6 January 2017

Reforming the Soft Tissue Injury ("Whiplash") Claims Process

Part 7 – Call for Evidence on related issues:

The CHO response to Questions 22, 23 and 24 in relation to credit hire only

1. Introduction

1.1. The Credit Hire Organisation (CHO) is pleased to respond to the MoJ's consultation: Reforming the Soft Tissue Injury ("whiplash") Claims Process, published on 17 November 2016 (**"Consultation"**).

1.2 Whilst some Credit Hire Company (CHC) members of the CHO may have involvement with personal injury claims the CHO has no engagement in that arena and this response will be limited only to the Call for Evidence that relates to credit hire.

2. The CHO

2.1. The Credit Hire Organisation (CHO) was established in May 2010 from a merger of the Accident Management Association (AMA) and the National Association of Credit Hire Operators.

2.2. It is a trade body with circa 55 full and associate members, which includes the majority of CHC representation in the UK and a number of key law firms.

2.3. As the official voice for the UK credit hire industry, the CHO is engaged in providing services to its members that include:

- Representation of the industry in the public domain
- Contribution to political debate on issues of interest to members
- The establishment of a favourable operating environment
- A forum for discussion on non-competitive issues
- Provision of information to assist them in their business
- Training in key legal, technical and compliance issues.

2.4. CHCs provide temporary replacement vehicles (TRVs) to non-fault parties following road traffic accidents. It is a basic right in tort that non-fault parties are legally entitled to be put back into the position they were in before the accident and that the

fault party is liable to pay their reasonable costs of so doing. A non-fault party does not have to make a claim on their insurance policy to obtain this right. [1]

2.5. CHCs operate with a number of dependencies including being referred details of non-fault parties, having access to a fleet of vehicles, and having the experience and skill set to form an opinion as to fault given the accident circumstances. They must have knowledge of tort and case law to contract (by way of a rental agreement) with the non-fault party and then to pursue the tortious claim in negligence against the fault insurer. CHCs require significant working capital to fund the upfront costs of vehicle provision to non-fault parties whilst engaged in the process of recovery from the fault party. CHCs pay referral fees to receive details of the non-fault party creating an important revenue stream to the referrer (which is often an insurer).

3. Credit Hire Industry Background

3.1. In the absence of any prior comment by the MOJ in respect of credit hire the CHO would query its inclusion within a consultation on personal injury and in particular "whiplash" reform.

3.2. <u>Differences between credit hire and personal injury</u>

3.3. While the government's focus on personal injury is primarily driven by a desire to combat the effects of claims farming, fraudulent and frivolous claims, credit hire provides a legitimate service for non-fault consumers involved in RTAs in the exercise of their reasonable legal rights. The CMA Report acknowledged the role credit hire companies play in acting as a *"competitive constraint which these parties provided on insurers"* (CMA Report, paras 6.56 – 6.58, 6.84, 6.108 and 10.77) resulting in a better service offered by insurers.

3.4. CHCs hold the hand of their customers throughout the claim journey, and act as their customer's voice in negotiations with insurers to ensure their rights are upheld. There is no concomitant cost to the customer. As the CMA acknowledged in its final report: *"There appears to be a consensus among market participants that the development of credit hire has addressed a gap in the market, improving the quality of the service that those not-at-fault drivers requiring a replacement vehicle receive"* (OFT Report, para 2.12).

3.5. The Insurance Fraud Taskforce Report of January 2016 made only a brief mention of credit hire, referring to an estimate only that relates to the costs of exaggerated vehicle damage and fabrication of documentation. Not only would those issues relate more to credit repair than to credit hire, the CHO would additionally emphasise that since the credit hire company always retains the right to pursue recovery of the charges from the non-fault party in the event that fraud were proven, the individual will be

[1] Per Parry -v Cleaver HL 5 Feb 1969 Lord Reid " As regards moneys coming to the plaintiff under a contract of insurance…it would be unjust and unreasonable to hold that the money which he prudently spent on premiums and the benefit from it should ensure to the benefit of the tortfeasor…" Rose -v- The Co-Operative Group (2005) Lawtel Poole CC 07/02/2005

pursued by member CHCs. Generally, as a commercial entity, a CHC will be alive to the risk of fraud from the outset of the claim – it is not in their interests to provide hire and suffer a financial loss through non-recovery from an insurer. Whilst fraud may be asserted by insurers more often than not it is fraud in respect of the injury rather than the accident or need for hire. The Impact Assessment does not reference any data that would suggest otherwise and it is the experience of CHCs, particularly those who work within the framework of bilateral agreements, that fraud is rarely maintained or upheld in credit hire.

3.6. The OFT Referral of the GTA 2002 – 2007 and the CMA Motor Insurance Market investigation 2012 - 2014

3.7. There has been no MOJ forewarning that credit hire was to be subject to government scrutiny. The CHO strongly argues that such scrutiny is unwarranted and unnecessary following the conclusion of prior and exhaustive Office of Fair Trade and Competition and Markets Authority investigations into the operation of credit hire within the private motor insurance market.

3.8. Ministers may recall that, as the body that administered the GTA on behalf of both CHCs and insurers, the ABI notified the GTA to the OFT in November 2002 in order to seek a declaration that it either fell outside the scope of Chapter I prohibition of the Competition Act 1998, or came within an exemption. The OFT initial decision [2] was that whilst the GTA may be anti-competitive, it was entirely beneficial to the consumer and could meet the requirements of an exemption. Consumer benefits were found by the OFT to include less litigation, a better transactional framework, greater consumer certainty in TVR and restraint to both daily hire rates and the cost of insurance premiums. On the basis that it was an error in both fact and law to find the GTA in breach of competition law, the ABI appealed the decision. The OFT did not contest that appeal. Following intervention and further review, the OFT published a decision by letter stating that they did not believe that there was any consumer benefit to be gained by making credit hire an administrative priority and they proceeded to close their file. They were satisfied that no further investigation of credit hire and the GTA was required.[3]

3.9. In September 2012 the supply or acquisition of private motor insurance and related goods and services was referred to the then Competition Commission. The CMA took up the investigation in April 2014. Their specific remit was to determine whether, in accordance with section 134(1) of the Enterprise Act 2002, there was "any feature, or combination of features, of each relevant market that prevents, restricts or distorts competition with the supply of any goods or services in the UK".[4]

[2] See Final Decision 22.04.2004
[3] See OFT Letter 29.01.2007
[4] Any such finding would have amounted to an adverse effect on competition per s134(2) Enterprise Act 2002

3.10. The CMA found that, as a consequence of tort law, costs liability rests with the fault party whereas costs control rests with the non-fault party, giving rise to a separation in costs and control. That perceived inefficiency was such that they believed there were higher than necessary transactional and frictional costs in the provision of credit hire. The CMA invested significant time and resource into the verification of data and consideration of potential remedies over a period of more than two years during which many bodies, including the CHO responded to documents and attended meetings to give evidence. Ultimately however, it was determined that the net cost of credit hire to the private motor consumer in 2012 was £84m in aggregate, for which per individual policyholder represented a cost of £3.24 per annual premium. [5] The CMA conclusion was that they *"… did not find that any of the other remedies we had initially considered would be both effective and proportionate in addressing the AEC and/or detriment. Some of these remedies would have required a change in the law but we found that such measures represented too fundamental a change in rights given the size and nature of the detriment we had found."*[6]

3.11. The CMA made a number of recommendations about future practices within the credit hire industry, but also stated that unless there was a further deterioration to the extent of the Adverse Effect on Competition (AEC) they could see no reason to review their findings. In the absence of any data within the impact assessment, annexed to the consultation, that supports such review, the CHO seeks confirmation from the MOJ with regard to the basis upon which the proposed reforms are predicated.

3.12. At the time the CMA's final conclusions were published, the CHO stated:

- "The report is a victory for consumers. We welcome the fact that, after a three-year investigation, the CMA has concluded that non-fault consumers do indeed require our assistance in their hour of need, and their legal right to a replacement vehicle while their car is off the road has again been reinforced.
- "The CHO does not agree with all of the CMA's findings however, and in particular the basis by which the CMA has identified and quantified a supposed adverse effect on competition with regard to the provision of temporary replacement vehicles.
- "We also believe that the CMA has missed an opportunity by dropping their earlier recommendation that insurers be obliged to make consumers aware of their legal entitlements when they make a claim.
- "Since day one of their investigation we have explained that the GTA (an existing voluntary protocol already used by most insurers and credit hire companies (CHCs) to manage replacement vehicle motor claims) is the most practical way forward, and the CMA confirms this to be the case.

[5] The final calculation was based on the economic theory of marginal rather than fixed cost and a net figure obtained by stripping out non-frictional aspects alongside the costs of commercial and bike policies. See para 6.61, para 6.95 and para 6.102

[6] CMA Final Report 24.09.2014 para 39

- "Now that this investigation has concluded and the valuable service that CHO members provide to consumers has been safeguarded we now urge all insurers to throw their full support behind the GTA, including the launch of an electronic portal. This will enable insurers and CHCs to share information more effectively and improve the motor claims process for the benefit of our customers, as well as reducing unnecessary frictional costs."

3.13. The CHO is concerned and would wish to address with ministers whether they fully appreciate the uncertainty and damage that could result from both insurers and CHCs having to respond to a government request for submissions that replicate those already examined by the CMA. The credit hire industry is a significant employer, taxpayer and investor in technology and vehicles. The CMA itself concluded that CHOs do not make excessive profits Further investigation could translate into the removal or reduction in working capital and mitigate against the appetite of asset lenders to want to lend to the sector. The effect would be to cause detriment to the ability of CHCs to provide services, with a concomitant reduction in consumer choice.

4. The Proposed Remedies

4.1. Proposed Remedy One – First Party Model

4.2. Remedy 1A proposed by the CMA was the provision by every insurer of a vehicle to their policyholders irrespective of fault. Notwithstanding that such a reform would require both primary and secondary legislation the proposal was rejected by both Insurers and CHCs on the basis that it would:

- Remove the basic right to restoration in tort
- Create inequality among those individuals better able to afford add-on polices to ensure vehicle provision and deal with insurers direct in respect of their accident[7]
- Increase the costs of premium due to both vehicle provision and the loss of referral fee income
- Benefit those more likely to cause accidents through costs redistribution
- Only remove frictional costs in credit hire rather than in other post accident services where the reform would not apply including repairs, recovery and storage
- Result in a reduction to the quality of service provided to non-fault parties. The CMA concluded that CHCs act as a competitive restraint to insurers who in their absence are not incentivised to provide the same level of service.[8]

[7] In the absence of the post accident services provided by CHC, which include the negotiation of pre-accident values to irreparable vehicles and uninsured loss recovery, individuals would be without representation in dealing with Insurers in respect of such issues. The proposal does not detail how this would be addressed not only in respect of the individual PMI holder but commercial, fleet and motorbike policyholders.

[8] CMA Final Report paras 6.56 – 6.58, 6.84 and 6.108

4.3. It should be noted that, partly due to the cost effectiveness of provision by CHCs, a large proportion of insurers do not currently work on the basis of a non-fault direct hire model and indeed most credit hire business is referred by insurers themselves, who receive the referral fee commission which they use to offset their costs and therefore help reduce motor insurance premiums.

4.4. Proposed Remedy Two – Regulatory Model

4.5. The MOJ suggests that formal regulation would allow measures such as a ban on referral fees and rate capping to be implemented.

4.6. In this regard The CHO would wish to raise the Minister's awareness of the following:

- Most CHCs are already regulated by the FCA having authorisation to undertake general insurance mediation activities. As such they are subject to the strict controls imposed, in particular the regulatory responsibilities outlined within the principles of PRIN2.1 of the Handbook and the six Treating Customers Fairly outcomes.
- CHCs are currently regulated as Claims Management Companies by the MOJ. Following the Independent Review of Claims Management Regulation,[9] that regulation is moving to the FCA from 2017. The more appropriate mechanism would be to determine how that regulation might be better introduced in accordance with the recommendations included within that report.
- The CHO have in place training, including Compliance Guru, which is directed towards ensuring that every member is aware of and compliant with the regulations imposed upon them. This is a free online portal service. In addition Iain Stephen, joint CEO of Compliancy Services is a member of The CHO Executive and directly involved in the provision of information and advice to members.
- The CHO has a number of solicitor members and within the credit hire industry generally, law firms are connected to CHCs and insurers, including the provision of FNOL and hire monitoring services. Those firms are subject to SRA rules of conduct and in addition have FCA professional body status. The CHO has a qualified and practising solicitor as its Chair of Legal and Technical.
- From 2017 the FCA will have a beginning to end involvement in and oversight of the credit hire and claims management processes with a number of tools at their disposal. These were highlighted in detail within the Independent Review of Claims Management Regulation and it would appear to be duplication on the part of the MOJ to implement costly reform that would require secondary legislation.

4.7. Remedy 1C and Remedy 1G proposed by the CMA respectively related to price caps and referral fee bans which the proposed reform would enable.

[9] Report of Carol Brady March 2016

4.8. The CMA considered a number of price cap models including those suggested by specific insurers but concluded that they would be inappropriate. Not only would frictional costs continue, due to the ongoing presence of two parties in conflict, but it was clear that opportunity for circumvention would exist. In the first instance CHCs might access hire by way of mobility insurance products, but more importantly price capping would fail to address duration of hire. **It was found that there would be "a substantial risk that this remedy would create distortions in the provision of TVR with the result that some claimants might not receive their tortious entitlement"**[10]

4.9. The issue of a referral fee ban is controversial due to the significant revenue stream that it creates[11] and although it isn't entirely clear whether there is any pass through of that benefit by insurers, the CMA anticipated that a referral ban may result in premium increases.[12] Additionally, absent the definition of what amounts to a referral fee, the CHO anticipates issues relating to means by which the ban might be avoided including use of marketing and vertical integration of companies through an ABS structure. It should further be noted that inability to source work will reduce the number of CHCs and reduce competition within the industry to the detriment of consumers.

4.10. Proposed Remedy Three – Industry Code of Conduct

4.11. The CHO invites the MOJ to more closely examine the GTA and how it influences the day-to-day conduct of CHCs and insurers, including those who may not be subscribers but who operate in accordance with its spirit through bilateral agreements or otherwise.

4.12. The GTA (General Terms of Agreement) was instigated as a voluntary protocol on 1 September 1999, at which point it comprised only two CHCs and the ABI. Since that time it has evolved to include the majority of major motor insurers and CHCs. It has a Technical Committee comprising six CHO executive members and six insurers together with a CHO and ABI representative, and an independent secretary. It has been redrafted on a number of occasions to reflect legal and market changes and has an FAQ section that is updated regularly to provide guidance to subscribers with regard to expected behaviours.

4.13. The CMA reviewed the GTA in detail and found that it provides a framework that streamlines process and encourages both early liability decisions and settlement with daily rates that are less than basic hire rate (BHR), thus reducing litigated cases. They stated that, in their view, "litigation and consequently frictional costs were lower than they would have been in the absence of these agreements."[13]

[10] CMA Final Report Para 10.81
[11] CMA Final Report para 6,90 suggests that the 2012 revenue generated by credit hire to insurers and brokers was £99million
[12] CMA Final Report para 10.144
[13] CMA Final Report para 6.20

4.14. The CHO has recently undertaken a review of data provided by its members, the analysis of which demonstrates that in the first quarter of 2015 81% of all payment packs submitted to insurers were either under the GTA or a bilateral agreement anchored to the GTA. Of those claims 95.2% have concluded and only 4.4% have required litigation. This is directly attributable to the behaviours set by the GTA, which most recently has involved a reduction of the negotiation period to 60 days and includes both benefit and penalty to each party by way of reductions and penalties in interest against an agreed base daily rate. As a protocol the GTA further reflects agreement in respect of other fundamental credit hire issues, including like-for-like vehicle provision, third party insurer intervention and vehicle grouping, which reduces the requirement for litigation and thereby the costs to the consumer.

4.15. The GTA also forms the basis by which many bilateral "protocols" are developed between insurers and CHCs, who either set lower rates by reference to the GTA rate or use the ethos it has developed to set scope rules.

4.16. Reform within the industry is continuous, and the GTA Technical Committee drives that forward. They are currently engaged in the appointment of an Independent Rates Assessor to bring greater certainty to the issue of daily rates in accordance with both OFT and CMA recommendations, and make more concrete the Code to which insurers and CHCs subscribe.

4.17. Non-GTA claims are bound only by case precedent, and whilst this will result in firm Court decisions, it does create a more litigious environment. In the same review, of the 19% of payment packs that were non-GTA, 87.3% had resolved but 21.7% had to resort to litigation to facilitate claim closure (compared to only 4.4% for claims under the GTA)..

4.18. In terms of any proposed reform that may be supported by the CHO, the extension of GTA principles and behavioural rules would be considered, however the MOJ would be required to better detail how they envisage that would operate and in particular how it would be both monitored and enforced without offending any anti-competitive considerations.

4.19. <u>Code of conduct</u>

4.20. The CHO has introduced a code of conduct for all its members, many of which are already regulated by the FCA and other appropriate bodies. All CHCs who are new or existing members of the CHO are required to sign and abide by that code of conduct. See appendix.

4.21. <u>Proposed Remedy Four – Competitive Offer Model</u>

4.22. Remedy 1B within the CMA scope, proposed reform that would improve the insurer opportunity to capture non-fault parties and provide direct hire to them. The model now suggested would appear to mirror that concept, which within the industry is already known as intervention.

4.23. Rule 3 of the GTA is known as the "First to the Customer" provision, and directly states that where an insurer or CHC are able to prove that they were the first to provide services to the non-fault party there should be no further offer made.

4.24. The case of Copley -v- Lawn (2009)[14] defines when a Court may deem an offer to be effective, including the terms that must be contained in that offer, how it is made and the particular vulnerabilities of the non-fault party that should be taken into consideration.[15]

4.25. Irrespective of the clear set rules in place to deal with intervention as a model, competitive offers may have unintended consequences. The erosion of right to choice by the non-fault party impacts legal and tortious entitlement. A direct hire offer will risk potential under-provision both in quality and speed of service.

4.26. Determination of day rate is extremely complex and commercially is subject to constant variables, even changing hourly, including issues of seasonality, accessibility and availability. The difficulties in providing a true rate comparison are well documented through case precedent, including most recently Stevens,[16] a case that will be the subject of appeal at concept level in February 2017. [17] CHCs and insurers who engage in rate discussion on a claim by claim basis, exchange evidence that includes complicated rebuttal statements of the evidence provided by the other side. The CMA further examined price comparison in detail in their subsequent Report on Short Term Car Rental[18] and confirmed that the processes available by which to determine basic hire rates are complex and that advertised rates often bear no relationship to the prices actually paid by, and terms of hire imposed on, consumers.

4.27. The GTA is endeavouring to overcome these complex issues through the appointment of an Independent Rates Assessor, as described above, and the McBride Court of Appeal decision may also have a longer term determinative impact. Until these issues have been adequately addressed The CHO submits that any further reform in respect of rate would be inappropriate.

5. Further Suggestions

5.1. The GTA is currently discussing the establishment of an arbitration scheme. At a conceptual level this would involve the insertion of a method of dispute resolution at 60 days after serving the payment pack that would obviate the need to enter into litigation and significantly reduce frictional costs in credit hire.

[14] Copley -v- Lawn and Madden -v- Heller (2009) EWCA Civ 580
[15] Sayce -v- TNT (UK) Ltd (2011) EWCA Civ 1583
[16] Stevens -v Equity Syndicate Management (2015) EWCA Civ 93 Set the principle that if a Claimant is not impecunious then the recoverable rate will be the lowest reasonable rate from a local mainstream supplier. This was is direct contravention to the previous precedent about which rate would apply namely Bent -v- Highways and Utilities (No 2) (2011) EWCA Civ 1384
[17] McBride -v- UK Insurance Limited - Appeal 22.02.2017
[18] CMA Report on Short Term Car Rental in the EU 13.07.2015

5.2. In higher value claims Court Orders frequently include a requirement to consider alternative means. The case of PGF made it clear that failure to consider resolution other than by litigation will result in costs penalties.[19] Most recently Lord Justice Briggs laid out his proposal for an online dispute resolution system within the Courts,[20] the first steps of which were supported through digitisation, proposed by the MOJ in their Transforming Justice consultation.[21]

5.3. The work now being undertaken within the GTA is aimed at introducing a process that reflects the aims expressed within reports such as those of LJ Briggs and the Transforming Justice consultation in an expedited way.

6. Transparency of Rental Agreements

6.1. The MOJ suggests within the consultation that there is a lack of understanding by consumers of the service with which they are provided and that improvements are required.

6.2. The CMA did undertake a consumer survey, albeit those results may now be outdated given the industry changes since that time. That survey determined that there were mixed results insofar as consumers being made aware [by insurers] of their legal rights. That confusion did in part relate to confusion about rights under the contract of insurance although overall the CMA believed that as far as the provision of services were concerned the reputational impact of poor quality in a highly competitive market would prevent under provision.[22]

6.3. The Independent Review of Claims Management Regulation was particularly concerned with the necessity to provide consumers with clear, fair and not misleading information, which directly reflects the FCA provision.[23] Transparency was equally a prevailing theme within the CMA report on Short Term Car Rental.[24] Overall the need to protect and promote the interests of consumers has been a recurrent theme with the FCA, whose authorisation is required by the majority of CHCs. The FCA is also preparing a paper on " Smarter Consumer Communications".[25]

6.4. The necessity for CHCs to comply with the FCA and MOJ authorisation and regulation discussed above, particularly extends to the provision of information to CHC customers. Rental agreements are drafted to comply with the Consumer Contracts Cancellations Regulations[26] and advice given to customers prior to signature includes

[19] PGF II SA -v- OMFS Company (2013) EWCA Civ 1288
[20] Civil Courts Structure Review – Final Report by Lord Justice Briggs July 2016
[21] Transforming Our Justice System – MOJ – September 2016
[22] CMA Final Report para 5.9 – 5.10
[23] Independent Review of Claims Management Regulation – Carol Brady – March 2016

[24] CMA Report on Short Term Car Rental in the EU – 13.07.2015
[25] FCA Smarter Consumer Communications – November 2015
[26] The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013; The Consumer Rights Act 2015

Integrated Voice Response telephone detail and information packs and is subject to call recording in order that the enforceability of the agreement might be demonstrated at Court. CHCs must comply with the Treating Customers Fairly outcomes at all times and have in place complaints systems that will satisfy FOS.

6.5. Some credit hire companies additionally provide a no cost ATE policy to indemnify their customer in respect of any request that may be made of them to make payment of the credit hire charges.

6.6. From 2017 the FCA will control CMC regulation, and proposals in respect of how that will work are awaited. The CHO is of the view that these should include those proposed by Carol Brady, such as standardised disclosure documents, signposting and reauthorisation of CMCs. Until such time as that process is complete any additional review would seem unduly pre-emptive however it would be of benefit to the MOJ if they engaged with more CHCs to determine the processes actually used.

6.7. Consumer rights charter

In response to the CMA's recommendation that insurers make it clearer to consumers what their rights are, the CHO launched a consumer rights charter and urged the ABI and insurers to support it, and follow suit. The ABI and insurers have not yet endorsed the CHO customer charter. Non-fault consumers remain largely in the dark about their rights in the event of an RTA, and CHCs fulfil a valuable role in providing information to them and ensuring their rights are upheld and losses are recovered. The use of the Charter ensures greater transparency and understanding for non-fault parties.

7. Conclusion

7.1. This submission is made with the permission and approval of our member companies and fairly represents the opinions of the industry as a whole. The CHO would be happy to provide further assistance by way of specific evidence or examples as required and attend any meetings or discussions to support the position that, without further detailed investigation and impact assessment, there is no requirement on the part of the MOJ to engage in any reform of an industry which is already well-set on a path of frictional reduction. Credit hire within the confines of the GTA operates in a unique way that ensures collaboration in an otherwise litigious environment as ways to reduce frictional cost are continually explored, developed and implemented.

Kirsty McKno

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