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Official Injury Claim and the Whiplash Reforms

Roundtable Summary

(25 April 2024)

This note offers a summary of the recent FOIL roundtable event discussing the whiplash reforms and the Official Injury Claim (OIC) Portal.

The Civil Liability Act 2018 made changes to the claims process for low-value road traffic accident (RTA) related personal injury claims, the majority of which are 'whiplash' claims. This included the introduction of a fixed tariff system of compensation for whiplash injuries to reflect a level proportionate to the pain and suffering incurred. The Act also mandated compulsory medical evidence to support these claims. As part of the package of reforms, the small claims limit was increased, and an online digital portal (the OIC) was developed by the MIB (Motor Insurers' Bureau) on behalf of the Ministry of Justice. The portal aims to provide a free and independent service for people with minor injuries from an RTA to claim compensation without legal help.

We heard from an excellent panel of speakers about different aspects of the reforms:

Glyn Thompson: Associate Partner at Horwich Farrelly and the sole defendant lawyer representative on the MoJ's cross-industry OIC Advisory Group

Glyn reflected on the Whiplash reforms triggered by part 1 of the Civil Liability Act 2018 and The Whiplash Injury Regulations 2021. He identified the main objective of the reforms and how those objectives had been translated through the introduction of the tariff, the OIC portal, revisions in the Small Claims track limits as well as changes around the regulation of experts and offers. On the positive side: these reforms have contributed to a reduction in the number of whiplash claims, even though this may not be the sole reason or explanation for the reduction. We now have a

relatively simple and usable system for processing the majority of these claims with virtually no costs payable. We have greater certainty around the valuation of whiplash injury claims, even if mixed injuries do complicate the picture. We also have improved regulations around the use of medical experts. In terms of negatives: there has been a failure of 'take up' by unrepresented claimants; there are several different SCT limits and claims processes, and the challenges introduced by the uptick of mixed injury claims. There is also the issue of dormancy, leaving pent-up insurer reserves.

Emma Fuller, Partner at DAC Beachcroft: Emma is head of market strategy for motor and casualty at DAC Beachcroft.

Emma's focus was on the statutory tariff review. She considered the impact of the recent Judicial College Guidelines update (the 17th edition) particularly upon mixed injury claims. The net effect is to shift settlements and awards far closer to the £5,000 Small Claims track threshold. We must keep a close eye on the length of whiplash injuries and the types of other minor injuries claimed.

There was then a discussion about the likely outcome of the tariff review. Issues included the relevant inflationary index (RPI or CPI); the application of the inflationary buffer; and the importance of prospective effect. Ultimately the inflationary adjustment will be a political decision, but one with an impact on consumers and insurer spending.

Isabel Hitching KC, Crown Office Chambers: Isabel acted for the Defendants in the Mixed Injury test cases heard by the Supreme Court in February 2024.

Isabel's focus was the outcome of the mixed injury litigation in the Supreme Court in *Briggs* and *Rabot*. The key issue in the litigation: how is any PSLA which is concurrently caused by both the whiplash and non-whiplash injuries to be compensated?

The 3 options:

1. Defendants' approach (adopted by the Master of the Rolls): Tariff amount + Common Law (CL) damages for PSLA caused solely by the non-whiplash injury = overall award

2. Interveners' and Claimants' primary approach (rejected by the entire Court of Appeal): Tariff amount + CL damages for all PSLA caused by the non-whiplash injury, including PSLA also caused by the qualifying whiplash injury = overall award

3. Claimant's secondary approach (adopted by the Court of Appeal majority): Tariff amount + (CL damages for all PSLA caused by the non-whiplash injury, including PSLA also caused by the qualifying whiplash injury – a discretionary amount to address the resulting double recovery but which cannot result in the overall award being less than would be awarded for the non-whiplash injury alone) = overall award

The UK Supreme Court's decision: options 1 and 2 were rejected. Option 3 is 'rough and ready' but less of a departure from common law than Option 2 and is workable. Option 3 is therefore adopted.

The UKSC decision provides further clarity. Double recovery is impermissible and highlights the need for better medical reports.

Nicola Critchley, Partner at DWF: Nicola is head of client strategy for insurance at DWF and sits on the Civil Justice Council (CJC)

Nicola started with a review of the claims data and the changes in claims frequency across the OIC and Claims Portals. There was then a discussion about behaviours and the landscape post-*Rabot*. The issues of dormancy and limitation were also discussed. There was a general discussion around future challenges that are likely to make their way through the courts and via appeal and broader strategies for future reform and lobbying.