Backlash on whiplash

Chris Pamplin looks at recent moves by the Ministry of Justice to control the whiplash claims industry & MROs

© XXX/XXX

The UK has long been dubbed the whiplash capital of the world, and both the Ministry of Justice (MoJ) and the insurance industry have increased their efforts to quell the number of fraudulent claims that are proving a drain on the court system, insurers and those who pay a high price for their motor insurance, at least that is the reason they say they are acting.

So far as experts are concerned, the issues that have come under scrutiny include the level of fees charged for medical reports on soft tissue injuries and the quality and independence, or otherwise, of those experts commissioned to provide them. The independence of experts in this field has also been questioned in relation to the work carried out by medico-legal reporting organisations (MROs) and their occasionally overly close connections with the solicitors who instruct them.

Of course, in these frugal times, the MoJ is unlikely to miss an opportunity to make savings. As highlighted in the government's *Whiplash Reform Response Paper* published in October 2013, fees for medical examination and reporting are, once again, in the government's sights as part of its continuing drive towards the reform of civil litigation funding and costs. According to the MoJ, the areas identified for further action are:

i. the need to fix fees for medical reports in whiplash claims;
ii. discouraging offers to settle being made before appropriate medical reports have been obtained ("pre-medical offers");
iii. the imperative for independence in the commissioning of reports; and
iv. a process to permit only experts with appropriate accreditation to conduct medical reports.

Expert panels

Chris Grayling, secretary of state for justice, has said: "The government wishes to press ahead with our consultation proposal to introduce independent medical panels, backed up by an accreditation scheme, to establish a new more robust system of medical reporting and scrutiny. This should mean that exaggerated and fraudulent whiplash claims are challenged whilst ensuring that the genuinely injured, backed up by good quality medical evidence, can get the help and compensation they deserve. We want to work with all sides, including insurers and claimants, to develop a comprehensive, effective and proportionate system of independent medical panels."

Following the recommendations of an MoJ working party, the minister of state for justice, Lord Faulks, issued a consultation document on 2 May 2014 inviting responses to the proposals it contained by 28 May. The government published its final proposals on 4 August and they were implemented in the October 2014 update to the Civil Procedure Rules.

Although aimed principally at whiplash-type injuries, the changes concern all "soft tissue injury" road traffic claims, which are defined as: "A claim brought by an occupant of a motor vehicle where the significant physical injury caused is a soft tissue injury and includes claims where there is a minor psychological injury secondary in significance to the physical injury."

The definition is drawn widely enough to encompass most types of claim likely to result from a collision of motor vehicles. The inclusion of "minor psychological" injuries will prevent claimants from avoiding the provisions by including a claim for such an injury, although there is likely to be some technical ambiguity in deciding exactly what constitutes a "minor" psychological injury.

Fixed fees

The costs of the majority of medical reports obtained in these cases (70% according to the Association of Medical Reporting Organisations (AMRO)) are already fixed by the voluntary cross-industry MRO agreement. However, the government and the cross-industry working groups agree that it is appropriate for fixed fees to be mandated and extended to all initial medical reports obtained in such cases that are said to be, by definition, relatively straightforward. If the initial examination reveals the need for a specialist report, this will be permitted (if necessary outside the fixed-fee regime), provided it is at reasonable cost—although, given the nature of these cases, it is expected that this situation will be rare.

The fee for the first report is fixed at £180 (except in exceptional circumstances where another type of report is justified). This represents a cut of about 10%—under the voluntary MRO agreement currently in force, a GP report costs £200. An addendum report from a GP on medical records will remain at £50. In line with the intention to introduce accreditation for medical experts, the rules do not limit the type of expert permitted to provide the initial report.

It will be explicit that a secondary report (if justified) should be commissioned only on the recommendation of the expert completing the initial report. Fixed costs will apply where secondary reports are provided by orthopaedic consultants (£420), accident and emergency consultants (£360) or GPs/physiotherapists (£180). Secondary reports may be sourced from

other experts, but the need and cost for such a report must be justified.

The government considers that in introducing a new system of fixed costs, an appropriate level of sanction for non-compliance is required. Under the amended RTA Pre-Action Protocol, if the first medical report is obtained outside the fixed-costs scheme, the cost of that report will not be recoverable. For a claim that falls outside the RTA Protocol, the court may not give permission for an expert medical report unless it is a fixed-cost report.

Pre-medical offers

The draft rules sought to eliminate pre-medical offers by denying a defendant the right to invoke Pt 36 until a valid report had been obtained and disclosed within the framework of the scheme. The MoJ is still of the view that these pre-medical offers should be prohibited. However, it recognises that this is a difficult issue and a new rule alone is insufficient to address the particular problem. The rules are being amended to strongly discourage this practice, and the MoJ intends to continue to work with the industry on further ways to tackle the issue effectively.

The RTA Pre-Action Protocol discourages pre-medical report offers being accepted. This stance is underlined in the rules, which provide that the acceptance of a defendant's offer to settle before the defendant receives the fixed-cost medical report will carry no costs consequences until after the report has been received.

Expert independence

In March 2014 Grayling pledged to make provisions to ensure that the new medical panels remain independent. This statement was in response to concerns that MROs could form alternative business structures (ABSs) with personal injury law firms. Grayling stated that the principles of medical panels are "not at odds" with support for ABSs, but acknowledged that safeguards must be implemented.

The consultation document stated the aim that there should be no financial link, direct or indirect, between the party commissioning the medical report and the medical adviser or intermediary organisation through which the report is provided, other than for payment of the examination or report. It was proposed that, as a preliminary measure, a prohibition should be introduced on either party having a financial interest in an intermediary through which a medical report is obtained. However, through the consultation the MoJ wanted to explore the issue of independence further to ensure that reciprocal arrangements cannot be established between different commissioning firms to subvert this prohibition. Among the suggested solutions are requirements that:

i. the claimant and defendant representatives may only commission a specified proportion of medical reports via any given intermediary, or
ii. representatives be required to commission reports on a rota basis from a variety of intermediaries.

Unsurprisingly, this has not gone down well with lawyers who have a financial interest in MROs.

The MoJ has kicked this can of worms down the road.

Other provisions affecting experts

At present, only the claimant's version of events is provided to the medical examiner. However, the consultation document proposed that in a limited number of cases it may also be helpful for the medical examiner to have access to the defendant's account to make an informed diagnosis and/or prognosis. Some experts have expressed concern that this places them in the role of sole arbiter of the facts before the court has even considered the question of causation, and this is a cause for some disquiet.

Nonetheless, the MoJ has now decided that in appropriate claims, and only where liability is admitted, the defendant will be permitted to send his account of events to the claimant.

Next steps

These changes took effect in October 2014. Meanwhile, the MoJ has been consulting on a new system through which medical reports will be obtained using random allocation. Linked to this will be a new accreditation (and re-accreditation) scheme for experts, which will include a peer review and auditing element to identify substandard reporting. Accredited experts who do not meet appropriate standards will face sanctions such as the removal of, or restrictions applied to, their accreditation.

It is the MoJ's strong view that this scheme must be owned and established by the industry. There are financial implications in terms of setting up and running such a scheme, and the MoJ is asking those operating in the personal injury sector to provide a suitable initial funding solution to cover start-up costs. However, it is expected that the scheme will become self-funding through accreditation and re-accreditation fees.

It seems to many that a system of random allocation of accredited experts working to fixed fees rather does away with the need for MROs. It will be interesting to see whether the government or the MROs win this little tussle. **NLJ**

Dr Chris Pamplin is the editor of the UK Register of Expert Witnesses and can be contacted on *nlj@jspubs.com* (*www.jspubs.com*)