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# The Future of Holiday Claims - A Response to Government

## Position Paper

Frank Brehany - [frankbrehany.com](http://frankbrehany.com) - 16 October 2017

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## **Introduction:**

This report has been published primarily as an Open Letter, but also a full response document to the UK Government's Consultation on Illness & Accidents in Holiday Claims (launched on 13 October 2017), which reflects the Government's desire to introduce a fixed costs regime and a protocol in the operation of these Consumer Complaints.

## **About the Author:**

I am a retired Police Officer and a self-funded Solicitor. I work extensively in the media, providing comment on Travel Consumer related issues. I am not connected to nor do I work within or with any Law Firm or other Legal entity.

In the last 10 years, I have provided extensive comment to the UK & EU about Travel Consumer issues, creating over 60 reports to highlight their detriment.

For 14 years, I was the Consumer Director of the Independent Travel Consumer Organisation, HolidayTravelWatch (HTW), until I left that post in July of this year.

I have some 20 years experience, both in the handling of holiday claims and latterly as a Consumer Campaigner, helping Consumers deal with their Travel Complaints. Whilst at the helm of HTW, we proudly aided 97.5% of holidaymakers to self-resolve their complaints and worked with specialist lawyers to help progress less than 2% of holidaymakers cases, where it was clear that they would not be capable of settlement by self-resolution methods.

I do not receive any funding from any source and my continuing work to independently advocate the Consumer position is entirely self-funded.

## **Opening Comments:**

Friday 13th October 2017, will probably be remembered in future years, as the day when ordinary holidaymakers opportunities to address failures in their holiday contracts, were subject to a coordinated one-sided attack; an attack on their Access to Justice.

Government announcements, news of one successful 'private' prosecution of a couple and that morning's interview on the BBC Flagship News show on Radio 4, have all provided a revealing look into the heart of the arguments, offered by those claiming that Holiday Claims are out of control; claiming that it is a British disease.

For many months, the Government and Travel Industry have met and discussed the serious issues raised, but to my knowledge, not one Consumer Commentator or Group have been offered equal access to present a balance on the representations being made.

Instead, the Public have been treated to an onslaught about the excesses revealed in this claim category; at least one Minister has sought to boil the issues down to feebleness of the British gastric condition, with the implication that all claims are therefore without merit.

I make no apology that this open letter/response to the government Consultation is lengthy. Given the government interest in this area, along with the column inches already devoted to this subject matter, I sincerely hope that all will understand and accept the need to provide a rational and proportional balance to this debate.

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In doing so, it is important to state that I am well and truly on the record as condemning the activities of so-called claims specialists, tripping around the hotspots of Europe in their faux ambulances or operating behind the veil of dynamic telephone numbers.

I also have little sympathy for lawyers, seeking perhaps reasonably to engage in new work-types as a result of government pressure in other areas and engaging with such Claims Specialists.

I am equally condemning of those Consumers who engage in any fraudulent activity (I also include those who seek such claims in resorts), who in my view, should feel the full force of the Criminal Law under the various Fraud Acts; frankly, condemnation under the Civil Law provision of Fundamental Dishonesty is insufficient and is an abdication of responsibility by government and the authorities on key issues - this is evident in the private prosecution brought by Thomas Cook!

The primary questions must be:

1. Has government really equipped themselves with a balanced and proportional overview of the key issues?
2. Is it sufficient for government to only invoke a 4 week Consultation to extract views, with as it appears, little opportunity for Consumer Groups or Commentators to physically express the real holiday experience, their concerns and the solutions, against the drive to promote the sense of a 'compensation culture'?
3. Has government satisfied itself that it has adequately resourced the Claims management Regulator to pursue rogue elements of the Claims Management Industry insofar as it relates to Holiday Claims?
4. Has the government satisfied itself that it has adequately resourced the Information Commissioner's Office to investigate what are very clear breaches of privacy and data protection insofar as it relates to Holiday Claims?
5. Is the government satisfied that it has adequately equipped & resourced itself for the challenges of cross-jurisdictional cooperation, to ensure that key intelligence is shared about those individuals or companies engaged in this activity?
6. Is the government satisfied that it has equipped and resourced agencies, such as the Serious Fraud Office or other Policing Agencies, with direction, resources and determination to deal with any criminal engagement in the operation of so-called Claims Management in the field of Holiday Claims?
7. Has the government measured data claimed by Travel Companies against its own data from the Compensation Recovery Unit and understood the difference between a Commercial allegation against the reality of registered claims?
8. Recognising the comment in the MOJ's press release: *'Tour operators often settle holiday sickness claims out of court'* (I do not support the premise that follows this comment nor indeed Minister Raab's uninformed comments), does the government not see its role as actively encouraging companies away from providing 'nuisance' payments in unmeritorious claims and providing an easier path toward encouraging companies to report fraud for onward investigation by the authorities?
9. Does the government understand the nature and complexity and indeed the long-term affect of holiday illness on Consumers - do they understand the extent of legal work required to manage a Consumer's claim to a conclusion?
10. Is government really convinced that a particular problem is out of control and therefore requires extensive legislative and procedural change or is it open to the continuing charge that such a route is simply a back-door route to actively help companies reduce their overall operational costs against the principle of equal access to justice - is this not just another form of State Aid?

**These are challenging questions for the government and they should be openly and transparently answered for the benefit of all stakeholders in this debate.**

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## **Initial Observations (Relevant to Q4 of the Government Consultation):**

### ***The summer of 2017:***

Throughout this summer I have monitored the complaints arena and have not detected one single major hotel or resort issue (quite aside from the usual crop of complaints), nor indeed how the activities of lawyers, claims companies or Consumers, have led to the reported sharp increase in claims being made.

On the build up to this long hot summer, we have continued to witness the debate about so-called 'fraudulent' holiday claims and this has produced the usual moral outrage, condemnation and perceptions of justice or an injustice.

For over 20 years, I have borne witness to the ebb & flow of Consumer outrage and Corporate failures in the delivery of holidays and various aspects of the travel product.

I have been at the heart of thousands of Consumers suffering with complete failures in quality, resulting in serious illness, hospitalisation and a lifetime of health consequences. I have observed the responses of travel companies, some of whom have blamed holidaymakers for their failings in resort, very often treating them with contempt.

I have also been witness to a changing Travel Industry, one that has adapted to Consumer pressure; an Industry that has created a sub-industry around health and safety, whose effectiveness is based on the prevailing strength of an economy or indeed a corporate determination.

My work has driven the Consumer experience to the very centre of European political discussion on standards and rights, ensuring that the voice of the holidaymaker is heard and indeed that Travel Companies are fairly catered for in such debates.

### ***Perceptions of Victimhood & Justice:***

In many respects the debate to date only serves to reinforce the notion that Companies and Corporations are the victims and that Consumers are somehow bad.

There is nothing surprising in this mantra; as a Consumer Campaigner I have been witness to the roller coaster agenda of Industry and Politicians. **The government must take care to ensure that they are not seen to be in cahoots with Commercial interests, hell-bent on reducing Commercial costs and promoting a greater de-regulation, all it seems to the detriment of the Consumer, through a potentially restricted unviable Access to Justice.**

It has always been my belief that every person has an inalienable right to seek Justice for any wrong committed against them; this is true for all Consumers, irrespective of the product that has caused them injury.

My fundamental belief for individual rights is also reflected in my belief that any company or entity, so accused of a misdemeanour, should also enjoy a right to fairness, protection and equal access to law, including the right to receive assistance from the State where criminal actions come to the fore and promoting those rights through a fully equipped and resourced State apparatus and the Criminal Law.

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These beliefs simply reflect the fundamental construct of European Consumer Laws and the nature of our societies.

Claims companies that seek to subvert that careful construct or the fundamental principles of justice should understand that Consumers on the whole, will find their actions repulsive.

However, any reaction to subvert such 'claims' activity should be proportionate and ensure that it protects the established principle of an open and equal access to law and justice where genuine complex claims are made.

**The government should resist the temptation therefore to create a new underclass of Claimant as a reaction to a perceived 'fraudulent' cohort of claims. It would be neither proportionate to genuine Claimants, to make access to justice unviable and I would suggest it would likely create a greater detriment for Travel Companies, for the want of a determination to deal with the root cause of the problem. The government must take care not to allow itself to become trapped by mantra or a limited view; that would not serve the interests of Justice for all.**

### ***The Question of Data-Protection & Privacy:***

Several weeks ago I gave an interview to BBC Hereford & Worcester, about the cold-calling of one of their listeners. It appears that this Consumer had received a call from a flight delay company encouraging them to make a claim for a delay some 5 years previously. They told the Consumer that they were able to do this because of a 'recent' change in EU Law! To be clear, flight delays are not currently subject to Claims Management Rules and the caller had misled the Consumer in that there had been no 'recent' change in EU Law which allowed a Consumer to complain; in that work-type, you can see the problem?

**What was interesting about this case was the fact that this claims company knew all of the personal details of the Consumer, including their flight details, which surely meant that someone, somewhere, had sold their personal data onto this flight claims company?**

In other cases, I have spoken with Consumers who had been contacted by a so-called 'After-Care' holiday team. It is an interesting title because it mirrors the teams set up in travel companies to deal with complaints following a Consumer's holiday. In each case, the caller knew the Consumer's name, presumably their address, the dates of their holiday and where they stayed. The calls followed the same pattern; 'I understand you have just come back from holiday', 'Did you have a nice time?', 'Were you ill on holiday?' 'Did you know that you can claim for your sickness?' 'Have you had a holiday in the last three years?', 'Were you sick on that holiday?'. In each case the holidaymaker was not just confused but made clear that they had not suffered with any illness. The Consumer's were puzzled how their personal details had been obtained and they received unsatisfactory answers to their questions; they were left with the impression that they were initially talking to the Travel Company but quickly realised that this was not the case.

**Important questions on personal data, are I would suggest, urgent matters for government:**

- 1. How are claims companies receiving detailed personal information?**
- 2. Are claims companies obtaining this information via personnel in travel or insurance companies?**
- 3. Is there some other criminal explanation for how personal data is received?**
- 4. Is there a need for concerted government action to combat this attack on privacy?**

***Questions of increased costs?***

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I was drawn to the following comment in the MOJ's press release:

*"It is the latest stage of the government's crackdown on a problem which is damaging Britain's reputation overseas and which could drive up holiday costs for hard-working families".*

As with Road Traffic Accidents, I have seen no evidence, that as a result of changes made to the Civil Justice system, that car insurance has fallen. On the contrary, it is clear that such costs are rising.

Consider then the simplistic goal of making changes to the Civil Justice System in Holiday Claims; will this check holiday prices or cause them to fall - I very much doubt that this is the case.

It is far more likely, and the Travel Industry will concede on this point, that holiday prices are far more likely to rise as a result of Brexit than any tinkering with the Civil Justice system for the benefit of Travel Companies.

**The government must therefore resist the age-old mantra of a fall within insurance/holiday costs, because this is quite simply an unsustainable argument. They must accept that Consumers are far more likely to be affected by Brexit price rises in their holidays. The government must look beyond this Insurance/Travel industry attempt to transpose the arguments used in RTA cases and look more closely to the fundamental issues that are causing concern and dedicate action and resources to deal with such problems, to whatever extent they exist.**

#### ***A Question of Fakery:***

A recent BBC Report provides some analysis behind the emotive headline 'Holiday Sickness Fakers Face Government Crackdown'. The overriding inference suggests perhaps that all holiday claims are fake; the word 'fake' has now been widely adopted as an aerosol expression, which apparently informs the reader with 'fact' and is often proffered with little or no supportive evidence.

The BBC article raises the question as to whether these purveyors of 'fakery' will face the full force of the law; or does it? I confess when I first saw the headline, I envisaged task-force teams lined up at airports and hotels ready to pounce upon this evil now saturating our society and indeed the very commercial activities of the travel industry.

I particularly noted the intervention of the Foreign Secretary, who was reported to have commented on the delicate nature of the British Digestive System; as a connoisseur of the All-Inclusive Package Holiday, he must surely know?

**The government must surely appreciate that it is the guardian of our legal system and indeed they have gone to great pains to point out that Consumer Protection will remain high on the agenda of Britain in its post-Brexit world? It is the responsibility of government therefore to dispense with mantra and so-called humorous put-downs about what is after all a serious issue. The seriousness of the issue is based within the real prospect that notifiable disease is returned to the UK, that Consumers suffer very serious deficits in the delivery of quality in the holiday product and that destinations with a history are allowed to continue to deliver a poor product without effective local enforcement. It is claimed that we are now experiencing 'epidemic' proportions of holiday claims, However, the burning questions for government must surely be:**

- 1. If applications to register claims are rising, what exactly has caused them to rise?**
- 2. Is it because of the fickle nature of human behaviour or are there a series of circumstances or failures that have lead us to this peak of legal discussion?**

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**Conclusion:**

In the remainder of this letter/response, I will reveal what I believe are the causes of this so-called holiday claims phenomena. I will highlight my earlier predictions to a Travel Industry and their lack of engagement, the cause and effect of government policy, challenging the notions that its the 'Brits Abroad', a statistical analysis, responses to the Consultation's remaining questions and some final observations.

**My Warning to ABTA and a Travel Industry in the Ascendancy (Relevant to Q4 of the Government's Consultation)!**

In March 2013, I made a speech to ABTA members, during which I made the following points about the state of the holiday market. I began by advising that as a practising solicitor, I had been following the debate on claims and so-called excessive legal costs since 2000. In my view, the debate on legal costs had resulted in a general disinterest from Claimant Lawyers, many believing that their devotion to the hourly rate would not be challenged.

I suggested that changes proposed to the legal market were based on political 'fundamentals' rather than on fact. These proposed changes had led to discussion and predictions, one of which was that 90% of all law firms would disappear in 10 years; it was also being predicted that in 5 years, there would only be 25% of solicitors still employed. I discussed how the threat of radical change was posing a real threat to Citizens trying to Access Justice (I recounted how there was already a rise in the number of people bringing their own claims to court without representation - I also observed that this affected even those members from the Travel Industry, because they too would discover the 'fundamentalist'-style changes would affect them in their own lives).

As a result of these potential changes to the legal market, I predicted the rise of the 'Super' Claims Manager, with Law Firms and Claims Management Companies working on a scale not previously seen.

I predicted that this would mean more, not less Claims!

I also predicted that such changes would produce less legal skill in the market - effectively Law Firms and Claims Management Companies would all be Travel Law Experts! As these changes took effect I suggested that this was likely to lead to a lack of satisfaction amongst Consumers and a great deal of frustration for the Travel Industry.

In conclusion, I asked the assembled ABTA Members to reflect upon these predictions and recognise that the 'Golden-age' of HolidayTravelWatch (the organisation I was at the helm of for 14 years) was now over and that we were all likely to be consumed by an ever more aggressive Legal Market!

But did the Travel Industry engage in the points or indeed speak with me following these serious predictions; of course they didn't?

Has the legal market become more aggressive? Absolutely!

In 2016, one Travel Company (Jet2) wrote to as many legal entities they could find and threatened them with regulatory action if they were engaged in the pursuit of claims that held no merit.

From my perspective, as the then Consumer Director of HolidayTravelWatch, I challenged the notion that you could tar all stakeholders in the Legal & Consumer Industry with such a blanket 'threat'. Not deterred, I wrote to the CEO and Regulatory Director of that company, setting out my

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views on the state of the market and inviting them to meet with me to discuss areas of mutual concern and with it, potential action; despite several letters, I never received a response.

In my view, the Travel Industry in general have adopted a similar strategy in trying to defeat claims, by following the same methodology applied by Insurance Companies on the issue of Whiplash claims.

In doing so, they have applied a clever PR strategy, demonstrating that they are the wounded party with one result being that they are able to push open political and media doors, meeting with Ministers with ease.

Despite my consistent public comments, no such invitations were ever offered to me or indeed other campaigners by government or the Travel Industry; how can Ministers or Policymakers possibly make informed decisions if they have only heard half the story?

**I would strongly suggest and urge government to remember that they are the gatekeepers of Access to Justice for ordinary Consumers. It is my view that they have failed to adequately inform and consult on these critical cross-border claims and a 4 week Consultation will not adequately address key fundamental problems. What might appear to be attractive quick-win solution to a perceived problem will visit further problems not just on Consumers but also on Industry and ultimately government. The government must not rush into changing the nature of Access to Justice without applying a sensible common-sense approach and demonstrating that they have correctly deployed due diligence and governance to their enquiries; a failure to do so will fail the very Consumers that Ministers have claimed are their priority.**

### **The 'Cause & Effect' of Government Policy! (Relevant to Q4 of the Government Consultation)**

In my view, this lack of engagement has been compounded by a series of government failures.

In November 2016 I suggested that government were principally to blame for what I describe as a 'cause and effect' scenario.

In that HTW press release I offered a timeline of how government has systematically failed to understand the nature of their actions and what the resulting affect might be:

1. In April 2010, the government of the day introduced a Portal through which all motor claims up to £10,000 could be processed (remember, there was a lead in through Consultation which already had an affect on the Legal Industry who reacted to try and beat the arrival of the Portal and its affect on their costs!);
2. In the same year, the new coalition government almost immediately claimed that there was a rampant claims culture in the UK and that they were intending to take steps to resolve such a culture. In my view, this started to ring alarm bells amongst legal firms and they began to either market themselves widely or use other vehicles to do so;
3. In 2012, the government introduced a ban on referral fees for cases under the strangely named Legal Aid, Sentencing and Punishing of Offenders Act - in my view, this gave birth to a much wider application of marketing services;
4. In 2013, the upper limit for the Claims Portal was increased to £25,000, and
5. The obligatory use of the Portal was extended to Employers and Public Liability Personal Injury Claims;
6. The effect of this was to inject some certainty for Solicitors handling such claims with regard to their costs, but, it also introduced a recognition within Law Firms that to achieve past earnings, they would have to market their abilities of 'success' and create greater volume;

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7. In November 2014, the government again announced in its [Autumn Statement](#) that it would change the way whiplash claims were processed and that all personal injury claims of up to £5,000 would be handled by the Small Claims Court - the apparent logic to this was that reforms were needed to be introduced to deal with 'fraud' and to reduce motor insurance costs - it had the affect of firing a starting pistol!
  8. In March 2015, the government then [raised the cost](#) of bringing a claim to court - the cause and effect was too see a rush of claims being lodged at court to ensure that they beat rising costs!
  9. In my view there is ample evidence to demonstrate an explosion of so-called claims management companies from 2014. As PPI and Debt opportunities fade into memory, many of these companies, along with some solicitors, now claim that they are experts in a given field, including holiday claims!
  10. We should also factor in the rise of the Ombudsman/Arbitrator type services following the ADR Directive, marketed by many industries as a way and methodology to resolve claims - I have heard of Consumer dissatisfaction on these routes which may contribute to the rise of civil court statistics.

In a BBC article, the Justice Secretary, The Rt Hon Mr David Lidington is reported to have stated that:

*"Our message to those who make false holiday sickness claims is clear - your actions are damaging and will not be tolerated".*

In an earlier [press release](#) from the Ministry of Justice (July 2017), the government stated that they had received advices from the Travel Industry that claims have risen by 500% since 2013 with the Justice Secretary further stating that:

*"This government is absolutely determined to tackle the compensation culture which has penalised the honest majority for too long".*

In the same statement, the government suggests that this is effectively a 'British' disease and that they would be examining the possibility of introducing 'fixed' legal fees for handling holiday claims.

The announcement that the reality of fixed costs is on the way is yet another example of a 'cause and effect'.

Did you hear the sound of the pistol going off again; what do you think is going to happen next - how do you think the legal profession is going to react?

With regard to the press release from the Ministry of Justice, announcing its plans and Consultation, the government has again fired the pistol; what does the Ministry think will happen in the weeks that follow?

**In my view, since 2010, government has applied a less than intelligent approach to questions of reform of the Civil Legal Process. The government needs to create a much broader opportunity for all stakeholders to discuss and consider options rather than supplying undeveloped quick turnaround strategy and subscription to mantra. Such announcements do not serve the cause of Justice nor indeed the stakeholders of the Justice product. At all costs, it must prove to be analytical in its approach to such complex issues, particularly in the field of holiday claims; currently they give the impression that they are only listening to the siren voices of Industry.**

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## **Is it just the Brits Abroad? (relevant to Q4 of the Government Consultation)**

The tenet from government and the Travel Industry, from the aforementioned BBC article, strongly suggests that this is a British societal problem; that we are greedy and act without morals - no such behaviour can be found from our neighbours!

I had to ask; where have I heard all this before?

In 2008/2009, there was a big debate about the 'Consumer Acquis' and how such Rights could be enhanced. At the time, there were similar debates about British holidaymakers making claims; one hotel in Turkey was by this time already into year 3 of continuous complaints. Whilst the Industry cried 'foul' and clear issues of Consumer detriment continued for several years after, we heard many times that this claims-culture was a 'British disease'.

As part of the Consumer Acquis review, I published an update report to the UK government and the EU Commission in which I confronted the notion that Brits are the only ones that complained (page 198 onwards).

I demonstrated that holidaymakers from around Europe were just as proficient at making complaints as their British counterparts, for a large number of problems, including food poisoning.

Is it the case that the Travel Industry is now suggesting that our fellow Europeans have somehow been cured of making complaints? The clue is in the BBC article in which it is suggested that they *'didn't get as sick and as often'* - so they do get sick and probably as sick as some of the holidaymakers I have previously dealt with!

Is it the case that Consumer behaviour claims amount to a non-argument?

**Government has in my opinion fallen into the trap set by the Insurance/Travel Industries; if it hasn't, then it should produce the evidence to support the notion that our European cousins enjoy stronger constitutions! Government must recognise that in setting this argument, they too can be accused of using an unverified headline or indeed 'jokes' about the 'British Digestive System, as a tool to capture PR. This does not constitute good government nor does it represent the experiences of the vast majority of UK Consumers. Government must abandon this type of commentary and concentrate on their obligation to protect a viable Access to Justice and deal with the root cause of fraudulent claims through action and resource allocation.**

## **The Truth of Claims? (Relevant to Q3 of the Government Consultation)**

Over the course of the last 12 months, as I too watched in horror at the antics of these so-called Claims Companies, I have also marvelled at the wide range of statistics as to the scale of the problem. I have seen some commentators wildly claim that such holiday claims have risen as high as 1,500%, but I have never actually been able to establish the provenance of these figures:

How do these level of claims measure against a normal year of trading against a high activity year?

For several years, the Travel Industry claims (leaving aside the one faux-ambulance and several people being arrested in Majorca), has created some great PR for those same Travel Companies, but little hard fact other than exposes in National newspapers.

Returning to the UK's Foreign Secretary and his remarks (allegedly based on information and data supplied by ABTA and the Travel Industry), he referred to the *'fakery'* as an *'injustice affecting*

millions of families' and that the purported claim of a rise of holiday claims by 434% as 'outlandish'; one company allegedly claiming it was as high as 700%. It is disturbing that the Foreign Secretary has chosen to fully embrace the Travel/Insurance Industry's position without it appears asking the simple question: **'How do Industry's statistics match against the government's own statistics on registered claims?'**

It is important for Consumers reading this letter/response to understand that when you make an allegation of an injury (this includes illness) or an accident, that claim has to be registered with the Compensation Recovery Unit so that government can reclaim lost costs for health or rehabilitation treatment or benefits.

Unlike the Foreign Secretary it appears, when I have tried to establish figures regarding our rampant 'Compensation Culture', I have found refuge of the government's own DWP statistics of Registered Claims (CRU); I reproduce the tables of registered personal injury claims (Contains public sector information licensed under the Open Government Licence v3.0):

Year	Clinical negligence	Employer	Motor	Other	Public	Liability not known	Total
2016/17	17,894	73,355	780,324	20,047	85,504	1,692	978,816
2015/16	17,895	86,495	770,791	11,388	92,709	2,046	981,324
2014/15	18,258	103,401	761,878	12,972	100,072	1,778	998,359
2013/14	18,499	105,291	772,843	14,467	103,578	2,123	1,016,801
2012/13	16,006	91,115	818,334	17,695	102,984	2,175	1,048,309
2011/12	13,517	87,350	828,489	4,435	104,863	2,496	1,041,150
2010/11	13,022	81,470	790,999	3,855	94,872	3,163	987,381

In general terms, the table reveals that despite the claims to the contrary, claims are generally either static or falling.

The key area I believe to concentrate on is the column headed 'Other'; this would appear to be the logical area where holiday claims would reside. I have considered the column marked 'Liability not Known, but given the fall in numbers and the claims of a rampant rise in holiday claims, I have dismissed that column as the appropriate area.

**However, it is not clear what case-types are included within 'Other', so great care should be exercised in assuming that this category is simply about holiday claims; I suspect that it does not!**

I have also reviewed the tables from the CRU which sets out the settled cases and also how much the government unit managed to recapture in lost costs to the public purse.

Before providing analysis, it is important to state that in my previous role as Consumer Director of HolidayTravelWatch, I carried out an assessment of the extent of holiday illness and its associated costs. In 2006, there was clear commentary about how up to one third of holidaymakers were

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suffering with illness; my analysis offered a much more modest assessment of 5% from some 22m Package Holidays being sold at that time. I made several observations however, that discounts had to be made for those for example who suffered with a self-limited illness (the type I think the Foreign Secretary was trying to describe), those whose illness failed to exceed the small claims court limit, to those who ate or drank outside their resort or hotel. I recall that the cohort who suffered with a serious illness were far less than the simple 5% extraction and much less than press cries that a third of Consumers suffered illness. I then assessed various costs of returning holiday illness and created categories for Insurance Claims for lost costs, Personal expenditure, NHS Costs and a cost to employers through lost days at work. In 2006, the global figure for returning holiday costs was determined to be £222m; **that figure was never challenged by government or the Travel Industry!**

**There are in my view several key questions that government should seek to answer:**

- 1. What does the Travel Industry mean by a rise in 434%?**
  - 1. Does it mean that holiday claims have risen by 434% nationally?**
  - 2. Alternatively, does it mean that holiday claims have risen by 434% across the selection of Travel Companies that have been surveyed?**
  - 3. How does the Travel Industry break down this figure of 434%, for example, does it include genuine claims or other non-fraud case activity?**
- 2. The second set of questions that government needs to answer is:**
  - 1. How do the Travel Industry statistics or survey compare with the government's own data from the CRU?**
  - 2. Are they able to determine for example the Travel Companies base figures from a normal year of operation against an increased activity year?**
  - 3. Are the Travel Industry figures based around real Package Holidays, DIY Holidays, Independent Travellers or other factors, and**
  - 4. How does that data-set compare with the CRU figures?**
- 3. The third important set of questions relates to sources of activity:**
  - 1. Is the government able to determine demographic differences?**
  - 2. Where are the hotspots in the UK and do those hotspots import other factors?**
  - 3. Is there a difference in the Travel Industry's survey of Travel Companies who are based or centre operations within these hotspot areas against those who do not feature strongly in these areas, and**
  - 4. What is the correlation between those 'hotspot' companies and them providing 'nuisance' payments to get rid of such claims?**

In my analysis of the CRU's data along with holiday trends, I have come to the following conclusions:

1. Since 2007, there has been a significant change in the dynamic of the way holidays are sold and booked;
2. Consumers are confused as to what constitutes a Package Holiday and this may be corrected with the arrival of the new Package Travel Directive;
3. An important question arises as to whether Claims Companies actually understand the difference between a Package or DIY holiday, or do they simply use the one-size-fits-all approach to promote the possibility of being able to make a claim without regard to the practical difficulties attached to DIY holidays (by analogy, this scenario is evident where an airline collapses and the difficulty Consumers have in understand the difference between independent travel, a package holiday or a flight-plus)?
4. Therefore, are Consumers and Claims Companies assuming a Package where perhaps none exists, perhaps with the result that Travel Companies are being unfairly cited as being liable?
5. Prior to 2008, in my experience, Group Actions were more prevalent and offered a group dynamic where between 21% and 50% suffered with illness where the holiday product failed;

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6. In analysing the CRU figures, it is difficult to understand why the 'Other' category increased so markedly in 2012/13, BUT, perhaps the answer lies in the commentary I have detailed above about government announcements and changes (The 'Cause & Effect of Government Policy - Points 3, 4 & 5 above);
  7. However, post 2013, the numbers of 'Other' claims started to fall consistently;
  8. By 2016/17 the numbers reveal an increase to 20,047, an increase of 57% on the previous year - how does this correlate with the claim of 434%?
  9. I then examined the table in which the CRU is notified of settled cases - there is a consistency year-on-year which reveals that of all claims registered an average of 85.5% of cases are settled each year;
  10. This latter point is important because it strongly suggests that the remaining 14.5% cases are either more difficult to settle, have no merit or indeed suffer with some other deficit;
  11. In trying to determine the nature of the 14.5% it is perhaps reasonable to observe that Law Firms will always try to settle as many cases as possible but for present purposes we should assume that an average Law Firm will try to settle 50% of its cases in any given year;
  12. The CRU annual figures of settlement will perhaps factor in cases that were created some 3 years before;
  13. From the 2016/17 figure of 20,047, we can reasonably assume therefore that 50% of those cases will settle within a reasonable timeframe thus leaving some 10,023.5 cases;
  14. If we then assume that a further 50% of the 2016/17 cases will settle at a later stage, this then leave a cohort 5,011.75 cases for onward settlement and action;
  15. Even if we repeat this further analysis, it does not suggest that the vast majority of claims are false but simply the complexity of the cases requires them time to settle and even with the CRU data-set, it does not suggest an out-of-control fraudulent set of claims;
  16. I have recently been asked by Civil Servants about what percentage level I think fraudulent claims rest; I have offered the view that I believe that they rest at about 1% or less of all holiday claims made. I did not nor have I received any direct contradiction of my view, but I accept, that within the data-set held within the survey of Travel Companies they may be experiencing something different for a variety of reasons, but such experiences does not in my view match the anecdotal nor statistical information to hand. It begs the question: 'Does one swallow constitute a Summer?'.

### **Response to Q1 of the Government Consultation**

I have examined the proposed changes to the Pre-Action Protocol for Low Value Claims (PAP) and would comment as follows:

1. I think that government and all Stakeholders will accept that introducing a fixed costs regime, will change the dynamic surrounding an ordinary Consumer's Access to Justice;
2. Many Consumers will, when faced with the distinct possibility, that they will have to make up the shortfall following a 'contribution' to costs, will either:
  1. Seek to deal with the case as a 'Litigant in Person' with all the inherent difficulties that this will present to the Judiciary and the Court Service, or
  2. They will be driven into the hands of process-driven legal factories;
3. The government must seriously question their proposed actions as this will deliver a whole range of unintended consequences, one being the difficulty in securing genuine, experienced, specialist representation in holiday claims;
4. It is my view that Consumers, having already experienced difficult circumstances, will be asked to manage complex multi-jurisdictional issues in the pursuit of their claims through these proposals;
5. Of greater concern however is the clear desire to merge in the claims under the Sales of Goods & Services Act (SGSA) along with the Consumer Rights Act (CRA) - that concern is expressed for the following reasons:

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1. The government acknowledges the imminent arrival of the new Package Travel Directive into UK Law in 2018;
  2. It appears to consider that Consumers generally also use the SGSA & the CRA to make their claim; in general terms they do not. The only exception to their use or inclusion in a case would be when a Consumer perhaps misidentifies the correct legislation to use, or more likely, when Counsel drafts court documentation, those provisions may be quoted;
  3. The government's attempt to also bring through the SGSA & CRA into its proposals raises concerns about the government's future intentions toward the new Package Travel Regulations;
  4. It is likely that the new Package Travel Regulations will be the last major piece of EU Consumer Legislation to be introduced into the UK (noting that the CRA originated from the CRD);
  5. We are assured by government that all Consumer Laws will be formally incorporated into UK Law upon Brexit via The Great Repeal Bill;
  6. However, I express concern that Package Travel Directive's single market focus may render the new Regulations ineffective in part following Brexit, thereby introducing uncertainty for Consumers. My concern is compounded by the fear that the inclusion of the SGSA & CRA is the pre-cursor to 'red-line' these important Consumer Protections and make any type of claim for holiday failures disproportionately difficult;
  7. Government must take great care with its intentions, consult far more widely and effectively than is currently the case and deliver viable Justice solutions within these complex multi-jurisdictional cases rather than to create disproportionate difficulties or a new legal industrial process!

### **Response to Q2 of the Government Consultation**

I have considered the issues raised within the Consultation document and would comment as follows:

1. I have noted the questions being asked of the Civil Justice Council (CJC);
2. It is noted that the CJC are not just being asked to look at holiday claims but at other forms of low-value personal injury claims;
3. It is my view that given the proposed nature of changes the government wishes to introduce into the field of holiday claims, that the CJC is asked to do the following before any final decision is made by government:
  1. That the CJC be tasked with understanding the extensive issues that lie behind illness or accidents in holiday claims;
  2. To achieve this, I would recommend that the CJC engages in a Public Consultation to help them consider direct Consumer experiences;
  3. By doing so, the CJC and indeed the government will understand the nature and complexity of these claims;
  4. As the government has requested, the CJC has been asked to look at the proposed PAP changes; in my view, following an analysis of the nature of illness and accident holiday claims, the CJC should:
    1. Carefully consider the complexity of holiday claims;
    2. The multi-jurisdictional issues;
    3. The potential for detriment within Consumer Laws following Brexit because of the potential for uncertainty within any legislation;
    4. That serious consideration is given to the level of costs being proposed and how these proposals will create a detriment for Consumers in the progression of their claims;
    5. That the CJC also consider the vitally important evidential issue within holiday claims and how the proposals or subsequent practicalities will seriously affect Consumers abilities to pursue such claims;

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6. The CJC should also seriously consider the important area of expertise and how if these proposals are accepted will ensure that Consumers are on their own!
  7. It is my view that the government and the CJC should be aware of the unintended consequences of their actions and should deploy a precautionary principle-like approach to their considerations.

### **Final Recommendations:**

It is simple; the government position is that there is fraud in the fields of whiplash, car accidents, holiday claims and this must be cured.

The extent of that fraud, despite an ascendent Industry and its information, is unclear.

If it is the case that fraudulent activity is as apparent and as widely spread as claimed, then surely, the State apparatus, who will have years of intelligence on such activity, should be deployed?

If a government chooses not to deploy the State apparatus, then it is either acknowledging that:

1. The problem of fraud in any type of claim does not pose a serious problem or threat to UK society, or,
2. The problem of fraud is not cross-border and does not pose any serious problem or threat to the other 27 Member States of the EU, or
3. It is simply abdicating its responsibilities?

Equally questionable is the notion that the government has a mandate to pursue this policy; that is a much wider debate!

However, it cannot be right that on the basis of an Industry's representations, several arrests in Spain and a Claims ambulance that such a fundamental change to a Citizen's right to access Justice is made.

If government believes that it has a mandate to make such changes, then it needs to demonstrate a far more impartial approach to its inquiry and demonstrate to Citizens that they will not be disadvantaged by a major change to the Legal Process; it is they after all who will provide a mandate for the next government! **To achieve this and for the sake of transparency, the government should release all the minutes and notes taken of all meetings they have held between themselves, Travel Companies and representative Trade Bodies. By doing so, the government will satisfy its obligation to fairness and openness and will allow an opportunity for an open examination of the provenance of the allegations; this can then be measured against the proposed changes and against the question of proportionality.**

It is also important for government to risk assess their current actions to-date and avoid the criticism that they are providing what is effectively a State Aid to Industry.

In my view the proposed changes will not cure the alleged fraudulent activity unless positive and determined steps are taken as I have detailed in this letter/report.

It will deliver serious detriment to Consumers already faced with having to deal with an apathetic Legal Industry.

It is more likely that rather than reduce claims, it will actually increase them through the creation of process-driven legal factories; this cannot be in the interests of Justice, Consumers or Industry

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In conclusion, the government must take great care not to fail in its duty of due diligence and governance on the question of Access to Justice; the consequences of failing to do so will reverberate for many years for all Stakeholders, including the Travel Industry.

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