

Claiming under the Motor Accidents Scheme

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Introduction

- 1 The cost of the Motor Accidents Scheme has been the object of intense concern in the New South Wales community over the past several years. It continues to be so.¹
- 2 The Motor Accidents Scheme is the compulsory third party (CTP) personal injury insurance scheme in the State. It began in July 1989 and 'provides compensation for people injured in motor vehicle accidents as a result of the fault of another vehicle owner or driver.'² The Scheme was set up with three major policy objectives. First, it was to provide full compensation for seriously injured victims of motor accidents (provided their injuries were the fault of another person's driving). Second, it was intended to provide CTP cover at an affordable premium. Third, it was to be self-funding that is, the premiums for CTP cover are to be not only affordable but also sufficient to fund the claims that arise from accidents that happen during the period covered.³
- 3 Initially, CTP premiums were regulated but since July 1991 each CTP insurer has set its own premium (there are currently fifteen insurers licensed to handle CTP insurance⁴). Before de-regulation, the annual premium for 'Metropolitan Class 1' vehicles (ordinary motor cars garaged in metropolitan Sydney) was \$345.⁵ This dropped to an average low of \$198 in the June 1993 quarter⁶ but has risen since to \$400.⁷ Further increases in the future have been predicted.⁸

¹ 'Private insurers may lose greenslips' *The Sydney Morning Herald* Saturday 7 March 1998, p 18; 'Green slips to rise \$30 Legal fees blamed for increase' *The Daily Telegraph* Tuesday 24 February 1998, p 9.

² Motor Accidents Authority, *June '97 CTP Statistics* at p 7.

³ Standing Committee on Law & Justice, *Report on the Inquiry into the Motor Accidents Scheme (Compulsory Third Party Insurance): Interim Report* (Report No 3, December 1996) cap 2 & 5; Motor Accidents Authority, *June '97 CTP Statistics* at p 7.

⁴ Over the period covered by our research there were 14 licensed insurers. Two have ceased to issue CTP policies, and another has since entered the market.

⁵ Motor Accidents Authority, *June '97 CTP Statistics* at p 6.

⁶ Motor Accidents Authority, *June '97 CTP Statistics* at p 6.

⁷ as at 31 December 1997. Source: The Motor Accidents Authority

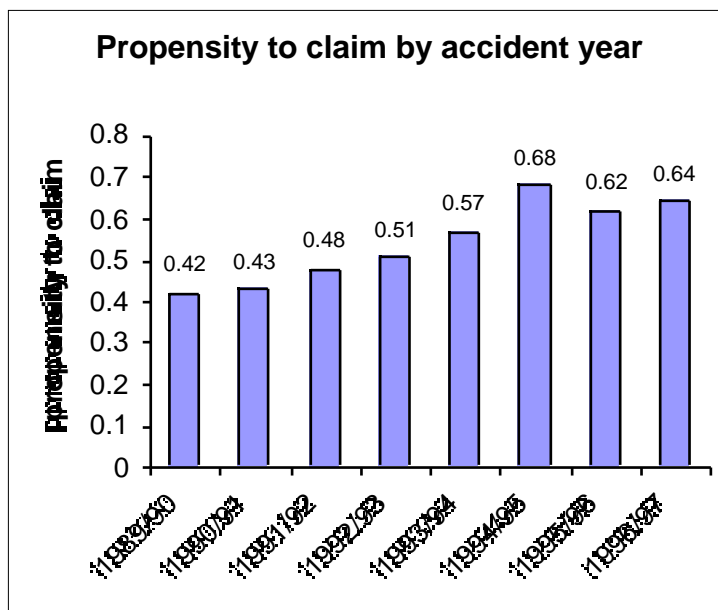
⁸ 'Green slips to rise \$30 Legal fees blamed for increase' *The Daily Telegraph* Tuesday 24 February 1998, p 9; 'Private insurers may lose greenslips' *The Sydney Morning Herald* Saturday 7 March 1998, p 18.

- 4 The rise in CTP premiums reflects rising costs of the Scheme. Costs have risen very plainly because of an increase in claims and, to a lesser extent, because of increases in average claim costs.⁹
- 5 The increase in claims has been due to a large rise in the proportion of road accident victims who make a claim, rather than to an increase in road casualties (indeed, there has been a decline in the latter number over the life of the Scheme).¹⁰ The trends in 'claiming propensity' are illustrated in Figure 1.¹¹ Only 42 out of every 100 people injured in road accidents in 1989-90 made a claim. The figure for accidents occurring in 1994-95 was 68 out of every 100 people injured, an increase of 62% on the 1989-90 figure.

⁹ Gauging the extent of different effects in the Scheme is a complex, expert's task. Movements in average claims costs are particularly difficult to interpret because the Scheme is still 'maturing' and there is a 'development year effect' (as more time passes after a given accident year, more claims are reported, and more claims are finalised in both cases at varying rates over time with a very significant relationship between claim cost and time taken resolve them). Total 'incurred costs' for claims for accidents in 1994-95 were \$831.1m (as at 30 June 1997) while the figure for 1991-92 was \$518.6m. The average incurred cost per 1994-95 claim was \$48,510, compared with \$40,303 for 1991-92. Incurred costs are the sum of payments made and estimated outstanding payments to be made in respect of a claim, including amounts paid to claimants for their legal costs. It should be noted that 39% of the 1994-95 claims were not finalised as at 30 June 1997 and therefore the incurred costs figures include a much larger component of estimated costs. See Motor Accidents Authority, *June '97 CTP Statistics* at p 16 and p 39.

¹⁰ Motor Accidents Authority, *June '97 CTP Statistics* at p 9.

¹¹ Taken from Motor Accidents Authority, *June '97 CTP Statistics* at p 9.

Figure 1. Trends in the propensity of claiming

- 6 Increasing average claim costs have been blamed on both rising trends in compensation awards for similar injuries particularly awards for non-economic loss and rising legal costs associated with resolving claims. Both of these factors and especially legal costs are suspected of being

very significant 'cost drivers' in claims involving minor injuries which, not surprisingly, are also the claims which have risen dramatically in number.

- 7 In fact, late in 1995 several amendments were made to the *Motor Accidents Act* in order to arrest or reverse these trends and to stabilise Scheme costs. (At the time premiums had risen by \$175 over the preceding 9 months, and further increases were in prospect.¹²) The most significant of these amendments was section 79A which reduced the availability of compensation for non-economic loss in claims for minor injuries.¹³ It is still too early to evaluate the impact of these amendments fully. Premiums have continued to rise, although the rate of increase has slowed considerably. The claiming rate has declined, although recent statistics indicate that it has stabilised at 61 claimants for every 100 accident victims,¹⁴ still appreciably above the average rate during the first five years of the Scheme. There is evidence that the amendments have had a significant impact on the average cost of minor claims but claims for 'post-amendment' accidents are still relatively undeveloped,¹⁵ and there are indications that the impact will be less than originally predicted. Concern about rising claim costs remains.

¹² The Hon J Shaw QC, Motor Accidents Amendment Bill Second Reading speech, Legislative Council of NSW Debates, *Hansard* 3320 (16 November 1995).

¹³ Motor Accidents Authority, *June '97 CTP Statistics* at p 10.

¹⁴ this is the up-dated figure for 1996-97 and the projected figure for 1997-98. Source: Motor Accidents Authority.

¹⁵ cf Motor Accidents Authority, *June '97 CTP Statistics* at pp 10 – 11. The MAA notes particularly that few cases involving the application of s. 79A have been decided by the courts.

- 8 At the same time as it passed the Motor Accidents Amendment Bill, the Legislative Council resolved that the Motor Accidents Scheme should be reviewed by the Standing Committee on Law & Justice. The terms of reference direct the Committee, among other things, to ‘examine the concerns of insurees, levels of claims and compensation as well as legal fees ...’. It was in light of this reference that this research was undertaken.¹⁶
- 9 We were concerned to learn more about the factors underlying the increased claiming rate and about trends in legal costs in motor accident claims.¹⁷ In particular, we were interested in assessing whether the *Legal Profession Reform Act* 1994 (‘LPRA’) has been a significant factor contributing to either the increase in claims or an increase in legal costs incurred in claims under the Scheme.¹⁸ This legislation, which introduced a number of reforms to the legal services market on 1 July 1994, has been a prime suspect, for a number of reasons.
- 10 The LPRA significantly deregulated legal fees, permitting lawyers to enter into ‘no win – no pay’ fee agreements which provided for a ‘success premium’.¹⁹ The Act also largely eliminated any advertising restrictions on lawyers.²⁰ The effect of these reforms might well have been to increase the availability of ‘no win – no pay’ legal services²¹ and to increase the awareness of accident victims of the availability of legal services on this basis.²² Lawyer advertising may also simply have increased victim awareness of the possibility of claiming under the Scheme. Certainly, most readers will have seen or heard examples of lawyer advertisements

¹⁶ The Centre was initially approached by the largest CTP insurer, NRMA Insurance Ltd which suggested that the research be undertaken, and made a substantial financial contribution to the cost. The Centre is responsible for final decisions relating to the scope and design of the research and the content of this report.

¹⁷ The Centre is conducting a separate study of trends in compensation awards and judgements before and after the 1995 amendments.

¹⁸ cf Standing Committee on Law & Justice, *Report on the Inquiry into the Motor Accidents Scheme (Compulsory Third Party Insurance): Interim Report* (Report No 3, December 1996) Recommendation 51.

¹⁹ See now *Legal Profession Act* 1987, ss. 186, 187.

²⁰ apart from a ban on ‘false, misleading or deceptive’ conduct. See now *Legal Profession Act* 1987, s. 38J.

²¹ Prior to the LPRA it was lawful for solicitors to enter into ‘no win – no pay’ fee agreements (known as ‘speculative’ fee arrangements) subject to the terms allowed by the ruling of the High Court in *Clyne v New South Wales Bar Association* (1960) 104 CLR 186. The ruling in *Clyne* was generally understood to mean not only that a success premium could not be charged but also that the practitioner was limited to charging ‘scale’ fees (that is, fees at the rates prescribed by the relevant court rules).

²² Many solicitors also extend an offer of a free initial consultation to prospective clients. It was legal to advertise this before the LPRA was enacted but the advertising restrictions that applied up to 1 July 1994 prevented lawyers from advertising their willingness to take cases on speculative fee arrangements (cf *Legal Profession Regulations* 1987 new clause 20 gazetted 29 November 1991.)

pitched at this market. The rise in the claiming rate might, in part at least, be due to this change.²³

- 11 The LPRA also repealed existing ‘costs scales’ (ie price regulations) for legal services²⁴ and changed the basis on which ‘bills of costs between party and party’²⁵ were to be ‘assessed’. These changes were potentially very significant for the Motor Accidents Scheme because, generally, the cost of claims includes a significant amount paid by insurers for claimant legal costs. However, understanding the predicted effect of the changes requires a little explanation.
- 12 Prior to the LPRA legal fees were only partially regulated. Each court promulgated a scale of costs which applied to proceedings in that court. ‘Party – party’ costs were always determined according to the applicable scale. In contrast, the fees lawyers charged their own clients (known as ‘solicitor – client costs’) could be based on the relevant scale, or a lawyer and client could agree on a different basis for charging (for example, an hourly rate).
- 13 In fact, before the changes introduced by the LPRA, the costs payable between party and party generally only partially reimbursed the costs incurred between a lawyer and her or his client. This was so for two different reasons. The first reason was that, even assuming both were priced according to scale, the items which can be included in party – party and solicitor – client bills were determined on distinctly different bases. A lawyer could charge her or his own client for all items of costs ‘reasonably incurred in pursuit of the client’s interests.’ In contrast, a party was permitted to charge another party only for such of those items of costs ‘as were necessary or proper for the attainment of justice.’ The second reason for the gap between party – party and solicitor – client costs was that it was not unusual for lawyers and clients to contract for a different basis of charging, often because the lawyer was only prepared to work for higher than scale fees.
- 14 Some gap between party – party and solicitor – client costs can be defended on policy grounds.²⁶ However, the LPRA implemented a policy favouring fuller

²³ The clear, almost linear rising trend in claiming rate between 1989-90 and 1992-93 leads us to suspect that not all of the rise can be attributed to the change, although advertising after 1 July 1994 might well have had an appreciable effect on the claiming rate for accidents in 1993-94.

²⁴ Formerly each court promulgated quite elaborate, itemised ‘price lists’ or charges for services that might be rendered in connection with litigation in that court. See now *Legal Profession Act* 1987, Sch 8, cl 47.

²⁵ ‘party – party costs’ are the expenses incurred in litigation that, generally, the winner is entitled to recover from the loser.

²⁶ cf Devlin LJ in *Berry v British Transport Commission* [1962] 1 QB 306 at 322 (‘It helps to keep down extravagance in litigation and that is a benefit to all those who have to resort to law.’).

recovery of the successful litigant's costs, on the ground that it was unfair that a person who litigates in order to secure their rights should be significantly out-of-pocket as a consequence. The Act therefore provides that both types of bill are assessable on the basis that they may include 'fair and reasonable' charges for all services and other items of cost 'reasonably incurred or performed'.²⁷

- 15 The expected consequence of moving toward full indemnity costs was that the share of litigation costs paid by unsuccessful parties would increase. However, the intended effect of repealing costs scales (among other changes) was to increase fee competition among lawyers, and therefore the expected net effect of the changes was that party – party costs would be a larger share of more competitively priced (and reduced) lawyer –client costs.²⁸ There has been, however, more than a passing suspicion that repealing costs scales may have inflated legal fees – at least for 'one-off' purchasers of services like accident victims – and that escalating market rates have 'rolled through' to insurers under the reformed assessment procedures.²⁹ Whether the LPRA reforms have had any of these effects is one of the important empirical questions addressed by this study.

Overview of this report

- 16 The research described in this report is in three parts —
- in order to find out why the claiming rate has risen, we undertook a survey of accident victims in 1991-92 and 1994-95
 - to find out whether legal costs have increased since the LPRA, we studied samples of claims litigated in late 1992 and late 1994 in the Sydney Registry of the District Court
 - in order to assess the significance of legal costs within the Scheme generally, we conducted a random survey of claims finalised in 1995 and 1996.

²⁷ See now *Legal Profession Act* 1987, s 208F. It should be noted that it was still contemplated that some gap would remain, and that what was fair and reasonable between solicitor and client was not necessarily fair and reasonable as between party and party. A court may order that costs be paid on an 'indemnity basis' (cf s 208F(3)) but this, although no longer as uncommon as it once was, is still not usual.

²⁸ Hon J Hannaford MLC in *Proceedings of the Seminar on the Motor Accidents Scheme (Legal Costs)* (Parliament of New South Wales, Legislative Council, Standing Committee on Law & Justice, Report No. 5, June 1997) at pp 91-92. Mr Hannaford, as Attorney-General of the day, sponsored the passage of the LPRA through Parliament.

²⁹ cf J Tamblyn in *Proceedings of the Seminar on the Motor Accidents Scheme (Legal Costs)* (Parliament of New South Wales, Legislative Council, Standing Committee on Law & Justice, Report No. 5, June 1997) at pp 8 – 9. See also Standing Committee on Law & Justice, *Report on the Inquiry into the Motor Accidents Scheme (Compulsory Third Party Insurance): Interim Report* (Report No 3, December 1996) para 13.4.5. Putting to one side the impact of the 'offer of compromise' rules, motor accident claimants are generally successful and their costs are usually met by the insurers.

Increased claiming rate

17 In the next section ('2 The decision to claim') of this report we describe the results of our accident victim survey. Nearly 800 victims of accidents in 1991-92 and 1994-95 answered questions about their accidents, their injuries, their losses and how they came to decide whether to make a claim or not. The claiming rate increased by 20 percentage points from 1991-92 to 1994-95. Our aim was to discover, first, what it was about the circumstances of accident victims that made some claimants and others not and, second, what may have changed between the two years that explained why so many more made claims in the later year.

18 In brief, we find that our claimant and non-claimant groups differed from each other in only a few, predictable ways. Non-claimants were more likely to believe themselves to be at fault in the accident, the injuries tended to be more minor and their losses less severe. They also knew marginally less about how the Motor Accident Scheme works, although claimants on the whole didn't know a lot — the results tend to suggest that experience with the Scheme does not lead to a good understanding of it.

19 We find that, compared with 1991-92 accident victims, more 1994-95 accident victims got legal advice about making a claim. More of them were prompted to see a lawyer by advertising, although advertising was not the reason most claimants saw a lawyer, and at most it can account for only a small proportion of the increased claiming rate. A higher proportion of their claims were handled by solicitors on a 'no win – no pay' basis, although this increase was the expense of agreements that payment would only be required at the end of claims (rather than agreements requiring payment as the claim progressed) and it is not clear how significant the difference was in decisions to claim. The most significant factor underlying the increased claiming rate appears to have been that 1994-95 accident victims with minor injuries who got advice, were told their claims were worth more. Changed perceptions about the worth of minor injury claims were in line with actual trends in awards and settlements.

Increasing legal costs

20 In Section 3 of the report ('The LPRA and claim legal costs') we report on our study of nearly 400 claims litigated before and 400 claims litigated after the LPRA in the District Court. We collected data from the managing insurers' files in all of these cases, and from claimant solicitor's files in a sub-sample of one-third of them. Our primary interest was to discover how the amounts —

- claimants paid their solicitors
- insurers paid for their own legal costs

- insurers paid claimants for their legal costs compared, and whether these had changed between the two groups.

21 *Meanings of references to legal costs.* In this report, we use ‘legal costs’ (in accordance with generally accepted usage in the Scheme) to mean the costs incurred by claimants and insurers for legal representation, medical examinations (not treatment), other factual investigations and other disbursements, in connection with resolving a particular claim. This *excludes* other transaction costs involved, particularly the ‘internal’ costs (eg employment costs) incurred by insurers for claims management and dispute resolution. Our data collection could not reliably capture the costs of legal services when these were supplied by ‘in-house’ solicitors employed by insurers. References to ‘claimant legal costs’ are to the amount charged by claimants’ own solicitors, including disbursements. References to the amount of these costs are to the *total* solicitor – client bill and *not* to the amount paid by claimants over and above the ‘amount paid by insurers for claimant legal costs’ (ie ‘party – party’ costs). ‘Insurers’ own legal costs’ are the amounts paid by insurers to their own solicitors, including disbursements. References to ‘total legal costs’ are to the sum of insurers’ own legal costs and the amount paid by insurers to claimants for their legal costs.

22 For reasons we explain in more detail in Section 3, sampling constraints, imposed largely by the ‘long-tailed’ nature of CTP claims, restricted our study design and the questions about increases in legal costs over time we could address. It has been suggested, for example, that legal costs in the Scheme have increased because of changes in the level of litigious activity in the process of resolving claims, and because of the increased proportion of minor injury claims (in which legal costs tend to be relatively higher). At the time we started our research, the relatively ‘undeveloped’ state of the ‘post-LPRA’ accident years effectively precluded us from testing these hypotheses. We were, however, able to isolate the effects of the LPRA on legal costs between two reasonably comparable groups of claims.

23 In brief, we find that the amount claimants were charged by their own solicitors (including professional fees and disbursements) did not differ. This indicates that ‘de-regulation’ of legal fees by the LPRA resulted in neither an increase or decrease in lawyer – client costs, at least in the early days after the changes came into effect.³⁰

³⁰ The sampling constraints alluded to in the text (and discussed in detail in Section 3) also confined us to studying an ‘early post-LPRA’ sample of District Court litigated claims and this may have limited the measurable effect of the LPRA on claim legal costs, particularly between claimants and their own solicitors. However, our analysis of ‘post-LPRA’ retainers in our other sample (Section 4) does not provide any evidence that claimant solicitor – client costs have increased or that an increase is driving the increase in Scheme costs.

- 24 We also find that insurers' own legal costs had not increased in the 'post-LPRA' sample of claims.
- 25 However, the amount paid by insurers to claimants for their legal costs had increased significantly. We estimate the increase, in claims finalised by an award or judgement, to be 31.5%, although it could be as high as 51%. The estimated increase in claims finalised by settlements is much lower (13%). Although there is an argument for using the awards and judgements estimate as a reliable indicator of the overall impact of LPRA-induced increases in Scheme costs, we caution that it may be an over-estimate. When both settlements and judgements are combined, the point estimate is 20% (95% confidence interval 12% - 29%).
- 26 Our results support the conclusion that the LPRA-induced increases in legal costs are substantially related to the amended basis for assessing party – party costs. These increased in the post-LPRA sample, on average, to just under 80% of the amount claimants actually paid for their own legal costs — a proportion still considerably less than 'full indemnity'.

Legal costs within the Scheme generally

- 27 The sample of claims we studied in order to discover what effect the LPRA has had on legal costs was constrained to a fairly narrow set of characteristics. In order to obtain a picture of legal costs across the spectrum of claims we also studied a large random sample of claims finalised in 1995 and 1996. Again, we collected data from the managing insurers' files in all of these claims, and from claimant solicitor's files in a sub-sample of nearly 40% of them. The results of this study are presented in Section 4 ('The claim process and claim costs').
- 28 Our aim was to understand the significance of legal costs within the Scheme as a whole, and to examine the relationship between legal costs and the process of resolving claims. We —
- look at legal costs and other claim costs by the level of disputation
 - compare the components of claimant and insurers' own legal costs
 - analyse the impact of conditional fee agreements on legal costs
 - consider the level of litigation in the Scheme and its impact on Scheme costs
 - assess the impact of post-LPRA increases in legal costs on Scheme costs
 - calculate the proportion of total claim costs attributable to legal costs.
- 29 In brief, we find no evidence that increases in claimant legal costs related to the prevalence of conditional fee agreements involving success premiums have affected Scheme costs.

- 30 Average legal costs in claims in which litigation is commenced are more than 10 times the average costs in claims in which disputes are resolved without litigation. A reduction in the current litigation rate of 50%, to 40%, could result in substantial savings in legal costs, of anything up to \$20m.
- 31 The litigation rate for insurers varied significantly in our sample, from 20% to over 70%. Although theoretically litigation should be a cost reduction strategy, the insurers most frequently involved in litigation incurred significantly higher legal and other claim costs.
- 32 We calculate that the increase in the amount paid by insurers for claimant legal costs, following the LPRA, has added to annual finalised claim costs overall by about \$18.5m. This amount was less than \$5.00 per motor vehicle registered in 1996-97.
- 33 We estimate that total legal costs (that is, the amount paid by insurers for their own and claimant legal costs) made up about 22% of the total incurred cost for claims finalised in 1996-97, or \$179.5m on total incurred costs of \$816m. That amount is equivalent to nearly \$50 per motor vehicle registered in 1996-97.

The decision to claim

34 In order to investigate the increased claiming rate among accident victims, we conducted a survey of a large number of people who had been injured in a motor accident either in 1991-92 or in 1994-95. The number of accident victims declined slightly between the two years, by 4%; yet, the number of claims rose by 36%.³¹ In the earlier of these two years, 48 out of every 100 motor accident victims made a claim under the Scheme. In 1994-95 (the first year after the LPRA came into force) the claiming rate was 68 out of every 100 accident victims. In this part of our study we sought to discover, first, what it was about the circumstances of accident victims that made some claimants and others not and, second, what had changed between the two years that explained why so many more made claims.

Methodology

35 We set out to survey approximately 200 claimants and non-claimants from each of the two accident years. We also decided to try to include approximately equal numbers of accident victims in each category whose injuries were ‘serious’ or ‘minor’. In all, 191 claimants and 163 non-claimants involved in accidents in 1991-92, and 252 claimants and 185 non-claimants involved in accidents 1994-95, participated in our survey.

36 The participants in our survey were drawn from the populations of accident victims in 1991-92 and 1994-95 in this way: The Road Traffic Authority (RTA) provided us with the records of all 43,672 people over 17 years of age who were injured but not killed in an accident involving at least one moving vehicle.³² From this group we drew a list of 2412 randomly selected accident victims, divided equally by injury severity³³ and accident year. The samples were also selected to maintain accident locality and gender proportionality. We then identified claimants by attempting to match people on this list with claim records maintained

³¹ Motor Accidents Authority, *June '97 CTP Statistics* at p 9.

³² No contact details were provided at this stage. The protocol for obtaining personal details and contacting accident victims in our sample was approved by the New South Wales Privacy Committee.

³³ The RTA records injuries as ‘serious (requiring hospital admission)’, ‘treated at hospital or elsewhere but not requiring hospital admission’ and ‘injured but not treated’. We grouped the latter two categories as ‘minor’ injuries.

by the Motor Accidents Authority (MAA).³⁴ This resulted in only 33% of our 1991-92 list, and 35% of our 1994-95 list being identified as claimants.³⁵ As it happened, however, a pilot study indicated that our expectation, that a starting sample of about 2400 people would yield an 'analytic sample' of 800, had been far too optimistic. We decided to 'top-up' our sample of claimants from the MAA claims database, randomly selecting additions subject to the other selection criteria³⁶ applied to the RTA sample. Our starting list of 3113 people was then reduced to a 'net sample' of 2309, because 804 of our starting number could not be contacted or otherwise could not participate in the survey.³⁷ In the result we received 791 responses – a response rate of 34.3% on our net sample.

37 The questionnaires mailed to claimants and non-claimants differed slightly. Both asked respondents questions about

- their accident
- their injuries
- their treatment
- treatment costs
- other costs attributable to their injuries
- what they were advised or understood about their potential claim
- what they did about making a claim
- the Motor Accidents Scheme
- their attitudes towards the Scheme and their experience
- some personal characteristics.

38 In a pilot trial of our survey, involving a sample of 120 people, we began by asking respondents to reply by telephone and take part in an interview. A toll-free (1 800) number was made available. In the face of a poor response, we subsequently sent a copy of the questionnaire and gave respondents the choice of filling it in and returning it by pre-paid post. We found that about half of our respondents chose one mode and half chose the other mode of reply. As a

³⁴ The RTA was able to provide contact details for 2409 of the people on our list.

³⁵ These figures are well below the expected numbers (of 48% and 68% respectively) based on the actuarial figures for claim proportions in the two years. We suspect that the explanation lies in the difficulty of matching information between the RTA and MAA databases, resulting in a high proportion of 'misses' for claimants. In fact, about 5% of the people we identified as non-claimants identified themselves as claimants, and this figure is very likely, given our low response rate overall, to have been an underestimate of the proportion who were incorrectly classified as non-claimants.

³⁶ relating to accident year and location, victim gender and injury severity.

³⁷ No correspondence was sent to 13 people because we had incomplete address details, 729 people had left the address at which they were living at the time of the accident, 23 had died since, 21 were unable to complete the survey due to health problems, and 18 people responded that they had not been involved in an accident and had been contacted in error.

consequence, we offered this choice from the outset in our full study. Also during the pilot, we offered an incentive of \$10 to half of the sample, to compensate them for their inconvenience.³⁸ We found that this did not affect the response rate, and we abandoned this in the full sample. Our initial contact letter, although written in English, indicated that we would provide a telephone interpreter service if this was desired by a respondent, and this offer was taken up in a small number of cases.

Results

Response biases

- 39 Our relatively low response rate raises the possibility that our results may be affected by response bias. We tested for differences in the six variables for which we had data for both our full sample of 3113 accident victims and our respondent sample of 791 people.
- 40 Significantly more claimants responded than non-claimants.³⁹ More people whose accident occurred in 1994-95 responded than did accident victims from the earlier year.⁴⁰ These response biases are in fact largely attributable to related effects of claim status and period on the failure to contact a large part of our starting sample that is, accident victims from the 1991-92 period and non-claimants were disproportionately represented among surveys which were 'returned to sender'.⁴¹
- 41 We also found that victims involved in Sydney metropolitan accidents were significantly under-represented in our respondent sample, and rural and regional respondents were proportionally over-represented.⁴² Fewer people under 35 years of age responded, whereas proportionally more people over 55 participated.⁴³ We found no significant differences between the full and respondent samples with respect to injury severity⁴⁴ or gender.⁴⁵

³⁸ Completing the survey or interview required about 20 – 30 minutes.

³⁹ $\chi^2 = 9.66$, $df = 1$, $p < 0.001$

⁴⁰ $\chi^2 = 22.56$, $df = 1$, $p < 0.001$

⁴¹ 29% of the questionnaires sent to the starting sample of 1991-92 non-claimants, and 22% of those sent to the 1994-95 non-claimants were 'returned to sender'. The comparable figures for the claimant groups were 25% and 16% respectively. The claimant effect was significant overall but not significant for the 1991-92 group, indicating that the period effect is much stronger and tends to attenuate the claimant status effect over time.

⁴² $\chi^2 = 6.52$, $df = 1$, $p < .01$. This effect could conceivably be related to a non-contact bias, as it is likely that the urban population as a whole tends to change addresses more frequently than the rural and regional population.

⁴³ $\chi^2 = 69.24$, $df = 5$, $p < .001$

⁴⁴ $\chi^2 = 0.25$, $df = 1$, $p = .618$

⁴⁵ $\chi^2 = 0.92$, $df = 1$, $p = .338$

42 None of the sample differences suggests to us any particular systematic influence which affects our interpretation of the other results presented here.⁴⁶

What's different about claimants and non-claimants?

43 *Overview.* Our claimant and non-claimant groups differed from each other in only a few, largely predictable ways. Non-claimants were more likely to believe themselves to have been at fault in the accident, their injuries tended to be more minor, and their losses less severe. They also knew marginally less about how the Motor Accidents Scheme works, although this difference very probably reflects the more substantial experience of claimants rather than some threshold barrier affecting the likelihood of claims being made.

44 *Accident details.* Overall, claimants were much more likely to believe that another driver was responsible for their injuries,⁴⁷ and Police assessments of fault tended to agree with them. Nearly 40% of claimants reported that they were either passengers or pedestrians,⁴⁸ and 92% of these reported that a driver of a motor vehicle was at least partly at fault in the accident. Just over 60% of claimants were drivers, and 96% of these reported that another driver was *completely* at fault.⁴⁹ In contrast, 31% of non-claimants reported that they were passengers or pedestrians, and only 62% of them reported that a driver of a motor vehicle was at least partly at fault. Of the non-claimant drivers, fully 36% reported themselves as being wholly at fault, and a further 23% said they were partly at fault.⁵⁰

45 *Injury severity and loss.* A much higher proportion of non-claimants described their injuries as minor, and more claimants described their injuries as serious or severe.⁵¹ The distribution of the respondents' assessments of their injury severity is shown in Table 1.

Table 1. Accident victims' assessments of their own injury

	Minor	Moderate	Serious	Severe	Critical
Claimants	14%	35%	34%	15%	3%
Non-claimants	33%	38%	18%	8%	3%

⁴⁶ This point is reinforced by the fact that the correspondence on claim costs between our respondents and the starting samples was remarkably close. The data is presented in note 79, below.

⁴⁷ $\chi^2 = 252$, $df = 16$, $p < .001$

⁴⁸ the questionnaire did not distinguish between passengers and pedestrians.

⁴⁹ In 78.7% of these cases the respondents reported that the Police had made a determination of fault and, further, the determination was said to be that another driver was *wholly* at fault in 93%.

⁵⁰ Police were reported as having made a determination in 73.2% of these cases; in 55.6% of them the determination was that the non-claimant respondent was wholly at fault, and partly at fault in a further 14.2% of cases.

⁵¹ $\chi^2 = 58$, $df = 5$, $p < .001$

- 46 Claimants were far more likely to report long-term injuries or disabilities, including scarring (71%), than were non-claimants (40%)⁵² and non-claimants were more likely to require no medical treatment for their injuries (16%) compared to claimants (3%).⁵³
- 47 About the same proportion of claimants (71%) and non-claimants (65%) said they required some hospital treatment and exactly the same proportion (42%) were admitted to hospital for treatment. There was an apparent trend for more non-claimants to spend shorter periods of time, and for more claimants to spend longer times in hospital, but this was not statistically significant. However, a significantly higher proportion of claimants (48%) reported receiving treatment from a doctor or general practitioner for more than six months, compared to non-claimants (17%).⁵⁴
- 48 Nearly 86% of claimants responded to a question about the amount of their medical treatment costs, compared to 61% of non-claimants. Less than 30% of claimants estimated this amount to be less than \$1000, compared to 59% of non-claimants; on the other hand, over 30% of claimants estimated their medical treatment costs to exceed \$5000, compared to 12% of non-claimants.⁵⁵
- 49 A higher proportion of claimants (17%) compared to non-claimants (8%) said they had to stop work completely as a consequence of their injuries.⁵⁶ About the same proportion of claimants and non-claimants (30%) reported that they had to take unpaid time off work, but a higher proportion of claimants (19%) compared with non-claimants (11%) had to take more than one month off work.⁵⁷ Nearly 10% of claimants had to take more than 6 months off work, compared with only 4% of non-claimants.
- 50 A higher proportion of claimants (57%) compared with non-claimants (44%) required assistance with tasks they normally did themselves.⁵⁸ Over 20% of claimants compared with 7% of non-claimants said they required help with general household tasks for more than 6 months.

⁵² $\chi^2 = 73$, $df = 1$, $p < .001$

⁵³ $\chi^2 = 135$, $df = 3$, $p < .001$

⁵⁴ $\chi^2 = 100$, $df = 3$, $p < .001$

⁵⁵ $\chi^2 = 59.6$, $df = 6$, $p < .001$

⁵⁶ This difference is not, however, statistically significant: $\chi^2 = 2.67$, $df = 1$, $p = .102$

⁵⁷ $\chi^2 = 11.1$, $df = 4$, $p < .05$

⁵⁸ $\chi^2 = 10.5$, $df = 1$, $p < .001$

- 51 *Knowledge of the Motor Accidents Scheme.* Respondent knowledge of the Motor Accidents Scheme was tested with 10 ‘true or false’ questions. Claimants performed marginally better than non-claimants, which is not surprising given their more substantial experience with the Scheme. On the other hand, and rather more surprising, was the fact that only 53% of claimant responses were correct (the remainder either got the answer wrong or did not respond to the question).⁵⁹ Non-claimants as a group managed only 46% correct responses but the small difference between claimants and non-claimants would seem to indicate that experience with the Scheme does not lead to a good understanding of it.⁶⁰
- 52 Few questions produced any striking differences between claimants and non-claimants. Two questions warrant some comment. A lower proportion of non-claimants (52%) knew that it was *not* necessary to use a solicitor to make a claim, compared with 63%⁶¹ of claimants⁶² and a lower proportion of non-claimants (37%) knew that a claim for general damages did *not* have to go through the court system, compared with 54% of claimants.⁶³ The level of misapprehension on these two points could conceivably be related to other threshold issues affecting decisions about whether to make a claim (such as whether a claim would be worthwhile or too much trouble).⁶⁴
- 53 Two further facts can be added about claimants and non-claimants. First of all, only 18% of non-claimants sought legal advice before deciding not to make a claim. In contrast, 59% of claimants said that the first thing they did following their accident was to see a lawyer, and 68% of claims were lodged by solicitors (from which we infer that this is the percentage of claimants who obtained legal advice before making their claim). Secondly, about half of the non-claimants who thought they were eligible to make a claim (but did not seek advice about doing so)

⁵⁹ the variation, question to question, in the number of non-responses was considerable, ranging from 5.9% to 20.8% for claimants and 8.6% to 25.1% for non-claimants. Given this, it seems reasonable to regard non-responses as equivalent to ‘don’t know’ responses.

⁶⁰ This may or may not be seen as disturbing – there is no obvious reason why accident victims should have a detailed understanding of the workings of the Scheme, although some of our questions related to basic entitlements of, for example, drivers partially at fault.

⁶¹ by the way, the highest correct response rate to all questions.

⁶² This difference only just failed to reach significance: $\chi^2 = 5$, $df = 2$, $p = .08$

⁶³ $\chi^2 = 25$, $df = 2$, $p < .001$

⁶⁴ A lower proportion of non-claimants also knew that there was no claiming threshold applicable to claims for medical costs and out-of-pocket expenses (36% vs 47% for claimants). This fragment of knowledge is, arguably, rather more esoteric and less likely to weigh significantly in many decisions about whether to make a claim or not.

nominated 'it would cost too much' or 'it would be too much hassle'⁶⁵ as important or very important reasons for not making a claim.⁶⁶

What's changed between the accident years?

54 Having canvassed what it was about the circumstances of accident victims that made some claimants and others not, we can turn to what changed between 1991-92 and 1994-95 which may explain why so many more in the latter year were claimants. In brief, it seems that more accident victims in 1994-95 got legal advice about making a claim. More of them were prompted to see a lawyer by advertising (although advertising was not the reason most claimants saw a lawyer). A higher proportion of their claims were handled by solicitors on a 'no win – no pay' basis (although the increase was at the expense of agreements that payment will only be required at the end of claims, rather than in arrangements to pay as the matter progresses). And, importantly, it appears that 1994-95 accident victims with minor injuries who got advice, were advised that their claims are worth more.

55 *Getting legal advice.* The proportion of our sample of accident victims who sought legal advice about making a claim is noticeably stable between the two accident years. Because we know the actual population statistics for claimants and non-claimants in each of the two accident years,⁶⁷ our data can be used to calculate the estimated increase in the proportion of accident victims who sought legal advice. The proportion increased between 1991-92 and 1994-95 by 10%, from 42% to 52%. The figures are shown in Table 2.

Table 2: The proportion of accident victims who sought legal advice

	91-92	94-95
Propn of claimants seeking legal advice	0.68	0.68
Propn of accident victims claiming	0.48	0.68
Propn of accident victims seeking legal advice and claiming	0.3264	0.4624
Propn of non claimants seeking legal advice	0.18	0.18
Propn of accident victims not claiming	0.52	0.32
Propn of accident victims seeking legal advice and not claiming	0.09	0.0576
Propn of accident victims seeking legal advice	0.3264 + 0.09 = 0.42	0.4624 + 0.0576 = 0.52

⁶⁵ Another option offered as a reason for not making a claim was infelicitously worded: this was 'what they were *told* about what their claim was worth' rather than 'what they *thought* their claim was worth.' Most respondents, sensibly enough, indicated this factor was 'not applicable' to their decision.

⁶⁶ The minor nature of their injuries or inconsequential cost of their medical treatment were nominated with about the same frequency.

⁶⁷ Motor Accidents Authority, *June '97 CTP Statistics* at p 9.

- 56 *Lawyer advertising.* Of those 1994-95 claimants who saw a solicitor about their claim (either before or after making it) the proportion who recalled having seen or heard, beforehand, a solicitor's advertisement relating to personal injuries was 32%. Only 20% of the 1991-92 claimants who saw a solicitor, saw or heard an advertisement before doing so.
- 57 About a third of those who saw or heard an advertisement in both years said they were actually prompted by it to see a solicitor, and only a quarter said that the advertisement actually influenced their choice of solicitor. This fact suggests that the content of solicitors' advertisements may not be very significant, beyond making the connection with personal injuries. The 1994-95 claimants who saw advertisements were about twice as likely as 1991-92 claimants to nominate 'no win – no pay' and 'initial consultation free' as information which 'stood out most' to them. Yet they were no more likely to say that the advertisements either prompted them to see a solicitor or to choose a particular solicitor. Our data indicate that lawyer advertising has a consistent but remarkably 'generic' effect on consumers.
- 58 The increase between 1991-92 and 1994-95 in respondents who said they were prompted to see a lawyer by an advertisement, would account by itself for 4% of the increase of 10%⁶⁸ in the proportion of accident victims who saw a solicitor.⁶⁹ This may underestimate the effect of advertising, for at least two reasons. One, the effect of advertising is diffuse. Many of our respondents said they were prompted to see a solicitor on the recommendation of a friend or treating doctor⁷⁰ — many of these recommendations may have been prompted by advertising. We would not be surprised, moreover, if the respondents in our survey under-reported the influence of advertising on their decision to see a solicitor — many of us might not like to confront the influence advertising has on our decisions. Beyond this, however, we cannot put any bracket on the effect of advertising on the claiming rate, except to point out that it cannot (obviously) be greater than the rise in the number of potential claimants who saw a solicitor (again, 10%), and we would not

⁶⁸ 4% is the difference between 32% / 3 and 20% / 3. See paragraphs 56 – 57, above.

⁶⁹ This assumes that the same proportion of all accident victims as claimants who saw an advertisement would have been prompted by it to see a solicitor (ie. one-third). We couldn't sensibly ask non-claimants about when they saw advertisements either in relation to the time they saw a solicitor or made their decision not to claim. However we did ask them if they recalled seeing any lawyer advertisements relating to personal injuries claims 'before or after you had your accident'. Of course, this question relates to any time up to the time the survey was completed, and interestingly enough 34% of the 1991-92 non-claimants, and 37% of the 1994-95 non-claimants said they had suggesting the same level of 'market penetration' by lawyer advertising among consumers and potential consumers of legal services.

⁷⁰ 20% said the recommendation came from their doctor, 60% said they were advised to see a solicitor by a friend or family member.

expect this to translate into an equal rise in the claiming rate, point for point. The hypothesis that advertising is responsible for some or all of the claiming rate rise must assume that at least some of the increase in 1993-94 is to be attributed to lawyer advertising after 1 July 1994⁷¹; the relevant rise to be explained, then, is from 51% (in 1992-93) to 68% (1994-95), in all a jump of 17%.⁷² Plainly, advertising does not account for all of this, and other factors must be involved.

59 *Fee arrangements.* The delicate subject of when claimants would be required to pay their legal fees⁷³ appears to have been discussed in most cases, and as often with 1991-92 as with 1994-95 claimants (89% of the 1991-92 claimants who saw a solicitor responded to the question about fee arrangement, compared with 86% of 1994-95 claimants). The proportion of ‘no win – no pay’ fee arrangements has risen markedly,⁷⁴ as Table 3 shows.

Table 3. Fee arrangements

	1991-92 ⁷⁵	1994-95
pay only at end of case	71%	52%
pay only if case won	18%	38%
pay as case progresses	10%	10%

60 It should be noted that the rise in the use of ‘no win – no pay’ fee arrangements has been entirely at the expense of arrangements to ‘pay only at the end of the case’. In fact, very few claimants in the motor accidents jurisdiction do not succeed in recovering something for their injuries which might suggest, to the statistician or rational punter at least, that the change is without a difference.⁷⁶ To the contrary, it can be suggested that the difference may be very significant to claimants, who are the paradigmatic ‘one-shotters’ and may well tend to be risk

⁷¹ since claims for some accidents in 1993-94 could be made after 1 July 1994.

⁷² As we noted in the introduction, there was some underlying increasing trend in the claiming rate apparently quite independent of the liberalisation of lawyer advertising rules introduced by the LPRA. Advertising after 1 July 1994 might have affected the claiming rate for accident years even earlier than 1993-94. This effect should be very small, as the time for making a claim is within 6 months of the accident, and the delay in making claims outside this time must be excused (cf. *Motor Accidents Act 1988* (NSW) ss 43, 43A), however, apparently something like 20% of claims are actually made more than 9 months after the accident date.

⁷³ the questionnaire did not distinguish between professional fees and disbursements.

⁷⁴ although the difference falls short of statistical significance: $\chi^2 = 2.9$, $df = 1$, $p = .088$

⁷⁵ the 1991-92 proportions do not add to 100% because of rounding error.

⁷⁶ We estimate that claimants are ‘unsuccessful’, in the sense that they recover nothing, in less than 5% of claims. As of 30 June 1997 there had been about 112,000 claims under the Scheme, and the incurred costs were either zero or negative in about 5,400 of these. See Motor Accidents Authority, *June '97 CTP Statistics* at p 17. Our data on litigated claims (that is, those claims involving substantial legal costs) indicates that these result in no recovery by the claimant in fewer than 2% of cases.

averse. Moreover, the right to negotiate for a ‘success premium’ may well affect the willingness of lawyers in some cases to proceed with claims.

61 *Advice on value of claim.* Finally, it appears that a higher proportion of ‘low-end’ claimants who sought legal advice in 1994-95 were advised that their claims were worth more money than 1991-92 claimants were told their claims were worth. Table 4 shows the distribution of claimants into the value brackets they were advised (or, in the case of self-represented claimants, thought) their claims were worth, for each of the two accident years. We have separated data for claimants who saw a solicitor and self-represented claimants to show that the differences between years are due to changes in the represented claimants data. Also shown are the distribution of total incurred costs for all reported claims for accidents in the two years.

Table 4. What claimants were told or thought their claim was worth

		<\$5K	\$5-20K	\$20-50K	\$50-100K	>\$100K
advised claimants	1991-92	16%	27%	21%	16%	20%
	1994-95	11%	35%	31%	17%	8%
self-claimants	1991-92	78%	13%	8%	3%	0%
	1994-95	81%	14%	2%	2%	0%
all claimants	1991-92	34%	22%	17%	13%	14%
	1994-95	27%	30%	25%	13%	5%
all reported claims (population data) ⁷⁷	1991-92	44.4%	16.5%	19.2%	10.3%	9.5%
	1994- 1994-95	28.2%	19.2%	29.6%	13.0%	10.0%

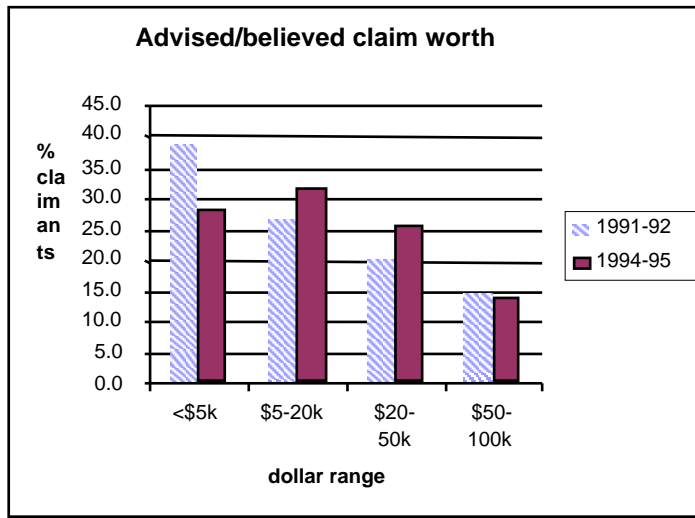
62 We must emphasise that the differences in the proportions for our respondents in the low-end brackets between the two accident years are not statistically significant.⁷⁸ However, the pattern in what claimants who saw a solicitor were told about the value of their claims reflects what was actually happening generally in the claims ‘population’ to the pattern of awards and settlements between the two accident years. This is somewhat masked by a sampling ‘artifact’ in the data in Table 4, as it appears that claimants advised their claims were worth over \$100,000 are over-represented among our 1991-92 respondents, and under-represented in our 1994-95 respondents. Claimants advised that their claims were

⁷⁷ distribution of total incurred cost (as at 30 June 1997). Source: Motor Accidents Authority *June '97 CTP Statistics* at p 17.

⁷⁸ Standardised residuals for the <\$5K and \$5K to \$20K groups are less than 1.

worth less than \$5,000 are also, apparently, under-represented in our group of 1991-92 respondents. When we investigated this further, we found the explanation in a bias in our original samples of 1991-92 and 1994-95 claimants the latter sample did not include any claimants who had been paid, or for whose claims the insurer had reserved, in excess of \$100,000.⁷⁹ In Figure 2 we have excluded responses in the over \$100,000 bracket (and recalculated proportions accordingly) in order to show the trend in relation to ‘low-end’ claims more clearly.

Figure 2. Dollar amount that claimants were advised their claim was worth.



63 This analysis leads us to conclude that accident victims who sought legal advice in 1994-95 were more likely than accident victims in 1991-92 to be told that their claim was worth between \$5,000 and \$50,000, and were less likely to be told that their claims were worth less

than \$5,000. This advice would reflect industry trends in incurred claims costs. Given that the value of a claim is undoubtedly an important threshold issue in deciding to make a claim, this trend may be a very significant factor underlying the rise in the claiming rate.

⁷⁹ and, indeed, small claims were also apparently under-represented in the original sample. In fact the correspondence on total claim costs (data supplied by the Motor Accidents Authority with each claim included in our sample) between our respondents and the original samples was remarkable, as shown in this table:

	Total cost	<\$5K	\$5-20K	\$20-50K	\$50-100K	\$100-200K	>\$200K	TOTAL
1991-92	full sample	37.0%	16.3%	19.7%	14.5%	8.0%	4.5%	100%
	respondents	37.4%	17.6%	16.6%	16.6%	8.6%	3.2%	100%
1994-95	full sample	26.2%	20.3%	37.1%	16.4%	0%	0%	100%
	respondents	28.2%	18.0%	37.1%	16.7%	0%	0%	100%

Summary of key findings on the decision to claim

- 64 Our research suggests a number of key conclusions about the factors which appear to underlie the increased rate of claiming under the Motor Accident Scheme
- 1994-95 accident victims with minor injuries were advised that their claims were worth more and therefore more worth pursuing. This advice reflected actual trends in awards and, we suggest, increasing trends in claim values may have been the most significant factor underlying the increased claiming rate over the study period.
 - more 1994-95 accident victims sought legal advice. Only some part of the increase in the claiming rate (4 percentage points of the claiming rate, or 25% of the increase) can be attributed to lawyer advertising. The content of advertisements does not appear to be particularly important.
 - more 1994-95 claimants entered into contingent fee arrangements with their lawyers but this increase was entirely at the expense of agreements to pay legal fees only at the end of a claim.
 - improved knowledge about the Scheme does not appear to be a factor underlying increases in the claiming rate; the level of knowledge has not changed, and appears to be poor among both claimants and non-claimants.
- 65 We should make it clear that we do not presume to express an opinion on whether a given, or indeed changing, claiming rate is, as a matter of policy, a ‘good’ or ‘bad’ thing. However, having identified advertising, obtaining legal advice and ‘no win – no pay’ fee arrangements as factors in the rising claim rate, we reiterate that very few claims are unsuccessful (in the sense that the claimant recovers nothing).⁸⁰ It seems difficult to argue that there has been some vice in removing barriers to advice and legal services in these circumstances.
- 66 Assuming, then, that the increasing number and cost of claims is widely accepted to be a problem, it would appear that the strategy of reducing the compensation value of minor injuries is not only direct and honest but also, we should have expected, a potentially very effective way of addressing it. This was, in fact, the strategy implemented by the enactment of section 79A of the *Motor Accidents Act* in 1995.⁸¹ It is therefore noteworthy that the claiming rate has stabilised at 61 out of every 100 accident victims (perhaps higher than expected) and that, despite early signs that the amendment was having a significant effect on claim costs, there are now, apparently, indications that the impact will be less than originally

⁸⁰ see note 76, above.

⁸¹ *Motor Accidents Act Amendment Act* 1995

predicted.⁸² There is clearly a need to monitor trends in compensation awards and judgements very closely.

⁸² See para 7 above.

The LPRA and claim legal costs

Introduction

67 In order to examine the legal costs⁸³ involved in motor accident claims, we decided to carry out what really amounted to two studies, based on two different samples of claims. We give more technical details about the samples below but the first study – the ‘Litigated claims study’ – examined claims in which litigation was commenced in either the latter part of 1992 or 1994.⁸⁴ The second study – the ‘All claims study’ – examined claims finalised in either calendar year 1995 or 1996.⁸⁵ Our reasons for structuring the research in this way are explained here.

68 One of our main research objectives was to assess whether the LPRA had affected legal costs under the Scheme. The classical design type for assessing the impact of an ‘intervention’, such as the introduction of the LPRA in July 1994, is a ‘before-and-after study’. In these studies, cases are selected from two time periods of equal length chosen so that as far as possible the only significant change is the one under study. This seems straightforward, until one realises the problems presented in our particular application by the ‘long-tailed’ nature of CTP business⁸⁶, and the fact that there have been other changes which may have had an impact on legal costs in the Motor Accident Scheme. In fact, four problems arose in designing a suitable study, related to the long-tailed nature of CTP business and the changing environment which affects the Motor Accident Scheme.

69 The first problem is that long cases are different from short cases in both nature and process. For example, the statistics show clearly that cases in which victims suffered less severe injuries are finalised earlier than cases in which the victims suffered more severe injuries. Moreover, compensation levels increase with ‘development year’ (an insurance industry concept related to, but not the same as, the time taken to finalise a claim from the accident). In general, higher levels of compensation are associated with higher costs leading to an observed statistical relationship between length of time and legal costs. So if the two populations

⁸³ Refer to the definitions of references to legal costs in para 21 above.

⁸⁴ drawn from the Motor Accidents List of the Sydney Registry of the District Court of New South Wales.

⁸⁵ drawn from the MAA database.

⁸⁶ cf. Motor Accidents Authority, *June '97 CTP Statistics* at p 7.

being compared are such that one population by definition has longer cases than the other, then this may affect estimates of average levels of legal costs. The design problem then is how to choose the pre and post samples so that they include cases of similar length and at the same time include a diversity of cases.

- 70 The second problem is that the claims environment is heterogeneous. In particular, during the years on either side of the introduction of the LPRA, changes in the law have had an impact on the litigation process. For example, the jurisdiction of the District Court increased from \$100,000 to \$250,000 on 1 July 1993. The 1995 amendments to the *Motor Accidents Act* made several changes, including extending the limitation period, and changing the threshold for non-economic loss claims. In order to isolate the effect of the LPRA, it would have been desirable to sample over periods in which there are no changes. But in these circumstances, such a requirement would have meant that we would have restricted our sample to cases with short processing times.
- 71 The third problem is that case processing times were reduced through the deliberate intervention of the District Court as it sought to clear its backlog of cases during 1995-96. To compare similar cases, we need within reason to compare similar cohorts of cases.
- 72 The fourth problem flowing from the 'long tailed' nature of CTP business is a technical problem called length-biased sampling. In selecting cases for a study comparing two populations with respect to variables correlated with time, we need to ensure that we have samples which are random with respect to time.
- 73 We resolved these problems by conducting two studies, using different sampling criteria. In the Litigated claims study, we compared two samples of completed cases which were litigated. The first sample was drawn from completed cases in which litigation commenced in the Sydney District Court between 1 July 1992 and 31 December 1992. The second sample was drawn from completed cases in which litigation commenced in the Sydney District Court between 1 July 1994 and 31 December 1994 and in which the total award or settlement was not more than \$100,000. (This latter requirement was introduced because of the change in jurisdiction in the District Court in 1993.) The samples were confined to the Sydney District Court because of the likelihood that most cases had been finalised by 1 April 1997 before sampling took place.⁸⁷ Moreover, both periods of time

⁸⁷ 1773 cases were commenced in the Motor Accidents List between 1 July and 31 December 1994. 25 of these were transferred to another court. 1673, or 96%, were finalised before 30 April 1997 (the time our sample was taken). 41 cases have been finalised since and 34 were not finalised as of 30 June 1998. In contrast, As of April 1997, approximately one-third of all claims relating to accidents between 1 July – 31 December 1994 were still open.

were governed by the same Court procedures.⁸⁸ We achieved then a fair degree of comparability between the two samples. The drawbacks however were —

- some of the 92 cases were completed after 1 July 1994 and costs in this group would, to some extent, have been affected by the LPRA
- the 94 cases were ‘early post-LPRA’ and, in fact, the claimant’s solicitor had been retained in all cases shortly before 1 July 1994; the LPRA may not have influenced claimant solicitor – client costs for this reason
- since no cut-off point was set for completion of cases other than when the sample was drawn, the 92 cases were potentially longer;
- restricting the study to litigated claims meant that we could only analyse possible increases in legal activity within litigation (and effectively precluded us from researching whether legal costs have risen because of factors such as increased utilisation of solicitors in the claims process⁸⁹ and possible increases in the litigation rate⁹⁰).

74 In the All claims study, a random sample of cases completed in 1995 and 1996 was selected. The purpose of this study was to obtain a picture of legal costs across the spectrum of claims. Our aim was to understand the significance of legal costs within the Scheme as a whole, and to examine the relationship between legal costs and the process of resolving claims. (By definition, finalisation of post-LPRA cases included in this sample took less time than did finalisation of pre-LPRA cases, and hence its use in assessing the impact of the LPRA on legal costs is limited.)

⁸⁸ Part 24C, District Court Rules.

⁸⁹ The MAA’s data suggests that the proportion of claims with legal representation increased from 50% of 1990-91 accident year claims to 65% of 1994-95 accident year claims, but that the proportion of claims with legal representation has decreased since. It is, however, also noted that the more recent accident years are relatively undeveloped. See generally Motor Accidents Authority, *June ’97 CTP Statistics* at p 13. Compare paras 53 and 55 above. In our survey of accident victims 68% of the claimants for both the 1991-92 and 1994-95 accident years said their claims were lodged by solicitors; a further 10% of the 1991-92 accident year claimants and 13% of the 1994-95 accident year claimants said they had ‘contacted a solicitor after lodging their claim’ suggesting a higher but approximately equal legal representation rate in the two periods.

⁹⁰ There is other evidence of a long-term increase in the litigation rate but the published data is somewhat inconclusive, at least as to whether increases in the litigation rate have been a factor in increasing claim costs since 1993-94. MAA statistics indicate that the litigation rate increased from 22% of 1989-90 accident year claims to 35% of 1993-94 accident year claims. However, claims for accident years since are still relatively undeveloped. See generally Motor Accidents Authority, *June ’97 CTP Statistics* at p 13. The MAA’s published litigation rate (as at 30 June 1997) for 1991-92 accident year claims was 26%, while the rate for 1994-95 accident year claims was 28.5%. In our survey of accident victims (see Section 2 above) 35% of the 1991-92 accident year claimants and 37% of the 1994-95 accident year claimants said their ‘solicitor had filed a Statement of Claim with a Court’, suggesting a higher but approximately equal litigation rate in the two periods.

75 The details of the Litigated claims study and our findings concerning the impact of the LPRA on claiming costs are discussed in the balance of this section. The details and results of the All claims study are presented in Section 4.

Methodology and sampling

76 The claims included in our Litigated claims study were selected in this way: We obtained a list of motor accident claims in which proceedings were commenced in the Sydney Registry of the District Court in either the period 1 July – 31 December, 1992 or 1 July – 31 December, 1994, and were finalised at the time of sampling (April 1997). Claims in the 1994 group where the final award or settlement was in excess of \$100,000 were excluded, as this was the jurisdiction limit of the Court in the 1992 period. We randomly selected a little more than 400 claims from each period. These were matched to records maintained by the Motor Accidents Authority, in order to obtain the managing insurers' details in each case.

Managing insurer file survey

77 Each of the 14 licensed insurers involved in the Scheme during the relevant period provided access to their files. However, in roughly 20% of the cases, the file could not be located, or it was found to still be active, or it was otherwise unusable. We therefore 'topped-up' our samples with a second draw of just over 100 files from each year, selected through the same process. We eliminated a further 39 files during our preliminary analysis because of problems with missing data. In the result, 392 claims in which proceedings were commenced in the second half of 1992 and 373 claims in which litigation commenced in the second half of 1994 were included in our study. The cases selected in the 1994 group were heavily weighted in favour of claims commenced in the latter part of the period.⁹¹

78 A team of trained coders surveyed the managing insurers' claim files during July and September 1997, using a standard survey form. The form sought detailed information on

- claim and injury details
- claim processing prior to litigation
- the course of the litigation
- the final settlement or award
- legal costs paid to claimants

⁹¹ The numbers selected from each month were: July (3), August (2), September (119), October (103), November (139), December (6). Roughly equal numbers were chosen from each month in the '92 group.

- details of the ‘external’ legal costs incurred by insurer in processing the claim.⁹²

Claimant solicitor file survey

79 In addition, the coders also recorded claimant solicitor details. We then attempted to contact these solicitors to obtain costs information from their files. The solicitors were given assurances of confidentiality and anonymity for both themselves and their clients, and were asked to send their files to a well-known firm of costs consultants, by pre-paid delivery through the Document Exchange. The costs consultants recorded a range of costs details (using a standard survey form), including

- the total amount of the solicitor’s professional fees charged to the claimant
- fees for counsel
- fees for medical assessments
- other expert fees
- court fees
- other disbursements
- the amount paid by the insurer for the claimant’s costs.

Results and analysis

Solicitor file survey response rate and response biases

80 Overall, we were able to study 254, or 33% of the claimant solicitor files in the sample. This response rate is usual in studies of this kind but nevertheless low, in absolute terms, and raises the possibility that results based on solicitors file data may be affected by response bias. In fact, the response rate was higher for the 94 group (38%) than for the 92 group (29%). Within the 92 group there was a lower response rate for cases finalised after 1 July 1994.⁹³

81 We investigated further whether the sub-sample of claims in the solicitor file survey differed from the full sample of insurer files in relation to a number of key variables – maximum injury severity, finalisation type (settlement and judgement or award), litigation time, amount of award or settlement, claimant legal costs and insurer legal costs. There were no statistically significant differences except in the

⁹² that is, the transaction costs attributable to resolving a particular claim, paid by insurers for legal representation, medical examinations (not treatment), factual investigations and other disbursements. This *excludes* other transaction costs involved, particularly the ‘internal’ (eg employment costs) costs incurred by insurers for claims management and dispute resolution. Our data collection could not reliably capture the costs of legal services when these were supplied by ‘in-house’ solicitors employed by insurers.

⁹³ See further para 66, above.

case of claimant legal costs. These were higher on average for the respondent group than the group of non-respondents.⁹⁴

Costs agreements and written disclosures

82 There was a written cost agreement or disclosure in only 4% of the 1992 claimant solicitor files, whereas in the 1994 files the figure was 28%. The latter figure reflects the fact that our sampling was ‘early post-LPRA’ and was based on the date proceedings were issued in the District Court rather than the date solicitors were retained, which, in most cases, was shortly before the LPRA came into force.

83 Half of the costs agreements in 1994 (compared to none in 1992) were for a ‘no win – no pay’ retainer, and these were evenly split between agreements providing for a success premium and agreements in which there was no stipulated success premium. Overall, only 13% of the 1994 files was undertaken on a ‘no win – no pay’ agreement in writing.⁹⁵ (Our All claims study sample included larger proportions of solicitor files relating to retainers made after the LPRA and undertaken on ‘no win – no pay’ fee arrangements, and some further analysis of these cases is presented in Section 4, below.⁹⁶)

Analysis of costs data

84 The main results of analyses of the data collected from both insurers’ files and solicitors’ files are set out in Tables 5, 6 and 7. We should explain two potentially confusing features of these tables before discussing the results in detail.

85 First, the data are presented separately for settlements and judgements (including awards). In cases ending in a judgement or award, costs were negotiated separately. In settlements, this occurred in about one-quarter of the cases⁹⁷ — many settlements were ‘inclusive’ of costs. A consequence of this difference was that the amounts recorded in insurers’ files for legal costs paid to claimants was an ascertained figure for claims finalised by a judgement but, in most settlements, it was an insurer’s estimate of the amount of the settlement figure which should be

⁹⁴ When the analysis was carried out using three analytical groups (ie., splitting the 92 group into cases finalised before and after 1 July 1994) there was no significant effect. Examination of the mean profiles suggests that this is explained by the small size of the samples and also reflects greater variability for the 92 cases finalised after 1 July 1994.

⁹⁵ We should recall, then, that in our accident victim survey 38% of claimants from the 1994-95 accident year group said the fee arrangement with their solicitor was ‘no win – no pay’. This difference might simply reflect the absence of a written record of the agreement in our solicitor file survey. However, it probably reflects the ‘early post-LPRA’ quality of our sample, and suggest that conditional fee agreements have become more prevalent in motor accidents litigation since the period from which our sample was taken. See also paras 111, 119 – 121, below.

⁹⁶ paras 111, 119 – 121, below.

⁹⁷ this figure is based on the data from our sub-sample of solicitor files.

attributed to claimant costs.⁹⁸ Moreover, we could not always reliably determine in the insurer file survey whether the amount recorded for claimant legal costs was based on an ascertained figure or was an estimate. In short, there is a difference in the quality of our data for claims finalised by award or judgement, on the one hand, and settlements on the other. (Despite having adverted to this problem at such length, we can also say that our analysis of data differences between insurer files and solicitor files suggests that insurer file data on the amount paid to claimants for legal costs in settlements is more reliable than perhaps generally thought. The detailed analysis is presented in Appendix A. In brief, we found a high degree of correspondence between the amounts recorded in solicitors' and insurers' files when costs paid to the claimant was a separately ascertained figure, as it was in about 25% of settlements. A reasonably good model of the relationship between this figure and the claimant's solicitor's bill was constructed using solicitor file data. The same exercise using insurer file data on the amount paid to claimants for legal costs also produced a reasonably reliable model, although tending systematically to 'under-estimate' claimant's solicitor's bill to a greater degree.)

86 Second (returning to our preliminary explanation of the format of Tables 5, 6 and 7), in each table two analyses are reported. While we should have liked to have kept our analysis to the simple 'before and after' model, in fact 17% of our 1992 sample of cases were not finalised until after 1 July 1994. Costs in this group would have been affected, to some extent, by the LPRA,⁹⁹ and it is clear that in some other respects this group of cases is distinctive. In the first analysis, then, comparisons were made between two groups defined in terms of when litigation commenced (92 vs 94). In the second analysis, the comparisons were made between the three groups defined in terms of commencement and completion before or after 1 July 1994 (that is, by dividing the 92 group into two — 92 'pure' and 92 'mixed').

87 The final column in each table reports the significance level for each of the two analyses, together with information about the statistical test used.¹⁰⁰ A significant result is one with significance level less than 0.05. In the analysis between years, this means that the data supports the conclusion that 92 litigated cases are different from 94 cases. In the three group analysis, a significant difference says

⁹⁸ The same general reservation also applies to the allocation of the total award or settlement figure to separate heads of damage, although this is of less practical concern in the present context.

⁹⁹ cf Legal Profession Regulation 1994 cl.79.

¹⁰⁰ Either analysis of variance or an equivalent non-parametric procedure, the Kruskal Wallis test, was used.

that the data supports the conclusion that either one group differs from the other two (which are the same), or all three groups differ from each other. The nature of the difference can be teased out using another statistical technique.¹⁰¹

88 *Multiple regression analysis of main costs components.* The analysis just described does not, however, take account of variables which are confounded with our analytical groupings of claims. Observed differences may result from other variables and not from the impact of the LPRA. For example, the time taken in litigation is positively related to legal costs — by definition, we know that litigation time was longer on average for the 92 mixed than for the 92 pure cases, and hence we should not be surprised to find that average legal costs in the mixed group are greater than those in the pure group. As well, confounding variables may mask actual differences — we could reasonably suspect, for example, that the 94 group of claims involved proportionally higher numbers involving less severe injuries, and relatively shorter litigation times. So both significant and non-significant results in the simple analysis call for further examination through methods which adjust for other sources of variation apart from the dates of litigation commencement and finalisation, relative to the coming into force of the LPRA.

89 This problem has been handled using multiple regression techniques. This is a sophisticated and quite complicated statistical procedure. For the ‘aficionados’ we have elaborated the details of the strategy followed and results emanating from our analysis in Appendix B. The principal conclusions flowing from this analysis are summarised here.

Compensation costs

90 Total award or settlement data, and their components for the three main heads of loss (out-of-pocket expenses, economic and non-economic loss) are shown in Table 5. There are no significant differences among groups in either analysis. This is not surprising, given our sampling criteria,¹⁰² which were intended to minimise award differences between the comparison groups. Multiple regression analysis produced the same result.

Claimant legal costs

91 The results for claimant legal costs are shown in Table 6.

¹⁰¹ The Bonferroni procedure.

¹⁰² above, paras 73 and 76.

Table 5. Compensation costs (\$) (Litigated claims sample)**(a) Settlements**

		92 pure Group 1	92 mixed Group 2	92 All	94 Group 3	All	Significance¹ i) 92 vs 94 ii) 3-Group
Settlement (inclusive of costs)	Mean	36739	42388	37396	35273	36403	i) 0.246²
	s.e.	1337	4368	1295	1279	915	ii) 0.455 ³
	n	293	44	337	296	633	
out-of-pocket expenses	Mean	4849	7555	5161	3950	4569	i) 0.100²
	s.e.	423	1907	436	345	280	ii) 0.187 ³
	n	207	27	234	224	458	
economic loss	Mean	7513	5249	7270	5510	6414	i) 0.194³
	s.e.	772	1262	704	584	461	ii) 0.403 ³
	n	200	24	224	212	436	
non economic loss	Mean	20317	26082	20955	19964	20481	i) 0.840³
	s.e.	950	3791	947	855	641	ii) 0.471 ³
	n	209	26	235	215	450	

(b) Judgements

		92 pure Group 1	92 mixed Group 2	92	94 Group 3	All	Significance¹ i) 92 vs 94 ii) 3-Group
Total award (exclusive of costs)	Mean	31797	37774	34359	38578	36788	i) 0.334²
	s.e.	4379	4502	3157	2918	2148	ii) 0.421 ²
	n	32	24	56	76	132	
out-of-pocket expenses	Mean	5723	6019	5853	4977	5327	i) 0.465²
	s.e.	1294	1532	979	726	585	ii) 0.757 ¹
	n	27	21	48	72	120	
economic loss	Mean	11039	9304	10280	10990	10701	i) 0.781²
	s.e.	2996	2725	2048	1578	1248	ii) 0.875 ²
	n	27	21	48	70	118	
non economic loss	Mean	17060	23601	19863	23527	22018	i) 0.128²
	s.e.	2356	2277	1711	1602	1184	ii) 0.066 ²
	n	28	21	49	70	119	

Notes

1 In the column labeled significance, are recorded the significance levels for two analyses. The first analysis, 92 vs 94, compares litigation years. The second analysis compares three groups — *92 pure*: cases commenced and finalised before 1 July 1994; *92 mixed*: cases commenced before but finalised after 1 July 1994; *94*: cases commenced and finalised after 1 July 1994.

The method of analysis used was one-way analysis of variance or the Kruskal-Wallis rank test.

2 Based on the analysis of variance

3 Based on the Kruskal-Wallis rank test

Table 6. Claimant legal costs (\$) (Litigated claims sample)

		92 pure Group 1	92 mixed Group 2	92	94 Group 3	All	Significance ¹ i) 92 vs 94 ii) 3-Group
<i>Solicitors' files</i>							
Claimant's legal bill	Mean	8320	11200	8580	9108	8860	i) 0.499 ²
	s.e.	565	1585	538	560	389	ii) 0.279 ²
	n	91	9	100	113	213	
Claimant's legal costs paid by insurer	Mean	5907	5358	5857	7900	6879	i) 0.164 ³
	s.e.	576	584	525	965	560	ii) 0.378 ³
	n	30	3	33	33	66	
<i>Insurers' files</i>							
Claimant's legal costs	Mean	4598	5841	4744	5550	5138	i) 0.011 ²
	s.e.	213	956	220	227	159	ii) 0.006 ³
	n	218	29	247	237	484	
(b) Judgements							
		92 pure Group 1	92 mixed Group 2	92	94 Group 3	All	Significance ¹ i) 92 vs 94 ii) 3-Group
<i>Solicitors' files</i>							
Solicitor's bill	Mean	10058	18045	11901	12010	11975	i) 0.953 ²
	s.e.	992	6596	1785	932	839	ii) 0.261 ³
	n	10	3	13	28	41	
Insurers' payment when paid	Mean	7466	12211	8652	8655	8654	i) 0.998 ²
	s.e.	583	3985	1136	552	509	ii) 0.243 ³
	n	9	3	12	27	39	
<i>Insurers' files</i>							
Claimant's legal costs	Mean	6604	11752	8683	9188	8967	i) 0.595 ²
	s.e.	495	1302	692	639	469	ii) 0.001 ³
	n	31	21	52	67	119	

Notes

4 In the column labeled significance, are recorded the significance levels for two analyses. The first analysis, 92 vs 94, compares litigation years. The second analysis compares three groups — 92 *pure*: cases commenced and finalised before 1 July 1994; 92 *mixed*: cases commenced before but finalised after 1 July 1994; 94: cases commenced and finalised after 1 July 1994.

The method of analysis used was one-way analysis of variance or the Kruskal-Wallis rank test.

5 Based on the analysis of variance

6 Based on the Kruskal-Wallis rank test

- 93 Two particularly noteworthy conclusions emerge from this data. First, the amount claimants are charged by their own solicitors (including professional fees and disbursements) is not different among groups in either analysis. This conclusion was sustained by multiple regression analysis (as reported in Appendix B) and indicates that ‘de-regulation’ of legal fees by the LPRA resulted in neither an increase or decrease in lawyer – client costs, at least in the early days after changes came into effect.¹⁰³
- 94 Second, the amount paid by insurers for claimant legal costs¹⁰⁴ does differ significantly, between litigation year groups for settlements, and in the 3-group analysis for both settlements and judgements. In the 3-group analysis, the highest average costs were found in the 92 mixed cases, but this did not differ significantly from the 94 cases.¹⁰⁵ Both of these groups differed significantly from the 92 pure cases. On the other hand, the differences between the 92 pure and 94 cases were statistically significant.¹⁰⁶ In short, the amount paid by insurers for claimant legal costs was higher on average in cases which were finalised after the LPRA than in the cases finalised pre-LPRA. The amount paid by insurers for claimant legal costs has increased since the LPRA came into force.¹⁰⁷
- 95 The results of multiple regression analysis are, again, set out in detail in Appendix B. There are different models for settlements and judgements. The model of claimant legal cost data for settlements indicates that there are significant effects due to both litigation year and time of finalisation in relation to the LPRA. However, the comparison between cases commenced and completed before 1 July 1994 and cases commenced and completed after 1 July 1994 (that is, the 92 pure and 94 groups) is of the most interest and in statistical terms the more reliable. The model indicates that the expected increase since the LPRA came into force in the amounts paid by insurers for claimant legal costs, in claims that are settled, is 13% (95% confidence interval 4% - 23%).

¹⁰³ The sampling constraints discussed in detail in Section 3 confined us to studying an ‘early post-LPRA’ sample of District Court litigated claims and this may have limited the measurable effect of the LPRA on claim legal costs, particularly between claimants and their own solicitors. However, our analysis of ‘post-LPRA’ retainers in our other sample (Section 4) does not provide any evidence that claimant solicitor – client costs have increased or that an increase is driving the increase in Scheme costs.

¹⁰⁴ insurer file data.

¹⁰⁵ using Bonferroni pairwise comparison test or its equivalent for the Kruskal Wallis test.

¹⁰⁶ settlements, $t = 2.44$, $df 481$; judgements, $t = 2.88$, $df 116$.

¹⁰⁷ We note that this difference is not replicated in the information obtained from solicitors files about payments made for legal costs. However, this would appear to be a power problem due to the smaller amount of data, and a sampling problem (92 mixed cases were under-represented in the responses to the solicitor file survey).

96 The model for judgements and awards indicates that the expected increase in claimant legal costs since the LPRA came into force is 31.5% (95% confidence interval 14% - 51%).

97 The difference between expected increases in claims resolved by settlement, on the one hand, and on the other, by award or judgement, could conceivably reflect real qualitative differences between claims which are related to finalisation type. It could also be partly an artifact related to data quality. As we have noted, amounts recorded in insurer files for legal costs paid to claimants was an ascertained figure for claims finalised by a judgement or award but most often was, in the case of settlements, an insurer estimate of the amount of the settlement figure which should be attributed to claimant costs. There is, then, a case for arguing that the estimated increase yielded by our model for judgements and awards is a better indication of the overall impact of the LPRA on Scheme costs than are the analyses using settlements data. However, our analysis of the quality of the insurer file data when compared with the solicitors' records induces greater confidence than might otherwise have been held in the settlement data.¹⁰⁸ Combining the data for settlements and judgements and applying the multiple regression procedure to claimant legal costs gives an estimated increase of 20% (95% confidence interval 12% - 29%).¹⁰⁹

Insurer legal costs

98 The results for costs incurred by insurers in defence of claims are shown in Table 7.

Table 7. Insurer legal costs (\$) (Litigated claims sample)

(a) Settlements

		92 pure Group 1	92 mixed Group 2	92 All	94 Group 3	All	Significance¹ i) 92 vs 94 ii) 3-Group
Total	Mean	5760	11777	6418	6922	6678	i) 0.415 ²
	s.e.	355	2334	424	446	308	ii) 0.001 ³
	n	179	22	201	214	415	
Solicitor fees	Mean	2860	6040	3252	3327	3291	i) 0.786 ²
	s.e.	178	991	209	179	137	ii) 0.000 ³
	n	199	28	227	244	471	
Counsel fees	Mean	561	1333	661	884	767	i) 0.060 ³

¹⁰⁸ See para 85, above and Appendix A.

¹⁰⁹ The model of claimant legal costs for all the data used MAIS, number of court appearances, litigation time, JUDGE and POST. (R^2 47.7%; F 96.9; df 5,532; p 0.000)

	s.e.	58	337	68	84	54	ii)	0.019 ³
	n	280	42	322	290	612		
Disbursements	Mean	368	901	442	461	451	i)	0.753 ²
	s.e.	33	216	42	45	31	ii)	0.011 ³
	n	264	42	306	274	580		
Medical assessments	Mean	1172	1955	1277	1368	1319	i)	0.852 ³
	s.e.	49	190	52	67	42	ii)	0.001 ³
	n	277	43	320	275	595		
Factual investigations	Mean	912	1397	976	769	880	i)	0.090 ²
	s.e.	76	251	74	99	61	ii)	0.034 ²
	n	281	43	324	283	607		
Other reports	Mean	44	302	77	142	107	i)	0.455 ³
	s.e.	15	205	29	57	31	ii)	0.120 ³
	n	289	42	331	292	623		

(b) Judgements

		92 pure Group 1	92 mixed Group 2	92 All	94 Group 3	All	Significance ¹ i) 92 vs 94 ii) 3-Group
Total costs	Mean	7740	13532	10465	11273	10993	i) 0.569 ²
	s.e.	957	2259	1263	782	670	ii) 0.032 ²
	n	18	16	34	64	98	
Solicitor fees	Mean	3674	6481	4811	5669	5347	i) 0.232 ²
	s.e.	569	1165	611	415	347	ii) 0.024 ²
	n	25	17	42	70	112	
Counsel fees	Mean	1497	3235	2281	2221	2245	i) 0.871 ²
	s.e.	162	568	295	229	180	ii) 0.022 ³
	n	28	23	51	74	125	
disbursements	Mean	738	1251	965	1010	991	i) 0.805 ²
	s.e.	115	283	144	112	88	ii) 0.179 ²
	n	29	23	52	76	128	
Medical assessments	Mean	1505	2277	1852	1493	1636	i) 0.043 ²
	s.e.	170	233	150	102	87	ii) 0.002 ²
	n	27	22	49	74	123	
Factual investigations	Mean	1114	1876	1466	1058	1225	i) 0.109 ²
	s.e.	199	376	209	152	125	ii) 0.040 ¹
	n	28	24	52	75	127	
Other reports	Mean	20	200	95	126	113	i) 0.682 ²
	s.e.	20	112	49	53	37	ii) 0.308 ³
	n	32	23	55	75	130	

Notes

1 In the column labeled significance, are recorded the significance levels for two analyses. The first analysis, 92 vs 94, compares litigation years. The second analysis compares three groups — *92 pure*: cases commenced and finalised before 1 July 1994; *92 mixed*: cases commenced before but finalised after 1 July 1994; *94*: cases commenced and finalised after 1 July 1994.

The method of analysis used was one-way analysis of variance or the Kruskal-Wallis rank test.

2 Based on the analysis of variance

3 Based on the Kruskal-Wallis rank test

99 These results show that total insurer legal costs, and most of its components, have increased but only on the three group analysis. The same pattern emerges for both settlements and judgements, and for total legal costs and most of its components, that is

$$92 \text{ pure} < 94 < 92 \text{ mixed}$$

However, the first inequality is not significant¹¹⁰ suggesting that the increase in insurers legal costs in our data should be attributed to characteristics of the 92 mixed cases¹¹¹ rather than any influence of the LPRA.

¹¹⁰ using the non-parametric equivalent of Bonferroni pairwise comparisons.

¹¹¹ It seems reasonable to suppose that the fact that the 92 long cases, by definition, took longer than all cases in the 92 short group, and longer than most 94 cases, indicates that they may have

100 The multiple regression analysis yielded a more complex picture. The details are, again, set out in Appendix B. The model for judgements yielded no significant difference for litigation year. The model for settlements, however, suggested a weak effect of litigation year in cases with long settlement times, with an apparently significant increase in costs after the LPRA in cases taking longer than 25 months.

Relationship between insurer payments for claimant legal costs and claimant legal bills

101 Our analysis of the amounts paid by insurers for claimant legal costs indicates that these costs have increased after 1 July 1994 by 31.5% (or, possibly, as much as 51%), at least in claims resolved by judgements or awards. This level of increase is in fact in line with, and indeed may be less than, the increase which would have been expected assuming that the only consequence of the LPRA was to significantly reduce the gap between party and party and solicitor and client costs.¹¹² Previous research on the relationship between these costs prior to 1994 suggests (wholly in accordance with conventional wisdom of that time) that party – party costs tended to be about 60% to 70% of solicitor – client costs.¹¹³ If, then, the effect of the LPRA had been to increase party – party costs to near full indemnity (ie, to 100% of solicitor – client costs) the expected increase in the amount paid by insurers for costs would approach something between 67% (40/60) and 43% (30/70).

102 Moreover, our findings that neither insurer nor claimant solicitor – client bills have increased are also consistent with the implication that LPRA-induced increases in Scheme costs are substantially attributable to the amended basis for assessing party – party costs. (Although we found some evidence of an increase in litigious activity in the 94 group of claims, we could not attribute an increase in legal costs to this factor.¹¹⁴

103 In order to investigate this issue more thoroughly, we analysed the relationship between claimant legal bills, using the solicitor file data, and the amount claimants

involved more complex or difficult issues, and may have been more strongly defended, leading to higher costs.

¹¹² see paras 11 – 15 above.

¹¹³ D. Worthington and J Baker, *The Costs of Civil Litigation* (Justice Research Centre, 1993) at 19.

¹¹⁴ The average number of court attendances was higher in the 94 group (2.57) than in the 92 group (2.37), and the proportion of claims which went to an award or judgement was higher in the 94 group (20%) than in the 92 group (13%). The net effect of process differences proved extremely difficult to tease out. The increase in court appearances was also associated with decreased litigation time, and the increase in claims going to judgement and award in fact involved a higher proportion being resolved by arbitration (12.1% in 94 vs 4.6% in 92) with a lower proportion going to judgement (8.3% in 94 vs 10.0% 92).

recovered for legal costs using both our insurer and solicitor file data. The details of this analysis are set out in Appendix A.

104 The proportion of legal costs recovered by claimants has increased since the LPRA, we estimate by as much as 10%, from 69% to 79%.¹¹⁵ However, it of course follows that claimants did not in fact, on average, fully recover their legal costs from insurers either before or after the LPRA. Analysis based on data from the solicitors' files show that the proportion recovered is negatively related to the size of the claimant bill – that is, the larger the bill, the smaller the proportion the claimant recovers – with the amount recovered verging on 100% in relation to small bills of \$2000 or less, and falling away to 60% or less in relation to bills over \$20,000.

¹¹⁵ These estimates are based on the models described in Appendix A.

Summary of key findings on the LPRA and claim legal costs

105 Our key findings on the effects of the LPRA on claim legal costs can be briefly summarised

- the amount paid by insurers for claimant legal costs increased in the post-LPRA sample of claims. We estimate the increase, in claims finalised by an award or judgement, to be 31.5%, although it could be as high as 51%.¹¹⁶ The estimated increase in claims finalised by settlements is much lower (13%). Although there is an argument for using the awards and judgements estimate as a reliable indicator of the overall impact of LPRA-induced increases on Scheme costs, we should also caution that it may be an over-estimate. When both settlements and judgements are combined, the point estimate is 20% (95% confidence interval 12% - 29%).
- the amount (including disbursements) claimants were charged by their own solicitors did not differ between the pre- and post-LPRA samples. This finding indicates that the increase in the amount paid by insurers for claimant legal costs was not ‘driven’ by an increase in legal fees paid by claimants. It also indicates that ‘de-regulation’ of legal fees by the LPRA resulted in neither an increase or decrease in lawyer – client costs, at least in the early days after changes came into effect.
- insurers’ own legal costs also did not increase (or decrease) generally.¹¹⁷
- our results support the conclusion that the LPRA-induced increases in legal costs are substantially related to the amended basis for assessing party – party costs. These increased in the post-LPRA sample, on average, to just under 80% of the amount claimants actually paid for their own costs – a proportion still substantially less than ‘full indemnity’.

¹¹⁶ The 95% confidence interval for our estimate is 14% to 51%.

¹¹⁷ although we found evidence of a weak increase in claims settled after long periods of litigation.

The claim process and claim costs

Introduction

106 Our Litigated claims study was directed primarily to answering questions about trends in legal costs after the LPRA came into force, and for reasons we have explained¹¹⁸ the sample was limited to claims finalised by litigation in the Sydney Registry of the District Court in which, moreover, the award or settlement was less than \$100,000. We also wanted to shed some light on the relative significance of increasing legal costs (assuming, as proved to be the case, that legal cost payments have risen) and to find out more about legal costs, more generally, in the Scheme. For these reasons, we studied a large sample of nearly 1100 claims, randomly selected from the whole population of claims finalised in the calendar years 1995 and 1996 (the All claims study).

Methodology and sampling

107 Our All claims sample was chosen by asking the Motor Accidents Authority initially for a random sample of 1450 claims recorded on the Authority's Claim Register (as of 30 June 1996) as having been finalised in 1996. As with our Litigated claims sample, each of the 14 insurers participating in the Scheme at the relevant time provided access to their claim files for each of the cases included in our sample. A team of trained coders surveyed the claim files during November 1996 – January 1997, using a standard survey form similar to the form used for the Litigated claims sample survey. We were actually able to collect details from 1276 of the claim files included in our sample.¹¹⁹ We eliminated a further 177 claims from our analysis because the settlement or award date was earlier than 1995,¹²⁰ leaving a total of 1099 claims in our All claims sample.

¹¹⁸ above, paras 67 – 73.

¹¹⁹ We excluded 129 claims from the sample because only an electronic file was available, and these lacked sufficient detail for our purposes. Another forty-five files could not be included in the survey for various reasons, the most common being that the file could not be located by the insurer.

¹²⁰ As noted above, the original selection criterion was claims recorded on the Claims Register as finalised in 1996. However, this date is the date the insurer closed its file, whereas we wanted to study claims in which the award had been made or settlement reached within a reasonably recent, circumscribed period.

Claimant solicitor file survey

108 Again, our coders also recorded claimant solicitor details, and we then attempted to collect costs information from a randomly selected sub-sample of 400 claimant solicitor files, following the same procedure as that outlined for our Litigated claims study.

Results and analysis

Solicitor file survey response rate and response biases

109 We were able to study 156 claimant solicitor files in the selected sub-sample of 400. This represents a response rate of 39%. As we noted above in relation to the Litigated claims study, this response rate is regarded as acceptable in studies of this nature but nevertheless low, in absolute terms, and raises the possibility that results based on solicitor file data may be affected by response bias.

110 We therefore tested the representativeness of our response group of 156 claims against a number of key variables for the original sample of 1099 claims. The variables of interest were the insurer's decision on liability, the level of dispute,¹²¹ the amount paid by insurer for the claimant's legal costs, and the total claim cost. The response group and original sample did not differ in relation to the insurer's decision on liability.¹²² Not surprisingly, claims which were resolved without any dispute were under-represented in our sub-sample of solicitor files, but the distribution of the remaining dispute resolution types did not differ significantly.¹²³ When the effect of under-sampling claims resolved without any dispute was excluded, the response group also did not differ from the original sample on either the mean amount paid for claimant legal costs¹²⁴ or total claim cost.¹²⁵ These results indicate that the response group of 156 solicitor files is representative of the parent sample of 1099 claims from which it was obtained.

Costs agreements and written disclosures

111 In this sample 31% of the claims related to accidents after 1 July 1994 and in a further 24% the retainer was made after that date.¹²⁶ There was a written cost

¹²¹ see para 112 below.

¹²² $\chi^2 = 2.9$, $df = 4$, $p = .562$

¹²³ $\chi^2 = 4.9$, $df = 2$, $p = .083$

¹²⁴ $\chi^2 = 1.9$, $df = 1$, $p = .165$, using the Kruskal-Wallis method.

¹²⁵ $F < 1$, $df = 1$, $p = .784$

¹²⁶ cf the Litigated claims sample

agreement or disclosure in 50 (58%) of the 87 cases in which this appeared to be required.

112 Fully two-thirds of the cost agreements were for a ‘no win – no pay’ (or ‘conditional fee’) retainer, and these overwhelmingly (90%) provided for a success premium. Overall, only 21% of the claims in our All claims sub-sample of solicitors’ files was undertaken on a conditional fee agreement in writing. However, fully 40% of the retainers made after 1 July 1994 were undertaken on this basis. We consider the possible impact of the prevalence of conditional fee arrangements on legal costs further, below.¹²⁷

Claim costs by level of disputation

113 Our data enabled us to categorize claims according to whether the claim was resolved without a dispute, or involved a dispute¹²⁸ which was resolved without litigation, or was litigated and, if litigated, was finalised by a settlement, or an award or judgement.¹²⁹ The average costs associated with each of these categories are shown in Table 8.

¹²⁷ paras 119 – 121.

¹²⁸ These were defined as any open or explicit disagreement between the parties regarding the claimant’s entitlements, including a denial of liability or acceptance of only partial liability, rejection by the insurer of a specific claim for reimbursement (for example, of a medical account) and rejection by the claimant of an offer of settlement. Requests for further information were not classified as disputes but refusals to provide information were.

¹²⁹ We also analysed our data distinguishing between litigated claims in which the litigation was preceded by a manifest dispute, and litigation without a prior dispute. Apart from producing the mildly interesting finding that in 70% of litigated claims proceedings were commenced without any dispute being evident (on the paper record) beforehand between the parties, this distinction had absolutely no significance relating to the outcome of the litigation. (Proceedings were commenced in litigated claims involving a prior dispute slightly later than in claims litigated without a prior dispute.) We comment further on the possibility that litigation might be avoided in a higher proportion of claims below.

Table 8. Mean components of claim costs according to level of disputation

	No Disputes	Disputed – No Litigation	Litigated - Settled ¹³⁰	Litigated - Award	All Cases
Total payment to claimant ¹³¹	\$2,560 (n=344)	\$8,571 (n=207)	\$74,458 (n=441)	\$79,764 (n=81)	\$38,810 (n=1099)
Total out of pockets	\$834 (n=322)	\$1,386 (n=191)	\$18,973 (n=343)	\$6,315 (n=78)	\$7,992 (n=958)
Total economic loss	\$458 (n=321)	\$502 (n=188)	\$23,317 (n=336)	\$32,143 (n=78)	\$11,298 (n=947)
Future economic loss	\$5 (n=307)	\$79 (n=183)	\$15,565 (n=302)	\$24,148 (n=70)	\$7,314 (n=886)
Non-economic loss	\$994 (n=324)	\$4,594 (n=186)	\$29,359 (n=337)	\$31,847 (n=79)	\$14,550 (n=950)
Claimant legal costs ¹³²	\$129 (n=338)	\$793 (n=192)	\$6,743 (n=365)	\$11,160 (n=80)	\$3,654 (n=1000)
Insurers legal costs ¹³³	\$228 (n=315)	\$670 (n=187)	\$8,135 (n=316)	\$11,607 (n=58)	\$3,972 (n=896)
Total claim legal costs ¹³⁴	\$357	\$1,463	\$14,878	\$22,767	\$7,626

114 In all, 31% of claims in our sample were resolved without litigation or any disputes. Not surprisingly, the average payment in these cases is relatively small, and total legal costs average less than 15% of the compensation component of the total payment (that is, the total claim cost less the mean amount paid for claimant's legal costs).

115 Just under a fifth (19%) of the claims in our sample involved some sort of dispute which was resolved without litigation. The average compensation payment in these cases was just over \$7,100, while average legal costs were around \$1,460 or about 21% of the compensation costs.

116 The average settlement, exclusive of costs, in litigated claims was just under \$67,715 with legal costs equal to 22% of the compensation cost. The average award, exclusive of costs was \$68,742, while total legal costs were 33% of the compensation cost. The average compensation cost of all litigated claims was \$67,874, with legal costs over \$16,100 or 24% of compensation costs.

¹³⁰ 27 cases resolved by processes other than settlement or award (eg struck out) have been excluded from this analysis.

¹³¹ inclusive of amounts paid to claimants for legal costs

¹³² the amount paid by the insurer for claimant legal costs, taken from the managing insurer's file. These amounts are ascertained in the case of judgements and awards, and insurers estimates of the amount of the total claim cost attributable to claimant legal costs in the case of settlements.

¹³³ See para 78, note 92 above. These are not included in the total payment amount.

¹³⁴ the sum of the mean claimant legal costs and insurers legal costs, ie. the costs attributed to resolving particular claims which were not paid as compensation.

117 A more detailed analysis of our data shows that legal costs in litigated claims are relatively higher the smaller the amount of compensation involved. Litigated claims under \$100,000 in our All claims sample made up 82% of all litigated claims (and over 40% of all claims). The mean total incurred cost for this group was \$39,120, while mean legal costs were \$13,360¹³⁵ or almost 40% of the compensation cost.

The components of claimant and insurer legal costs

118 A detailed breakdown of the legal costs incurred by insurers and claimants in claims, excluding those resolved without a dispute,¹³⁶ is shown in Table 9.

Table 9. Comparison of insurer and claimant mean legal costs (excluding claims resolved without dispute)

	Insurer costs	Claimant costs
Solicitor fees	\$2,867 (n=630)	\$5,808 (n=122)
Counsel fees ¹³⁷	\$861 (n=717)	\$946 (n=128)
Medical investigations	\$1,125 (n=677)	\$1,015 (n=106)
Other disbursements	\$701 (n=723)	\$422 (n=114)
Court filing fees	NA	\$206 (n=25)
Total	\$6,006 (n=561)	\$8,231 (n=123)

119 The amounts spent by insurers is about three-quarters of the amount spent by claimants. A higher proportion of claimant costs (approximately 82%) are for legal services (in the strict sense) while approximately 62% of insurer costs are for legal professional fees. These differences are not surprising given that claims are generally not referred by insurers to outside solicitors unless proceedings are commenced. Insurers spend about the same amount on medical examinations, which account for nearly 20% of insurers costs and more than 12% of claimant costs. The higher amount spent by insurers on other disbursements reflects expenditure on factual investigations.

¹³⁵ There was a very high degree of consistency between these figures and the figures in our Litigated claims sample, adding greatly to our confidence in our obtained results from the two samples. Total incurred cost and claimant legal cost figures differed by less than 4% between samples.

¹³⁶ as noted above, this group was under-represented in our sample of claimant solicitor files (presumably because many are resolved without the involvement of solicitors).

¹³⁷ missing values indicated that Counsel were not used.

The impact of conditional fee arrangements on legal costs

120 We considered whether the apparently prevalent use of conditional fee arrangements providing for a success premium, following the LPRA, might be influencing the legal costs incurred by claimants, and in turn the amounts paid by insurers for claimant legal costs. In order to address this question, we separated the ‘post-LPRA’ retainers in our solicitor file sample into two groups – retainers on a ‘no win – no pay’ plus success premium fee arrangement and others. We then calculated and compared mean claim cost components in each group (excluding those claims which were resolved without any dispute from the analysis). The results are shown in Table 10.

Table 10. Claim cost components for post-LPRA retainers
(excluding undisputed claims)

	No win – no pay plus success premium	Other fee arrangements	Significance ¹
Total payment to claimant	\$51,461 (n=25)	\$18650 (n=39)	P = 0.144
Claimant legal bill (total)	\$6,346 (n=25)	\$4,822 (n=36)	P = 0.238
Solicitor professional fee	\$4,686 (n=25)	\$3,654 (n=35)	P = 0.276
Legal costs recovered	\$3,284 (n=24)	\$2,613 (n=35)	P = 0.372
Insurer legal costs	\$2,932 (n=22)	\$1,958 (n=35)	P = 0.196

Notes 1 calculated using one-way analysis of variance.

121 Although the mean legal costs paid by claimants, and the amount recovered by them from insurers was apparently higher in the conditional fee group, the differences are not statistically significant. Perhaps more tellingly, however, is that such differences as there may be between the two groups would appear to be related to characteristics of the claims rather than claimant-solicitor fee arrangements as such. Although the differences are again not statistically significant, the average total award or settlement in the conditional fee group was nominally higher than for the other group, as was insurer legal costs. Moreover, the proportion of solicitor fees to the total bill is the same between the two groups, as is the proportion of legal costs recovered.¹³⁸

122 This analysis involves a relatively small sample of cases, and we think the issue warrants further research. However, suffice to say that the results in Table 10 are far from conclusive evidence that increases in claimant legal costs related to the

¹³⁸ although we should note that the proportion recovered in both groups is apparently lower than for the entire sample.

increased prevalence of conditional fee arrangements involving success premiums have affected Scheme costs.¹³⁹

Could average claim costs be reduced by reducing the litigation rate?

123 It came as no surprise that litigation is associated with increased legal costs incurred by both insurers and claimants,¹⁴⁰ as these costs reflect the amount of activity that precedes finalisation of a claim. Initially, we were inclined to accept without question that the compensation costs of litigated claims should be significantly higher than for claims which are resolved without litigation. However, on reflection, we find it perplexing that there should be such a strong relationship between the compensation value of disputed claims and the likelihood of litigation. Although, on the face of it, the larger a claim the more worthwhile it is to resist it, this is only actually true if the costs incurred in litigating a claim are offset by a larger reduction in the amount finally paid. We, of course, cannot tell if this is the factor which separates the group of claims resolved after a dispute but without litigation from those which are litigated but the only thing which we know separates them is their size.

124 Another way of looking at the data in Table 8 is to observe that the average *amount* of the legal costs involved in litigated claims is more than ten times the amount for claims which, although involving some dispute, are resolved without litigation (even though, as a proportion of the total claim cost, the amounts are similar). The difference is in the order of \$12,000 per claim.¹⁴¹ If only some additional claims can be resolved without litigation, for the same compensation cost as with litigation, then it would seem that the potential for reducing Scheme costs is considerable. In fact, we can suggest that a decline in the litigation rate of 10 percentage points could result in savings of anything up to \$20m,¹⁴² all other things remaining equal.¹⁴³

¹³⁹ This is not to say, of course, that the increased prevalence of these fee arrangements has not affected the number of claims. See further paras 59 – 60, above.

¹⁴⁰ cf Table 8 and paras 112 – 116 above.

¹⁴¹ The group of claims involving a dispute resolved without litigation contains a high proportion of claims resulting in either a zero award or zero recovery of costs, and these arguably cannot be sensibly compared with litigated claims. The difference of \$12,000 has in fact been calculated removing these claims from consideration.

¹⁴² This estimate is based on a reduction of the litigation rate from 50% to 40% and uses 16,800 as the number of claims finalised (the number in 1996-97). Savings of as much as \$20m assumes that the average difference in costs, of \$12,000, between litigated and settled claims vs disputed but not litigated claims could be realised as savings.

¹⁴³ This qualification is, of course, significant. As we note below, litigation is, from an insurer's point of view, a strategy for reducing other claim costs. Whether it is employed effectively for this purpose, however, is a question we also address further below.

- 125 Moreover, our data suggests that about half of all claims result in litigation,¹⁴⁴ a level which on any reckoning is high although more than three-quarters of these are resolved by a settlement without going to a hearing before a judge or arbitrator.¹⁴⁵ These facts would seem to indicate great scope for reducing the litigation rate.
- 126 A strategy for reducing the litigation rate was in fact introduced in the 1995 amendments to the *Motor Accidents Act*. Section 52(1A)(c) precludes a claimant from commencing proceedings in the face of an offer from the insurer to settle a claim, without first giving the insurer 28 days notice that the offer is unacceptable. The intended effect of the amendment is, obviously, to require claimants to give insurers an opportunity to revise their offers to settle claims before litigation is commenced. Although our research relates to claims made prior to the amendment coming into force, we can suggest that this amendment could have a significant effect on the litigation rate.
- 127 In all, about 68% of the claims in our sample involved some form of dispute (including litigation). In about half of these, the disagreement was manifest before litigation commenced but in the other half (about 70% of litigated claims) litigation was commenced by claimants without any prior manifestation of a dispute between the parties. This is a potentially fertile focus for reducing the litigation rate.
- 128 Unfortunately our All claims survey did not collect data on whether the insurer had made an offer to settle the claim prior to litigation in these cases. However, we did think to do so in our Litigated claims survey. We are also able, using our All claims sample data, to estimate the proportion of litigated claims in which litigation results from failed negotiations over offers (12.4%). On the basis of this data, we estimate that at least a quarter of the '94 cases in our Litigated claims sample involved offers rejected by litigation, that is, without further negotiations

¹⁴⁴ The litigation rate in our All claims sample was 49.8%. This differs appreciably from MAA data, which suggests the figure may be around 34%. On the other hand, there is reason to suspect that the MAA's statistics may under-estimate the litigation rate. The MAA reports the litigation rate for claims relating to accidents in 1991-92 as 26%, and for 1994-95 accidents as 28.5% (*June '97 CTP Statistics* at p 13). In our survey of accident victims (see Section 2 above) 35% of the 1991-92 accident year claimants and 37% of the 1994-95 accident year claimants said their 'solicitor had filed a Statement of Claim with a Court', suggesting a higher litigation rate (there was, moreover, a high non-response rate to the question which may have been because of the 'legalistic' terms in which it was put). The difference may be partly due to claims not finalised not being included in the MAA statistics but it appears that some of it must be attributed to disagreements between our data. According to the MAA records, only 30.6% of the 1991-92 accident victims, and 26.8% of the 1994-95 accident victims who responded to our survey were involved in litigation.

¹⁴⁵ ie. the three-quarters settlement figure does *not* include settlements occurring *after* a hearing before a judge or arbitrator.

before litigation was commenced. This is, of course, the proportion of litigated cases to which section 52(1A)(c) now applies. We cannot put a figure on how often litigation might have been avoided in these claims by further negotiations but it can at least be suggested that the potential of section 52(1A)(c) to reduce the litigation rate is substantial *provided* that insurers avail themselves of the opportunity for further negotiations after an initial offer is rejected.¹⁴⁶

129 *Claim management.* Some level of litigation is unavoidable in the Scheme — in fact, litigation is a critical strategy for controlling insurance costs in a fault-based compensation system. However, our data contain an interesting suggestion that some insurers do better at optimising their level of litigation than others.

130 When we compared litigation rates for individual insurers in our All claims sample, we found that these differed very significantly¹⁴⁷ ranging from 22.5% to 70.3%, with three insurers apparently much more likely to litigate, and three apparently much less likely to litigate than the rest.

131 Of course, we are not suggesting that the insurers are wholly responsible for every instance claims result in litigation — it takes two to dispute. Moreover, the likelihood of litigation is also, unquestionably, affected by many factors related to characteristics of claims and claimants. On the other hand, we would expect in a large sample that these kinds of differences would tend to be randomised across insurers.¹⁴⁸ It seems likely that part of these large differences in litigation rates is to be attributed to systematically different approaches on the part of individual insurers to the negotiation process. The question then is, is there an approach which seems to win better results than others for the insurers concerned?

¹⁴⁶ More than half (58%) of the claims in our All claims sample in which an insurer's first offer was rejected by the claimant were resolved after further negotiations without litigation. Our analysis of the reasons for manifest disputes prior to litigation indicates that rejection of an insurer's offer is by far the most common reason, followed by denial of liability or only partial acceptance of liability by the insurer. However, there is a very great difference between the two categories of cases, in terms of what happens next. About 44% of cases where the insurer denies liability, wholly or in part, are litigated, while 48% end with the claimant abandoning their claim. Only 8% lead to some other settlement without litigation.

¹⁴⁷ $\chi^2 = 61.869$, $df = 13$, $p < .001$.

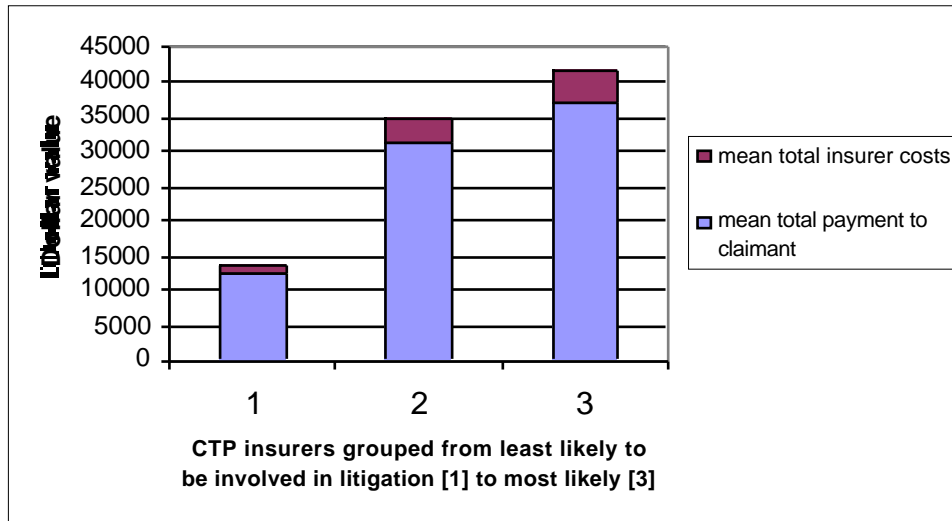
¹⁴⁸ Indeed, analysis was carried out examining the distribution of claim characteristics related to the likelihood of litigation. These characteristics included claimant characteristics (employment status, occupation, previous injuries), accident variables (injury severity and the occurrence of a critical injury) and claim processing variables (decision on liability, the stage at which the decision was made and whether the insurer changed their decision). Although the characteristics listed are related to the probability of litigation, all but employment status and the stage at which the decision on liability was made were evenly distributed amongst the 14 insurers surveyed. However, these differences did not in turn explain the relationship between insurer involvement in litigation and average total incurred claim costs (see further para 131 and Figure 3, below).

132 To address this question, we grouped insurers according to their frequency of involvement in litigation, into three groups – high, medium and low litigators, based on whether their litigation rate was higher than 60%, between 30% - 60%, and less than 30%. (There were three insurers in the high litigation group, eight in the medium group and three in the low group. We calculated the average total payment as well as an average insurer's cost figure – the sum being, of course, the average total claim cost for each group. Surprisingly, we found that both insurer costs¹⁴⁹ and payments to claimants¹⁵⁰ were significantly higher in the high litigation group, and significantly lower in the low litigation group. The results of this analysis are shown in Figure 3.

¹⁴⁹ $\chi^2 = 58.21$, $df = 2$, $p < .001$

¹⁵⁰ $\chi^2 = 36.41$, $df = 2$, $p < .001$

Figure 3. Relationship between frequency of involvement in litigation, total award and insurers costs



133 We must reiterate that the likelihood of litigation is related to characteristics of claims and claimants (and no doubt their solicitors) as well as insurers. Equally, the cost of claims is related to many factors in addition to the managing insurer and the occurrence of litigation, and no doubt some of the differences portrayed in Figure 3 are to be attributed to the influence of factors other than the litigation policy of managing insurers. Nevertheless, these data suggest to us that some insurers might do well to review their general approach to negotiating the outcome of claims, and that the general direction of the modification indicated by our analysis is towards greater willingness to settle rather than dispute claims.

The impact of post-LPRA increases in legal costs on Scheme costs

134 Whatever might be said about the level of claim legal costs generally, our analysis suggests that *increases* in legal costs since the LPRA have had a relatively modest impact on Scheme costs overall.¹⁵¹ Using the average figure for the amount paid by insurers to claimants for legal costs in our All claims sample, and a figure of 16,800 as the number of claims finalised in a year,¹⁵² we can put a figure of about \$61 million on the amount paid in a year for claimant legal costs. Using 30% as

¹⁵¹ Contrast 'Green slips to rise \$30 Legal fees blamed for increase' *The Daily Telegraph* Tuesday 24 February 1998, p 9.

¹⁵² This figure is substantially higher than the rate of finalisations in both 1995 and 1996, which we have not used because of an unusual slowdown in finalisations in 1995-96. The figure we have used is approximately the number of claims finalised in 1996-97 and somewhat higher than the expected number of claims for accidents in that year. The effect of doing this is, if anything, to exaggerate the impact of increasing legal costs on Scheme costs.

our estimate of the increase paid by insurers for claimant legal costs¹⁵³ we calculate the resulting increase in total Scheme costs to be \$18.3m. This amount is equivalent to less than \$5.00 per motor vehicle registered in 1996-97.¹⁵⁴

135 We must emphasise that three factors all contribute to the likelihood that this calculation is an over-estimate of the actual impact of increases in legal costs on the Scheme. First, as we have observed, the number of claims we have used is high.¹⁵⁵ Second, we have used a figure for calculating the increase which is approximately the point estimate for awards and judgements and the upper limit of the 95% confidence interval for the data including settlements. (We can justify using the award and judgement estimate on the ground that the costs data was 'hard' data, and therefore arguably a better estimate of the overall effects of the LPRA on costs.¹⁵⁶) Finally, we have applied the estimated increases fully to our All claims sample estimate of total claimant legal costs – the latter figure would already reflect some of the increase, given that the sample included appreciable numbers of 'post-LPRA' claims.

Legal costs in the context of the Scheme

136 We were anxious from the outset of our research to try to place legal costs within their context in the Scheme as a whole. This is easier said than done, particularly because of the difficulty of estimating claim costs for recent accident years and matching premium income to those costs. Nevertheless, we think some sort of frame can be placed around the issues concerning legal costs in the Scheme by observing a few general facts. Premium levels have, as noted in the introduction, fluctuated considerably over the life of the Scheme. Gross premium income received in each year is shown in Figure 4.¹⁵⁷

Figure 4. Gross premium income received in each year of the Scheme

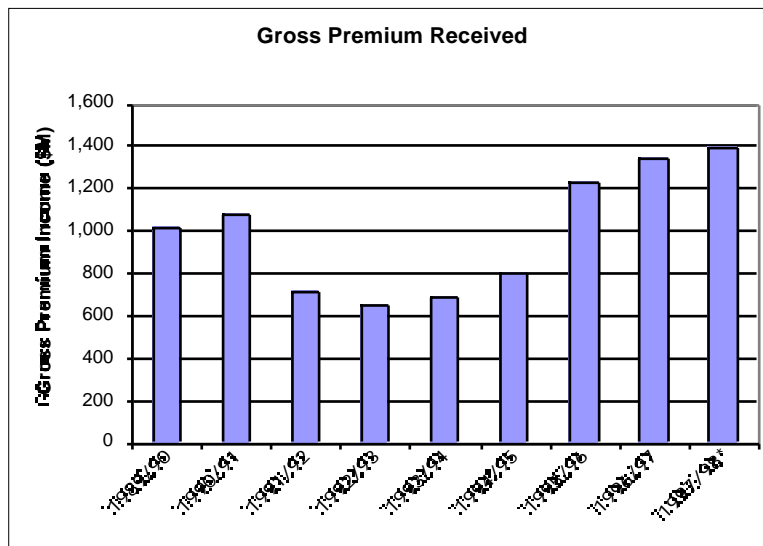
¹⁵³ This figure is approximately the point estimate for awards and judgements (actually 31.5%), and the upper limit of the 95% confidence interval for the award and settlement data combined (actually 29%).

¹⁵⁴ There were 3,744,567 vehicles registered in 1996-97. Source: MAA Statistics and Research.

¹⁵⁵ The figure of 16,800 is based on the number of claims finalised in 1996-97. There was a slow-down in the finalisation rate in 1995-96 (just over 13,000) and some catch-up in 1996-97. The expected number of claims for accidents in 1996-97 is 16,400.

¹⁵⁶ see paras 85 and 96, above.

¹⁵⁷ information supplied by the Motor Accidents Authority.



1997-98 is an annualised figure based on \$1,047.6m received in the 9 months to 31 March 1998. Source Motor Accidents' Authority

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137 In 1996-97 (the last full year for which published statistics are available) 16,825 claims were finalised, at an average cost of \$49,000 and a total 'incurred cost' of \$816m.¹⁵⁸ We estimate that legal costs (adjusted for the increase after the LPRA) make up 22% of average incurred costs.¹⁵⁹ On this basis, we calculate that the amount of legal costs included in the total incurred costs of claims finalised in 1996-97 was \$179.5m. This sum is equivalent to \$48 per motor vehicle registered in that year.¹⁶⁰

Summary of key findings on the claim process and claim costs

138 The results of our analysis of a representative sample of the population of claims finalised in recent years point to a number of noteworthy conclusions, about the significance of increasing legal costs and about legal costs in the Scheme more generally

- we found no evidence that increases in claimant legal costs related to the increased use of conditional fee arrangements involving success premiums have affected Scheme costs.

¹⁵⁸ Trowbridge Consulting, *New South Wales CTP Scheme Superimposed Inflation Aggregate Study* (September 1997).

¹⁵⁹ cp Trowbridge Consulting estimate of 22%, in *New South Wales CTP Scheme Superimposed Inflation Aggregate Study* (September 1997).

¹⁶⁰ There were 3,744,567 vehicles registered in 1996-97. Source: MAA Statistics and Research.

- average legal costs in claims in which litigation is *commenced* are more than 10 times the average costs in claims in which disputes are resolved without litigation. A reduction in the current litigation rate of 50%, to 40%, could result in substantial savings in legal costs, of anything up to \$20m.
- the litigation rate for insurers varied significantly in our sample, from 20% to over 70%. Although theoretically litigation should be a cost reduction strategy, the insurers most frequently involved in litigation litigators incurred significantly higher legal and compensation costs.
- we calculate that the increase in the amount paid by insurers for claimant legal costs, following the LPRA, has added to annual finalised claim costs overall by about \$18.5m. This amount was less than \$5.00 per motor vehicle registered in 1996-97.
- we estimate that total legal costs (that is, the amount paid by insurers for their own and claimant legal costs) made up about 22% of the total incurred cost for claims finalised in 1996-97, or \$179.5m on total incurred costs of \$816m. That amount is equivalent to nearly \$50 per motor vehicle registered in 1996–97.

Conclusion

139 This research was undertaken to investigate a widely entertained hypothesis that the reforms to the legal services market introduced by the Legal Profession Reform Act had contributed to increasing CTP Scheme costs, both by contributing to the increase in the claiming rate and by increasing legal costs incurred in the process of resolving claims.

140 Our results do point to an increase in claims which may be attributed to the LPRA. However, it would appear that the increase in claims has been due more to perceptions about the levels of compensation awarded for minor injuries claims changing over the life of the Scheme, in line apparently with trends in actual awards.

141 The increase in legal costs found between our samples is attributable to the deliberate policy of the LPRA to increase the proportion of claimant legal costs recoverable on a party and party basis and, indeed, we found that the proportion of claimant costs recovered in our post-LPRA group was still substantially less than full indemnity. Moreover, this increase appears to be, relative to overall Scheme costs, modest.

142 We also found no evidence that increases in Scheme costs are being ‘driven’ by increases in solicitor – client costs; indeed, we found no evidence of increases in average solicitor –client costs since the LPRA, although it is evident that conditional fee retainers providing for a success premium are now quite common.

143 On the whole, then, this research points to the LPRA as a ‘minor culprit’ in increases in Scheme costs. There are, however, two further implications of our research which we think call for particular comment. The first is, obviously, that the effectiveness of the 1995 amendments to the *Motor Accidents Act*, and especially section 79A, in reducing average claim costs and the number of claims will be critically important. This is still to be fully evaluated. The second is that our analysis of claim costs has led us to believe that the focus for reform should not be so much on legal costs as such but the activity which underlies those costs, that is, the level of disputing involved in processing accident claims.

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APPENDICES

Appendix A

Solicitor Files

1 Reliability Of Insurers' Record Of Claimant Legal Costs

144 There were 107 cases for which we had both solicitor and insurer data about claimant legal costs. In Table 1 are given summary statistics for the difference between the two values viz. insurer's record less solicitor's record.

Table 1 Reliability of Insurer's Record of Claimant Legal Costs

<i>(insurer's record — solicitor's record) (AUD)</i>	Cases in which solicitor recorded 0 <i>included</i> in results			Cases in which solicitor recorded 0 <i>excluded</i> from results			
	92	94	all	92	94	all	
<i>settlements</i>							
equal	number	28	23	51	26	23	49
not equal	mean difference ¹	5704	2218	3448	4421	857	1926
	standard deviation	7918	3032	5318	11830	2780	6262
all	number	6	11	17	3	7	10
	mean difference	1007	203	605	457	200	327
	standard deviation	3791	3696	3738	3446	1317	2572
	number	34	34	68	29	30	59
<i>judgments</i>							
equal	number	12	26	38	12	26	38
not equal	mean difference	0	1856	1856	0	1856	1856
	standard deviation	0	0	0	0	0	0
all	number	0	1	1	12	1	1
	mean difference	0	69	48	0	69	48
	standard deviation	0	357	297	0	357	297
	number	12	27	39	12	27	39
<i>all cases</i>							
equal	number	40	49	89	38	49	87
not equal	mean difference	5704	2188	3360	4421	982	1920
	standard deviation	7918	2893	5173	11830	2598	5941
all	number	6	12	18	3	8	11
	mean difference	744	430	565	324	138	216
	standard deviation	3277	1518	2426	2891	981	2002
	number	46	61	107	41	57	98

145 The two values were equal in 89 cases (83%). The average difference was \$565 if we include cases in which the claimant paid his own costs, \$216 if these cases were excluded. (There were 9 such cases with agreement in only 2.)

146 The agreement rate differed by finalisation type but did not differ by year. In settlements, there was agreement in 51 out of 68 cases (75%). In judgments, there was agreement in 38 out of 39 cases (97%).

2 Recovered Costs

147 The aims of the analyses reported in this section were to estimate what proportion of costs was recovered by the claimant and to test whether this had changed since the introduction of the LPR. The method of analysis was to regress $\log(\text{recovered costs})$ against $\log(\text{bill})$ and POST, the 0—1 variable indicating litigation year. (POST = 1 if litigation year is 94, 0 if 92). The transformations were dictated by the fan-shape evident in the graphs of recovered costs against solicitor's bill. Interactions were considered but found to be insignificant. The analysis was in two parts:—

- (a) The solicitors' data was used to build and compare two models obtained as follows:—
- (i) response variable = recovered costs as paid to the solicitor by the insurer
 - (ii) response variable = claimant legal costs as recorded by the insurer
- (b) There were many more cases (almost twice as many) for which we had details about the solicitor-client bill and the insurer's record of claimant legal costs. The analysis in 1(b) was repeated for this more extensive set.

The results are set out in Table 2.

Table 2 Models of percentage of costs recovered

		Outcome variable = $\log(\text{recovered costs})$		
		Amount of costs recovered from insurer	Claimant legal costs (insurers' record) using 1(a) cases	Claimant legal costs (insurers' record) using extended data set
		Analysis 1(a)	Analysis 1(b)	Analysis 2
Constant	estimate	1.139	1.808	2.291
	s.e.	0.393	0.465	0.350
	p value	0.005	0.000	0.000
Log(bill)	estimate	0.832	0.758	0.696
	s.e.	0.043	0.051	0.039
	p value	0.000	0.000	0.000
POST	estimate	0.120	0.164	0.138
	s.e.	0.048	0.053	0.045
	p value	0.014	0.003	0.002
	R^2	79.5	70.0	63.9
	d.f.	2, 98	2, 98	2, 189
	p value	0.000	0.000	0.000

148 Since the coefficient of POST is significant in both models, we conclude that there is a difference in the level of cost recovery between the two years. Moreover, since the coefficient is positive in both models, we conclude that the post LPRA group recovered a higher proportion of costs than did the pre-LPRA group. Since the coefficient of log(bill) is significant and does not equal 1, we conclude that the proportion recovered is dependent on the size of the bill.

149 To find out what the models predict about percentage recovered we need to rearrange the resulting equations as follows:—

$$\begin{aligned} \text{Log}(\text{proportion recovered}) &= \text{log}(\text{costs}/\text{bill}) \\ &= \text{log}(\text{costs}) - \text{log}(\text{bill}) \\ &= \text{constant} + (\beta_1 - 1) * \text{log}(\text{bill}) + \beta_2 * \text{POST} \end{aligned}$$

where the betas are the estimated coefficients of log(bill) and POST respectively.

In both equations, we find that the coefficient of log(bill) < 1. Hence the coefficient in the equations for log(proportion recovered) is negative. This means that the larger the bill, the smaller the proportion recovered. Predicted values of the percentage recovered over the range of values of the solicitor's bill are given in Table 3.

Table 3 Predicted values of percentage of costs recovered by claimant

Bill (\$)	Complete cost data set				Extended cost data	
	Model (a)i		Model (a)ii		Model (b)	
	Solicitor's record of legal costs recovered for claimant		Insurer's record of claimant legal costs		Insurer's record of claimant legal costs	
	92	94	92	94	92	94
2,000	87	100	89	104	97	113
5,000	74	85	75	88	74	86
10,000	66	76	66	78	60	70
15,000	61	71	62	72	53	62
20,000	58	67	58	68	49	57
25,000	56	65	56	66	46	53
30,000	54	63	54	64	43	50

150 The models built using the sub-set of data from the solicitors' files in which we had amount recovered by insurer from solicitor, claimant legal costs as recorded by insurer and client's bill from the solicitor, (a)i and (a)ii, are reasonably consistent:— the major difference occurring at bill amount equal to \$2,000. This suggests that the model obtained using the insurer's data can be used except for small bill amounts. The extended data then confirms the results based on the complete data set. We conclude that the introduction of the LPRA affected the proportion of costs recovered from the insurer.

151 Further analysis showed a difference between finalisation types for the insurers' data but not for the solicitors' data. There may be other factors involved in determining what proportion of costs a claimant recovers.

Appendix B

Multiple Regression

1 Multiple Regression Strategy

152 In multiple regression, linear models are fitted using the method of least squares. The aim is to find the best model i.e. the one which accounts for the largest amount of variation in the data subject to various assumptions being met. We used the following strategy.

153 In the first step, we identified possible explanatory variables. These are set out in Section 2 of this appendix.

154 In the second step, we checked that the underlying assumptions of multiple regression were met by the full model, i.e. the model using all the variables. These assumptions are that the residuals of the observations from the fitted model are independently normally distributed with constant variance. If necessary, failure to meet these assumptions was corrected by transforming the response or outcome variable or by investigating outliers i.e. data points which have standardised residuals greater than 3 in size and, if there was good reason, removing them from the analysis.

155 In the third step, we applied the method of backward regression. In this method, all explanatory variables are fitted and then the variable with the smallest t value is removed provided that it has p value greater than 0.1. This was continued until all explanatory variables have p-values less than 0.1.

156 In the fourth step, we investigated further the last few models obtained by the backward procedure. It is possible that models before the last have smaller residual variation (mean square errors) than the last model. These were investigated using a number of tactics including:—

- replacement of some variables left in the model by others which convey similar information and provide more sensible interpretations or better fitting models
- inclusion of interactive terms which are used to model situations in which the response depends on the combined values of two or more variables
- testing the significance of a factor by including all terms in the factor set, some of which are included in the final model or models using the partial F test
- possible exclusion of variables with p values greater than $(0.05/k)$ where k is the number of variables in the full model

- exclusion of extreme outliers and points with large influence and then refitting the model
- assessment of normality.

157 Most importantly, it must be realised that the best model is not necessarily the one which meets the statistical goodness of fit criteria, but is one which is close to this model and makes good sense in contextual terms.

2 Explanatory Variables of Compensation and Costs

Table 1 — Explanatory variables by contributory factor and year

Litigation year		92 n=393	94 n=372	All n=765	Statistical significance
Personal details					
Age at accident (years)	Mean	40.2	36.8	39.0	0.007 ³
	Std. error	0.88	0.91	0.70	
	<i>number missing</i> ¹	10	10	20	
Sex	Female	60%	55%	58%	0.135 ²
	Male	40%	45%	42%	
	<i>number missing</i> ¹	3	4	7	
Employment status at time of accident	Employed	55%	58%	56%	0.428 ²
	Not employed	45%	42%	44%	
	<i>number missing</i> ¹	2	2	4	
Accident details					
Accident year		%	%	%	not relevant
	89—90	17	2	10	
	90—91	49	5	28	
	91—92	34	7	21	
	92—93	0	30	14	
93—94	0	57	28		
Liability fully accepted by insurer	Yes	61	74	67	0.000 ²
	No	39	24	33	
	<i>number missing</i>	0	1	1	
Role in accident	Driver	37	44	40	0.065 ²
	Passenger	36	37	37	
	Pedestrian	19	12	16	
	Other	8	7	7	
	<i>number missing</i> ¹	2	2	4	
Nature and extent of injuries					
Body part injured		%	%	%	0.310 ²
	Head/chest/abdomen	12	12	12	
	Neck	15	20	17	
	Spine	24	24	24	
	Limbs	28	25	26	
	Multiple locations	19	18	19	
Other	2	1	2		
Injury type	Fracture	33	24	29	0.016 ²
	Sprains, strains, cuts	57	68	62	
	Other	9	9	9	
Whiplash – one of the injuries	Yes	41	49	45	0.027 ²
	No	59	51	55	
Whiplash – Primary injury	Yes	34	39	36	0.209 ²
	No	66	61	64	
	<i>number missing</i> ¹	5	4	9	
Maximum severity	Minor	51	61	56	0.002 ²
	Moderate	28	28	28	
	Serious or worse	20	11	16	
	<i>number missing</i> ¹	21	13	34	

- Notes**
- 1 number of cases in which data was missing for this variable
 - 2 from Pearson chi-squared test
 - 3 from one-way analysis of variance

Explanatory Variables continued

Litigation year		92 n=393	94 n=372	All n=765	Statistical significance
Pre-litigation behaviour					
Claim time (months from accident to lodging claim)	Mean	5.5	5.3	5.4	0.627 ³
	Std. error	0.30	0.39	0.24	

10 Claiming under the Motor Accidents Scheme

	number missing ¹	1	2	3		
Filing time (months from accident to filing at court)	Mean	18.7	17.3	18.0	0.000 ⁴	
	Std. error	0.39	0.56	0.34		
Liability fully accepted by insurer (before litigation)	Yes	48%	64%	56%	0.000 ²	
	No	52%	36%	44%		
	number missing	0	1	1		
Offer by insurer (before litigation)	Yes	27%	40%	33%	0.000 ²	
	No	73%	60%	67%		
Offer by plaintiff (before litigation)	Yes	10%	13%	11%	0.194 ²	
	No	90%	87%	89%		
Disputes	Yes	39%	37%	38%	0.601 ²	
	No	61%	63%	62%		
Litigious activity						
External Solicitor engaged by insurer	Yes	80%	82%	81%	0.528 ²	
	No	20%	18%	19%		
Court appearances (no)	Mean	2.32	2.57	2.44	0.080 ³	
	Std. error	0.1	0.1	0.1		
Finalisation						
Litigation time (months)	Mean	14.5	12.1	13.3	0.001 ⁴	
	Std. error	0.45	0.33	0.28		
Development year (number of years since accident when claim was finalised)	2	9%	18%	13%	0.000 ²	
	3	33%	42%	37%		
	4	36%	25%	31%		
	5	14%	7%	11%		
	6	6%	6%	6%		
	7	2%	2%	2%		
	8	+	+	+		
Year of finalisation (financial year since start of CTP scheme in which claim was finalised)	4	92/93	25%	0%	13%	not relevant
	5	93/94	58%	0%	30%	
	6	94/95	13%	30%	21%	
	7	95/96	4%	57%	30%	
	8	96/97	1%	12%	6%	
	9	97/98	+	1%	+	
Finalisation type	Settlement	86%	80%	83%	0.024 ²	
	Judgement	14%	20%	17%		
Design variables definitions						
POST	0-1 variable	Cases commenced post 1 July 1994, (post LPRA) coded 1 Cases commenced before 1 July 1994, i.e. pre LPRA coded 0				
GROUP						
GROUP1	0-1 variable	Cases commenced in 92, finished pre LPRA coded 1, otherwise 0				
GROUP2	0-1 variable	Cases commenced 92, finished post LPRA coded 1, otherwise 0				
GROUP3	0-1 variable	Cases post LPRA: GROUP3 = POST coded 1, otherwise 0				
Notes	1	number of cases in which data was missing for this variable				
	2	from Pearson chi-squared test				
	3	from one-way analysis of variance				
	4	from the Mann Whitney test				

3 Compensation

158 In analysing compensation, the strategy outlined in Section 1 was applied to settlements and judgements separately because, in settlements, the amount of compensation is invariably inclusive of costs, whereas, in judgements, it is invariably exclusive of costs. Moreover, the components of the award are determined by the Court in the cases of judgements, but are allocated by the Insurer in the case of settlements. The resulting models are set out in Table 2. The table gives point estimates of the beta coefficients, 95% confidence intervals for each together with details about the goodness of fit of the models.

The impact of LPRA

159 This is tested in two ways:— by assessing the impact of the variable POST and the terms which measure the interaction of POST and the explanatory variables in the reduced model; by assessing the impact of GROUP2 and GROUP3 and their interaction terms (see Table 1 for definitions of these variables). For both settlements and judgements, the test of the significance of these two factors gave F statistics less than 1. Therefore, we conclude that compensation did not differ significantly between litigation years or between the 3 (LPRA) groups.

Interpretation of the final Models

160 For both settlements and judgements, whether or not the plaintiff was employed at the time of the accident affected the amount of compensation. In the case of settlements, an employed person received on average \$7,371 more than someone not employed with the same MAIS (maximum injury severity), with the same pattern of injuries (as classified in one of two groups: at multiple locations or with no physical symptoms; at other sites), the same liability status and who made the same number of court appearances. In the case of judgements, an employed person received on average \$12,514 more than an unemployed person with the same MAIS, the same liability status and with the same financial year of finalisation.

161 For both settlements and judgements, the level of compensation was related to maximum injury severity, MAIS. For each unit increase in severity level, the amount settled was \$11,306 higher on average, and the amount awarded by the Court was \$13,232 higher on average for plaintiffs with the same values for the other explanatory variables in the two models. It is important to note that in our sample there were no cases with MAIS equal to 6. So this linear relationship does not apply to the full range of MAIS but only to the range (1,5). In fact, the CTP

Statistics published by the MAA strongly support the above and show that the linear relationship fails at MAIS 6.

Table 2 Final models of compensation by disposition type

	Settlements Estimated coefficient 95% confidence interval p-value	Judgments Estimated coefficient 95% confidence interval p-value
constant	41.3 (-5,772; 5,855) 0.989	-26,163 (-29,212; 26,941) 0.036
Employed at time of accident no=0, yes=1	7,371 (4,105; 10,638) 0.000	12,514 (-20,254; -4,774) 0.002
MAIS	11,306 (9,268; 13,343) 0.000	13,232 (8,475; 17,989) 0.000
Multiple locations injured or no physical symptoms no=0; yes=1	8,108 (4,092; 12,124) 0.000	— —
# court appearances	3,993 (3,054; 4,933) 0.000	— —
Full liability accepted no=0; yes=1	5,400 (1,894; 8,907) 0.003	12,781 (4,626; 20,935) 0.002
Year of finalisation Financial year since start of scheme: 1=89/90 etc	— —	4,197 (898; 7,496) 0.013
R²	25.6%	29.8%
Standard error	19,856	21,021
F	41	12.5
Degrees of freedom	5 & 598	4 & 118
#cases omitted		
data missing	28	9
extreme cases	3	0

162 Acceptance of full liability on the part of the insurer results in an increase in compensation:— \$5400 in the case of settlements and \$12781 in the case of judgements (with the proviso that all other variables in the model take the same values).

163 In the case of settlements, the number of court appearances affects the amount of the settlement:— each additional appearance results in an increase in compensation by \$3993 on average. Quite properly this variable is not significant for judgements, because costs are not included in the award in the case of judgements, but are included in the case of settlements.

164 The amount of compensation received from judgements changed over time being \$4,197 per annum greater on average. This was not a strong effect since its p-value or significance level was 0.013. There is in fact an argument for omitting it from the analysis given the number of explanatory variables under consideration. Substitution of this variable with other time variables such as litigation time,

development year etc reduced the goodness of fit of the model and the effects were clearly not significant.

Use of the models

165 The robustness of the model seemed reasonable in so far as the coefficients of the variables in the reduced set varied little with changes in the set of explanatory variables. Cook's distance which measures influence was well-behaved. The assumptions of normality, homogeneity of variance and independence were met.

166 In modelling settlements, three cases were removed. In one of these, even though the case was settled on the day of arbitration, the earlier decision about full liability for the insurer was rescinded and the plaintiff awarded zero compensation. In the other two cases, the settlement amount was \$100,000, which according to our model was excessive. However, in one of these cases, the accident had aggravated an old injury which led to a knee replacement. As a result, out-of-pocket expenses accounted for about half the settled amount. In the other, the insurer would only accept partial liability. Settlement was reached after a status conference and advice from counsel.

167 The models are not good predictive models of compensation since in the case of settlements, only 25.6% of variation is accounted for and in the case of judgments, 29.8%. It is however reasonable to use these models to assess the impact of the LPRA as we have done.

4 Claimant Legal Costs

168 In analysing claimant legal costs, the strategy outlined in Section 1 was applied to settlements and judgments separately because, in settlements, the allocation made by the insurer is made in-house and is the insurer's estimate of these costs. The reliability of the insurers' data is investigated in the final section of this report. In judgments, claimant costs are awarded by the Court on the basis of information submitted by the claimant's solicitor. The results are given in Table 3. The table gives point estimates of the beta coefficients, 95% confidence intervals for each together with details about the goodness of fit of the models.

169 In order to go some way towards meeting the underlying assumptions used to estimate the strength of the model and of the individual variables, claimant legal costs was transformed using the log transformation. Where these costs were zero, the transformation returned a missing value.

170 Other cases were omitted because they were extreme points with respect to the fitted model. In the case of settlements, all variables retained in the model had

significance levels 0.003. So even though the underlying assumption of normality was not met (using the Kolmogorov-Smirnov test), we can be confident that the variables are significant and that the confidence interval estimates are reasonable.

171 In the case of judgments, the 0–1 variable, prior offer made by claimant, was retained with a significance level of 0.032. All other variables had significance levels 0.001. The underlying assumptions were met without the need to exclude the one extreme point. Removal of this point did not affect the parameter estimates significantly.

The impact of LPRA

172 This is measured by the variables POST and GROUP2 (see definition in Table 1). In the case of settlements both variables are significant. In the case of judgments, only POST is significant.

173 *Settlements* Because of the presence of both POST and GROUP2 in the final model, interpretation is difficult. To understand these effects better, we need to express the results in terms of dollars rather than in log(dollars). Suppose we have two cases called A and B where the only difference between A and B is that A belongs to the 92 pure group and B to the 94 group. Then the model says that:—

$$\text{Predicted log(legal costs for B)} - \text{predicted log(legal costs for A)} = 0.126$$

(all other terms in the model for B are the same as all other terms in the model for A)

Transforming back to the original units by using the exponential function gives

$$\text{costs for B} \div \text{costs for A} = \exp(0.126) \Rightarrow \text{costs for B} = 1.13 * \text{costs for A}$$

i.e. the expected % increase in average costs from 92 to 94 = 100(1.13 - 1) = 13%*

A 95% confidence interval is obtained by transforming the 95% confidence interval for the coefficient of POST in the same way.

174 The definitions of these groups coupled with the fact that litigation time is included in the model mean that the only valid comparisons are between the 92 pure group and the 94 group, and between the 92 mixed group and the 94 group. The expected increases in legal costs for 94 for cases in which victims had the same injury severity, made the same number of court appearances and whose cases lasted the same length of time, are as follows:

<i>Comparison</i>	<i>Expected increase</i>	
	<i>Point estimate</i>	<i>95% Confidence interval</i>
<i>94 compared with 92 pure</i>	<i>13.4%</i>	<i>(4.3%, 23.5%)</i>
<i>94 compared with 92 mixed</i>	<i>71.9%</i>	<i>(39.8%, 111.5%)</i>

Table 3 Final models of claimant legal costs by disposition type

	Settlements	Judgments
	Estimated coefficient 95% confidence interval p-value $\log_e(\text{legcosts})$	Estimated coefficient 95% confidence interval p-value $\log_e(\text{legcosts})$
<i>transformation</i>		
constant	7.64 (7.51; 7.77) 0.000	-8.47 (8.29; 8.66) 0.000
MAIS	0.126 (0.077; 0.175) 0.000	—
Prior offer made by claimant no=0, yes=1	—	-0.260 (-0.498; -0.022) 0.032
# court appearances	0.132 (0.101; 0.164) 0.000	—
Litigation time in months	0.023 (0.014; 0.032) 0.000	0.029 (0.020; 0.037) 0.000
POST (1 July 1994) no=0; yes=1	0.126 (0.042; 0.211) 0.003	0.274 (0.134; 0.414) 0.000
GROUP 2(92 mixed) No=0, yes=1	-0.416 (-0.624, -209) 0.000	—
R²	40.0%	36.1%
Standard error	0.42	0.353
F	56.9	20.4
Degrees of freedom	5 & 426	3 & 108
#cases omitted		
data missing	164	18
removed by transformation	26	2
extreme cases	11	0

175 *Judgements* The impact of the LPRA is to increase claimant legal costs by 31.5% (95% confidence interval 14.3% to 51.3%). In this case, the comparison is between 92 and 94 cases with the same litigation time and in which the pre litigation behaviour by the claimant in respect of making an offer is the same. Similar results can be obtained for the other explanatory variables in the model.

5 Insurer Legal Costs

176 In analysing insurer legal costs, the strategy outlined in Section 1 was applied to settlements and judgments separately because of ease of interpretation. The results are given in Table 4. The table gives point estimates of the beta

coefficients, 95% confidence intervals for each together with details about the goodness of fit of the models.

177 In order to meet the underlying assumption of the normal distribution of the residuals, a log transformation was made i.e we modelled log (insurer legal costs).

The impact of LPRA

178 *Settlements* This is harder to evaluate than previously because of the complexity of the model. However, we can affirm that LPRA had a statistically significant effect because of the significance of the variables POST and POST * litigation time. The model gives 2 equations for insurer legal costs — one for 92 and one for 94. These are obtained by substituting 0 and 1 for POST in the model given in Table 4. The following equations are obtained:

Year	POST	Equation
92	0	$C^1 + 6.81 + 0.028 * \text{time}$
94	1	$C^1 + 6.50 + 0.057 * \text{time}$

1 C is a function of role in the accident, number of court appearances, and use of an external solicitor.

179 Not only does the constant differ between the 92 and 94 cases but so does the slope of the line. The two lines intersect at 10.7 months. For cases in which litigation time is greater than 10.7 months, insurer legal costs are on average greater in 94 than in 92. For cases in which litigation time is less than 10.7 months, insurer legal costs are greater on average in 92 than in 94. This is true for cases in which the claimant had the same role in the accident, in which an external solicitor was engaged at the time litigation began and in which the number of court appearances were the same. There is of course a range surrounding the point of intersection in which there is no statistically significant difference between the two year groups. Hence, we conclude that for long cases, there has been an increase in insurer legal costs. Exact determination of “long” has not been completed.

180 *Judgements* Since the variables POST, GROUP2 and their interactions with other variables are not statistically significant, we conclude that the impact of the LPRA on insurer legal costs for judgments is negligible.

Table 4 Final models of insurer legal costs

	Settlements	Judgments
	Estimated coefficient	Estimated coefficient
	<i>95% confidence interval</i>	<i>95% confidence interval</i>
	<i>p-value</i>	<i>p-value</i>
<i>transformation</i>	<i>Log_e(insurer legal costs)</i>	<i>Log_e(insurer legal costs)</i>
constant	6.81	8.060
	(6.56, 7.06)	(7.82; 8.30)
	0.000	0.000

ROLE driver	0.259 (0.047; 0.472) 0.017	—
passenger	0.122 (-0.089; 0.332) 0.255	—
pedestrian	0.403 (0.163; 0.643) 0.001	—
External solicitor no=0, yes=1	0.980 (0.849; 1.111) 0.000	0.779 (0.556; 1.001) 0.000
# court appearances	0.167 (0.124; 0.211) 0.000	0.109 (0.073, 0.145) 0.000
Litigation time in months	0.028 (0.014; 0.032) 0.000	—
POST (1 July 1994) no=0; yes=1	-0.315 (-0.546;-0.084) 0.008	—
POST * litigation time	0.029 (0.013, 0.046) 0.001	—
R²	63.0%	48.6%
Standard error	0.57	0.400
F	85.0	44.8
Degrees of freedom	8 & 406	2 & 95
#cases omitted		
data missing	218	34
removed by transformation	0	0
extreme cases	6	0

6 Solicitor – Client Bill

181 In analysing the amount solicitors charged their clients, the strategy outlined in Section 1 was applied to settlements and judgments together. The results are given in Table 5. The table gives point estimates of the beta coefficients, 95% confidence intervals for each together with details about the goodness of fit of the models.

182 In order to meet the underlying assumption of normality of the residuals, a log transformation was made i.e we modelled log (solicitor-client bill).

The impact of LPRA

183 The final model was enhanced by the addition of POST and interaction terms which included POST. These were found to be insignificant (Partial F = 0.67). Since the coefficient of POST was not significant (p value 0.803), we conclude that the amount charged by solicitors did not increase from 92 to 94. We note in passing that there is a difference between settlements and judgements. For settlements, the degree of severity of the injury leads to higher legal costs. This is not the case with judgements.

Table 5 **Final model of solicitor-client bill (log(amount))**

	All cases
	Estimated coefficient
	<i>95% confidence interval</i>
	<i>p-value</i>
<i>transformation</i>	<i>Log_e(insurer legal costs)</i>
constant	8.128 (7.949, 8.307) 0.000
# court appearances	0.138 (0.913, 0.186) 0.000
Litigation time in months	0.022 (0.010, 0.033) 0.000
MAIS	0.162 (0.090, 0.233) 0.000
JUDGE	0.407 (0.096, 0.717) 0.011
JUDGE*MAIS	-0.162 (-0.317, -0.008) 0.040
POST (1 July 1994) no=0; yes=1	0.015 (-0.101, 0.131) 0.803
R²	44.1%
Standard error	0.424
F	30.8
Degrees of freedom	6 & 234
#cases omitted	
data missing	13
removed by transformation	0
extreme cases	6

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