Ouch! The practicalities of whiplash claims

Gerald Swaby and Paul Richards[1]

According to the Association of British Insurers in 2021 there were 89,000 fraudulent claims detected in England. Of that number 49,000 were in motor insurance, of which 10,617 were of an organised nature. This was an increase of approximately 8%[2] on the 2020 levels where detected fraud amounted to £1.12bn.[3] The insurance industry of course sees insurance fraud on a daily basis and clearly legitimate policy holders should not have to bear the cost of high premiums that result from such fraudulent claims. It therefore comes as no surprise that a perceived compensation culture surrounding fraudulent insurance claims with regard to whiplash injuries has developed. With regards to this culture, it has been estimated that the eradication of such claims would save the motor insurance industry £2bn per annum and that this would result in every insured person seeing a reduction of £50 in their motor insurance policy premiums. [4]

In February 2017 the Government published its post-consultation report to the Ministry of Justice consultation paper, 'Reforming the Soft Tissue Injury ('whiplash') Claims Process.'[5] Its recommendations were originally intended to be embodied in the Prisons and Courts Bill,[6] however, this Bill was withdrawn in the run up to the General Election in June 2017. The proposals then formed part of the Conservative manifesto.

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[2] Total valuation was approx. £1.1bn for 2020. https://www.abi.org.uk/products-and-issues/topics-and-issues/fraud/ (Accessed 20/04/2023).

[3] http://portfolio.cpl.co.uk?ABI-KeyFacts/2022/top10 (Accessed 20/04/2023)) According to the ABI, the insurers claim acceptance rate for motor insurance had increased in 2019/20 by an extra £133 on the previous year. And that insurers detected proportionately more motor insurance fraud than in 2019, despite a fall in the overall number of motor insurance claims due to fewer vehicles on the roads during lockdowns. Detected motor frauds fell by 6% to 55,000, while their value fell by only 1% to £602 million. However, detection rates rose – by number up 0.55 percentage points to 2.05%; by value up 1.31 percentage points to 6%. https://www.abi.org.uk/news/news-articles/2021/10/detected-fraud-2020 (Accessed 15/4/2023)

[4] Although this was watered down to £35. It has been difficult to find any evidence of any insurer who was proud to announce that they had passed it on. For example see: https://www.autoexpress.co.uk/car-news/consumer-news/99834/whiplash-crackdown-will-save-drivers-35-a-year-on-insurance (Accessed 20/04/2023) https://www.telegraph.co.uk/news/2021/05/31/motorists-insurance-cut-35-crackdown-fake-whiplash-claims/ (Accessed 20/04/2023) https://www.insurancetimes.co.uk/whiplash-crackdown-to-save-motorists-35-a-year-says-justice-minister/1426665.article (Accessed 20/04/2023), but it is worth noting that the Justice Committee which is reviewing these reforms has restated the £40 to £50 amount. https://committees.parliament.uk/committee/102/justice-committee/news/186138/justice-committee-to-study-whiplash-claims-and-reform/ This is consistent with the Ministry of Justice's Nov 2016 consultation document 'Reforming the Soft Tissue Injury Claims Process' CM9299 where stated that it would be £40 that would be passed on to the consumers (p.3)

[5] Ministry of Justice, Reforming the Soft Tissue Injury (Whiplash) Claims Process, Cm 9299.

[6] Prisons and Courts Bill 2016-17, Bill 145 56/2.

The Government's proposals and policy objectives were set out in a regime contained In the Civil Liability Act 2018 ("CLA 2018") and other subordinate pieces of legislation,[7] not only to restrict the damages available for whiplash injuries, but also to limit the costs of bringing claims for such injuries. The intention then was to dis-incentivise minor, exaggerated and fraudulent claims to address what was perceived to be the continuing high number and cost of claims.

The Act commences by defining what is meant by a whiplash injury in s.1 thus:

(1) In this Part "whiplash injury" means an injury of soft tissue in the neck, back or shoulder that is of a description falling within subsection (2), but not including an injury excepted by subsection (3).

(2) An injury falls within this subsection if it is—

(a) a sprain, strain, tear, rupture or lesser damage of a muscle, tendon or ligament in the neck, back or shoulder, or

(b) an injury of soft tissue associated with a muscle, tendon or ligament in the neck, back or shoulder.

(3) An injury is excepted by this subsection if—

(a) it is an injury of soft tissue which is a part of or connected to another injury, and

(b) the other injury is not an injury of soft tissue in the neck, back or shoulder of a description falling within subsection (2).

The Act does not remove the necessity for the claimant to prove negligence and therefore issues of liability may still be an issue to be addressed by the claimant. The Act does not purport to introduce a no-fault liability regime of the type which might be found in New Zealand, for instance.

Guidance on assessing damages for whiplash injuries is set out in the Whiplash Injury Regulations 2021. Regulation 2[8] places whiplash injuries into a tabulated scale of severity based on "(a) the duration or likely duration, of the injury a person has suffered, or (b) where a person suffers more than one whiplash injury on the same

[7] The Whiplash Injury Regulations 2021/642.
[8] Whiplash Regulations 2021/642.

occasion, the whiplash injury of the longest duration, or likely longest duration, suffered on that occasion, if the person were to take, or had taken, reasonable steps to mitigate the effect of that injury or those injuries." At the same time the small claims court remit for hearing such claims was increased from £1,000 limit to £5,000 for injuries in road traffic accident ("RTA") claims for those over 18, inside a vehicle in England or Wales if they were not at fault. In introducing the new regime, the government asked the Motor Insurance Bureau to set up the Official Injury Claims service where all such claims within the remit of the regulations would go through a website portal.

The government's reforms to whiplash injury claims came into force on 31 May 2021. Depending on the viewpoint of the individual or insurer there has been a love/hate relationship surrounding the reforms and certainly the regime, whilst achieving much, has been found wanting in several crucial areas.

The intention behind this article is to examine the reforms, its flaws and practical observations for the future.

Background

The Government was very heavily lobbied by the defendant insurance industry to pass the Civil Liability Act 2018. The stance taken by the industry was that many whiplash claims were inherently fraudulent and that a claims culture had developed around whiplash claims specifically. The assessment of damages for whiplash injuries requires particular care. Allegations of such injuries are easily made and not easily disproved. Medical experts are reliant on the honesty of claimants. The evidence relating to such a claim requires careful scrutiny.

The notion of compensation culture has been hotly debated over the past two decades. Briefly summarised, the Association of Personal Injury Lawyers (APIL) and Motor Accident Solicitors Society (MASS) have, over the years, routinely rejected allegations of widespread spurious claiming. Lord Dyson, (former MR), challenged and dismissed the existence of a compensation culture as a media-created myth. Lord Young investigated this during the Cameron Government where the Prime Minister stated in the Forward to Lord Young's policy paper, "Common Sense, Common Safety: a Report", written in the context of health and safety in general, that compensation culture was a real problem. Whilst Lord Young's report categorically stated that this was in fact a myth, he commented:

> "Clearly, it is right that people who have suffered an injustice through someone else's negligence should be able to claim redress. It a basic tenet of law and one on which we all rely. What is not right is that some people should be led to believe that they can absolve themselves from any personal responsibility for their actions, that financial recompense can make good any injury."[9]

He considered that the UK's:

> "… compensation system should focus on delivering fair and proportionate compensation to genuine claimants as quickly as possible – not fuelling expectations that injury means automatic compensation regardless of the circumstances."

He further observed:

> "What is not right is that some people should be led to believe that they can absolve themselves from any personal responsibility for their actions, that financial recompense can make good any injury, or that compensation should be a cash cow for lawyers and referral agencies."

These words and the approach are clear, but from the industry's perspective in the previous five years leading up to the Covid pandemic there were many sources that supported the idea of a compensation culture in the context of whiplash injuries. As can be seen at fig.1 below, despite these falling statistics, the Ministry of Justice has previously confirmed that a compensation pay out for a whiplash claim was made once every 60 seconds. The insurers LV suggested that close to 8 in 10 (78%) car accidents involves a compensation claim for whiplash. Similarly, Esure reported that its profits had fallen annually by more than a fifth due to the 7,500 more whiplash claims every year from as far back as 2015. Even 10 years ago the Association of British Insurers (ABI) suggested that motor insurance premiums had increased by an average of £90 to accommodate the so-called whiplash phenomena.

In 2018 the ABI Director, General Huw Evans, stated in relation to whiplash claims reforms that:

> "If passed, these proposals would be great news for motorists…People and businesses are paying more for their motor insurance than ever before, and we need changes to the law to tackle some of the root causes. Soft tissue injury claims have been rising year on year since 2014 as cold calling claims firms have thrived, driving up the cost of insurance."

[9] Common Sense Common Safety P8.

He continued:

> "This Bill (i.e. the Civil Liability Act 2018) will ensure people in England and Wales receive fair compensation while reducing excess costs in the system. In a competitive market such cost benefits get passed through to customers, as they did after previous reforms in 2012 when average motor premiums fell by £50 over the next two years."[10]

This reform programme is therefore not confined to dealing with fraudulent and exaggerated claims, but also aimed at reducing the cost to all motorists resulting from the continuing high number and cost of these 'straightforward' claims. Often there is too great a financial incentive for an individual to make a claim. The average payment for a minor whiplash claim was £1,850, and the cost of dealing with them is out of all proportion to any genuine injury suffered. Undoubtedly the perception of a compensation culture has been fuelled by stories in the media and by rumour and hearsay within the general public, of individuals receiving compensation pay-outs (often when no or only minor injury has been sustained). And why not? If a person involved in a motor accident is offered a non-refundable costs inducement and the promise of a handsome settlement if they claim, why would they not be tempted by that?

The very notion of the compensation culture arises from a mindset that accidents do not occur. If an event does occur and someone is injured then someone else is at fault and must therefore compensate the victim, i.e. "where there's blame, there's a claim!" All too often however it is the victim of the RTA who is considered to be the perpetrator of whiplash "fraud". This notion belies the fact that victims are merely complicit in a conspiracy between the legal and medical professions to extract compensation and fees from insurance companies. The victim is often unaware of this "conspiracy" and only sees the accident as a means of obtaining a financial gain. The reasoning that underpins these notions is based on the fact that whiplash injuries are often difficult or impossible to prove. These injuries cannot be seen on X-ray, CT or MRI scans.[11] This results in the medical examiner having to rely on previous medical history and the individual's honesty. The default position within the insurance industry seemed to be that such claims were fundamentally based on the dishonesty of the victim.

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[10] https://www.reinsurancene.ws/uk-gov-introduces-bill-targeting-ogden-rate-whiplash-reforms/ (Accessed 7/9/2023)

[11] B. Fleming, *'Whiplash: The Role of Imaging – To X-Ray or Not?'* (BC Medical Journal, Volume 44, No. 5, June 2002) Pages 248-251.

To a large degree this state of affairs has arisen out of the drive for access to justice fuelled by the Access to Justice Act 1999 that gave rise to the notion of conditional fee agreements, after-the-event insurance and the rise of claims management companies. Whilst well-meaning at the time, these developments nevertheless gave rise to an increased public perception that it was now possible to sue even for the most minor accidents with no financial risk. Lawyers in turn saw an opportunity to charge high fees, safe in the knowledge that these fees will be picked up by the loser – often the insurance company. Insurance companies would make a judgment to settle the claim on a cost analysis basis. Far better to haggle on the compensation level and pay the lawyers' costs rather than to embark on expensive litigation in the courts – loss adjustment has been a common feature of the insurance industry for many years. Thus, the widening of access to justice produced a culture surrounding compensation and easy pickings for claimants, the lawyers and the claims management companies ("CMCs").

Parallel to this were CMCs that were using scripted conversations along the lines of wanting to know if there had been an accident within the last 3 years where an injury was suffered, and the individual was not at fault.[12] The growth of CMCs compounded the problem. Such companies, often directly run by firms of solicitors themselves, offered to investigate the facts of the accident and assess whether or not there were grounds for a claim, and then offering to act on a 'no win, no fee' basis. At this point the claim was handed over to solicitors in return for a referral fee.

The means by which claims were processed amounted to an "ambulance-chasing" culture, with the legal and medical professions seeing it as a milch cow to enhance profits. The insurance industry itself however is not necessarily without a degree of blame here. All too often the companies simply capitulated and paid up, and did not contest the claims on liability grounds. It may be that in the vast majority of cases there is little point in contesting liability. For instance, where the injury results from a rear-end collision, the default position is that the driver of the car running into the back of the claimant's vehicle is automatically at fault. No doubt therefore insurance companies had good reason not to contest all claims as this would place a significant financial burden on them in terms of legal and court fees, with the result that insurance premiums escalated. So, where is the "fraud" taking place? Here it is contended that claimants themselves are not, for the most part, knowingly involved in defrauding insurance companies. They are caught up in a process that allows them to obtain money for little effort. One might say this is unethical, but the man on the top of the Clapham omnibus does not see it that way. The fraud arising in the process

[12] But it is worth noting that just because the CMC's enquiries were illegal it did not mean to say that the claim itself was dishonest.

is a “structural fraud” by, on the one hand, lawyers and medical examiners attempting to maximise profits, with the insurance companies on the other hand attempting to minimize their losses. The claimants themselves are often unwitting participants in the structural fraud surrounding their claim.

Structural fraud is therefore a phenomenon that has arisen out of the demise of civil legal aid and the move towards conditional fee and “no win, no fee” arrangements. Its character is essentially different from, say, claims to recover monies owed for mis-sold payment protection insurance. In this situation Law firms and CMCs would undertake to recover the premiums whilst taking a percentage of the amount recovered, sometimes as much as 50%. In the case of structural fraud, however, law firms and CMCs would actively seek out those who had been involved in an RTA and encourage the victim to pursue a whiplash injury claim on a “no win, no fee” basis. Often the process would commence by the claimant receiving a telephone call beginning on the lines, “We believe you have been involved in a motor accident….”. If the claimant responds positively then he or she would then find themselves on a litigation conveyor belt giving discretion to the law firm or CMC to manage the claim. As we have seen, insurance companies would rarely contest such claims on the basis of economic viability, leaving law firms and CMCs to drive up the level of damages, with the aid of compliant medical practitioners, and, of course recover their often-inflated fees. Many of the firms built their entire business models on such a process. Claimants often had no notion that they were embarking in a fraud, nor did they consider themselves to be dishonest. The claimant simply acted on the basis that they had been informed by a law firm that they had a claim for compensation. The idea that claimants themselves are making exaggerated or fraudulent claims is for the most part a false assumption. The fraud, therefore, is a legal-establishment or “structural fraud”, centred on law firms and CMCs cynically applying a business model to increase their profitability. The Whiplash Reform Programme was implemented on 21 May 2021 with the intention of reducing the disproportionately high number of whiplash claims and the costs associated with such claims. Part and parcel of the reforms was that insurance companies would be legally bound by the Civil Liability Act 2018 (“CLA 2018”) to pass on savings to consumers by way of reduced premiums and report their compliance to the Financial Conduct Authority by 1 October 2023. In order to administer the new programme, the Motor Insurance Bureau developed the Official Injury Claim (“OIC”) portal through which both unrepresented and represented claimants must process their claims.[13] The OIC has been developed in such a way as to provide an accessible and free process that is intended to enable claimants to commence their own claims without the need for professional representation within the County Court small claims structure .

[13] https//www.officialinjuryclaim.org.uk

The programme comprised measures included in Part 1 of the CLA 2018. In activating the programme, the Whiplash Injury Regulations 2021 provides regulations under the auspices of the CLA 2018. The regulations specify, by way of a tariff, the amount of damages payable for pain suffering and loss of amenity ("PSLA") for any road traffic accident (RTA), related whiplash injury or injuries (as defined by the CLA) lasting up to 2 years, and any whiplash injury or injuries and any minor psychological injuries suffered on the same occasion as any whiplash injury. The tariff presents an ascending scale of fixed sum payments, with the appropriate tariff figure for any given case being determined by the duration of the whiplash injury incurred. The tariff is divided into two halves, the first dealing simply with the total amount of damages for pain, suffering and loss of amenity payable in relation to one or more whiplash injuries (i.e. "the tariff amount" for the purposes of section 5(7)(a) of the Act). The second part represents the total amount of damages for pain, suffering and loss of amenity payable in relation to both one or more whiplash injuries and one or more minor psychological injuries suffered on the same occasion as the whiplash injury or injuries, taken together (i.e. "the tariff amount" for the purposes of section 5(7)(b) of the Act). Thus, the fixed tariff of compensation for whiplash injuries covers injuries, both for those lasting not more than 3 months and also for more serious injuries lasting for up to 2 years, with the minimum compensation which resolves within 3 months of £240 (£260 with a psychological injury) and a maximum sum for an injury that lasts approximately 18 months to 2 years of £4,215 (£4,345 with a psychological injury). The tariff also allows the court to make a discretionary uplift (up to 20%) to the appropriate tariff figure in exceptional circumstances.

At the same time as the whiplash reforms came into operation the small claims limit was set at £5,000[14] for damages for personal injury and £10,000 in total for general losses and is limited to claims where the claimant is not a child.

The intention behind the reforms was that only genuinely injured claimants will receive a proportionate amount of compensation provided the claim is supported by good quality medical evidence from an accredited medical expert. The government and the industry hoped that these measures would in turn lead to savings by insurers which can then be passed on to policy holders in the form of reduced motor insurance premiums. However there is no evidence that any savings made by the insurance industry as a result of previous reforms have been passed on to consumers. Further, in the report of Capital Economics of March 2017, it is stated that there is a virtual

[14] Civil Procedure (Amendment No. 2) Rules 2021 (SI 2021/196)

underwriting monopoly at play in the insurance market and as such any possible passing on of any savings is likely to be 50% at best.[15]

Curing the Mischief?

The reforms introduced by the CLA 2018 could hardly be said to have been brought in quickly, but there is nevertheless a good case for arguing that the reforms have not been fully thought through. Indeed, it could be argued that the reforms are in fact detrimental to the interests of those injured in a road traffic accident through no fault of their own. As part of those reforms the Pre-action Protocol for Personal Injury Claims Below the Small Claims Limit in Road Traffic Accidents[16] is specifically designed to be uncomplicated and to enable individuals to bring their own claims without legal representation, as per other actions within the small claims court. At a stroke the reforms removed the possibility for legal costs to be recovered in whiplash injury claims and further, it removed the possibility of no win, no fee agreements being entered into. The result is that solicitors involved in such personal injury claims have withdrawn from this area of business, as have CMCs which have moved into other areas such as travel insurance claims for food poisoning. This development also influences the claimants themselves, since the levels of compensation available under the tariff means that it is not viable for the claimants to fund the legal fees themselves, since these fees are now irrecoverable. Thus, the claimant could end up spending more in respect of legal fees than they could recover in compensation under the tariff. This, however, has not deterred claimants from incurring legal costs. The Ministry of Justice statistical analysis[17] shows that of the 255,000 claims started via the OIC service between 31 May 2021 and 30 May 2022, 232,000 claims or 91% of claimants were still legally represented. Undoubtedly this is not what the original protocol envisaged, but the figures give rise to several consequences.

Firstly, some claimants will undoubtedly have their own legal costs insurance, often as part of their home or car insurance, and to this degree they can draw down on this cover to pursue their actions. No doubt in the fullness of time insurance companies will

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[15] Report of Capital Economics' Boosting Insurers Profits, March 2017. Cynically it is questionable how much a company would wish to give back to their policy holders when there are shareholders' dividends in most business structures. If the industry wanted good publicity and make promises to the public of discounted premiums, then they should explain to their customers at the time of policy inception. This would help educate the insureds about the new legal position for claims. It would also help if the insureds were also told about the small claims system and the need for legal insurance to cover legal fees that are not otherwise recoverable in that system.
Of course, it is probably fair to say that the insurer is always professionally represented, but the government's view was that low value RTA related personal injury claims were not so complex as to require claimants to routinely require legal representation.

[16] https://www.justice.gov.uk/courts/procedure-rules/civil/cpr-pap-update-feb-2021.pdf

[17] Ministry of Justice, Official Injury Claim: MOJ Operational Analysis, 31 May 2021 to 30 May 2022. Published 29 November 2022.

respond to the number of claims being received under these policies by increasing the premiums in such types of insurance. As can be seen from the statistics in the data above most claimants are still seeking legal representation for which they will not be able to recover their costs. How many of these claimants are relying on legal expenses insurance to recover their costs is not known. If a significant number of claimants are being supported by such insurance, then the legal costs associated with whiplash claims will simply move from the claimant's pocket back to the insurers. This allows the insurance industry to claim that premiums for car insurance are lower, but then charge an additional premium for legal expenses insurance. This premium will only rise if an increasing number of people learn of their rights to use this service, and with legal costs increasing, any extra claims may again result in allegations that there is a compensation culture despite the efforts to eliminate it. Thus, whilst one of the factors behind the protocol is to reduce premiums for motor insurance, the unintended consequence will be to simply pass on increased premiums under their domestic legal expenses insurance policies.

Secondly, with over 90% of claimants still seeking legal advice in pursuing their claims for whiplash injuries, the notion that the protocol allows for claimants to pursue their own claim in the small claims court simply fails. It is suggested that the notion behind the new protocol overestimates the ability of the ordinary man or woman in the street to bring such an action themselves. The protocol has been designed with the collusion of insurance companies to reduce their costs and to curtail the perception of a compensation culture that is perceived to be based on fraudulent claims. But is such a perception a correct one? The Official Injury Claim Service ("OICS") is responsible for the reporting on the operation of the programme.[18] The figures released by the OIC do not appear to support the perception of widespread fraud. In its published claims data for the period 31 May 2021 to 30 May 2022 there were 255,000 claims started via the OIC service. Of these, 53,000 (21%) exited the portal for a variety of reasons, including settlement, however only 2,451 claims exited the portal because of fraud. Equally in the quarterly reports published by the OIC from 1 April 2022 to 31 March 2023 their was a total of 291,884 claims processed through the OIC, with an average of 9% of those claims involving allegations of fraud or dishonesty. As can be seen in the table below such levels of fraud or dishonesty have continued up to 30 June 2023. One conclusion that may be drawn from these figures is that the new framework is indeed reducing the levels of fraud in the system. An alternative view is that the levels of fraud by claimants per se was never high but was perpetuated by a structural fraud arising out of an ambulance-chasing culture by solicitors and CMCs.

[18] This was developed by the Motor Insurance Bureau on behalf of the Ministry of Justice as part of the implementation of the Whiplash Reform Programme; it became operational on 31 May 2021.

Maybe Lord Dyson and Lord Young were correct.

Quarter	Claims Submitted per quarter	Represented/ unrepresented claims submitted	Exiting portal[19]	Allegations of fraud or dishonesty (%)[20]
30 May 2021 – 31 Aug 2021	45,718	41,387/4,331	2,763: Represented claims – 2,446 Unrepresented claims - 317	No figs provided by OIC
1 Sept 2021 – 30 Nov 2021	68,359	62,126/6,233	4,421: Represented claims – 3,944 Unrepresented claims - 477	17 11
1 Dec 2021—31 March 2022	95,266	86,805/8,461	11,957: Represented claims – 10,953 Unrepresented claims – 1,004	13 10
1 April 2022 – 30 June 2022	70,718	64,037/6,081	5.655: Represented claims - 5,204 Unrepresented claims - 451	11 8
1 July 2022 – 30 Sept 2022	71,191	64,813/6,378	8,222: Represented claims – 7,760 Unrepresented claims - 462	10 8

[19] Claims can exit the OIC process in a variety of different circumstances. Reasons for exit include complex issues of law, claimant no longer wishes to claim, agreement reached outside of the service, duplicate claim and fraud or dishonesty. Since the reasons are self-selected by the claimants or professional user at the point of exit the figures should be as approximations.

[20] Note that the OIC does not provided actual figures.

1 Oct 2022 – 31 Dec 2022	73,385	66,443/6,942	11,465: Represented claims – 10,962 Unrepresented claims - 503	11 8
1 Jan 2023 – 31 March 2023	76,590	68,558/8,032	13,315: Represented claims – 12,702 Unrepresented claims - 613	10 8
1 April 2023 – 30 June 2023	66,741	59,154/7,587	12,558 Represented claims – 11,959 Unrepresented claims - 599	9 8

Thirdly, whiplash claims are valued by reference to the tariff, but where a claimant suffers injuries outside of the tariff, for instance if the claimant suffers a broken wrist, the claimant is expected to make an assessment of damages for that element. In such a situation the claimant would have to refer to the Judicial College Guidelines. Part and parcel of the whiplash reforms is that the small claims limit was set at £5,000[21] for damages for personal injury and £10,000 general damages in total.

It would seem to be a tall order to expect the ordinary man in the street to review these guidelines. Even if he can access and understand the guidelines and make an assessment of the non-whiplash element of his or her claim, the claimant is then expected to make an overall value of the claim and assess the implications of this value as against the limitations on the amounts that may be claimed. The complexity of this assessment is exacerbated where the claimant suffers multiple non-whiplash injuries. In such an instance it is not simply a question of adding up the guideline injuries since it is likely that the claimant would receive a total that represents the combined extent of the injuries sustained and this is likely to be lower than the overall figure. It is suggested that this is beyond the capabilities of the average layman to comprehend and analyse.

Official Injury Claims Portal.

[21] Civil Procedure (Amendment No. 2) Rules 2021 (SI 2021/196)

As has been seen above, central to the reform of whiplash injury claims was the establishment of the Official Injury Claims portal. Currently this has been used by 568,214 claimants since the launch of the portal on 31 May 2021. [22] For the period 1 April 2023 – 30 June 2023, 66,741 claims were received. The portal is intended to be a simple-to-use online service that enables a claimant to bring a claim without going through a solicitor. The portal can be used by drivers or passengers over the age of 18 who suffer injuries that are valued at less than £5,000. For many claimants this is where problems may start.

This service displays several flaws. The first confusing issue is the website's name and internet address. The internet is awash with names that contain search terms of "official," "injury" and "claim." A claimant may not even know to search for this website: officialinjuryclaim.org.uk. Realistically they are more likely to search for 'whiplash injury' and miss this site altogether. There therefore needs to be more publicity about this service to the same extent as is made with the advertising for more serious injuries. Obviously this is of no concern to insurers, since they are hardly likely to publicise or promote something that potentially exposes them to greater liability. This is further evidenced by the low use of the YouTube channel[23] that launched on 31 May 2021. It has a simple 2 minute video, but has only been viewed 2,898 times. Moreover, a Q&A session with Martin Saunders, Head of Services, in a 90 minute video, had the grand total of 262 views.[24] Facebook does, however, have a good page that contains clear information from contact numbers to the web address, but again, this has only had 27 'likes' and 38 'followers.' When considering that the number of claims has dropped by 300,000, one would have expected the YouTube channel and Facebook websites to have been inundated with "hits". Clearly potential claimants are not accessing these resources and are therefore ignorant of their rights as a result. Thus, it would seem that the majority of claimants are accessing the process by way of legal representation rather than on their own initiative as originally envisaged.

The second area where there is a lack of clarity is the 'Guide to Making a Personal Injury Claim' itself. This guide claims to be a simplified document, but it is nevertheless highly detailed and runs to 67 pages. The guide is littered with technical language. Thus, at the beginning on page 4 under "Introduction" the text reads that the guide "explains the key legal terms and procedures used by the legal framework that underpins this service; the RTA Small Claims Pre-Action Protocol". Just how does one expect the layman to understand what this is or its significance? Similarly, section 4.2 of the guidance states a claimant cannot use the protocol if he is "a protected

[22] Official Injury Claims Data 1 April 2023 – 30 June 2023
[23] https://www.youtube.com/channel/UC9oBwimkVtSntlyHyePW9nw
[24] https://www.youtube.com/watch?v=1p2KaCu71XE (Accessed 20/04/2023).

party", defined by the Pre-Action Protocol (see 4.3(g)) as a "party, or an intended party, who lacks capacity to conduct proceedings". Again, it is suggested that such language is outside the capacity of the layman to understand the nature of this and other such statements within the guidance. The guide states that it has been "been reviewed by senior independent legal counsel to ensure it is both comprehensive and accurate" and that may well be so, but that does necessarily mean that it is fit for the layperson who has no legal knowledge and whose intellectual capabilities may not allow them to navigate their way through what is a technical process. No doubt the complexity of the Guide is a contribution to the high number of claimants proceeding through the Protocol with the aid of legal representation, which is the very antithesis of what the Protocol set out to achieve.

In his article "A Critical Review of the Official Injury Claims Service"[25] Masood Ahmed refers to a Freedom of Information Request made by the Association of Personal Injury Lawyers to the Ministry of Justice. The result of this request disclosed the experience of 62 unrepresented claimants using the OICS. In it, Ahmed states:

"The survey involving the 62 unrepresented claimants shows that they have had a highly negative experience of using the OICS. Of the 62 respondents, when asked how likely they would be to recommend the OICS on a scale of 0-10 to someone else, 20 respondents (32%) chose a score of 5 or less, which clearly indicates poor user experiences with the system. Furthermore, when asked on a scale of 1-5 how easy it was to make their claim overall, under a quarter scored 1 or 2 on the scale, which indicates that they struggled to grapple with the system."

Whilst the numbers involved in the survey are small, the findings nevertheless demonstrate that the OICS is clearly to be found wanting. The notion that the OICS is designed to revolutionise the way in which claims are made, creating a system that is clear, efficient and easy to navigate, is clearly being unfulfilled. The statistics themselves, as seen above, provide evidence that a significant number of claimants have to turn to legal representation in order to litigate their claims.

It should also be noted that the Pre-Action Protocol for Personal injury Claims in Road Traffic Accidents only applies where a claimant, whether as driver or passenger is inside a motor vehicle.[26] The protocol does not apply to "vulnerable road users". These are pedestrians, motorcyclists, pillion riders and passengers in sidecars, cyclists, users of wheelchairs, powered wheelchairs and mobility scooters, and horse riders. Claims by

[25] Ahmed: A Critical Review of the Official Injury Claims Service, Journal of Personal Injury Law, JPIL 2023, 2, 130 - 141
[26] Defined as "a mechanically propelled vehicle intended for use on roads": Pre-Action Protocol for Personal injury Claims in Road Traffic Accidents Para 1(2)(23)

such users will be assessed outside the tariff and will be subject to fixed costs, whilst claims by infants are subject to the tariff; however they are not subject to the costs limitation and will be dealt with through the existing portal.[27] Such claimants will therefore have to pursue their claims through the normal claim route. Such restrictions have the effect that persons within these categories are still subject to the vagaries of CMCs and personal injury lawyers. There is a further consequence of the vulnerable user restriction in that a person falling within this category may well labour under the belief that they have no right of action or that the alternative process is so complex as to dissuade them to pursue what may be a rightful action.

The third problem with the reference to the guidelines in that it is difficult to find the guidelines online. In our digital society most people would probably go to a search engine, such as Google, but anyone who types into Google 'Judicial College Guidelines' will find themselves confronting a plethora of sources, from Thomson Reuters and LexisNexis at the top of the page which require subscriptions, or to so many solicitors and claims management companies' websites who are fishing for new claimants. Anyone looking at the guidance must search for a single sentence on page 16 of the Guide to making a personal injury claim[28] where there is a very small link click on, taking the claimant to the appendix which tries to explain the various valuations.

The fourth issue therefore becomes how to value a claim. The valuing of a claim starts by referring the claimant to Judicial College Guidelines.[29] This is where the serious problems commence in the relationship between tariff and non-tariff injuries. From the whiplash tariff perspective, it is clear that once the claimant's medical appointment has occurred it is easy to see how much the claimant will get based on the number of months the injury in question will last. Where this becomes very complicated is in valuing combined whiplash tariff and other common law non-tariff injuries. There are three concerns.

1. Practicalities around combined damages.

One problem with the legislation is that Parliament left it to the judiciary to find the methodology of working out the damages where there is a combination injury of tariff and non-tariff damages. Even though there was a consultation period it does perhaps

[27] Pre-action Protocol for Personal Injury Claims Below the small Claims Limit in Road traffic Accidents ("The RTA Small Claims Protocol") para 1(2) (37).
[28] guide-to-making-a-personal-injury-claim-version-301-july-2022-final-pdf.pdf (officialinjuryclaim.org.uk)
[29] Ibid

suggest that Parliament was too quick in trying to do the bidding of the insurers. This lack of foresight has significantly disadvantaged anyone injured inside a vehicle. No thought was given to the practicalities of how the unrepresented claimant could ever work these out. Objectively, simply saying that that it is a small claim and is therefore a simple process displays some ignorance of the capabilities of the average claimant.

2. Managing Offers to Settle

For the ordinary unrepresented man or woman, it is impractical, unclear and virtually impossible to work out whether they have had a fair or reasonable offer. This whole area is crying out for alternative dispute resolution ("ADR") /conciliation, provided there is capacity and resources which at the moment appear to be virtually non-existent.[30]

Many claimants will not receive reasonable offers which could be substantially less than what could be achieved with a judicial award. Strategically, the defendant insurance industry will hope to do nothing more than buy off the claimant with a series of very small offers, trusting that he or she will not want to proceed to court. The defendants may well bet on unrepresented individuals being too ignorant or nervous to go to court. It is a daunting process for the unrepresented claimant and should be recognised as such. If this is going to be the way in which tariff and non-tariff injuries are dealt with, then all the claimants need to be informed that they may never get fair or reasonable offers from the insurers. Of course, the consequences of encouraging claimants to go to court will result in an increased workload for the insurers and the courts. Nevertheless, the unfairness of the system can be seen later in this article where the technicalities of working out damages for tariff and non-tariff injuries has caused the lawyers and the judiciary to disagree. If those technicalities are of such a complex magnitude, then this is clearly beyond the capabilities of the individual unrepresented claimant.

3. Issues over the small claims and county court limits.

If it is borne in mind that there is a £5,000 limit for small claims for in-vehicle RTA injuries, then how is the claimant to know, for example, the value of an eye injury when it is defined as *"… being struck in the eye, exposure to fumes including smoke, or being splashed by liquids causing initial pain and some temporary interference with*

[30] There may be a glimmer of hope as the Ministry of Justice has confirmed that mediation in the small claims court will be compulsory (https://www.gov.uk/government/news/new-justice-reforms-to-free-up-vital-court-capacity accessed 17/12/2023) following a consultation last year https://www.gov.uk/government/consultations/increasing-the-use-of-mediation-in-the-civil-justice-system (accessed 17/12/2023).

*vision" a*nd provides a valuation bracket between £3,950 to £8,730? If the eye injury is of a serious nature, then this will undoubtedly take the claim outside of the small claims jurisdiction. The temptation for the unrepresented claimant is to undervalue the claim to stay within the £5,000 limit and, of course, be potentially under-compensated.

In other cases such as a head injury the position is potentially worse. The considerations for damages for head injuries are:

(i) The severity of the initial injury;
(ii) The period taken to recover from any symptoms;
(iii) The extent of continuing symptoms;
(iv) The presence or absence of headaches.

Once the claimant can prove these, they are given the valuation bracket between £2,210 and £12,770. The claimants do not possess experience of valuing their claims. There has been a very good reason for keeping this within the small claims remit, but the claimant does not know how much their claim is potentially worth. Therefore, when trying to work out if they have had a fair offer from the insurer, this is extremely difficult without legal advice, and it is suggested that an ADR process would go some way to solving this problem.

Legal professionals and defending insurers assess and value claims every day. Consider the possible injustice when looking at pedestrians and cyclists who have the same claim injuries as above, but who are excluded from the regulations. Such claimants will often have the benefit of a no-win-no-fee agreement if the claim is for more than £1,500, and their legal advisor will provide expert advice on the valuation. Furthermore, such claimants can mediate the claim as part of CPR. The result is that the current approach for those within the regulations is too unpredictable, and many potential claimants are at a significant disadvantage. There is also the problem for those in cars with injuries which fall on the boundary between the small claims court and the county court. In such a situation a solicitor will only take on the case if the level of damages is over £5,000 for the injury (or £10,000 for the injury and general damages) in order to recover their costs.

3. **Process of calculating damages in mixed injury cases**

Neither the Act nor the Regulations provide any guidance as to how the courts are to calculate damages in mixed injury cases. The question therefore arises as to how a court is 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. The additional non-whiplash injuries are governed by common law principles.

Damages in respect of whiplash injuries, together with damages for minor psychological injuries, are set out in the Regulation 2:

> ”2.—Damages for whiplash injuries
>
> ”(1) Subject to regulation 3 —
>
> (a) the total amount of damages for pain, suffering and loss of amenity payable in relation to one or more whiplash injuries, taken together (”the tariff amount” for the purposes of section 5(7)(a) of the Act), is the figure specified in the second column of the following table; and
>
> (b) the total amount of damages for pain, suffering and loss of amenity payable in relation to both one or more whiplash injuries and one or more minor psychological injuries suffered on the same occasion as the whiplash injury or injuries, taken together (”the tariff amount” for the purposes of section 5(7)(b) of the Act), is the figure specified in the third column of the following table:

Duration of injury	*Amount* – Regulation 2(1)(a)	*Amount* – Regulation 2(1)(b)
Not more than 3 months	£240	£260
More than 3 months, but not more than 6 months	£495	£520
More than 6 months, but not	£840	£895

more than 9 months		
More than 9 months, but not more than 12 months	£1,320	£1,390
More than 12 months, but not more than 15 months	£2,040	£2,125
More than 15 months, but not more than 18 months	£3,005	£3,100
More than 18 months, but not more than 24 months	£4,215	£4,345.

It should be noted that the level of damages set out in the tariff is substantially lower than the amounts that can be claimed for PSLA at common law, as set out in the guidance provided by the Judicial College regarding the quantification of damages for these types of injuries.

The CLA 2018 however recognises that there will be cases in which an assessment of damages for PSLA reflecting the combined effect of injuries in cases of tariff and non-tariff (mixed injury cases) will be carried out. Thus section 3(8) provides:

> "Nothing in this section prevents a court, in a case where a person suffers an injury or injuries in addition to an injury or injuries to which regulations under this section apply, awarding an amount of damages for pain, suffering and loss of amenity that reflects the combined effect of the person's injuries (subject to the limits imposed by regulations under this section)."

The assessment of damages at common law is based on normal tortious principles, that is to place the injured party in the same position he would have been in if he had not sustained the injuries complained of, as set out by Lord Blackburn in *Livingstone v Rawyards*.[31] Such an assessment is always difficult with regards to non-pecuniary injuries, since here a court has the unenviable task of attempting to

[31] (1880) 5 App Cas 25, 39.

assess the appropriate damages in monetary terms.[32] In Rabot v Hassam [2023] Lord Briggs expressed appropriate damages as being what society as a whole considers to be fair and reasonable compensation for the claimant victim.[33]

Where there are several non-whiplash injuries, there is a danger of the victim being overcompensated. In particular, where there are several injuries sustained it is not a question of simply aggregating the damages for each PSLA injury since this may result in double counting. A court therefore has to stand back and assess the overall award so as to either increase the award if to do so would reflect the overall effect of the injuries on the claimant's quality of life. On the other hand, the court also has to stand back and assess whether the effect of the overall award is to overcompensate the claimant, in which case the court must reduce the damages so as to avoid double counting for the PSLA injuries. Either way the role of the court is to take an overall view to ensure that the claimant receives "appropriate damages in monetary terms."[34] This process of "standing back" was set out by Pickford LJ in *Sadler v Filipack*[35] in the following terms:

> "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."[36]

The problem arises in relation to mixed injury cases is where damages are claimed under the tariff and also on common law principles. In relation to whiplash injuries there is thus a conundrum as to how an award for common law damages for PSLA can be reconciled with an award under the whiplash damages tariff. If the two awards are aggregated, should the overall award be reduced to avoid double counting, or should the two awards be treated distinctly with only the common law damages for PSLA be subject to the standing back process? In other words, should the tariff award be a discrete award that stands on its own? These questions have been considered in the

[32] See the judgment of Lord Pearce in *H. West & Son Ltd v Shephard* [1964] AC 326, 364.
[33] [2023] EWCA Civ 19 at [23].
[34] Supra.
[35] [2011] EWCA Civ 1728.
[36] [2011] EWCA Civ 1728 at [34].

Court of Appeal in the conjoined appeals in *Rabot v Hassam* and *Briggs v Laditan*.[37]

In whiplash cases the process of how to value a claim starts when the claim is registered through the Official Injuries Claim portal. In both *Rabot v Hassam* ("*Rabot"*) and *Briggs v Laditan* ("*Briggs*") the cases had been processed through the portal before proceedings were issued. The two cases were heard in Birkenhead County Court (small claims) on 22 June 2022 before Hennessy DJ.

The first case to be considered was the reserved judgment in the case of Rabot.[38] In this case there was an RTA on 16 July 2021. The claimant was examined by the medical expert at 10 weeks post-accident. The claimant suffered injuries to the cervical spine and the lumbar area. This was an 8–10-month recovery prognosis for whiplash. The claimant also suffered travel anxiety that had a 3-month prognosis and injury to both knees with a 4–5-month prognosis. The claimant suffered loss of amenity re disturbed sleep patterns, bending, exercising, driving and putting bins out, and sought medical help once. These issues were still present at the time of the medical examination. However, the whiplash injury had a longer-term prognosis that included loss of amenity. This meant that there was no loss of amenity from the knee injury alone.[39]

The result of this was that there were both tariff and non-tariff injuries and the question became one of how to accurately assess damages when both were present. Both sides had legal representation, but they could not agree, which begs the question as to how an unaided claimant could ever be able to resolve their case? In *Rabot* the insurer, known as the compensator, admitted liability in full. The claimant sought £1,390 for the tariff and £2,500 for the non-tariff injury. The insurer offered £1,390 for the tariff and £465 for the non-tariff injury. The difference is clearly significant, and it reinforces the earlier reflection that insurers will only ever offer the smallest amount possible and that unrepresented claimants will be at a disadvantage. To that extent many claimants will probably be apprehensive of going to court and thereby be denied fair compensation.

In this case there was no disagreement over the whiplash claim and both parties agreed the tariff amount of £1,390. By the time this case was heard Mr Seed, for the claimant, valued his knee injury at about £3,000 (for both knees), the total claim therefore being £4,390.[40] Mr Seed claimed that Regulation 2, the duration of the tariff injury, paid little regard to loss of amenity and that it was not triggered unless there

[37] [2023] EWCA Civ 19.
[38] J10YJ826 Hennesy DJ.
[39] [2023] EWCA Civ 19 at [41] and [54] per Sir Geoffrey Vos MR.
[40] This was obviously a different/higher figure than was initially claimed, but this took into account the new JC guidance that had been updated.

were exceptional circumstances[41] and therefore any overlap between the tariff and non-tariff remained minimal.[42]

By comparison Mr Taylor for the defendant focused on the fact that the whiplash was more acute than the knee injury. He concentrated on the traditional stand back approach set out by Pickford LJ in *Sadler.* His submission was that the £3,000 amount was too high and claimed it should be less than £2,000. Hennessy DJ considered the case gave rise to 3 questions:

1. Is the non-tariff injury quantified first and the tariff added (with deduction) or is the whiplash to be viewed as the "main" injury with the addition of a sum in respect of the non-tariff injury or does it matter?
2. Accordingly, what is the appropriate award in respect of the non-tariff element of the injury?
3. What is to be deducted for an overlap in the awards and, therefore, what is the overall figure for the totality of the injuries?

Hennessy DJ could not see how to value the claim when it was unclear which part of the claim should be valued first. The decision in *Sadler* provided no guidance in this matter. Furthermore, neither the CLA 2018 nor the Regulations provided any guidance on where to start, especially when the whiplash was the dominant injury. Ultimately Hennessy DJ followed *Sadler* and stated that the methodology should be to:

a. Determine the nature of each injury;
b. Value each injury…
c. Add them and then take a step back…
d. Reach a final figure by making an appropriate deduction (if any).

By applying this approach Hennessy DJ added the tariff award (£1,390) with the non-tariff award (£2,500) to reach £3,890. Then stepped back and reached a figure of £3,100. Henessy DJ therefore took the view that the tariff award was fixed by the legislation and could not be subject to the *Sadler* reduction.

The case of *Briggs v Laditan*[43] was also heard by Hennessy DJ. In this case an RTA occurred on 8 June 2021. A claim was submitted through the Official Injury Claims portal. The insurer (the compensator) admitted liability in full. The claimant claimed

[41] The example given referred [to a pregnant woman who has difficulty breast feeding that would qualify as exceptional.
[42] J10YJ826 at [19].
[43] J10YJ855.

£840 for a tariff injury, £3,000 for a non-tariff injury and £400 for physiotherapy. The insurer offered £280 for physiotherapy, £840 for the tariff award and £700 for the non-tariff award.

The issue with regards to the physiotherapy was easy to resolve. The insurer made an offer of physiotherapy at a cheaper rate than the claimant's claim. This difference was their basis for a lower offer amount. As this offer arrived too late Hennessy DJ awarded the full amount that the claimant claimed.

The second issue focused on the claimant's injuries. The claimant was examined post-accident by the medical practitioner. The tariff injuries were to the neck and upper/lower back and had a prognosis of 9 months recovery. The non-tariff injuries to the soft tissue were to the knee, elbow, chest and hips. All the injuries commenced about 24 hours after the accident where the level of pain was moderate in all areas. The claimant was unable to work as a taxi driver for 4 days. Counsel for the claimant submitted that the methodology to value the claim was to add the value of the tariff injuries (£840) to the value of the non-tariff injuries (£4,000) making a total claim of £4,840.

Acting for the insurer, Miss Mahmood defended on the basis that the "combined effects" of the injuries must be taken into account. She submitted that the correct position to take was based on the "combined effect" provision in the CLA 2018, s. 3(8)[44] and the "combined effect" provision in Regulation 3(1)(c)[45]. Furthermore, she submitted that the government website provided the solution to resolving mixed injury cases where it stated that "*… [w]here a claimant suffers injuries in addition to*

[44] Section 3(8) states "Nothing in this section prevents a court, in a case where a person suffers an injury or injuries in addition to an injury or injuries to which regulations under this section apply, awarding an amount of damages for pain, suffering and loss of amenity that reflects the combined effect of the person's injuries (subject to the limits imposed by regulations under this section)."

[45] Reg 3(1) states:

(1)Subject to paragraphs (2) and (3), a court-

(a) May determine that the amount of damages payable for pain, suffering and loss of amenity in respect of one or more whiplash injuries is an amount greater than the tariff amount relation to that injuries or those injuries;

(b) May determine that the amount of damages payable for pain, suffering and loss of amenity in respect of one or more whiplash injuries; and

(c) In a case where the court considers the combined effect of-

(i) an injury or injuries in respect of which a tariff amount is specified in Regulation 2(1); and

(ii) one or more other injuries may determine that an amount greater that the tariff amount is to be taken into account when deciding the amount of damages payable for pain, suffering and loss of amenity in respect of the injuries in mentioned in paragraphs (i) and (ii).

a whiplash injury the court is not prevented from awarding damages that reflect the ***combined effect*** *[emphasise added] of the injuries sustained."*

From this it is clear how the insurer was reaching their valuation. The fact that only 4 days were taken off work and that there seemed only minimal loss of amenity to reflect the Sadler approach. This meant the valuation was £840 and £700 or £1,540 overall. But there was no loss of amenity for the knee, elbow, chest and hips injures;[46] the only compensation for loss of amenity was within the whiplash element based on the medical report.

Hennessy DJ held that this case differed from her earlier decision in *Rabot*, stating that, "The claimant does not make the concession made therein, namely that there is to be a deduction for overlap or the tariff and non-tariff injuries."[47] Hennessy DJ then decided to apply *Sadler*, but focused the question as to the degree and manner in which it was to be applied. The claimant's submission was that it only applied between the non-tariff injuries whilst the defendant's submission was that it be applied across the board.[48] As was further explained there was "a subtle difference."[49] This difference focused on pain, suffering and loss of amenity. This "includes or recognises"[50] that the deduction is to be made from the non-tariff element and *Sadler* recognises this. Hennessy DJ held that the tariff award was £840 and £3,000 for the non-tariff award. She then made the *Sadler* adjustment reducing the latter figure by £1,040 reflecting that there was a clear overlap between the PSLA award for tariff and non-tariff damages. She therefore made an aggregated award of £2,800.

In both *Rabot* and *Brigg*s there was no loss of amenity relating to the additional injuries that were not also associated with the whiplash injuries, furthermore the whiplash injuries sustained lasted longer than the other additional injuries.

What can be deduced from this decision is that, again, unrepresented claimants are highly unlikely to understand these principles of assessing quantum and it reaffirms the position that insurers will always seek to settle these cases by making low offers to settle and essentially hoodwink unrepresented claimants. This is despite the fact that under the OIC portal there can be three offers and counteroffers before court proceedings are issued.

[46] J10YJ855 at [64].
[47] J10YJ855 at [48].
[48] J10YJ855 at [53].
[49] J10YJ855 at [54].
[50] J10YJ855 at [55].

There were appeals in both the cases that focussed on the approach of the court on the assessment of damages for mixed injury cases. Various approaches were put forward by the parties.

1. The first and primary approach was that put forward by the claimant who argued that a tariff award should be made for the tariff injury to which conventional common law damages should be added for the other injuries.
2. The claimant also put forward a secondary approach. In this it was argued that a tariff award should be made for the whiplash injury to which damages for conventional common law damages should be added but, in addition, the court should apply a "totality" principle and discount the overall award to allow for any overlap between the PSLA that was common to both the whiplash and non-whiplash injuries. It was accepted by the claimant that there could be no reduction to the tariff award.
3. The defendant's ground for appeal was that damages for all PSLA that was common to both the whiplash and non-whiplash injuries was to be fully compensated by the tariff award alone. The defendants argued that where there was additional PSLA that could be exclusively attributed and solely caused by the other injuries, then a further small sum could be awarded.

The claimant also put forward two cross appeals. Firstly, with regards to *Rabot* the claimant argued that the judge was wrong to make a deduction to the amount awarded on the basis that there was an overlap between the PSLA in the two heads of loss. Secondly, with regards to *Briggs*, the claimant argued that the judge should not have made an adjustment to the total and should simply have aggregated the two awards. This would have resulted in a total award of £3,840. In any event, even if the judge was correct in her approach, her adjustment of reducing the total damages to £2,800 was less than had previously been attributed to the non-whiplash injuries. Thus, even if the methodology of the judge was correct the application of the *Sadler* principle should not have reduced the damages to less than £3,700, since that figure reflected the judge's composite figure of £3,000 for general damages for the non-whiplash injuries.[51]

These two cases were regarded to be of such importance that their appeals were leapfrogged directly to the Court of Appeal where Nicola Davies, Stuart-Smith LJJ and the Sir Geoffrey Vos MR heard the case. What followed was a classic example of statutory interpretation. Davies LJ looked at the Act's Explanatory Notes which stated the purpose of the Act was "… to reform the claims process of road traffic accident-related whiplash injuries and to make the way in which the personal injury discount

[51] [2023] EWCA Civ 19 at [23] and [24] per Davies LJ

rate … is set."[52] She applied the mischief rule by looking at what Parliament intended to rectify by the legislation. In this case the policy background was that the Conservative party won the general election with a manifesto commitment to reduce insurance costs for drivers by reducing whiplash-related injuries[53] by specifically disincentivising minor, exaggerated and fraudulent claims.[54] She stated that the mischief was only focused on whiplash claims and that the common law for non-tariff claims remained unaltered.[55]

She considered the presumption of Lord Sumption in *Lachaux v Independent Print Ltd*[56] who stated what presumptions can be made when the common law applies, unless legislation indicates to the contrary. These are:

(a) Parliament is taken to have known what the law was prior to the enactments, including the principle of full compensation and the Judicial College Guidelines provided as to the quantification of the PSLA at common law.
(b) There is a presumption that a statute does not alter the common law unless it so provides, either expressly or by necessary implication.
(c) There is a presumption that Parliament has not altered the common law further than was necessary.

She went on to review the basic approach of the common law with regards to non-tariff injuries focusing on the original speech by Lord Blackburn in *Livingstone v Rawyards Coal Co*[57] where he stated that the purpose of damages in a personal injury claim is to put the claimant into the position as if the claimant had not "… sustained the wrong…".[58] She then considered the concept of "full compensation" citing Lord Wolff MR in *Heil v Rankin*[59] who referred to Dickson J in *Andrews v Grand & Toy Alberta Ltd,*[60] stating that "compensation has to be expressed in pecuniary terms."[61]

The more important point, however, was how to approach compensation when there were overlapping symptoms between tariff and non-tariff damages. Where this occurred, Davies LJ referred to Pitchford LJ in *Sadler v Filipiak*[62] who, as stated above, had suggested that the sums for the different heads should be added together and

[52] [2023] EWCA Civ 19 at [3]
[53] [2023] EWCA Civ 19 at [4].
[54] *Ibid.*
[55] [2023] EWCA Civ 19 at [26]..
[56] [2020] AC 612 .
[57] (1880) 5 App Cas 25, 39.
[58] *Supra*.
[59] [2001] QB 272 at [23]
[60] 83 DLR (3d) 452, 475-476.
[61] [2001] QB 272 at [23].
[62] [2011] EWCA Civ 1728 at [34].

then the judge should step back and review the amount to ensure that the correct amount of compensation is achieved. This amounted to an approval of Hennessy DJ's approach. In this respect the decision in *Rabot* was that the application of the process resulted in a deduction that was too great and that a reduction of £340 was more reasonable.[63] Davies LJ therefore allowed the cross-appeal. Thus, whilst approving of the approach by Hennessy DJ, Davies LJ provided one caveat [at 38], namely that the final award cannot be less than would be awarded for the non-tariff injuries if they had been the only injuries sustained by the claimant.[64]

The Master of the Rolls, Sir Geoffrey Vos took a dissenting view, stating that CLA 2018, s. 3 clearly indicated that damages allowed for PSLA concurrently caused by both whiplash and other injuries are to be only that part of the tariff amount allowed for PSLA. He concluded that Parliament had legislated for a reduction in general damages for non-whiplash injuries in cases where whiplash injuries had been sustained.[65] He considered this was a simple matter of statutory interpretation, but, rather surprisingly, went on to state that, "even though the statute does not appear specifically to be directed at non-whiplash cases".[66] This is all the more surprising when he makes the point that the CLA 2018:

> ...removed certain rights to full compensation for whiplash injuries, but not for other kinds of injury. In many small claims covered by the CLA 2018, claimants often allege that they have sustained injuries in addition to whiplash[67].

The provisions which he appears to rely on here are sections 3(1), 3(2) and section 3(8). These provide:

> "Damages for whiplash injuries
>
> (1) This section applies in relation to the determination by a court of damages for pain, suffering and loss of amenity in a case where—
>
> (a) a person ("the claimant") suffers a whiplash injury because of driver negligence, and…
>
> (2) The amount of damages for pain, suffering and loss of amenity payable in respect of the whiplash injury or injuries,

[63] [2023] EWCA Civ 19 at [41].
[64] [2023] EWCA Civ 19 at [38].
[65] [2023] EWCA Civ 19 at [58].
[66] *Supra*.
[67] [2023] EWCA Civ 19 at [50].

> taken together, is to be an amount specified in regulations made by the Lord Chancellor...
>
> (8) Nothing in this section prevents a court, in a case where a person suffers an injury or injuries in addition to an injury or injuries to which regulations under this section apply, awarding an amount of damages for pain, suffering and loss of amenity that reflects the combined effect of the person's injuries (subject to the limits imposed by regulations under this section)."

What seems to be occurring here is that Vos MR is reading these sections into Regulation 2 of the Whiplash Regulations. Therein lies the error, since Regulation 2 is directed solely at damages for PSLA in relation to "one or more whiplash injuries"[68] and "both one or more whiplash injuries and one or more minor psychological injuries suffered on the same occasion as the whiplash injury or injuries".[69] These regulations make no reference to non-whiplash injuries and to make such a connection is not only a non-sequitur, but it flies in the face of authority. Thus, as Davies LJ pointed out, in *Lachaux v Independent Print Ltd*[70] Lord Sumption had stated:

> "There is a presumption that a statute does not alter the common law unless it so provides, either expressly or by necessary implication. But this is not an authority to give an enactment a strained interpretation. It means only that the common law should not be taken to have been altered casually, or as a side-effect of provisions directed to something else."[71]

Vos MR suggests that section 3(1) does not say that it applies where a person makes a claim for PLSA damages for whiplash injuries, and therefore the provisions have to be taken into account if a claimant suffers from a whiplash injury irrespective whether that person is claiming for it. Thus, it is suggested that if a person attempts to sidestep the Act and the regulations by choosing to only claim for additional damages that claimant would still be caught by the Act. Section 3(1) cannot be read in isolation and should be read in the context of section 3(2). Stuart-Smith LJ makes the point at [45]:

> "…it is plain that sections 3(1) and 3(2) go together and are directed to cases where a claim in respect of "the whiplash

[68] Reg 2(1)(a).
[69] Reg 2(1)(b).
[70] [2019] UKSC 27
[71] [2019] UKSC 27 at [13]

> injury or injuries" is made: "*the* whiplash injury or injuries" in section 3(2) are the whiplash injury or injuries referred to in section 3(1). Sections 3(1) and (2) say nothing, either expressly or by necessary implication, about the assessment of damages for other injuries, whether or not those other injuries give rise to overlapping (i.e. concurrently caused) symptoms or loss of amenities. They do not, in my judgment, support an argument that the Act has, without mentioning them, fundamentally altered the basis of assessment of damages for those other injuries. To the contrary, by their express terms, they are limited to the assessment of damages for qualifying whiplash injuries. No other provision of the 2018 Act either states expressly or necessarily implies that the statute has prescribed or affected the assessment of any part of the (full) compensation for other injuries."

Where reference to non-tariff injuries is made, it is in section 3(8) where a qualification is applied where a person claims for both types of injury. In such a situation, whilst the overall award will reflect the combined effect of the injuries suffered by the claimant, that overall award is "subject to the limits imposed by regulations under this section 3". The effect therefore is the tariff award cannot be adjusted and there is no scope for over-compensation.

The majority decision in the Court of Appeal is undoubtedly correct not just in legal terms but also political terms. The legislation was specifically drawn up to deal with the growth and cost of whiplash claims. As has been seen, of particular concern was the ever-increasing cost of insurance premiums ascribed to such claims. Furthermore, it was perceived that many claims were of a fraudulent or exaggerated nature, though it is unfair to place such claims at the door of the victims themselves. Many claimants just found themselves in the hands in CMCs, personal injury solicitors aided and abetted by medical practitioners as part of a "structural fraud". The Act and the regulations however were never intended to limit claims for non-whiplash claims and to this extent this problem persists. This is particularly true when one considers that the processes set out in the legislation do not apply to persons under the age of 18 or pedestrians, motorcyclists, pillion riders, sidecar passengers or horse riders cannot use the portal. On the other hand, the portal would apply to someone who is injured getting on or off a bus! The portal from the outset should make this clear so that if a person does fall within one of these categories, then they should be directed elsewhere for legal advice to follow the existing personal injury procedures. Such

restrictions have the effect that persons within these categories are still subject to the vagaries of CMCs and personal injury lawyers.

As is seen, the intention behind the legislation is to reduce the number of whiplash claims and the costs associated with such claims; however, discriminating between claimants depending on whether they are in or outside of vehicles does not accord with this overarching policy. If the industry wants to reform, then it should apply equally to everyone.

Whilst the decision in the *Rabot* and *Briggs* cases is undoubtedly correct there are likely to be repercussions that demonstrate that the legislation does not operate quite as intended. The tariff contained within the legislation was designed to reduce the damages recoverable for whiplash injuries, the intention being to disincentivise exaggerated or false claims. To this extent the legislation departs from the common law principle that claimants should receive 100% compensation. Thus, the tariff award is significantly less than damages that would be claimable pursuant to the Judicial College Guidelines[72]. In addition, the tariff award does not provide for damages that cover both tariff and non-tariff injuries the effect of which is to make non-tariff claims more attractive and valuable. It is not surprising, therefore, to find that many claimants going through the portal are doing so with legal representation.

One intention behind the legislation was to place claims within the small claims court so that individuals can administer their own actions, as with other small claims actions. This is clearly not occurring, and it should come as no surprise. Whilst the tariff arrangement is, on the face of things, straightforward, once non-tariff injuries come into play it is beyond the ability of the average person to attempt to assess the value of those injuries by consulting the Judicial College Guidelines and then argue for those damages in front of a judge. Furthermore, it must be borne in mind that the legislation only operates where the claimant suffers injuries "because of driver negligence."[73] The claimant, therefore, could be confronted with complex legal questions regarding liability. In addition to these obstacles is the likelihood in many cases where there are combined tariff and non-tariff injuries will take the value of the claim beyond the £5,000 upper limit under the RTA small claims protocol. For instance, if a claimant claims for a whiplash injury with a prognosis period of more than 18 months, then the tariff award is £4,215. If one then couples this with a non-tariff award, and this is highly likely if this degree of tariff injury is claimed, then it is equally likely that the overall claim will be out of scope. The effect of these issues is that the whole *raison d'etre* of the legislation is undermined.

[72] [2023] EWCA Civ 19 at [28] per Davies LJ.
[73] Civil Liability Act 2018 s.1(1)(a).

Conclusion

There are some very simple and practical solutions to disincentivise exaggerated claims, both through the OIC portal and claimant legal advisors. A simple fraud warning is needed at the beginning of a claim. An example of the effect of a claimant over-exaggerating the nature of the injury in order to increase damages at a medical examination would, for instance, be a good start. If the consequences are then explained it may deter the opportunistic claimant. Having said this, the OIC portal will not prevent outright fraudulent claims being advanced by unscrupulous claims management companies and dubious legal advisors.

It is suggested that the insurance industry could place a specific whiplash returns discount on every motor policy that would allow all motorists to have this drawn to their attention. This would transparently demonstrate the consequential discount the industry is applying as part of the underwriting process. This would be good practice, although given that most insurance policies have increased by at least 40% in recent times[74] a £30 discount is an inconsequential reduction for many motorists. Indeed the £40 amount that the Ministry of Justice originally quoted 2016 today be approximately £51.88 when inflation is taken into account.[75] Therefore, the discrepancy is significant between what has been considered and what has been delivered.

There still needs to be simplified guidance to help the claimants to assess whether a reasonable offer has been made. To this extent this may be achieved by the mandatory referral of all small claims to ADR/conciliation or some other alternative dispute resolution process before any trial. It would of course be more beneficial if this formed part of the OIC process, provided capacity is built into the process to enable such a facility. Furthermore, it is vital that a claims valuation service is adopted as part of the portal so that all claimants can see if the insurer has made a reasonable offer. It is to be hoped that the appeal to the Supreme Court following the 2:1 decision in the Court of Appeal will add weight to the adoption of such a process.

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[74] https://www.independent.co.uk/money/why-has-car-insurance-risen-so-much-b2391334.html (Accessed 17/12/2023) considers the increased to be approximately 50%. Whereas The Times considers this to be closer to 66% in some cases. https://www.thetimes.co.uk/money-mentor/insurance/car-insurance/why-are-car-insurance-premiums-increasing (Accessed 17/12/2023).

[75] https://www.inflationtool.com/british-pound/2016-to-present-value?amount=30&year2=2023&frequency=yearly (Accessed 18/12/2023).

In many respects the whiplash regulations meet their primary intentions. Previously where an agreement on the quantum of damages for PSLA for whiplash could not be reached, the damages were determined by the courts. Part 1 of the CLA 2018 changes this by providing in section 3 of the Act for a fixed amount of compensation that a court may award for PSLA in respect of one or more whiplash injuries or of one or more whiplash injuries and any minor psychological injuries. Equally the CLA succeeds in reducing the costs of bringing whiplash claims as sections 6 to 8 of the CLA 2018 provides for a ban on "regulated persons" (for example, solicitors, claims management companies and insurers) seeking, offering, paying or accepting a settlement in respect of an RTA-related whiplash claim without first seeking appropriate medical evidence of the whiplash injury. The statistical evidence suggests that the number of exaggerated or fraudulent claims has been reduced. It is questionable whether the vast majority of exaggerated or fraudulent claims were brought at the behest of the claimants themselves. The reduction in such claims appears to have been arrived at by the ban on the activities of regulated persons and that evinces the incidence of structural fraud that was previously prevalent.

The whiplash compensation regime does not achieve its objective in attempting to place such claims in the small claims regime where individuals are expected to bring the claims themselves. The statistical evidence indicates that most claimants are still bringing their claims by taking legal advice, the cost of which cannot be recouped. It is clear the complexities of assessing tariff and non-tariff damages are beyond the scope of the layman to undertake. The expectation that individual claimants should navigate the Judicial College Guidelines is at best optimistic. Similarly, to expect a claimant to navigate the complexities of assessing the quantum of their damages by reference to the decisions in *Rabot* and *Briggs* is largely inconceivable, let alone having to deal with potentially complex questions as to liability. Further it is clear that once damages are assessed for non-tariff injuries then the overall claim will take the claim out of the scope of the small claims process.

There is no doubt that the OICS has the capacity to radically reform the process by which RTA claims are dealt with and resolved. At the moment, however, the process falls far short of providing an accessible means by which the layman can litigate his or her claim within the county court small claims process. The processes are just too complex and couched in language that is beyond lay claimants to understand and navigate. If anything, the processes appear to be designed by lawyers to dissuade the unrepresented claimant and indeed are designed to compel claimants to seek professional legal advice – the very antithesis of one of the primary objectives of the system as is now stands.