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Mixed Injury Claims: Has the Court of Appeal provided any useful guidance? Analysis

IN BRIEF

The Court of Appeal has held that non-tariff injury damages should be dealt with separately from the tariff damages and on a common law basis. The court should then 'step back' and make any necessary adjustment to avoid over compensation.

Yoann Samuel Rabot v. Charlotte Victoria Hassam: Matthew David Briggs v. Boluwatife Laditan and The Association of Personal Injury Lawyers and The Motor Accident Solicitors Society (Interveners) (2023) EWCA Civ 19

The appeals related to the construction of S3 Civil Liability Act 2018 ("the 2018 Act") the question being: how is the court to assess damages for pain, suffering and loss of amenity ("PSLA") where the claimant suffers a whiplash injury which comes within the scope of the 2018 Act and attracts a tariff award stipulated by the Whiplash Injury Regulations 2021 ("the Regulations"), but also suffers additional injury which falls outside the scope of the 2018 Act and does not attract a tariff award (a mixed claim)?

The court noted that the starting point of an assessment of damages in a mixed claim is to return the claimant to the position they would have enjoyed absent the wrong. Where a number of injuries are sustained, there will frequently be an overlap in the various symptoms such that a simple aggregation of the individual injuries would represent overcompensation.

The approach in such circumstances was identified by Pitchford LJ in *Sadler v Filipiak (2011) EWCA Civ 1728* as follows:

"*It is in my judgment always necessary to stand back from the compilation of individual figures, whether assistance has been derived from comparable cases or from the JSB guideline advice, to consider whether the award for pain, suffering and loss of amenity should be greater than the sum of the parts in order properly to reflect the combined effect of all the injuries upon the injured person's recovering quality of life or, on the contrary, should be smaller than the sum of the parts in order to remove an element of double counting. In some cases, no doubt a minority, no adjustment will be necessary because the total will properly reflect the overall pain, suffering and loss of amenity endured. In others, and probably the majority, an adjustment and occasionally a significant adjustment may be necessary*."

In *Rabot* the claimant suffered whiplash injuries, soft tissue injuries to the cervical spine and lumbo-sacral area (tariff injuries) together with soft tissue injuries to both knees (non-tariff injuries).

At the quantum only hearing before a District Judge the tariff award was assessed to be £1,390 and the non-tariff award to be £2,500, an overall figure of £3,890. Following the guidance in *Sadler*, the judge added the two figures and then "stepped back" in order to reach a final figure by making an appropriate deduction. The judge identified the clear overlap between the injuries based upon the medical evidence and noted that in terms of loss of amenity there was nothing that could be attributed to the knee injuries alone. The 'overall award' was assessed to be £3,100.

In *Briggs* the claimant suffered soft tissue injuries to the neck, upper and lower back (tariff injuries) and to the left elbow, knee and the hips (non-tariff injuries). The judge identified her approach as being that applied in Rabot namely:
(a) determine what each injury is;
(b) value each injury in accordance with whatever scheme/regime is appropriate;
(c) add them and then step back exercising the type of judicial discretion that judges have been doing over many years;
(d) reach a final figure by making an appropriate deduction (if any).

The judge stated that the reduction has to be from the non-tariff amount given that the tariff valuation is fixed. She accepted that the overlap represented an overlap in PSLA recognised within each award. The judge assessed the tariff award to be £840, the non-tariff award to be £3,000 and reduced the latter figure by £1,040 to recognise the "clear overlap on the basis of the medical evidence". She made a total award of £2,800.

The primary grounds of appeal were that:

(i) A tariff award should be made for the whiplash injury and a conventional common law general damages award for the other injuries. The two awards should then be aggregated. This was the claimants' primary case on appeal;

(ii) A tariff award should be made for the whiplash injury and a conventional common law general damages award for each of the other injuries but in addition the court should apply a "totality" principle and discount the overall award to allow for any overlap between the PSLA, common both to the whiplash and non-whiplash injuries. The discounting process should only be completed when the appropriate awards for the tariff and non-tariff injuries have been combined. This was the claimants' secondary

case and the approach adopted by the judge.

(iii) The tariff award is the starting point. All PSLA common to (i.e., concurrently caused by) both the tariff and non-tariff injuries is to be treated as fully compensated for by the tariff award. Thus, only a further small amount would be appropriate for any additional PSLA, if any can be exclusively attributed to the other injuries as being solely caused by them. This was the defendants' approach;

(iv) Pursuant to section 3(8) when the court is making an assessment of the non-scheme injury, it must make an award of PSLA which "reflects the combined effect" of the tariff and non-tariff injuries. The non-tariff award should reflect and include the totality of any overlap between the PSLA, common both to the whiplash and non whiplash injuries. This was the approach of the interveners.

In *Rabot* the claimant took no issue with the judge's original assessments of the tariff and non-tariff injuries but contended that the judge was wrong to make any further deduction to the amount and reduce the combined judgment sum to £3,100 on the basis there was an overlap in the PSLA between the two heads of loss.

In *Briggs* the claimant's primary case was that the judge should not have made a totality adjustment and should have aggregated the award which would have resulted in a total award of £3,840. The claimant's secondary case was that even if the judge was correct in her approach the totality adjustment was too great. The adjustment of the total figure from £3,840 to £2,800 led to a total award of less than had previously been attributed to the non-whiplash injuries.

The Court of Appeal noted that the 2018 Act and the Regulations represent a statutory incursion into the common law method of assessing damages and a radical departure from the common law approach to such an assessment in that they abandon the "fair and reasonable" approach to the assessment of whiplash injuries and minor psychological injuries in cases falling within the scope of the legislation.

The mischief at which the legislation is directed is minor whiplash claims resulting from a motor vehicle accident. There is nothing in the wording of the statute or in the extra Parliamentary material which suggests, let alone demonstrates, an intention to alter the common law process of assessment for, or the value of, non-tariff injuries. The legislation was directed to and confined exclusively to whiplash injuries. There is no mischief which Parliament attempted to remedy in respect of the common law assessment of non-tariff injuries.

The whiplash reform programme was designed to reduce the amount of damages recoverable for the whiplash injury in order to discourage false or exaggerated whiplash claims. The compromise effected by the legislation derogates from the principle of 100% compensation pursuant to the common law. An award pursuant to the legislation is significantly lower than a common law assessment of damages made pursuant to the Judicial College Guidelines.

Pursuant to Ss3(2) and 3(3) of the 2018 Act, the amount of damages for PSLA for the whiplash injury or injuries is the amount specified in the Regulations. The

court's role in assessing the appropriate figure for PSLA for a tariff injury is circumscribed by section 3(2) and, where appropriate, section 3(3), and by the Regulations. It is limited to an assessment of the duration of the whiplash injury save where the claimant seeks an uplift under Regulation 3. The award is based upon the duration of the symptoms regardless of the level of pain, suffering and loss of amenity actually suffered by a claimant.

S3(8) recognises the need for an assessment for an award of damages in respect of injuries additional to those suffered and contained within the section 3(2) or 3(3) injuries. In such a mixed injury case, given the differing bases of the section 3(2), 3(3) (tariff) and s.3(8) (non-tariff) assessments, the court is required to carry out two separate assessments. The issue is how an assessment is to be made for PSLA which is concurrently caused by both the tariff and non-tariff injuries.

The approach of the court begins from the premise that the focus of the 2018 Act and the Regulations is directed to whiplash injuries: they were not intended to and did not alter the common law assessment of non-whiplash injuries. Neither section 3(8), nor any other provision of the 2018 Act, either expressly or by necessary implication provides that non-tariff injuries should be assessed by reference to anything other than common law principles.

An intrinsic part of a common law assessment in which more than one injury is sustained is, following *Sadler*, to step back and to assess whether the total award represents double counting or overcompensation. Such an approach is appropriate where both injuries are assessed pursuant to common law principles. In a case where one award is in respect of a tariff injury which has not been assessed pursuant to common law principles and thus represents a lower figure than would have been awarded had such an assessment been made, the court is faced with the difficulty of not knowing what, if any, allowance has been made in the tariff award for PSLA arising from a concurrent cause.

The approach of the court to an assessment of damages in respect of a tariff and non-tariff award where concurrently caused PSLA is present is that the court should:
(i) assess the tariff award by reference to the Regulations;
(ii) assess the award for non-tariff injuries on common law principles; and
(iii) "step back" in order to carry out the *Sadler* adjustment, recognising that the sum included in the tariff award for the whiplash component is unknown but is smaller than it would be if damages for the whiplash component had been assessed applying common law principles.

There is one caveat, namely that the final award cannot be less than would be awarded for the non-tariff injuries if they had been the only injuries suffered by the claimant.

Dismissing the defendants' appeals, the Court of Appeal held that their approach would result in the claimant's right to common law compensation for PSLA caused by the non-tariff injury where the whiplash injury is a concurrent cause being effectively extinguished. It would serve to extend the compass of the 2018 Act to the non-whiplash injury which is contrary to the stated purpose of the statute and not required by necessary implication. It would also have the effect of claimants being compensated in radically different amounts for their non-whiplash injuries depending upon

whether a qualifying whiplash injury has been sustained. It could lead to a position where a claimant would not pursue a claim for
whiplash injury as it would have the effect of reducing any award for compensation
for the non-tariff injury.

As to the cross appeals, the appellate court found that the deduction made by the judge in *Rabo*t was not wrong in principle or unreasonable. In *Briggs* the judge's adjustment resulted in a total figure which was lower than the assessment for the non-tariff injury. The adjustment was too great. A reduction of £340 to the non-tariff award, giving a total
award of £3,500 would represent appropriate compensation for the injuries sustained.

Whilst Lord Justice Stuart-Smith agreed with this judgment, The Master of the Rolls dissented. He concluded that the wording of S3 of the 2018 Act leads inexorably to the conclusion that the first solution was the correct one as a matter of statutory construction. The effect of this conclusion was that Parliament had legislated for the reduction of general damages for non-whiplash personal injuries in cases where whiplash injuries have been sustained, even though the statute does not appear specifically to be directed at non-whiplash cases.

Comment

FOIL Technical Director **Dr Jeffrey Wale** comments:

The dissenting judgment by the Master of the Rolls offers scope for an application for permission to appeal to the UK Supreme Court. We will have to wait to see whether that option is pursued.

Whilst this judgment clarifies that the final award cannot be less than would otherwise be awarded for the non-tariff injury alone (as occurred in Briggs), it offers limited steer on how the 'step back' adjustment should be undertaken by first instance courts. It remains to be seen whether there is enough guidance here to accelerate the settlement of cases through the Official Injury Claim process. This judgment highlights the continuing need for critical scrutiny on any claim and evidence relating to a non-tariff injury claim.

Glynn Thompson, a Principal Associate with **Weightmans LLP** and a member of the FOIL Motor SFT adds:

Frustratingly, the majority judgments are a simple reaffirmation of how to interpret correctly the legislation and the logic of Sadler. What the industry needed was real guidance on how to value a non-tariff injury when a tariff injury is sustained at exactly the same time, so expanding upon Sadler. Pitchford LJ in Sadler set out that in the majority of mixed injury cases an adjustment to the combined injury value assessments will be warranted, and occasionally significantly so. What are those occasions? Surely there are more of them now? What is the rationale behind adjustment? This decision does little to assist those on the ground seeking to decide what the appropriate level of compensation on a mixed injury case is. A real opportunity lost.

The full judgment may be found at: Charlotte Victoria Hassam & Anor. v Yoann Samuel Rabot & Anor. - Find case law (nationalarchives.gov.uk)

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