Ministry of Justice

Future provision of medical reports in road traffic accident related personal injury claims

A response by the Association of Personal Injury Lawyers

May 2019

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation with a history of over 25 years of working to help injured people gain access to justice they need and deserve. We have over 3,500 members committed to supporting the association's aims and all of which sign up to APIL's code of conduct and consumer charter. Membership comprises mostly solicitors, along with barristers, legal executives and academics.

APIL has a long history of liaison with other stakeholders, consumer representatives, governments and devolved assemblies across the UK with a view to achieving the association's aims, which are:

- To promote full and just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise;
- To provide a communication network for members.

Any enquiries in respect of this response should be addressed, in the first instance, to:

Alice Taylor

Legal Policy Officer

APIL
3, Alder Court, Rennie Hogg Road, Nottingham, NG2 1RX#

Tel: 0115 9435428; Fax: 0115 958 0885

e-mail: alice.taylor@apil.org.uk

Introduction

APIL welcomes the opportunity to respond to the Ministry of Justice's consultation on the future provision of medical reports in road traffic accident cases. We support any measures that will ensure claimants can continue to access justice for injuries suffered in road traffic accident cases falling within the small claims track limit (SCT). Many of these claimants will likely have to pursue the claim without the benefit of a legal representative, and the process should be made as easy and straightforward as possible for these litigants in person. It is important that the process ensures that no claimant is disenfranchised, or put off from pursuing a claim because they do not understand what they need to do. APIL is supportive of the expansion of MedCo to provide medical reports for all road traffic accident claims falling within the new small claims limit, but the reform to MedCo must be much more comprehensive than simply allowing litigants in person to access the current system.

Q1) The Government proposes to extend the scope of MedCo so that all initial medial reports for all RTA related PI claims under the SCT are provided under a single system. Do you agree with this proposal?

We agree with the proposal to extend the scope of MedCo so that all initial medical reports for all RTA related PI claims under the SCT of £5,000 are provided under a single system. There must be a process in place to enable a litigant in person to easily access a medical expert, and MedCo is the logical solution. If MedCo were not extended, it would mean that an unrepresented claimant would need to locate a medical expert by themselves. Most people would not know where to begin locating an appropriate expert to assist with their claim. The claimant would have no control over the quality of service provided by these experts or on the quality of the report provided.

Extending the scope of MedCo to all initial medical reports for PI claims under the small claims limit, however, should not simply be a broadening of the current system. The extension must include a revision of the information that is provided to the claimant throughout the selection process, and must ensure that the system will be easy for any litigant in person to use. Those who have accessibility issues and those who do not speak English as a first language, for example, must have access to the system. The extension should ensure that MedCo is able to provide a genuinely good and fully accessible service for litigants in person.

The MedCo search must also be free to access, and the insurer should meet the upfront cost of the medical report, regardless of whether liability is admitted. If an unrepresented claimant is injured by another's negligence, and suffers whiplash for three months, but is required to pay £180 upfront for a medical report, they are likely to be deterred from making a claim, as they will only receive £225 in compensation. Although they would be reimbursed by the compensator if successful in their claim, £180 is a lot of money to many people, and even if they have been injured through no fault of their own, and have been struggling for weeks with a whiplash injury that has meant that they are unable to continue their day to day activities, they may decide that they simply cannot afford to pursue a claim. People must not be deterred from accessing justice by cost. This consideration may be even more acute if, for example, a self-employed person has had to take time away from work as a result of their injury.

Q2) If you have suggestions for alternative approaches please provide details and, in particular, how they would work in practice.

We have no comments on this question.

Q3) If MedCo is extended to cover all types of medical reports for RTA related personal injury claims under the SCT, should other types of medical expert be added to those currently available for the purpose of providing medical reports? Please give examples of who should be added along with your reasons.

Ideally, if all RTA related personal injury claims fall within the scope of MedCo, people should be able choose the most appropriate expert for their injury to write an initial report. This may not be a GP. We acknowledge, however, that most litigants in person will not know which sort of expert they need to search for. The system must be as easy to use and explain as possible, so we recommend that in the system for litigants in person, only GPs should be able to provide an initial medical report. We believe GPs are most suited to this because they should have sufficient experience to be in a position to provide an initial report on any of the claims that fall within the extended scope (e.g. tinnitus, minor facial injuries), and they should be in the best position to provide an unbiased opinion as to whether a further report from a different specialist will be required. They will also have the most experience out of the experts currently registered with MedCo in dealing with the public, and litigants in person are also likely to be most familiar with GPs, and will perhaps be most comfortable visiting them. There should then be provision for the GP to recommend that a second report is produced by a specialist, if needed. If recommended by the GP, the compensator must fund the second report, regardless of whether liability is admitted. The current rules at paragraph 7.8B of the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents, stating that a further report is permitted where the first report recommends it, and the report has been first disclosed to the defendant, should continue to apply.

Q4) If additional specialists are added, should they be restricted to providing initial reports for claims which involve their specialisms or should they be allowed to complete the full accreditation process and be allowed to provide all initial reports? Please give reasons for your answer.

If additional specialists are added to the system, they should be restricted to providing reports for their specialisms, but they must also be fully accredited by MedCo. This accreditation process must take place before they are permitted to join the system. There have been many problems with the current MedCo system, including some very poor-quality reports and examinations taking place in inappropriate settings, that could have been avoided if experts were accredited before they were permitted to register.

Q5) Do you agree that other types of practitioner (such as osteopaths or chiropractors) be included in the list of experts who can provide medical reports for claims subject to the new RTA SCT limit? If you agree, please describe which types of additional practitioner should be included and why? If you disagree, please gives reasons why.

As above, we believe only General Practitioners should provide initial medical reports for litigants in person. GPs undertake a minimum of 10 years training, with 3 years of approved clinical training, and their broad range of knowledge and experience makes them ideally suited to providing initial reports for the range of injuries that will fall within the new RTA SCT limit. Other types of practitioner could be included in the list of experts who can provide additional medical reports, should the GP recommend that a further report is required. The other types of practitioner included should be limited to those who have specialist skills in the diagnosis (rather than treatment) of injuries beyond the skills of a GP, for example Ear Nose and Throat specialists, dentists and psychologists.

Q6) Should the current fixed recoverable cost regime for initial soft tissue injury medical reports be extended to cover initial reports for all RTA related PI claims under the SCT? Please give reasons to support your answer.

Q7) Should the fixed recoverable cost regime be extended to all initial reports for claims that fall under the revised SCT in the new IT platform, if additional experts are added to and sourced through MedCo? Please explain your answer.

We are not opposed to the extension of the fixed recoverable cost regime for initial soft tissue injury medical reports, but the fees should be set at a level which allows a quality report to be produced. One of the main issues with the current system is that the fees are set without consideration or control of how much medical agencies take from the expert. Experts must receive a fee which allows them to provide a quality report, and evidence shows that currently, while the fee may be a reasonable amount for a report to be produced, medical agencies take a cut which then leaves the expert with an insufficient amount. Experts are required to write large volumes of reports over a short period of time to make the work worthwhile, so there is a risk that poor quality reports may be produced. There must be transparency in the fees, and consideration must be given to the minimum amount that the expert gets should an agency be involve. One solicitor's personal experience of the medical legal process made legal press headlines in August 2018[1], revealing that claimants are presented with a lengthy and detailed questionnaire to complete whilst they are waiting for their appointment, which is scheduled to last only 10 minutes. The appointment with the expert lasted less than five minutes, and when the report arrived, it was full of inaccuracies – even her age was wrong. It is clear that in order to make the work worthwhile, experts must see a large number of people in a short period, so the time spent with each claimant is insufficient and the reports produced are of low quality. The circumstances of the examination will ultimately depend on how much the expert is paid to undertake the examination and provide a report.

Fees must be set at a workable level, and there must be control over how much medical agencies are permitted to deduct from the expert's fee for their services.

Q8) When extending the current MedCo search system to unrepresented claimants, what, if any, changes should be made to the current MedCo Qualifying Criteria? Please give reasons for your answer.

GPs will invariably know how to interact with claimants, however the qualifying criteria for the medical reporting organisations and the front-end interactions for direct medical experts must be more consumer focused. The ultimate aim is to ensure that litigants in person can make an informed and educated choice, and it is not possible to simply roll out the current business to business MedCo system to unrepresented claimants. The medical reporting agencies and experts must have a consumer facing website, so that claimants can research them before making a choice. The MROs must be able to prove that they can provide a good service to litigants in person, and should demonstrate that they will provide information to the claimant to ensure that they can make an informed choice. MedCo must require those wishing to register to provide reports to litigants in person to be committed to quality and have a good complaints procedure in place.

Q9) When extending the current MedCo search system to unrepresented claimants, what changes would you like to see as to how the information returned should be presented (i.e. currently only contact details are returned, but should more

[1] https://www.litigationfutures.com/news/solicitor-outlines-serious-medco-shortcomings-after-own-whiplash-injury

information about the provider and their service offering be provided)? Please give reasons for your answer.

The system must be completely reviewed in this regard. It is pointless for the litigant in person to be presented with the same information that a lawyer is presented with on carrying out a search, as it will mean very little to them and they will not be able to make an informed choice. We suggest that there should be some sort of built-in rating system, so that once litigants in person have had an experience with the MRO, they are asked by MedCo to complete a survey to detail the length of time between the instruction and appointment, and provide a rating for how satisfied they are with their experience. These ratings can be displayed on the returning screen, to enable those presented with that particular MRO/expert in their offer in the future, to make an informed choice.

There must be guidance generally around this part of the process, and specific guidance on how the offer works – making it clear to the litigant in person that they are able to contact all of the experts on the list returned to them before making a decision on who to instruct. There must also be specific guidance on how pricing works.

Q11) When extending the current MedCo search to unrepresented claimants, do you think it should include a standardised set of service level agreements? Please give reasons for your answer

Yes. There should be a consumer-focused service level agreement, with providers committing to a suitable complaints procedure, and ensuring that litigants have enough information to make an informed choice.

Q12) What other changes do you think would need to be made to the current MedCo system for unrepresented claimants to be able to obtain a medical report? Please give reasons for your answer.

It must be made clear to the claimant which parts of the medical report they can challenge, and which parts they are unable to change. It must also be ensured that the claimant has the opportunity to amend the report in relation to factual errors before it is sent to the defendant.

Q13) Please provide, with supporting evidence, the average cost of an initial medical report for non-soft tissue RTA related PI injuries

Having liaised with member firms, it is clear that the cost of medical reports outside of those dealing with soft tissue injuries do vary. A fixed priced report from an orthopaedic consultant (including a review of medical records) is £420 plus VAT. If the injury is a non-soft tissue injury a report from an orthopaedic consultant will cost between £420 and c.£550 plus VAT. This is probably the most common type of report required in this situation.

Other reports depend on the amount of work required, for example two reports from a plastic surgeon could differ wildly in cost in that one might be required to deal with a simple scar to the forearm, but where the degree to which it may or may not settle is unclear to a report dealing with facial scaring or rhinoplasty revision which is much more involved. Reports from such expects might cost as little as £400 plus VAT but as much as £1800 plus VAT.

Reports from consultant psychologist and psychiatrists tend to cost in the region of £750 plus VAT to £950 plus VAT, against depending on the complexity of the issues involved and the volume of records to be reviewed.

Reports from other experts, such as consultant neurologists and ENT surgeons also vary in price, again according to the complexity of the particular injury, volume of records and time taken but are likely to cost in the region of £800 to £1000 plus VAT. More specialist reports

from for example a consultant rheumatologist, or consultant maxillofacial surgeons may cost more than £1500 but are very unlikely to be first reports and more often obtained upon recommendation from the initial expert(s) to report.

Q14) Do you agree with an assumption that around 400,000 claims would be processed through the MedCo portal; and of these, around 10,000 (5%) would be non-soft tissue claims?

Q15) Do you agree with the assumptions that around two thirds of claims processed on the MedCo system would be with legal representation (made up of just under 50% of claims with BTE insurance and under 20% with other legal representation) and one third of claims without legal representation?

There are too many variables in play, and it is unclear what the personal injury market will look like once the reforms are in place. We therefore have no comments on this question.

- Ends -

Association of Personal Injury Lawyers

3 Alder Court, Rennie Hogg Road, Nottingham, NG2 1RX

● T: 0115 943 5400 ● W: www.apil.org.uk● E: mail@apil.org.uk