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Tariff, non-tariff or what? How one District Judge is approaching the assessment of damages under CPR PD27B

Three unreported cases provide insight into how a court might interpret the 'new rules' for the assessment of damages in soft tissue injury claims where there are claims for both tariff and non-tariff damages. All three cases went before the same District Judge (DJ). Although the decisions are non-binding, they do serve to put flesh on the bare bones of the question that is what a court should award for a 'mixed' injury.

R v H is the latest and most significant of the three decisions, handed down a fortnight after the case of *M v P* and *K v K*.

In *R v H* the Court Valuation Form set out that the claimant claimed £1,390.00 in respect of a tariff injury and £2,500.00 in respect of a non-tariff injury. The compensator offered £1,390.00 and £465.00 respectively.

The level of damages for whiplash injuries were to be assessed in accordance with the Whiplash Injury Regulations 2021 SI 2021 No. 642. The parties agreed that the claimant sustained a whiplash injury within the meaning of the Act and, given the prognosis was one of 8 - 10 months (treated as 9) with travel anxiety, the relevant tariff amount was £1,390.00.

It was also agreed that there was a non-tariff injury which fell to be quantified in accordance with the JC Guidelines. The claimant accepted that there was to be a deduction in the overall award to represent the overlap in pain, suffering and loss of amenity occasioned by the injuries combined.

The DJ commented that the question raised in this case was "when there is a tariff and non-tariff element to the injury, what is the methodology that should be employed to quantify the injury as a

whole?". She then went on to say that that question could be broken down into the following issues:

a. Was the non-tariff injury quantified first and the tariff added (with deduction); or was the whiplash to be viewed as the "main" injury with the addition of a sum in respect of the non-tariff injury; or did it in fact matter?
b. Accordingly, what was the appropriate award in respect of the non-tariff element of the injury?
c. What was to be deducted for an overlap in the awards and, therefore, what was the overall figure for the totality of the injuries?

The DJ could not see how which element was valued first should matter or, more properly, should lead to a different result. Once it was accepted that there should be a deduction for overlap (as here), just because the value of the whiplash element was now fixed (as opposed to being assessed), she could not see that the methodology to be used should differ from that which it was before when it came to considering multiple injuries, as set out in *Sadler (2011)*. That judgment dictated that the court must look at the individual injuries, consider individual awards for them and then take a step back to reach an overall conclusion. Which injury the court started with was not suggested.

The DJ's valuation here of the non-tariff injury to the claimant's knees was assessed on the basis of the pain suffering and loss of amenity caused by the knee injuries. The whiplash injury (and the travel anxiety) was quantified in accordance with the tariff which did not allow for any nuance in duration, let alone effect (save for once the threshold for "exceptional circumstances" was reached).

Accordingly, the DJ's approach was as follows:

a. Determine what each injury was;
b. Value each injury in accordance with whatever scheme/regime was appropriate;
c. Add them together and then
d. step back and exercise the type of judicial discretion that judges have been doing over many years to reach a final figure by making an appropriate deduction (if any).

In this case the DJ took into account that the non-tariff injury was to both knees and decided that a free-standing award would be in the region of £2,500. The tariff award was £1,390, giving an overall sum of £3,890. After stepping back and making a deduction, the overall award was £3,100.00 to recognise the clear overlap in pain, suffering and loss of amenity.

The other two cases, *M v P* and *K v K*, on which judgments were handed down simultaneously a fortnight earlier, involved the same issue: was there a non-tariff injury and is so what was it worth and so what should the overall injury award be?

Significantly, the DJ held that a non-tariff injury was not sustained in either case: the contended non-tariff injury was referred pain from the whiplash. The DJ went on in each case, however, to make a similar albeit hypothetical assessment of what she would have allowed for the contended non-tariff injuries had she in fact found that they were non-tariff injuries (which was not the case). Her assessments in those cases applied a similar logic to *R v H*.

Glyn Thompson of **Weightmans** and a member of the FOIL Motor SFT comments:

"*This Judge's decision to approach the exercise of assessing the value of a mixed injury in the manner that she did in R v H, echoed earlier obiter comments she made to a similar effect in M v P and K v K, but these are the first cases we are aware of in which a Judge has set out how this exercise should be approached. This decision is not-binding and it remains to be seen if other judges will take the same approach and/or follow the logic here. The approach in R v H has certainly led to an award (and expressed opinion in the other two) which will no doubt be considered more generous than insurers had hoped for. It is to be borne in mind that this Judge's approach is simply 'one approach' but might not be the approach taken by all'.*