

# Whiplash: What's Going On?

Michael A Foy, Chair, BOA Medicolegal Committee

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Whiplash injury has been around for some time. The Quebec Task Force suggested that it should be referred to as Whiplash Associated Disorder (WAD) because of the wide variety of symptoms that may be associated with the condition. Those of us dealing on a regular basis with patients with spinal problems see little to distinguish neck pain and associated symptoms following road traffic accidents (WAD) from neck pain and/or other symptoms in patients who have never suffered an injury.

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For those of us who have been involved for some time in the assessment of claimants with WAD (either at the request of insurers or claimants' solicitors), we have seen great changes in the organisation of the reporting process. Twenty to thirty years ago reports were largely done by Orthopaedic Surgeons. With the advent of the Woolf reforms, Medical Agencies and moves to speed up the litigation process and reduce costs, reports are usually provided by GPs, sometimes working solely in medicolegal practice. Only the higher value, more complex claims come the way of the Orthopaedic or Orthopaedic/Spinal Surgeons.

Why has whiplash suddenly been highlighted in the press and come on to the public and Government's radar? The answer is 'Jack Straw'. Mr Straw had constituents who were the victims of some rather shady and underhand dealing after they were involved in what sounded a rather trivial road traffic accident. Therefore he made something of a crusade out of the issue in 2011, proposing the Motor Insurance Regulation Bill (which to my understanding has not found its way on to the statute books.)

He criticised the industry in general (referring to it as "grubby") and referral fees in particular. He threw the cat amongst the pigeons to annoy APIL (Association of Personal Injury Lawyers) and the medical profession when commenting, "Whiplash is not so much an injury, more a profitable invention of the human imagination – undiagnosable except by third rate doctors in the pay of claims management companies or personal injury lawyers."

Therefore the Prime Minister became involved and there was an Insurance Summit in Downing Street in February 2012. The Government committed to tackle the compensation culture, reduce legal costs and cut health and safety red tape. The upshot of this was the publication by the Ministry of Justice (MoJ) of a consultation document entitled 'Reducing the Number and Costs of Whiplash Claims' in December 2012. The consultation closed on 8 March 2013. I have had some peripheral input through a meeting at the MoJ in November 2012 and further comments via a telephone discussion through the Department of Health in early March 2013, prior to the closing date.

Broadly speaking the consultation document focused on two areas: difficulties in diagnosing the 'injury' and the cost of the Court system and how it works against insurers who wish to contest claims which they believe to be exaggerated or fraudulent. The most relevant area, as far as we are concerned as Orthopaedic Surgeons, is the former. The document questions the impartiality of current reporting doctors. It seems to ignore the Civil Procedure Rules that we all adhere to and quote in our reports. The CPR emphasises the fundamental importance of providing a report for the assistance of the Court, the content of which should be the same irrespective of which side the expert has been instructed by.



*Michael A Foy*

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○○ *A PANEL SUGGESTS A GROUP OF EXPERIENCED DOCTORS WHO WILL CAREFULLY WEIGH THE MERITS OF AN INDIVIDUAL CLAIM. IT SEEMS THAT THIS WILL NOT BE THE CASE.* ○○

It has been suggested that there should be Court- or Government-appointed Panels to improve the quality of diagnosis of whiplash injury?! A panel, to me, suggests a group of experienced doctors who will carefully weigh the merits of an individual claim. It seems that this will not be the case. The ‘panels’ will probably be individual doctors and the selection criteria for these doctors appears quite vague in the consultation document. In section 41 a National Accreditation Scheme with standards proposed by the Government has been suggested. A certifying body would be appointed by public tender to run such a scheme. The BOA has already been approached by one of the major Reporting Organisations to endorse their accreditation scheme. Perhaps, if the consultation document becomes law, it may be timely for the BOA to consider taking control of this area again by tendering to run the accreditation scheme?

From talking to senior BOA members, this is certainly an area where, as Orthopaedic Surgeons, we have lost influence in the last 10-15 years. Individual doctors, groups of doctors or reporting organisations would be able to apply to the certifying body for recognition to provide the expert medical evidence.

In the background, whilst the consultation paper was being considered, are the competing interests of the Association of British Insurers (ABI) and APIL. To the outside observer they seem to have locked horns and have little common ground. James Dalton from the ABI spoke at the International Whiplash Conference in Bristol in April 2012 pointing out that “The whiplash compensation system in the UK is completely dysfunctional. The system is riddled with ambulance-chasing claims management companies and claimant lawyers. So it will come as no surprise to you that fraudulent and exaggerated whiplash claims are an ever-present and increasing problem.”

He expressed consternation at the fact that while Thatcham research evidence suggested that cars were becoming safer, statistics showed that road traffic accidents notified to police had decreased and yet whiplash claims were “rocketing.”

Meanwhile APIL fired back with the publication of “The Whiplash Report 2012: Myth or Fact”, claiming that the number of whiplash claims was falling! They conducted a survey of 4,000 people from June to August 2012. They came up with a ten-point plan to eliminate fraud in whiplash claims. In this they emphasised the importance of a medical report before settlement to discourage insurers from settling without such medical evidence. They concluded: “APIL will support any proposals which will eliminate fraud, but will stand firm against any proposals which put barriers in the way of obtaining compensation for people with genuine whiplash claims.”

Therefore we have a dilemma. Where does the truth lie? Whose statistics and their interpretation should we rely on? The Government Consultation document, whilst respecting the individual’s right to “access to justice” seems more allied with the insurers’ position than with that of the claimant. If the recommendations for ‘medical panels’ are implemented we need to decide whether to proceed passively as we have done over the last few years or whether, as an organisation, the BOA should become more proactive and push to be intimately involved with the accreditation process. By so doing perhaps we could regain some of the influence in this sphere that we have clearly lost.

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