

**Ministry of Justice
Whiplash reform: proposals on fixed costs for medical
examinations/reports and related issues**



A response by the Association of Personal Injury Lawyers

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Introduction

It is essential that these reforms retain access to justice for the genuinely injured. We support:

- deterring fraudulent, exaggerated and spurious claims, whilst retaining access to justice;
- the creation of a process for ensuring better diagnosis of whiplash injury;
- improving the quality of medical reporting;
- the creation of an accreditation scheme dependent on expertise and training
- the independence of medical examiners.

However it is worth noting against the backdrop of these ongoing reforms that the latest CRU figures show that whiplash claims continue to fall. Last year alone they fell by 60,000 and are currently at their lowest levels for the last seven years.

1. Fixed fees for medical reports

APIL's primary concern is that these reforms deliver a more thorough examination, review of medical history, and detailed report as this will help deter fraudulent and exaggerated claims along with ensuring an accurate valuation of the claim. Whilst we have no particular stake in the fee itself, we resist a reduced fee if it results in an examination and report that fails to achieve this objective.

Any fixed fee that is introduced must:

- allow for an examination and medico-legal report of sufficient quality to engender respect from insurers;
- be set at a level that allows access to a medical expert in all parts of the country;
- be set at a level that allows an individual medical expert to operate as well as medical agencies;
- also involve a mechanism that allows for the fee to be up-rated annually to ensure the market remains viable long term;

- be sufficient to allow the medical expert to be paid for any new activities required by these reforms including, checking photo ID to ensure that the person being examined is actually the claimant, considering and commenting on two versions of how the accident occurred, completing a more substantial report, using a prescribed more detailed examination test.
- allow for the medical expert to check any previous injuries revealed by data sharing, reading medical records, and cross-checking the history with the claimants version of events.
- Result in a report which delivers on the balance of probabilities, a reasonably certain diagnosis together with an informed prognosis and sets out:
 - the nature of the injury suffered;
 - the impact on the claimant's ability to function in and out of work;
 - the extent to which the symptoms and/or inability to function will continue, including how those symptoms might change during the prognosis period and how the claimants ability to function will therefore change or improve during that time.
- It is suggested that it will also be important for the report to identify and distinguish nuisance only symptoms from more serious ones, which should attract a greater level of compensation.

Any fee proposed must be sufficient to carry out a robust examination and produce a detailed report. Whether the fees set out are sufficient to allow the medical expert to do this is a matter for the medical profession.

We would prefer one fee for an accredited expert deemed sufficiently knowledgeable to provide a report on a soft tissue injury resulting from an RTA. It would also remove the need for different fees for different disciplines of expert. If there are going to be different fees as set out in the draft rules it must be clear at what stage of the claim a more expensive report can be obtained. We assume for example that a report from an orthopaedic surgeon can only be obtained where there is either agreement from the parties or there is referral through the initial report from a GP or physiotherapist.

2. Extra information for medical experts

Whilst we support the eradication of fraud, there are already established court procedures for dealing with the different issues arising with low velocity impact arguments. The Protocol is a simplified process and should not be used to deal with arguments about the facts of the case. It must also be remembered that the report being obtained is an opinion and prognosis reports and not a report on liability and causation.

If the MoJ makes a policy decision to introduce this reform then we suggest that the following steps are introduced as a safeguard. If the defendant does not agree with the claimants versions of events the defendant should be required to provide a witness statement with a signed statement of truth to the claimant lawyers setting out how they recall the accident occurred. The claimant lawyer on instruction of the expert will be then be able to advise the expert that the manner in which the accident occurred is disputed and what points are in dispute. The expert should then be required to answer the following question:

What difference would it make to your prognosis if:

- a) the claimants version of events is found to be true; or*
- b) if the defendants version of events is found to be true?*

The claim then **must** leave the protocol for low value road traffic accident cases as there is no mechanism for dealing with such a dispute within a simplified process. Claimants will then be free to issue Part 7 proceeding to allow a judge to heard arguments regarding the facts of the case.

Guidance will also need to be issued to medical experts to ensure that they know they are not permitted to act in a quasi judicial capacity and must not comment on how they think the accident occurred.

The expert must be reminded that resolution of factual issues is a matter for the court and that their function is to comment on how a different finding of fact will affect their medical opinion. It is no part of their function in a condition and prognosis report to comment on liability.

3. Independence

APIL understands the MoJ's concerns around the independence of medical experts. Medical experts have a duty to the court and not to those that instruct them. If properly regulated and monitored through accreditation, they should not necessarily be a cause for concern. The key is tackling a minority of medico-legal experts whether inside or outside such arrangements. This can be done by ensuring that the report fee is payable regardless of outcome of the case and by introducing accreditation and auditing of experts.

There should be no conflict of interest for the medical expert, and therefore it is important that the medical expert is not also the treating expert should any rehabilitation, or other treatment be proposed.

APIL is opposed to limiting the proportion of work that can be commissioned from one expert, or instructing a medical expert on a cab rank basis. The party obtaining the report must be free to nominate and instruct an accredited expert of their choice.

4. Reports commissioned outside the fixed fee

Pre-medical offers by insurers are common place and have contributed to fraud. Making pre-medical offers removes the checks and balances from the system and creates an environment of easy money. It is essential that there is commitment from claimant representatives and insurers to put an end to pre-med offers in RTA portal cases as this will help tackle fraud and opportunistic claims. If we are to build a system where the genuinely injured person gets appropriate compensation, we should seek to stop pre-med offers in their entirety. No whiplash claim should be allowed to settle in or out of the portal without a medical report being in place.

It is important that medical evidence is obtained in every RTA portal case. That evidence should be obtained through the correct procedure identified for the case in question.

The sanction proposed for disclosing a non-compliant report, where for example the claimant lawyer has failed to use an authorised/accredited expert, is chronologically flawed. A pre-med offer, by definition is one made before a medical report is disclosed and cannot therefore be a sanction imposed subsequent to the disclosure of the report.

Effectively the proposal suggested by the Government will allow and indeed encourage the insurance industry to continue to make pre-med offers (offers without Part 36 sanction), just in case (or on the pretext that) the claimant might file a report, which does not comply with the rules. Surely it is illogical to allow in through the back door, by way of sanction, something which the Government has indicated in clear unambiguous terms that it wishes to discourage? This fails to tackle the perception of easy money and fraudulent claims.

A more suitable sanction for such a failure would be that the claimant would not be able to rely on the report for the purposes of bringing the claim.

APIL believes that Part 36 should be further amended to prevent all pre med offers from enjoying the benefits of part 36.

5. Further comments

The importance of medical notes

APIL would support the examination of the claimant's medical history in every case. Cross checking the claimant's medical history by the medical expert is an essential step in detecting fraud or exaggeration, spotting underlying conditions, understanding the claimants' recovery profile etc. It is especially relevant where data sharing reveals previous claims or accidents which can impact in two ways – it can either show that a claimant is more likely to have compounding injuries or weaknesses which may impact recovery times, it could also flag a heightened risk of fraud.

Who should carry out the examinations?

APIL would propose that prior to the introduction of the accreditation scheme, the list of those able to carry out medical examinations is extended to include Accident and Emergency consultants.

The importance of accreditation

A properly run accreditation scheme can be an essential tool in ensuring that only reputable practitioners carry out the reports. Properly run and administrated, it need not be overly burdensome or bureaucratic. APIL has extensive experience on accreditation schemes and would be happy to advise further.

The importance of data sharing

In order for the medical examination to be properly informed, the medical expert needs an indication of previous accidents /claims. The insurers have given a commitment to providing claimant representatives with this information for a fee.