

Propose Changes to Soft Tissue Injury [Whiplash] Claims Process 2017

Michael A Foy

The government is bringing forward a new reform programme to tackle the high number and cost of personal injury claims, and in particular soft tissue injuries after road traffic accidents (RTA), the majority of which are labelled as whiplash claims. This flows from the initial involvement of Jack Straw when he was home secretary highlighting the problem of fraudulent claims and the engagement of prime minister David Cameron with the Association of British Insurers (ABI) in order to address the issue of the increasing number and value of claims and their effect on the cost of car insurance.



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I thought that it might be useful for BOA members involved in medico-legal practice to be aware of the recent and forthcoming developments.

The Ministry of Justice (MoJ) published a consultation document in November 2016. The consultation ran for seven weeks, closing on 6th January 2017. The consultation document was circulated to a number of organisations (including the BOA) and invited comments on a variety of measures designed to reform the personal injury claims process and in particular to discourage minor, exaggerated and fraudulent claims. The document pointed out

that despite the implementation of the Jackson reforms in 2013 and the introduction of the Med Co portal in April 2015 the volume of RTA related personal injury claims had remained static. It was over 50% higher than ten years previously with 460,000 claims registered in 2005/6 compared to 770,000 in 2015/6. The increase in claims in the last decade is against a background of a reduction in the number of RTA's reported to police, from 190,000 in 2006 to 142,000 in 2015. The document also highlighted the fact that in the last ten years there have been a number of advances in vehicle safety with integrated

seat and head restraints, energy absorbing car design and the introduction of automatic collision detection systems which can take over a vehicle's braking and steering system in order to avoid low speed impacts. These modifications would all be expected to reduce the impact of motor vehicle accidents.

Various issues were raised including:-

1. Removal of compensation for pain, suffering and loss of amenity (PSLA) for all minor soft tissue injuries.
2. Introduction of a fixed sum of compensation for all minor soft tissue injuries. The "tariff" would differ depending on the longevity of the effects of the injury and whether there was additional "psychological injury". For example, the suggested tariff for a 0-6 month injury was proposed to be £425 (£400 physical/£25 psychological) compared to £3,600 for a 19-24 month injury (£3,500 physical/£100 psychological).
3. Prohibition of settlement of claims without expert medical evidence. For small claims usually obtained through accredited MedCo experts.
4. Implementation of the recommendations of the Insurance Fraud Task Force. >>

JTO Medico-Legal Features

∞ *THE MOJ DECIDED THAT “GOOD QUALITY MEDICAL EVIDENCE” WILL BE REQUIRED TO SUPPORT A CLAIM AND THAT MEDCO WOULD BE IMPORTANT IN THIS RESPECT. THERE WAS NO CLEAR DISCUSSION OF HOW THIS GOOD QUALITY EVIDENCE SHOULD BE OBTAINED AND HOW A DECISION WOULD BE TAKEN ON THE LONGEVITY (SEVERITY) OF THE ACCIDENT.* ∞

Part 1 of the government response was published in February 2017. The majority of comments (56%) on the consultation were from claimant solicitors. It was on the basis of these comments that the action points outlined in the February 2017 document were framed. As one would expect there were diametrically opposing views from claimant lawyers and the insurance industry, particularly in relation to the abolition of compensation for minor soft tissue injuries and the introduction of tariffs and their levels. The MoJ decided that “good quality medical evidence” will be required to support a claim and that MedCo would be important in this respect. There was no clear discussion of how this good quality evidence should be obtained and how a decision would be taken on the longevity (severity) of the accident. It seems to me that opining on the duration of a low end soft tissue injury is entirely arbitrary and relies on the

claimant’s description of their symptoms. There are rarely any significant clinical findings, excepting local tenderness and restricted movement, to aid the expert. The whole process of judging the injury duration will be based on the veracity of the claimant’s account and their response to physical examination. My experience of reading first reports from MedCo experts is that they are usually carried out without any reference to GP or other medical records. The table below shows the tariff levels proposed by the MoJ, these are due to be implemented in October 2018. As can be seen a decision was taken to introduce two bands at the minor injury end of the range, 0-3 months and 3-6 months. It was decided to abandon the idea of having two separate tariffs for physical injury and physical injury plus psychological trauma. The claimant solicitors were

unimpressed that psychological injury was quantified at £25 at the lower end of the scale!

Also having considered removing compensation for claims at the lower end of the scale altogether the government decided not to pursue this option. However, they confirmed that claims could not be settled without medical evidence.

Not surprisingly all this attracted mixed reviews from the involved parties. The claimant’s solicitors don’t like it at all. Deborah Evans (2017), chief executive of the Association of Personal Injury Lawyers (APIL) described their aim as, “To fight tooth and nail to get the select committee to read the evidence, to understand the enormous detriment the proposals bring to injured people, to correct the misconception of a system perpetuated by fraud and to sow seeds of doubt regarding the savings on motor premiums”. In the same edition of PI Focus Neil Sugarman (APIL president) gave the view that the government was, “fanatical about suppressing the right to claim for legitimate injuries”.

Ian Miller (2017) in the personal injury and clinical negligence blog was of the view that the logic behind the new tariffs must be to make it economically impossible for lawyers to make any money from whiplash claims

on the small claims track, for example by taking a cut of the damages. Equally he believed that the tariffs had been set at such a level as to make it not worth anyone’s while making a claim if their symptoms had lasted for no more than a few months. He concluded that, “These reforms will have a huge impact on those who suffer whiplash injuries in road traffic accidents and will put many personal injury lawyers out of work. Will we see insurance premiums reduced? A cynic might anticipate that increases in vehicle repair costs and insurance premium tax will offer insurers a perfect explanation for not passing on any savings. Only time will tell”.

Andrew Twambley the spokesperson for Access to Justice was also unimpressed by the proposals indicating that “We are extremely disappointed that the government seems hell bent on removing the rights of ordinary people to gain redress for injuries that weren’t their fault. Increasing the small claims limit to £5,000 discriminates against ordinary people suffering whiplash injuries and will open the doors for claims management companies and cold callers to wreak further havoc on the market. The government has not even waited to issue a response to the consultation exercise, confirming that it is

Injury Duration	2015 average payment for PSLA - uplifted to take account of JCG uplift (Industry data)	Judicial College Guideline (JCG) amounts (13th edition) Published September 2015	New tariff amounts
0-3 months	£1,750	A few hundred pounds to £2,050	£255
4-6 months	£2,150	£2,050 to £3,630	£450
7-9 months	£2,600	£2,050 to £3,630	£765
10-12 months	£3,100	£2,050 to £3,630	£1,190
13-15 months	£3,500	£3,630 to £6,600	£1,820
16-18 months	£3,950	£3,630 to £6,600	£2,660
19-24 months	£4,500	£3,630 to £6,600	£3,725

Table 1: Tariff levels proposed by the MoJ.



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∞ DAVID WILLIAMS THE TECHNICAL DIRECTOR AT AXA TOOK THE VIEW THAT “BEING ABLE TO CLAIM THOUSANDS OF POUNDS FOR MINOR WHIPLASH INJURIES THAT ARE ALMOST IMPOSSIBLE TO VERIFY IS ABSOLUTELY LUDICROUS AND HAS ONLY SERVED TO INDULGE THE ACTIONS OF CLAIMS MANAGEMENT COMPANIES AND FUEL THE RISE OF ‘A HAVE A GO’ COMPENSATION CULTURE IN THE UK. ∞

uninterested in due process and deaf to the serious concerns raised by legal firms, the judiciary and consumer groups. Insurers will be rubbing their hands in glee. They have the government in their pocket, and will themselves be pocketing any savings made, for themselves and their shareholders”.

Not surprisingly, the proposals have been greeted more favourably in the insurance world. David Williams the technical director at AXA took the view that “being able to claim thousands of pounds for minor whiplash injuries that are almost impossible to verify is absolutely ludicrous and has only served to indulge the actions of claims management companies and fuel the rise of ‘a have a go’ compensation culture in the UK. By drastically reducing the cash incentive for these claims the Government has taken a strong stand in favour of honest motorists who will now save around £40 on their motor insurance premiums”.

Ben Fletcher the director of the Insurance Fraud Bureau (IFB) also strongly supported the proposals, “one of the reasons that organised crime groups have orchestrated ‘crash for cash’ scams for far too long is that they’re perceived as low risk and high reward. The industry has been working hard to deal with this myth and has been

successful in fighting back, with over 1190 people arrested and 498 convicted. It’s due to the amount of money in the system that fraudsters are perceiving this as an easy target and exploiting it, netting upwards of tens of thousands of pounds. By reducing the amount of excess money in the system, we hope to see a positive effect in helping to tackle these scams, as the criminals recognise that the risks are higher and the rewards are lower than they once were. The effects and harm caused by these scams is wide reaching from those plagued by nuisance calls. It is also a burden on the innocent policyholder who is asked to cover the cost and the road users whose safety are being put at risk by criminals targeting them to deliberately cause a collision. In taking some of the excess cash out of the system, we hope that it will help to positively influence the level of ‘crash for cash’ fraud that we see”.

The position was echoed by James Dalton the director general of the ABI who believes that the reforms to whiplash claims set out in the Bill cannot come soon enough. Dalton said, “the current” insurance claims system is “riddled with exaggerated and fraudulent claims” from which claimant lawyers have been “profiting handsomely”. The gravy train

must stop. Motorists know that the UK’s roads have been getting ever safer, so why have whiplash style claims been rising? People want an insurance claims system that provides compensation and support to those who genuinely need it”, Dalton added. “What they don’t want is to be plagued by spam calls and texts from ambulance chasers, while personal injury lawyers continue to profit from a broken system in urgent need of reform”.

So there we have it. It will be difficult if not impossible to reconcile the extreme differences between the opposing groups in this argument. My understanding is that the great majority of reports in these claims will be given by GPs and physiotherapists through the MedCo portal. No doubt in those cases that progress and continue to be symptomatic we, as orthopaedic surgeons, will come across these reports later in the litigation process. It certainly appears that the government is prepared to continue their crusade in this area despite the protestations of APIL and like-minded organisations. ■

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References

References can be found online at www.boa.ac.uk/publications/JTO or by scanning the QR Code.

