parliament's attention was drawn back to whiplash claims by a ten minute rule Bill introduced by Jack Straw MP in September 2011.²⁹ Introducing the Bill, Straw described whiplash as 'not so much an injury, more a profitable invention of the human imagination—undiagnosable except by third-rate doctors in the pay of the claims management companies or personal injury lawyers.'³⁰ Clause 2 of the Bill, entitled 'Whiplash', accordingly sought to introduce two limitations on the ability to recover damages for whiplash injuries: first, a requirement for 'independent, objective evidence' of the injury, and not merely the claimant's 'subjective description of symptoms'; second, a rebuttable presumption that no whiplash injury has been suffered in the absence of musculoskeletal indications or if the relative speed of the collision giving rise to the accident was 15 miles per hour or less. In full, the clause read:

(1) This section applies to any personal injury claim for whiplash.

(2) The onus shall be on the claimant to satisfy the court that there is independent, objective evidence that the claimant has suffered harm, and of the extent of that harm.

(3) No damages shall be recoverable if the only evidence is the subjective description of symptoms by, or behalf of, the claimant.

(4) There shall be a rebuttable presumption that no harm or injury to the claimant has been suffered where either or both of the following conditions applies—

(a) the collision giving rise to the accident took place at a relative speed of 15 miles per hour or less;

(b) there are no musculoskeletal signs of any injury, including fracture and dislocation.

(5) In this section "whiplash" means a neck injury caused by a sudden movement of the head forwards, backwards or sideways.

Other proposals in the Bill to clean up the 'extensive and grubby industry'³¹ that had grown up around whiplash claims were the abolition of referral fees and the cutting in half (from £1200 to £600) of the fixed fee that lawyers were entitled to recover as costs for their work on low-value road traffic claims.

The Bill did not receive a second reading and failed to complete its passage through Parliament before the end of the session, consequently making no further progress.³² However, even before Straw had formally introduced the Bill, the Government had indicated its support for his proposal to

²⁷ Ibid, pp 3-4. One possible measure was the banning of referral fees which were seen to increase costs undesirably.

²⁸ Ibid, pp 4-5.

²⁹ Motor Insurance Regulation Bill 2010-12, Bill 229. Ten Minute Rule Bills are a mechanism whereby a backbench MP is able to introduce a Private Members' Bill to the House of Commons and to make a case for it in a speech lasting up to ten minutes: <http://www.parliament.uk/site-information/glossary/ten-minute-rule-bill/>.

³⁰ HC Deb, 13 Sep 2011, col 897.

³¹ HC Deb, 13 Sep 2011, col 897.

³² <http://services.parliament.uk/bills/2010-12/motorinsuranceregulation.html>.

abolish referral fees,³³ as previously recommended in the Jackson Report.³⁴ A set of provisions on referral fees was accordingly introduced to the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Bill that was brought to the House of Lords from the Commons in November 2011.³⁵ It fell to the House of Commons Transport Committee to pick up Straw's proposals relating specifically to whiplash. In a follow-up to its report on *The Cost of Motor Insurance*,³⁶ it indicated its support for an 'objective evidence' requirement should the Jackson reforms prove ineffective in reducing the number of whiplash claims:³⁷

in relation to whiplash, we are not convinced that a diagnosis unsupported by any further evidence of injury or personal inconvenience arising from the injury should be sufficient for a claim to be settled. In our view, the bar to receiving compensation in whiplash cases should be raised... We note the Government's argument that its legal reforms should reduce the money in the system and encourage insurers to defend claims more vigorously. If the number of whiplash claims does not fall significantly once these changes are implemented there would in our view be a strong case to consider primary legislation to require objective evidence of a whiplash injury, or of the injury having a significant effect on the claimant's life, before compensation was paid.

Though the LASPO Act did not receive Royal Assent until 1 May 2012, and though its reforms to the CFA regime and referral fees did not come into effect until 1 April 2013,³⁸ the Government continued to press on with measures to address the problem of whiplash claims without waiting to evaluate the impact of the LASPO reforms. After a summit with insurance industry, consumer and business groups in February 2012, Prime Minister David Cameron made a personal commitment that the Government would take action to 'tackle the compensation culture' and reduce legal costs.³⁹ One of the measures agreed was for the Government and insurance industry 'to work together to identify effective ways to reduce the number and cost of whiplash claims'.⁴⁰ This commitment was reiterated in April of the same year in the Government's response to the House of Commons Transport Committee's second, follow-up report on the cost of motor insurance.⁴¹ The outcome, in December

³³ HC Deb, 13 Sep 2011, col 896.

³⁴ *Jackson Report*, para 5.1.

³⁵ Legal Aid, Sentencing and Punishment of Offenders Bill 2010-12, HL Bill 109, brought from the Commons on 3rd November 2011, cl 54-58, available at <http://services.parliament.uk/bills/2010-12/legalaidsentencingandpunishmentoffenders/documents.html>. The provisions had not been included in the Bill that was given its first reading in the Commons on 21 June 2011.

³⁶ House of Commons Transport Committee, *Cost of Motor Insurance: follow up*, 12th Report of 2010-12, HC 1451, 12 January 2012.

³⁷ *Ibid*, para 8.

³⁸ Legal Aid, Sentencing and Punishment of Offenders Act 2012, ss 44 and 46 (CFAs), ss 56-60 (referral fees); Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No. 5 and Saving Provision) Order 2013/77, art 3 (CFAs); Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No. 6) Order 2013/453, art 3 (referral fees).

³⁹ Prime Minister's Office, news story, 14.02.2012 ('Statement on outcomes following Downing Street Insurance Summit').

⁴⁰ *Ibid*.

⁴¹ House of Commons Transport Committee, *The cost of motor insurance: follow-up: Government Response to the Committee's Twelfth Report of Session 2010-12*, Thirteenth Special Report of Session 2010-12, HC 1934, p 2.

2012, was a Ministry of Justice consultation paper specifically focused on reducing the number and costs of whiplash claims.⁴²

The consultation paper highlighted the Government's concern that the growth in whiplash claims arising from road traffic accidents could be linked to an increase in fraudulent and/or exaggerated claims⁴³ and identified four key areas in which the Government wished to make progress: improving diagnosis, the development of standards for diagnosis, challenging questionable claims and tackling the perception that exaggerated claims are acceptable.⁴⁴ The difficulty in diagnosing soft-tissue injuries, the consultation paper suggested, might be addressed by the delivery of better Government guidance and, in particular, by the creation of a register of independent medical practitioners subject to assured standards of training and audit.⁴⁵ Greater scope for challenging questionable claims might be allowed if the limit for small personal injury claims were raised from £1000 to £5000 for whiplash claims or road traffic accident claims generally, bearing in mind the strict limitations on recoverable costs in such proceedings: this would take away an economic incentive for insurers to pay out on questionable claims rather than see them tested in court.⁴⁶ The consultation paper also noted insurance industry efforts to combat fraud, including the creation of a cross-industry fraud database to enable insurers to share data about fraudulent claims; describing this as a positive step, the Government encouraged that the data be shared with all those who could help deter potential fraudsters from making claims,⁴⁷ and not just within the insurance sector.

The Ministry of Justice's proposals met with a mixed reaction from the House of Commons Transport Committee in July 2013, in its third report on the cost of motor insurance, on this occasion with a specific focus on whiplash.⁴⁸ The Committee expressed its broad support for the proposals to improve medical reports,⁴⁹ but opposed the suggested increase in the financial limit for small claims, fearing that this might impair access to justice, inadvertently fuel a boom for claims management companies in cases solicitors were unwilling to take on and, insofar as expert evidence is not generally submitted in small claims, be counterproductive in countering fraudulent and exaggerated claims.⁵⁰ But the Committee urged the Government to consider an issue not addressed in the consultation, namely, reducing the normal three-year limitation period for personal injury claims in whiplash cases, bearing in mind that the symptoms of a whiplash injury generally emerge within seven days and do not usually last for more than one year.⁵¹

D. The Government's programme of whiplash reforms

⁴² Ministry of Justice, *Reducing the number and costs of whiplash claims: A consultation on arrangements concerning whiplash injuries in England and Wales*, Consultation Paper CP17/2012, Cm 8425, December 2012 [hereinafter *Whiplash consultation*].

⁴³ *Whiplash consultation*, para 22.

⁴⁴ *Ibid*, para 24.

⁴⁵ *Ibid*, para 24 and Part Two.

⁴⁶ *Ibid*, Part Three (especially para 58).

⁴⁷ *Ibid*, para 86. Presumably the 'all' was meant to include claimant lawyers, though they were not mentioned expressly.

⁴⁸ House of Commons Transport Committee, *Cost of Motor Insurance: whiplash*, 4th Report of Session 2013-14, HC 117, 31 July 2013 (2 volumes) [hereinafter *Cost of Motor Insurance: whiplash*].

⁴⁹ *Ibid*, Summary and para 37.

⁵⁰ *Ibid*, paras 50-52.

⁵¹ *Ibid*, para 40.

In October 2013, the Ministry of Justice announced the Government's plan to press ahead with the introduction of independent medical panels, backed up by an accreditation scheme, to establish a more robust system of medical reporting and scrutiny for whiplash claims.⁵² The Government also proposed to take further steps to tackle the problem of fraudulent and exaggerated claims by working with stakeholders to prevent claims from proceeding before a medical examination and report has been completed, thereby stopping insurers from making 'pre-medical offers to settle', and by encouraging the insurance industry to share its data on known fraudsters so as to facilitate 'know your client' checks by claimant solicitors.⁵³ However, although continuing to believe that increasing the small claims threshold would be beneficial in providing a low cost route for bringing a claim through the courts, the Government decided that it would be better to consider the combined impact of other reforms before embarking on any further change, bearing in mind the possible detriment to genuine accident victims and the risk that unscrupulous claims management companies might enter the market to offer advice that might not be in claimants' best interests.⁵⁴ The Government also rejected the House of Commons Transport Committee's suggestion to reduce the limitation period for road traffic accident claims, noting that this would create complexity in the law and might only serve to increase the number of cases in the short term while front-loading the expenses into a shorter period with cost implications for the courts and the parties.⁵⁵

Following a further exchange of views and information with the Transport Committee,⁵⁶ the Government proceeded with the implementation of its reforms relating to medical reports, establishing working groups to consider improvements to the medical examination and reporting process⁵⁷ and launching a further mini-consultation with stakeholders in May 2014 to consider proposals for a regime of fixed costs for medical examinations in whiplash claims.⁵⁸ The outcome was the announcement in August 2014 of a set of proposals to introduce special rules on soft-tissue injury claims into the Civil Procedure Rules ('CPR') and the Pre-Action Protocol for Low Value

⁵² Ministry of Justice, *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*, Cm 8738, October 2013 [hereinafter *Government response*], p 6 (ministerial foreword) and para 8 ff.

⁵³ *Ibid*, p 6 (ministerial foreword) and paras 24-28. The Government also 'invite[d]' the insurance industry to collect and publish robust data on case volumes, case injury types, initial claim values, and final case settlements, together with information on suspected exaggerated and fraudulent claims and on claims which were withdrawn: *ibid*, para 50. It remains to be seen whether this invitation will be taken up.

⁵⁴ *Ibid*, p 6 (ministerial foreword) and paras 38-45. The Government reiterated its position in October 2014 in its response to another Transport Committee report: House of Commons Transport Committee, *Driving premiums down: fraud and the cost of motor insurance: Government and Association of British Insurers Responses to the Committee's First Report of Session 2014-15*, 5th Special Report of Session 2014-15, HC716, 24 October 2014, para 11 f.

⁵⁵ *Government response*, para 18.

⁵⁶ House of Commons Transport Committee, *Cost of motor insurance: whiplash: Further Government Response to the Committee's Fourth Report of Session 2013-14*, 11th Special Report of Session 2013-14, HC 902, 12 December 2013.

⁵⁷ Letter from Chris Grayling MP to Louise Ellman MP regarding 'Proposals to reduce the number and cost of whiplash claims', 12 March 2014, available at <http://www.parliament.uk/business/committees/committees-a-z/commons-select/transport-committee/publications/?type=&session=1&sort=false&inquiry=1375>.

⁵⁸ Keogh's Client Alert, 'Whiplash Reform: Proposals on fixed costs for medical examinations/reports and related issues', 6 May 2014, available online at <https://www.keoghs.co.uk/Publications/Client-Alert--Whiplash-Reform-Proposals-on-fixed-costs-for-medical-examinationsreports>. Despite repeated requests, the Ministry of Justice did not supply the author with the actual consultation materials and other attempts to track them down proved unsuccessful.

Personal Injury Claims in Road Traffic Accidents ('the RTA Protocol'), effective for claims brought on or after 1 October 2014.⁵⁹ The key changes were the fixing of the cost of medical reports for soft-tissue injuries at £180,⁶⁰ a presumption that no claim for disbursements shall be allowed for such a report where the medical expert or an associated person has provided treatment to the claimant or proposes or recommends treatment that they then provide,⁶¹ a presumption in soft tissue injury claims that the court will give permission only for one expert medical report, which must be a fixed cost medical report,⁶² and changes to the regime of offers to settle under Part 36 of the CPR so as to discourage pre-medical offers.⁶³

A further follow-up consultation was conducted in September 2014, addressing the independence of medical experts and their accreditation.⁶⁴ The Government announced that a centrepiece of the new system for medical reports would be an internet hub known as 'MedCo', to be funded and built by the ABI, which would provide a list of relevant experts for every soft tissue injury claim, using filters to prevent there being any financial link between the expert and the person commissioning the report. The MedCo system ultimately went live on 6 April 2015,⁶⁵ and from then on experts providing a fixed cost medical report for a soft tissue injury claim have had to be registered with MedCo and from 1 February 2016 must be accredited by it.⁶⁶

The Government was also supporting cross industry efforts by the ABI, the Law Society and claimant solicitors representatives to negotiate a data sharing process in an effort to prevent fraudulent personal injury claims.⁶⁷ This led to the construction of a new internet platform known as askCUE PI, allowing approved organisations to check records held on a database of reported incidents of personal injury or industrial illness before they submit a personal injury claim.⁶⁸ From 1 June 2015, before submitting a claim notification form, the claimant's legal representative must undertake a search of askCUE PI and must provide in the form an access code enabling the defendant to retrieve the search results.⁶⁹

E. Additional measures

⁵⁹ Keogh's Client Alert, 'MoJ announcements on fixing costs of medical reports and limiting evidence for RTA soft tissue injury claims', 4 August 2014, available online at <http://www.keoghs.co.uk/Publications/Client-Alert--MoJ-announcements-on-fixing-costs-of-medical-reports-and-limiting-medical-evidence->.

⁶⁰ CPR rule 45.19(2A)(a).

⁶¹ CPR rule 45.19(2B).

⁶² CPR rule 35.4(3B).

⁶³ CPR rule 36.21(4). Broadly speaking, this provides for the deferral until the date the defendant receives the medical report of the normal 21 day period within which the claimant must decide whether to accept a Part 36 offer or run the risk of having to bear the defendant's cost from that date onwards if the judgment is no more advantageous than the offer.

⁶⁴ Keogh's Client Alert, 'Whiplash Consultation – Independence and Accreditation', 4 September 2014, available online at <https://www.keoghs.co.uk/Publications/Client-Alert-Whiplash-consultation--independence-and-accreditation>.

⁶⁵ <http://www.medco.org.uk/>

⁶⁶ RTA Protocol, para 1.1(A1) and 7.8A(1).

⁶⁷ Letter from Lord Faulks QC regarding 'Whiplash reform: cross-industry data sharing', 7 April 2014, available at <http://www.parliament.uk/business/committees/committees-a-z/commons-select/transport-committee/publications/?type=&session=1&sort=false&inquiry=1375>.

⁶⁸ www.askCUE.co.uk.

⁶⁹ RTA Protocol, para 6.3A. See further John Hyde, 'Insurers open data to claimant solicitors in fraud crackdown', LS Gaz (27 April 2015).

As noted, the programme of whiplash reforms described above overlapped with multiple other efforts to reduce the costs of civil litigation and to counter fraudulent and exaggerated claims. The introduction of a new system of medical reports and mandatory ‘know your client’ checks must therefore be seen in the context of a variety of other initiatives which were intended to deter unmeritorious claiming. The following may be noted as among the most important: the implementation of the Jackson recommendations relating to CFAs and referral fees,⁷⁰ with effect from 1 April 2013 (as detailed above); the introduction in 2010 of a new special procedure for the resolution of low-value road traffic accident claims where liability is not in dispute and no contributory negligence is alleged, based on fixed recoverable costs and the use of an online ‘claims portal’⁷¹ for communication between the parties;⁷² and a series of rule changes strengthening the regulatory regime applying to claims management companies (CMCs) under Part 2 of the Compensation Act 2006. These included banning CMCs from offering cash inducements for making a claim⁷³ and preventing CMCs from acting for claimants based on a phone call alone by requiring them to have a signed contract before they can take any fees.⁷⁴ CMCs were also exposed to the possibility of complaint to the Legal Ombudsman, who has the legal power to award compensation for poor service where appropriate.⁷⁵ In addition, separate statutory provision was made in 2013 for CMCs to be liable to fines by the Claims Management Regulator for breaches of applicable regulations,⁷⁶ and the new financial penalties scheme came into force in December 2014.⁷⁷ These changes accompanied a ‘clampdown’ on ‘rogue’ claims firms by the Ministry of Justice’s Claims

⁷⁰ Legal Aid, Sentencing and Punishment of Offenders Act 2012, ss 44 and 46 (CFAs), ss 56 -60 (referral fees). See further, in addition to the *Jackson Report* itself, Ministry of Justice, *Proposals for Reform of Civil Litigation Funding and Costs in England and Wales: Implementation of Lord Justice Jackson’s Recommendations*, Consultation Paper CP 13/10, October 2010, Cm 7947; *id*, *Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson’s Recommendations: The Government Response*, March 2011, Cm 8041.

⁷¹ <http://www.claimsportal.org.uk>.

⁷² Under the *RTA Protocol*. The procedure applies to claims valued at up to £25,000 (raised from £10,000 in July 2013).

⁷³ Ministry of Justice, *Claims Management Regulation: Annual Report 2012/2013* [hereinafter *CMR Annual Report 2012/2013*], ch 8 para 2; Ministry of Justice, *Claims Management Regulation: Annual Report 2013/2014* [hereinafter *CMR Annual Report 2013/2014*], ch 6 para 24.

⁷⁴ *CMR Annual Report 2012/2013*, ch 8 para 1; MOJ Press release, 8.07.2014, available online at <https://www.gov.uk/government/news/new-rules-to-protect-customers-from-rogue-claims-firms>. This followed a consultation on proposals for amendments to the Claims Management Regulation rules on the Conduct of Authorised Persons, available online at <https://consult.justice.gov.uk/digital-communications/cmr-rules-consultation-cp15-2012>. See further MOJ Press release, 8.04.2013, available at <https://www.gov.uk/government/news/new-rules-for-cmcs>.

⁷⁵ *CMR Annual Report 2012/2013*, ch 8 para 1; *CMR Annual Report 2014/2014*, ch 9 paras 8-10; *CMR Annual Report 2014/2015*, ch 9 paras 9-12 The Legal Ombudsman’s CMC complaints service was launched in January 2015 and accepted 648 complaints for investigation in its first six months: Legal Ombudsman, *Complaints in focus: Claims management companies*, November 2015, p 1.

⁷⁶ Financial Services (Banking Reform) Act 2013, s 139.

⁷⁷ Ministry of Justice, *Claims Management Regulation Financial Penalties Guidance*, December 2014; *CMR Annual Report 2014/2015*, ch 9 paras 5-8. In August 2015, claims management company The Hearing Clinic became the first CMC to be fined (£220,000) by the Claims Management Regulator following hundreds of complaints from members of the public who have received speculative calls about claims for Noise Induced Hearing Loss: Ministry of Justice, Press release, 5.08.2015, available online at <https://www.gov.uk/government/news/first-fine-issued-against-rogue-claims-management-company>. The decision is available online at <https://www.claimsregulation.gov.uk/details.aspx/31218>. Further information about the Regulator’s recent enforcement actions and investigations is available online at <https://www.claimsregulation.gov.uk/enforcement.aspx>.

Management Regulation Unit,⁷⁸ which revoked 514 licences in the three years from April 2012 and March 2015, contributing significantly to the fall in the number of CMCs in the personal injury sector from 1902 in 2013 to 979 in 2015.⁷⁹

These changes to the CMC regime had knock-on effects for other claimant representatives. In April 2015, the ban on offering cash inducements for making a claim was extended to all 'regulated persons', including solicitors and barristers.⁸⁰

A final set of developments that undoubtedly reflected concerns arising in relation to whiplash claims, though not limited to them, was directed at countering fraudulent claims. In April 2015, a statutory requirement was introduced that a court must dismiss any claim for damages in respect of personal injury in which it finds that, although the claim would otherwise have succeeded, the claimant was fundamentally dishonest, unless it is satisfied that the claimant would suffer substantial injustice if the claim were dismissed.⁸¹ The passage of the legislation overlapped with determined action by police and prosecutors in combination with insurance companies to bring the weight of the criminal law to bear on dishonest claimants and representatives, which has now resulted in some high-profile convictions for fraud in connection with personal injury claims.⁸² A further development in this context was the Government's creation in January 2015 of a new Insurance Fraud Taskforce, whose terms of reference stated its aim as to '[t]o investigate the causes of fraudulent behaviour and recommend solutions to reduce the level of insurance fraud in order to ultimately lower costs and protect the interests of honest consumers.'⁸³

⁷⁸ Ministry of Justice, Press release, 21.02.2014, available at <https://www.gov.uk/government/news/clampdown-on-rogue-claims-firms>.

⁷⁹ Ministry of Justice, *Claims Management Regulation: Annual Report 2014/2015* [hereinafter *CMR Annual Report 2014/2015*], ch 3 para 10 (table) and ch 4 para 5 (table).

⁸⁰ Criminal Justice and Courts Act 2015, ss 58-61, effective 13 April 2015 (Criminal Justice and Courts Act 2015 (Commencement No 1, Saving and Transitional Provisions) Order 2015/778, art 3 and Sch 1 paras 48-51). The relevant clauses were inserted in the Bill during the Committee stage of its progress through the House of Lords: see HL Deb 23.07.2014 col 1271 (Lord Faulks).

⁸¹ Criminal Justice and Courts Act 2015, s 57, effective 13 April 2015 (Criminal Justice and Courts Act 2015 (Commencement No 1, Saving and Transitional Provisions) Order 2015/778, art 3 and Sch 1 para 47). The relevant clause was inserted in the Bill at the end of its consideration by the House of Commons: see HC Deb 17.06.2014 col 1066 (Chris Grayling MP). The provision seems to have been inspired by s 26 of the Civil Liability and Courts Act 2004 (Ireland) but differs from it in requiring that the dishonesty be 'fundamental', while limiting the court's power to allow the claim despite the dishonesty to cases where dismissing it would cause *substantial* injustice.

⁸² Most notably, in March 2015 John Smith of Cheshire-based Swift Accident Solutions, a claims management company, was found guilty of fraud and conspiracy to defraud at Manchester Crown Court in respect of a serial bus crash scam; nine other defendants were also guilty of conspiracy to defraud, four more having pleaded guilty to the same offence. It was reported that the fraud involved a series of stage-managed crashes in which cars and vans were driven into the side of First Group buses so that passengers - who were mainly friends and relatives complicit in the scam - could falsely claim damages for soft-tissue injuries. In each case, the owner of the car or van admitted full liability, exposing the insurer to the claims. Smith made an illicit profit of £159,000 by referring 218 claims to law firms, receiving £960 each time. Most of the claims were settled out of court by the insurers without independent verification of the claimants' injuries. It was estimated that, had all the bogus claims been successful, the total cost would have been over £1 million. See Steph Cockcroft and Thomas Burrows, 'Moment Audi deliberately crashed into side of bus as part of £1million no win no fee scam which led to hundreds of fake whiplash claims', MailOnline, 1.04.2015. In April 2016, Smith, the ringleader, was sentenced to six-years' imprisonment: John Hyde, 'Insurers open data to claimant solicitors in fraud crackdown', LS Gaz, 27.04.2015.

⁸³ Available online at <https://www.gov.uk/government/groups/insurance-fraud-taskforce>.

II. The ‘whiplash capital’ claim

A persistent refrain in the problematisation of whiplash and the introduction of the reforms outlined above has been that the UK is the ‘whiplash capital’ of Europe or even the world. As the claim has been a key aspect of the rhetoric employed by those pushing for reform, it seems useful to trace its origins and to subject it to critical analysis. As noted above, the claim dates back at least as far as 2008, when the ABI published its report ‘Tackling Whiplash: Prevention, Care, Compensation’,⁸⁴ which claimed: ‘Whiplash claims form a much higher proportion of personal injury claims in the UK than elsewhere in the EU.’⁸⁵ It was left to the accompanying news release, entitled ‘ABI reveals whiplash epidemic’, to anoint the UK as Europe’s ‘whiplash capital’: ‘The UK is the whiplash capital of Europe,’ read the ABI statement, ‘75% of motor personal injury claims are for whiplash, compared to an average of 40% throughout the rest of Europe.’⁸⁶ This ‘whiplash capital’ claim was repeated in further news releases by the ABI,⁸⁷ endorsed by other players in the insurance sector,⁸⁸ and picked up by a number of media outlets.⁸⁹ A *Daily Mail* headline from April 2013 read: ‘Europe’s whiplash capital: Compensation culture makes British twice as likely to claim, adding £90 to premiums’.⁹⁰ The *Telegraph* looked to explain ‘Why Britain is the whiplash capital of Europe’.⁹¹ And the Times told us that ‘Being the “whiplash capital” of Europe costs us dear’.⁹² Government ministers were also quick to adopt the claim: writing in the *Mail on Sunday* in 2013, Transport Secretary Justine Greening regretted that ‘[s]adly, Britain is now the whiplash capital of Europe’ and vowed to end that state of

⁸⁴ *Tackling whiplash* (November 2008).

⁸⁵ *Ibid*, p 6.

⁸⁶ ABI news release, 8.11.2008 (‘ABI reveals whiplash epidemic’), available at <https://www.abi.org.uk/News/News-releases/2008/11/ABI-reveals-whiplash-epidemic>.

⁸⁷ ABI news release, 19.05.2011 (‘Britain’s pain in the neck culture must be reduced says the ABI’), available at [https://www.abi.org.uk/News/News-releases/2011/05/Britains-pain-in-the-neck-culture-must-be-reduced-says-the-ABI-\(the-UKs-pain-in-the-neck-culture...-has-made-the-UK-the-whiplash-capital-of-Europe\)";](https://www.abi.org.uk/News/News-releases/2011/05/Britains-pain-in-the-neck-culture-must-be-reduced-says-the-ABI-(the-UKs-pain-in-the-neck-culture...-has-made-the-UK-the-whiplash-capital-of-Europe)) ABI news release, 13.03.2013 (‘Fair, independent, objective – ABI publishes proposals to curb the UK’s whiplash epidemic’), available at <https://www.abi.org.uk/News/News-releases/2013/03/Fair-Independent-Objective--Abi-Publishes-Proposals-To-Curb-The-Uks-Whiplash-Epidemic> (‘UK must lose its title of Whiplash Capital of Europe’); ABI news release, 22.04.2013 (‘Brace yourself – UK is the biggest pain in the neck in Europe’), available at <https://www.abi.org.uk/News/News-releases/2013/04/Brace-Yourself--UK-Is-The-Biggest-Pain-In-The-Neck-In-Europe>; 31.07.2013 (‘ABI responds to Transport Select Committee, Cost of Motor Insurance: Whiplash report’), available at <https://www.abi.org.uk/News/News-releases/2013/07/ABI-responds-to-Transport-Select-Committee-Cost-of-Motor-Insurance-Whiplash-report> (‘Facts... The UK is the whiplash capital of Europe’).

⁸⁸ See eg British Insurance Brokers’ Association, news release, 23.10.2013 (‘British Insurance Brokers’ Association support Government whiplash move’), available at <http://biba.org.uk/MediaCenterContentDetails.aspx?ContentID=3466>.

⁸⁹ See eg, in addition to the items highlighted in the text, <http://www.express.co.uk/news/uk/298630/6mph-the-whiplash-limit>; <http://www.thesun.co.uk/sol/homepage/features/6365758/Whiplash-scams-costing-Brit-drivers-25billion-a-year.html>.

⁹⁰ Mail Online, 20.04.2013.

⁹¹ Dan Hyde, Comment: ‘Why Britain is the whiplash capital of Europe’, *Daily Telegraph*, online edn, 18.07.2013, available at <http://www.telegraph.co.uk/finance/personalfinance/insurance/10185382/Why-Britain-is-the-whiplash-capital-of-Europe.html>.

⁹² Adrian Brown, ‘Being the “whiplash capital” of Europe costs us dear’, *The Times*, 7.05.2012, available at <http://www.thetimes.co.uk/tto/business/columnists/article3406600> (paywall).

affairs.⁹³ In her foreword to the Ministry of Justice’s whiplash consultation, launched in December 2012, Helen Grant MP, the Parliamentary Under-Secretary of State for Justice, had gone even further, inflating the claim to be that the UK is ‘the whiplash capital of *the world*’.⁹⁴

In launching its own inquiry into the effect of whiplash claims on the cost of motor insurance in March 2013, the House of Transport Committee set out to probe this claim, asking specifically ‘[w]hether the Government is correct in describing Great Britain as the “whiplash capital of the world”’.⁹⁵ As might well have been expected, the answers it received in the evidence submitted to it varied significantly. The claim was endorsed by the ABI and others in the insurance sector,⁹⁶ but rejected by the Law Society and claimant representatives.⁹⁷ The Committee’s conclusion was that the claim ‘cannot be conclusively proved or disproved from the information available.’⁹⁸ It observed acidly that “[i]t is surprising that the Government has brought forward measures to reduce the number of fraudulent or exaggerated whiplash claims without giving even an estimate of the comparative scale of the problem.”⁹⁹

To assess the adequacy of the evidence base for ourselves, we need to go back to the original source of the ‘whiplash capital’ claim. As noted, it was in the news release accompanying the ABI’s report on whiplash in 2008 that the ‘whiplash capital’ terminology seems first to have been used. The evidence purporting to substantiate the contention that whiplash claims form a much higher proportion of personal injury claims in the UK than elsewhere in the EU was a study by Insurance Europe, the *Comité Européen des Assurances* (CEA), published in 2004 (CEA Study). The same research was also the basis for the ‘whiplash capital’ claim made in the Government’s *Whiplash consultation* of 2012. Having noted Compensation Recovery Unit (CRU) data that showed that whiplash injury claims formed 70% of total RTA personal injury claims, the consultation document stated: ‘An international comparison study carried out in 2004 showed that this figure is significantly higher in the UK than in other European jurisdictions, such as Spain, Germany or France.’¹⁰⁰ It thus seems worthwhile to see precisely what the *CEA Study* said and how its data was collected.

The CEA Study

The *CEA Study* was based on responses provided by national insurance associations to a common questionnaire circulated in July 2002. Ten country associations replied to the questionnaire. The focus was ‘minor cervical trauma’, defined as ‘a lesion of the cervical spine, caused by acceleration-

⁹³ Justine Greening, ‘Britain is the whiplash capital of Europe - and I’m going to stop it’, Mail on Sunday, 4.02.2013, available at <http://www.dailymail.co.uk/news/article-2096597/Justine-Greening-Britain-whiplash-capital-Europe--Im-going-stop-it.html>

⁹⁴ *Whiplash consultation*, p 3 (emphasis added).

⁹⁵ *Cost of Motor Insurance: Whiplash*, vol 1, para 7.

⁹⁶ *Cost of Motor Insurance: Whiplash*, vol 1, Ev 7 Q53 (David Brown, Chair of the Third Party Working Group, Institute and Faculty of Actuaries, IFoA), Ev 47 para A1 (Thatcham Research) (‘Whiplash Capital of Europe’); Ev 53 para 6 (IFoA), Ev 58, para 2.1 (Lloyd’s Market Association), Ev 66 para 5 (ABI), Ev 78, para 3.2 (AXA Insurance). Thatcham Research is a motor vehicle research centre funding by UK motor insurers.

⁹⁷ *Cost of Motor Insurance: Whiplash*, vol 1, Ev 27 Q228 (Andrew Ritchie QC), Ev 27 Q231 and Ev 29 Q246 (Desmond Hudson, Chief Executive, Law Society), Ev 88 (Association of Personal Injury Lawyers, APIL), Ev 97 para 17 (Motor Accident Solicitors Society, MASS) (claim not based on reliable, current data).

⁹⁸ *Cost of Motor Insurance: Whiplash*, vol 1, p 3 (summary) and para 28.

⁹⁹ *Ibid*, para 28.

¹⁰⁰ *Whiplash consultation*, para 18.

deceleration mechanisms... without neurological complications and without affecting the osseous, nervous or ligamentary-disc structures...'¹⁰¹ Respondents were asked about, inter alia, the total number of motor liability claims, the number of bodily injuries, the number of claims linked to minor cervical trauma, the cost of bodily injuries claims, the cost of claims linked to cervical trauma, and the average cost per claim linked to cervical trauma.

In terms of claims numbers (Table 1), by far the most were made in Italy (4,700,000) and Germany (3,960,000) if bodily injury and material damage claims are combined; the UK's figure was 2,900,000. The UK overtakes Germany if one looks at bodily injury alone, with 493,000 recorded claims as compared with Germany's 424,000; however, Italy remained out in front, both in absolute and percentage terms (846,000 or 18% of the combined number of bodily injury and material damage claims). Italy also remained at the top of the list if one looks at the total number of cervical trauma claims (558,000) but this was a lower percentage of all bodily injury claims (66%) than in the UK (76%). It was that 76% figure ('twice the average'¹⁰²) that was seized on by those claiming the UK to be Europe's 'whiplash capital'.

Table 1: Number of claims: in total, for bodily injury and for cervical trauma (CEA, 2004)¹⁰³

Country	Number of claims (bodily + material)	Bodily injury	Cervical trauma (compared with BI)
Belgium	420,000	12% or 50,000	No data available
Switzerland	300,000	10% or 30,000	33% or 10,000
Germany	3,960,000	10.7% or 424,000	47% or 200,000
Spain	2,320,000	10.8% or 250,000	32% or 80,000
Finland	88,839	13% or 11,574	8.5% or 1,000
France	2,500,000	9% or 225,000	3% or 6,750
Italy	4,700,000	18% or 846,000	66% or 558,000
Netherlands	600,000	8% or 48,000	40% or 19,200
Norway	165,378	9.1% or 15,000	53% or 8,000
UK	2,900,000	17% or 493,000	76% or 375,000

A quick look at the CEA data on the cost of claims (Table 2) provides a further measure according to which the UK leaves the rest of Europe behind: the cost of cervical trauma claims as a percentage of total bodily injury claims costs. At 50%, the UK was ahead of a group of countries on 40%, comprising the Netherlands, Norway and Switzerland. But the total cost of cervical trauma claims in the UK (€ 1,080 million) was well below the total cost in Italy (€ 2,393 million), even though that accounted for only 32.6% of the total cost of Italian bodily injury claims. The superficial disparity is explained when

¹⁰¹ *CEA Study*, p 4. The definition does not refer specifically to whiplash injuries but these were acknowledged to be its focus: Guy Chappuis and Bruno Soltermann, 'Number and cost of claims linked to minor cervical trauma in Europe: results from the comparative study by CEA, AREDOC and CEREDOC' (2008) 17 *Eur Spine J* 1350, 1352.

¹⁰² *Tackling whiplash*, p 4.

¹⁰³ Reproducing the table in the *CEA Study*, p 6 (with very minor amendments for presentational purposes).

one looks at the average cost per claim linked to cervical trauma, which was € 4,288 in Italy but only € 2,878 in the UK. In fact, both these figures were well behind the average costs of cervical trauma claims in Switzerland (€ 35,000) and the Netherlands (€ 16,500).

Table 2: Cost of claims: bodily injury (total), cervical trauma (total/average) (CEA, 2004)¹⁰⁴

Country	Cost of bodily injury	Cervical trauma (compared with BI)	Cervical trauma: average cost/claim
Belgium	+/- € 1,400 million	no data available	no data
Switzerland	€ 860 million	40% or 350 million	€ 35,000
Germany	€ 5,346 million	9% or 500 million	€ 2,500
Spain	€ 2,199 million	No data	no data
Finland	€ 190 million	0.78% or 1.5 million	€ 1,500
France	€ 3,950 million	0.5% of 19.75 million	€ 2,625
Italy	€ 7,480 million	32.6% or 2,393 million	€ 4,288
Netherlands	€ 800 million	40% or 320 million	€ 16,500
Norway	€ 121 million	40% or 48 million	€ 6,050
UK	€ 2,159 million	50% or 1,080 million	€ 2,878

It will be clear from the summary provided here of the CEA data that the support it provides for the ‘whiplash capital’ claim is somewhat fragile. Two particular criticisms can be made: first, that the ‘whiplash capital’ claim relies very selectively on the CEA data, which might plausibly be interpreted as identifying a number of alternative ‘claims capitals’; second, that the research design and methodology are simply inadequate for the production of reliable data sufficient for the making of any claim of that nature.

Selective use of the CEA data

It is apparent that the ‘whiplash capital’ claim as applied to the UK is dependent on a selective use of the CEA data that leaves out details that do not fit the agenda being pursued. In fact, the same data provide equal support for a number of alternative ‘claims capital’ statements:

- **‘Italy and Germany are the motor claims capitals of Europe’**, with respectively 4.7 million and 3.96 million motor claims per year, well ahead of the UK with 2.9 millions claims per year.
- **‘Italy is the bodily injury claims capital of Europe’**: 18% of all claims (846,000) are for bodily injury and their overall value is € 7.48 billion euros, ahead of Germany (€ 5.346 billion), France (€ 3.95 billion) and Spain (€ 2.199 billion). The UK ranks only in mid-table with an

¹⁰⁴ Reproducing the table in the *CEA Study*, p 7 (with very minor amendments for presentational purposes).

overall cost for bodily injury claims of € 2.159 billion (paid out in 493,000 claims, comprising 17% of all motor claims).

- **‘Italy is also the *whiplash* capital of Europe’**, with 558,000 claims for minor cervical trauma (as compared with only 375,000 in the UK) at a total cost of € 2,393 (more than double the € 1,080 in the UK) .
- **Alternatively: ‘Switzerland is the *whiplash* capital of Europe’**: the average cost per claim linked to cervical trauma is € 35,000, massively higher than the € 2,878 average reported for the UK – which was also behind the Netherlands (€ 16,500), Norway (€ 6,050) and Italy (€ 4,288) and perhaps other countries, like Spain, for which no data were available.

Compounding this selectivity in the use of the CEA data has been the drawing of some very dubious inferences from it. In particular, the claim that the proportion of cervical trauma claims in the UK to bodily injury claims is ‘twice the [European] average’¹⁰⁵ seems simply to be based on the aggregation of the national data from nine countries and then the calculation of an average without any regard to population size or numbers of vehicles.¹⁰⁶

Flaws in the CEA research design and methodology

Additionally, the *CEA Study* barely hints at the considerations that were considered relevant in designing the research and the methodology employed in it. The use of a common questionnaire is mentioned in the Study’s Foreword¹⁰⁷ but nothing is said about the choice of countries for comparison. A plausible, even likely, inference is that the questionnaire was sent to all the national insurance associations that constitute the CEA’s membership¹⁰⁸ and the ten featured in the Study were simply those that responded. Though these include the EU’s five largest countries by population and size of economy (France, Germany, Italy, Spain and the UK), the data for one of these countries (Spain) are incomplete. No country in Central or Eastern Europe is included and, even if one assumes (plausibly) that claims markets in Western Europe are rather more developed, there are still quite a few countries in that region that are omitted (including Austria, Luxembourg and Portugal). For the purposes of comparison in respect of the key indicator of cervical trauma as a proportion of bodily injury it is immaterial that these countries are rather small in terms of population or economic power: the figure used for comparison purposes is a percentage, not the total number of claims.

Further, the Study is entirely silent on how the national insurance associations compiled the data they supplied. The disparities between some of the findings – notably between the 78% of bodily injury claims said to be linked to cervical trauma in the UK and the corresponding figure of just 3% in France (see Table 1 above) – is strongly suggestive that the questions posed, and/or the underlying

¹⁰⁵ *Tackling whiplash*, p 4.

¹⁰⁶ Figures for numbers of inhabitants and number of vehicles were stated in a table in the *CEA study* (p 5) that is not reproduced here.

¹⁰⁷ *CEA Study*, p 2.

¹⁰⁸ At the date of writing, the Insurance Europe website (<http://www.insuranceeurope.eu>) lists 34 member countries.

data, may have been interpreted in divergent ways.¹⁰⁹ For example, the definition of ‘minor cervical trauma’ as ‘a lesion of the cervical spine, caused by acceleration-deceleration mechanisms... without neurological complications and without affecting the osseous, nervous or ligamentary-disc structures...’¹¹⁰ seems to leave it open whether or not cases of neurological injury, bone fracture and nerve or ligament damage should be excluded from the data provided. (Was the qualification introduced by the word ‘without’ intended only to ensure that cases of minor trauma should be counted *as well*, even if they did not involve such sequelae?) The Study also gives us no idea of what other classifications of injury were used by the national associations, which leaves open the possibility that some national associations may have classified as, for example, back or neck injuries what in the UK was counted as cervical trauma. We also have no way of knowing what national associations did if they simply did not know the nature of the injury involved in a proportion of claims received: did they have a large category of ‘unknowns’ which might have included additional cervical trauma cases?

The ABI’s further research

In 2013, the ABI claimed to have conducted new research which substantiated its ‘whiplash capital’ claim, updating its 2008 news release to read: ‘The UK is the whiplash capital of Europe: 78% of low value motor personal injury claims are for whiplash, compared to an average of 48% throughout the rest of Europe.’¹¹¹ This further research by the ABI has not, to my knowledge, been published but data from it were submitted as written evidence to the House of Commons Transport Committee in connection with its inquiry *Cost of Motor Insurance: Whiplash*. This is what the ABI wrote: ‘The ABI has carried out further research with a number of insurance federations across the EU and the overall position has changed little since 2004. The UK (78%) still has [a] substantially higher than average percentage of whiplash claims as a proportion of personal injury claims, than our EU counterparts (48%).’¹¹² The following information was then appended in chart form:

Table 3: ABI’s revised data on whiplash claims (2013)¹¹³

Country	Cervical trauma (compared with BI)*
UK	78% (76%)
Italy	68% (66%)
Sweden	61% (--)
Netherlands	35% (40%)
Spain	31% (32%)

¹⁰⁹ That the French figure should rise to 30% when a second survey was attempted (see below) suggests this even more powerfully, as it seems very unlikely that there should be a ten-fold growth in such claims in just a few years.

¹¹⁰ *CEA Study*, p 4.

¹¹¹ ABI news release, 31.07.2013.

¹¹² *Cost of Motor Insurance: Whiplash*, vol 1, Ev 66 para 6.

¹¹³ *Cost of Motor Insurance: Whiplash*, vol 1, Ev 66 Chart 1 (reproduced in amended format, 2004 *CEA Study* figures added in brackets).

Denmark	30% (--)
France	30% (3%)

* 2004 CEA Study figures in brackets

Unfortunately, this research appears to share the methodological flaws of the CEA study of 2004 (including a failure to disclose the research methods adopted). It is based on a very narrow set of comparator countries (only seven, including the UK), which differ to some extent from the comparators used in the CEA Study, preventing straightforward comparison of the two data sets. A footnote in the ABI's written evidence notes that the information was collected from national insurance associations, but states that the German, Austrian and Hungarian insurance bodies were unable to supply data as they did not collect such information (any more) because whiplash 'is not seen to be a problem in their countries.'¹¹⁴ This really is quite remarkable when it is recalled that the 2004 study showed that Germany had a well above average percentage of cervical trauma claims (47%).

Nevertheless, it is still possible to compare the ABI's 2013 data with that in the CEA study for the five countries included in both, and this reveals that the proportion of RTA PI claims involving cervical trauma is reported to have risen not just in the UK (from 76% to 78%), but also in Italy (from 66% to 68%), and – most strikingly – in France, from the suspiciously low 3% reported in the 2004 study, to 30%. This large disparity regarding the French figures in the two studies lends weight to the contention that the studies are methodologically flawed and so may well have actually been counting different things. It also prompts the thought that a new 'whiplash capital' might be anointed: **'France is the new whiplash capital of Europe'**, with proportionally ten times as many whiplash claims in 2013 than in 2004, a rate of growth massively in excess of that in any other country for which data are available.

The 'world capital' claim

Not content with calling the UK the whiplash capital of Europe, Helen Grant (Parliamentary Under Secretary of State for Justice) raised the bar in her Foreword to the Ministry of Justice's *Whiplash consultation* of 2012: Britain,' she said, 'has become the whiplash capital of the world.'¹¹⁵ The basis for this 'claim inflation' is not stated and is far from clear. The only international comparison referred to in the consultation document is the CEA Study of 2004.¹¹⁶ There is no reference at all to experience with whiplash claims in any country outside Europe. So, what was the evidence (if any) on which this new assertion was based?

One possible explanation is that Grant had been given advance notice of calculations by the Institute and Faculty of Advocate (IFoA) which were subsequently included in the IFoA's written evidence to the House of Commons Transport Committee for its *Cost of Motor Insurance: Whiplash* report of 2013. Finding that it was 'likely' that the UK was the whiplash capital of the world,¹¹⁷ the IFoA explained that this conclusion was based on a comparison between the UK and the United States, relying on 'an assumption that, given the high litigiousness which we see demonstrated in the USA

¹¹⁴ *Cost of Motor Insurance: Whiplash*, vol 1, Ev 66 n 5.

¹¹⁵ *Whiplash consultation*, p 3.

¹¹⁶ *Ibid*, 18. In fact, the CEA Study is not mentioned by name, but a link is provided to it in a footnote (n 9).

¹¹⁷ *Cost of Motor Insurance: Whiplash*, vol 1, Ev 53 para 6.

as observed in other insurance products, we would have expected the USA to show more whiplash claiming than any other country all else being equal.¹¹⁸ Moreover, data in respect of the USA was '[t]he most ready source of overseas data' that was available.¹¹⁹ The IFoA admitted, however: 'We have not been able to confirm the comparability of this data or otherwise, either in terms of the structure of motor insurance products, their use, or on the structure of the data.'¹²⁰

Proceeding despite these acknowledged issues to compare data from the UK and the US, the IFoA specified that the basis for comparison would be the ratio of the number of third-party personal injury (TPI) claims made to the number of insured accidents, as measured by the number of third-party property damage (TPD) claims which are made largely in respect of damage to third-party vehicles. It believed that this provided a measure of the scale of whiplash 'given that personal injury claim numbers are dominated by small whiplash type claims'.¹²¹ The IFoA's figure for the UK, 30%, exceeded by a significant margin the equivalent figure for the US, 23%, and hence the UK could reasonably be considered the whiplash capital of the world.¹²²

It will be immediately apparent that this analysis is deeply flawed. The conclusion that the UK is the whiplash capital of the world is based on a comparison with just one other country, the USA, and it is simply assumed that any country that has a higher number of whiplash claims than the USA must have the highest number in the world. Further, the IFoA itself admitted that it was unable to confirm the comparability of the data from the two countries. Perhaps most remarkably, the data used as the basis of the claim that the UK is (likely) the whiplash capital of the world did not include data about whiplash claims at all; instead, data about *all RTA personal injury claims* were used as a proxy. Indeed, the IFoA's 'whiplash capital' claim was based on no evidence at all about the incidence of whiplash claims in the USA, the only other country taken for comparison.

Lastly, one might note a subtle sleight of hand in the IFoA's conclusion that '*the UK shows more whiplash claiming per insured third party accident than the US.*'¹²³ Measuring the prevalence of whiplash claims with reference to *all accident claims*, including claims for property damage only, may well be a reasonable approach. But it was not this measure that the ABI and the Government relied upon for evidence that whiplash claims were more prevalent in the UK than in the rest of Europe. That contention took data from the 2004 CEA Study that considered the ratio of whiplash (more accurately: minor cervical trauma) claims to bodily injury claims, not the ratio of bodily injury claims to all accident claims (bodily injury and property damage). Actually, if the latter measure had been highlighted, Italy would have placed at the top of the European comparison, with bodily injury claims making up 18% of all accident claims, while the comparable figure for the UK was only 17%.¹²⁴ So, perhaps we should say that '**Italy is the whiplash capital of the world.**'

¹¹⁸ Ibid, Ev 52 para 4. This was reiterated in oral evidence provided by David Brown, Chair of the IFoA's Third Party Working Group: 'the US leads the world in terms of matters of liability, in terms of being more litigious and so on' (ibid, Ev 7 Q53).

¹¹⁹ Ibid, Ev 52 para 4.

¹²⁰ Ibid.

¹²¹ Ibid, para 5.

¹²² Ibid, Ev 53 para 6. The US figure was provided by the Independent Statistical Service (ISS), a subsidiary of the American insurance trade association, the Property Casualty Insurers Association of America. See further <http://www.pciaa.net/>.

¹²³ *Cost of Motor Insurance: Whiplash*, vol 1, Ev 53 para 6 (emphasis in the original).

¹²⁴ See Table 1 above. Of course, both figures are lower than the IFoA's 2013 estimate of 30% for the UK, but they come from quite different data sets which cannot meaningfully be compared.

IV. Wider reflections on the 'whiplash capital' rhetoric

The evidence to support the claim that the UK is the whiplash capital of the world is, for all the above-stated reasons, entirely lacking in substance. The claim may well be justifiable, but the evidence base presented provides inadequate support for it. Nevertheless, the way it has been adopted as a slogan in the wider debate about compensation culture, encapsulating a specific view of whiplash injury as a problem that needs to be addressed, is an interesting phenomenon in its own right and warrants further reflection.¹²⁵

The UK's ongoing programme of whiplash reforms is premised on the view that whiplash injury is a category that is ripe for exploitation by those willing to engage in fraud and exaggeration. The 'whiplash capital' slogan projects the UK as peculiarly susceptible to such conduct and serves as a shorthand reminder of various features of the UK's civil litigation landscape that were conditions of possibility for it, in particular by inducing various professional actors in the civil justice system to become complicit with dishonest claimants. Thus, lawyers were provided with financial incentives through the CFA regime to take on routine whiplash claims despite their low value – and to do so without looking too closely at the veracity of their clients and the reality of the injury alleged or its effects. A claims economy developed in which CMCs acted as intermediaries between the lawyers and potential clients, whose claims were seen as commodities to be traded for financial gain through the mechanism of referral fees.¹²⁶ Doctors compliantly certified whiplash injuries out of sympathy for their own patients or, when acting as independent experts, to ensure their continued engagement in that role. And insurers were willing to settle claims without adequate evidence of the injuries alleged or their effects, or even before any medical evidence had been submitted at all, because they saw economic advantage in closing their files as quickly as possible.

The insurers, with the ABI in the lead, were the main proponents of reform, and decisively shaped the surrounding discourse with their 'whiplash capital' rhetoric. Their own complicity in the claims 'epidemic' (to use another favoured metaphor) was largely passed over and attracted little by way of consequence: only the relatively small tweaking of Part 36 of the CPR to reduce the temptation to make 'pre-med' offers can be seen as specifically directed at them. But each of the other parties who were deemed to bear responsibility for the failures of the system was individually targeted as the programme of reforms unfolded. Even before the whiplash consultation of 2012, the Government had introduced fixed fees for low-value motor claims (via the Claims Portal) and resolved to further reduce the financial incentives for lawyers to bring personal injury claims by reconfiguring the system of CFAs so that success fees were no longer recoverable from the insurer on the other side. The main focus of the subsequent whiplash reforms so far as lawyers were concerned was the introduction of mandatory 'know your client' checks (via askCUE PI) so as to enlist claimant solicitors as gatekeepers against fraud. At the same time, the Government targeted CMCs through the aggressive use of its regulatory powers and a series of extensions to the regulations, exposing CMCs (inter alia) to fines for regulatory violations and to compensation awards in respect of complaints upheld by the Legal Ombudsman. There was also a sustained effort to dismantle the whole 'claims

¹²⁵ The following analysis adopts, albeit somewhat loosely, the approach advanced by Carol Bacchi in *Analysing Policy: What's the problem represented to be?* (2009).

¹²⁶ As to commoditisation generally, see further Jonathan Ilan, 'The commodification of compensation? personal injuries claims in an age of consumption' (2011) 20 Soc & Leg Studies 39.

economy' by banning cash inducements to claimants and referral fees for those selling on their claims. And concerns about the partiality of medical experts were addressed by a new system of accreditation and allocation (MedCo), combined with revisions to the rules on recoverable costs which sought – in combination with the MedCo scheme – to ensure the expert's independence from the claimant and the claimant's representatives. Lastly, potential claimants were given clear warning that fraudulent and exaggerated claims might result in criminal prosecution and conviction, while a new statutory provision provided for the complete loss of any entitlement to damages in 'fundamentally dishonest' claims, even where partly well-founded.

Though there is undoubtedly some truth in the above representation of the problem, the manner of its representation is troublesome in a number of respects. The focus on fraudulent and exaggerated claims diverts attention from those who have genuine claims and the possible effects on them of the various reforms; the need to uphold access to justice for the deserving is routinely affirmed but, in the absence of any serious effort to gauge how it may have been affected by the reforms, it remains an empty platitude. Further, the coupling of fraud with exaggeration blurs the line between what is criminal and what may only be an optimistic estimate based on the resolution of all remaining doubts in the claimant's favour, used as an opening salvo in a bargaining process in which both sides are expected to compromise. One may now expect such estimates to be met with a threat from the insurer that, if the claimant holds out for even near to the amount claimed, an application will be made to the court to dismiss the entire claim for fundamental dishonesty. Even if this might only be bluff, it seems likely that some claimants will be pressured into settling for much less than their claim is worth, especially if they are litigants in person – which will become more frequent if the limit for small claims, in which legal representation is discouraged, is raised from £1000 to £5000. It may also be noted in this context that there is no equivalent sanction for a defendant or insurer who knowingly defends a claim on a basis for which there exists inadequate evidence.

More generally, the repeated recycling of the 'whiplash capital' rhetoric testifies to the power of simple slogans to colonise public debate about tort law, coined by those pursuing an agenda of tort reform and enthusiastically taken up by conservative commentators because they reinforce and provide tantalising new examples to illustrate more general narratives about declining standards of personal conduct and individual responsibility.¹²⁷ As demonstrated above, the evidence base for the claims made can be exceptionally flimsy, but mud sticks even if the justification for flinging it is dubious. Purported rebuttals never gain the same currency¹²⁸ and do nothing to stop the slogan's repetition until the point that it becomes a habit of speech and then a habit of thought. Attempts to counter the claim with 'real facts' are doomed when all the data are in the hands of the claim's proponent, who can selectively release whatever seems likely to strengthen the claim, while ignoring awkward questions about its reliability or representative nature.

None of this is to suggest that there has not been a problem in the UK with claims for whiplash injury. Indeed, there is convincing evidence that such claims have in fact been exploited for fraudulent gain in some instances.¹²⁹ It may also be the case that lawyers and other actors in the civil justice system have culpably failed to prevent or even facilitated such conduct. But it is hard to believe that fraud is involved in anything other than a very small proportion of claims that are made,

¹²⁷ See generally William Haltom and Michael McCann, *Distorting the Law: Politics, Media, and the Litigation Crisis* (2004), especially at 54-56.

¹²⁸ *Ibid*, ch 3.

¹²⁹ See n 82.

so it seems an unwarranted over-reaction to allow the whole reform agenda to be driven by the perceived need to prevent such fraud and counter complicity in it by professional actors in the system. That representation of the problem pushes into the shadows other narratives that see the real issues as lying elsewhere, especially in the adoption of commercial rather than professional models for the delivery of legal services and a reliance upon market forces to ensure access to justice after the abolition of Legal Aid. How access to justice is to be achieved if the claims economy is dismantled – precisely because innovative market-based solutions that have emerged are deemed unacceptable – is just one of the pressing social questions that the ‘whiplash capital’ rhetoric has encouraged us to ignore.

Update: In November 2015, in what was seen as a surprise move, it was announced in the Chancellor of the Exchequer’s Autumn Statement¹³⁰ that the Government would bring forward measures to raise the small claims limit to £5,000 for personal injury claims and, following a consultation on the details in 2016, to remove the right to claim general damages for minor whiplash injuries.¹³¹ The announcement followed an early review of the MedCo system¹³² in the light of concerns that new business practices had developed that had the potential to undermine the Government’s policy objectives and public confidence in the system.¹³³e

¹³⁰ <https://www.gov.uk/government/publications/spending-review-and-autumn-statement-2015-documents/spending-review-and-autumn-statement-2015>.

¹³¹ See further John Hyde, ‘Spending review: Osborne raises small claims limit to £5k and scraps whiplash compensation’, LS Gaz, 25 November 2015.

¹³² Ministry of Justice, ‘MedCo Framework Review: Call for Evidence’, July 2015.

¹³³ Ibid, Foreword (Edward Faulks QC, Minister of State for Justice), 3.