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Reforming whiplash claims

Personal Injury analysis: The Ministry of Justice is currently seeking views on the government's proposed reforms of whiplash claims. Sarah Towler, partner at Russell-Cooke, discusses some of the implications and issues surrounding the proposals.

Original news

Consultation: Whiplash reform--Proposals on fixed costs for medical examinations/reports and related issues, LNB News 06/05/2014 56

Proposals on the reform of the handling of soft tissue injury claims arising from road traffic accidents, i.e. whiplash claims, include the introduction of mandatory fixed fees for all initial medical reports, and a bar on the recovery of the cost of a report if it is commissioned outside the fixed fee scheme. The Ministry of Justice (MoJ) is consulting on the proposals and requests responses by 28 May 2014.

What are the key changes proposed?

The changes are in relation to the soft tissue injury claims that fall within the RTA Portal and the proposed changes are:

- to introduce fixed fees for medical reports
- the claimant and the defendant to provide their version of events to the medical experts, and
- for independence in the commissioning and provision of reports--so no financial arrangements between the party instructing and the expert

What prompted the proposals and are the proposed changes likely to be successful in achieving their aim?

Ongoing from Jackson it continues the reform of civil litigation funding and costs prompted in addition by a backlash from the insurance industry complaining about the number and cost of whiplash claims and the rise in fraudulent claims.

The aim is to control the cost of whiplash claims and to narrow down the scope for fraudulent and speculative claims - although I'm not convinced these reforms are going to assist with that aspect.

Could there be any unintended consequences? Is there anything that should be drawn to the rule makers' attention at this stage?

I think that financial independence, in the commissioning of the report, is an extension of the banning of the referral fees scheme. For those practitioners who don't do a large quantity of this type of claim that probably isn't a problem. However, companies that do vast quantities of these claims have arrangements with large Page 2 medical organisations set up to provide medical reports and rehabilitation programmes, and it is a possibility those arrangements could be brought to an end as a result of these reforms.

Following on with the independence issue, the reforms propose that you are only allowed to give a specified proportion of work to an individual expert. It strikes me that if you are doing thousands of these types of claims, then you may struggle to meet that independent quota.

It's hard to say whether this would be an intended or unintended consequence of this proposal though for firms with lower volume workloads it is unlikely to be an issue.

Medical evidence supporting the claim is vital to ascertain what the clients' injuries are. The proposed fee structure, in principle seems fine as we've got fixed fees going on in lots of other areas. However it might prove difficult, particularly in London, to find experts willing to work for those fees. I see that as a difficulty which might encourage parties to instruct less experienced clinicians and that might itself impact on the quality of the medical evidence.

The proposals are for soft tissue injury claims in the RTA portal. However I am uncertain how this will work in practice, effectively splitting the Protocol in two for soft tissue injury claims and other claims.

Looking at Annex B, the fixed supply fee for a consultant orthopaedic surgeon is £420 inclusive of a review of the medical records. That may be fine applied to a soft tissue whiplash injury. However, it may be a struggle to get someone to report on a case where there has been an exacerbation of an asymptomatic back injury, with serious implications for the future.

Changing the Protocol to provide for fixed fees could have serious implications for those claimants who need more medical investigation or a more senior expert.

In addition, fixed costs might encourage the parties to get an expert to report purely on the records and not on examination of the claimant in a low value whiplash claim. That's not going to help identify fraudulent claimants and it is helpful to have a visual examination in all cases.

Finally, by giving both versions of events to the medical expert you're adding a new dimension to what the expert is expected to comment upon--if the versions differ is he expected to comment on both scenarios? He could be commenting on liability issues in his report, which is a matter for the parties. In addition, the extra work may well be for a lower fixed fee. The experts need to know the nature of the accident but I am not certain that they need to know both scenarios.

I envisage that there would be a lot more dispute about the medical evidence, and in the Portal there is no opportunity to put questions to the expert if the evidence is disputed. In those cases, the matter is taken out of the Portal and dealt with under the PI Protocol. This defeats the object of keeping the costs of these cases down.

What should lawyers advising in this area take note of?

Apart from what I've said above, where we are going to have to instruct experts who won't perhaps work to those fixed fees and we are going to have to consider how we deal with the shortfall on fee recovery, maybe advising claimants that they will have to contribute towards getting medical evidence to support their claim as it's not going to be covered by the proposed fixed fees.

We have already seen this issue arising in legal aid cases, with some experts refusing to do legal aid work because of the limit that was placed on their hourly rate by the LSC. If you wanted or needed to instruct that particular expert then you would have to consider recovery of that shortfall in the event that the costs were not met by the defendant. I can see the same issue arising in the Portal claims with experts saying they won't carry out RTA work for the amount that is being paid.

What is the proposed timeline on this?

Implementation is due in October 2014 Page 3

Are there any trends in this area of law and are these proposals in line with trends?

Broadly the proposals are in line with the Jackson theme--the banning of the referral fees, and fixed costs for cases.

Although it's not part of this particular proposal, it has also been discussed that the government is considering lifting the value of fast track claims from £1,000 to £5,000. This hasn't been implemented and I think this would be punishing really genuine claimants for a small number of fraudulent and speculative claims.

Interviewed by Fran Benson.

The views expressed by News Analysis interviewees are not necessarily those of the proprietor.

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