



Ministry of **JUSTICE**

Consultation Document

Whiplash Reform: Proposals on Fixed Costs for Medical Examinations/Reports and Related Issues

Response from:

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Executive Summary

We welcome the opportunity to comment on the proposals to reform the handling of whiplash claims and some of the costs incurred.

We are pleased that the Government has recognised there is a need to further reform the medical examination and reporting process and the independence of medical examiners.

It may be helpful to explain that the vehicle rental industry is a major consumer of compulsory motor insurance and the sector would be unable to offer its services to the public without it. Regardless of whether a vehicle rental company or car club purchases motor insurance on the open market or operates through a 'captive' the impact of increased liability costs is having a major impact on the industry's ability to deliver an efficient low cost mobility solution to consumers and businesses.

We fully support the proposal to fix fees for medical examinations and reports in whiplash claims and the importance of ensuring the medical examiner is independent. We believe this will go some way to reduce the number of fraudulent whiplash claims currently being made. Furthermore, adopting this approach will help to ensure that only genuine claims are paid which will reduce costs for all UK businesses.

We believe there could be a number of unintended consequences if the proposals are introduced as currently drafted which would lead to an increase rather than decrease in costs on UK businesses and motorists. These include:

Additional reporting burdens if physiotherapists are able to produce the initial medical report – This is because the physiotherapist will not be able to provide a diagnosis for a psychological element of a claim, as they do not have the necessary skill set. This is likely to lead to an increase in additional reports given that a psychological report would also need to be commissioned. The cost of obtaining two medical reports may lead to increased costs overall which will put upward pressure on motor insurance premiums. Secondly, we believe the inclusion of physiotherapists will lead to a steep rise in the number of referrals for rehabilitation. Both these concerns will lead to an increase in the cost of whiplash claims with very little benefit to the claimant and will prevent the Government from achieving their objectives.



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The number of non-GP specialists providing medical reports will increase – As the fees for GP medical reports will be fixed at a proportionate cost in the Civil Procedure Rules under the current proposals, claimant lawyers with financial links to medical reporting organisations are likely to change their business strategies once the proposals are implemented, by using more non-GP reports to attract the higher disbursements and thereby generating greater profits. Again, rather than reduce the number of whiplash claim, this has the potential to incentivise more claims to be filed rather than fewer.

However, to address these consequences we do have a number of recommendations that we believe the Ministry of Justice (MoJ) should consider to ensure its objective of reducing the costs of motor insurance are achieved. These are:

- **apply the fixed fees for medical-legal reports to all low value road traffic accident cases.** There are significant circumvention risks, highlighted above, with trying to create a medical-legal process for one type of injury, i.e. whiplash, as claimant lawyers and medical reporting organisations will look to try to get claims to fall outside the scope of that definition in order that claims fall outside the new framework.
- **allow the defendant's version of events to be taken into account for all claims, not just those that are admitted at stage 1 of the MOJ Process.** We note that to reduce the number of exaggerated and potentially fraudulent claims, the new RTA portal rules now provide for the defendant's version of events to be submitted at Stage 2 of the RTA portal process, so as to allow the expert to comment on and have regard to both versions of events when providing his diagnosis and prognosis. If on the defendant's version of events the expert concludes that no or little injury could have been sustained, then the next step must be for the parties to proceed to a hearing so that causation can be determined by a judge. By allowing the defendant's version of events to be taken into account for all claims it will address concerns around the lack of independence and transparency in the claims process and should be addressed if the wider concerns around fraudulent and/or frivolous claims are to be tackled effectively.
- **medical reports only to be provided by GPs unless there is good reason for another expert to be selected.** We believe that use of other experts would likely see an increase in the need for follow up reports dealing with any psychological element of the claim which would lead to an increase in costs.
- **introduce a robust accreditation process for medical-legal experts and regular peer review.** In order that the Government achieves its objectives of reducing the costs of motor insurance premiums we believe there needs to be a



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robust accreditation process for medical-legal experts, in addition to regular peer review. These experts would need to have a certain level of clinical experience and a working knowledge of up to date recognised research in the relevant medical area. In addition, they should ideally be aware of the engineering research into vehicles and car safety through the likes of Thatcham.

Specific Comments

1. Do you agree with the proposal to introduce mandatory fixed fees as set out in Annex B for all initial medical reports?

We support the proposal, however, we believe that MoJ should go further and recommend that the fixed fees for initial medical reports should apply for all RTA low value cases. There are significant risks with trying to create this process for one type of injury, i.e. whiplash, as claimant lawyers and medical reporting organisations will look to try to get claims to fall outside the scope of that definition in order that claims fall outside the new framework.

There are still concerns that there are likely to be attempts to overplay the psychological element of an injury and to underplay the physical element in order to ensure that the claim falls outside of the definition of “soft tissue injury” that has been developed to support the proposed regime, which will be largely driven by claimant lawyers. Any behaviour of this sort needs to be closely monitored and addressed if these concerns become reality.

We note that the fees are for reports by: General Practitioners; Consultant Orthopaedic Surgeons; and Members of the Chartered Society of Physiotherapists only. As we highlighted in our executive summary we are concerned with allowing physiotherapists to carry out the initial medical report as they will not be able to diagnose the psychological injury as this does not fall within their core competency. To address our concerns, we would ask MoJ to ensure it is limited to suitably qualified Members of the Chartered Society of Physiotherapists, such that they should be required to have a level of medico-legal expertise and would be able to consider and comment on any related psychological injury such as travel anxiety etc. The appropriate level of qualification should be set out in the RTA Portal Rules.

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We also believe there could be significant unintended consequences in enabling non-GP specialists to carry out the initial medical report in the new process. Claimant lawyers, who either own a medical reporting agency or have financial links to one, will be strongly incentivised to instruct medical experts who attract higher fees to compensate for the loss of profit from the fixing of the fees for GP reports. Furthermore, non-GPs are unlikely to have sufficient training to diagnose simple psychological elements such as travel anxiety, thereby increasing the likelihood of a psychological report being required –which in turn would increase the cost of the claim.

Given there are no barriers to stopping a claimant lawyer from instructing whichever medical expert they want, there is little doubt that a number of claimant lawyers will adjust their business strategy by looking to use the more expensive expert wherever possible because of the increased level of disbursements that they would be able to charge. This problem is reinforced by the Courts, who have shown little appetite for deciding which type of medical report is appropriate.

To address these concerns we would suggest that only GPs of all the experts proposed have the relevant knowledge and training to give a prognosis against any psychological element of the claim. Therefore we consider that reports should come from a GP unless there is good reason for another expert to be selected, as use of other experts would likely see an increase in the need for follow up reports dealing with any psychological element of the claim. Indeed, in any low value soft tissue injury claim, the presumption should be that the medical report should be provided by a GP unless there are very good reasons why a different specialist is required and we would ask that this is reflected within the RTA Portal Rules.

2. Do you agree with the level of fixed fees for all initial medical reports as set out in Annex B? If you do not agree with the level, please provide evidence for that argument.

We have no comment on the level of fixed fees.

3. If an insurer submits a version of events, the defendant would need to give the insurer specific authority to do this. We would therefore be grateful for views on how this can most appropriately be achieved, and on the provision of the defendant's version of events more generally.

The defendant must see the version that is to be provided to the claimant's expert so they can advise whether the version is agreed, or that it is not agreed at which point the defendant should be provided a specified amount of time to provide their own version to the medical expert by email. This process should be reflected in the RTA Portal Rules.

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The proposal that insurers can submit their insured's version of events upon receipt of authority to do so is the most practical and effective method for the defendant driver's version of events to be provided to the experts preparing the medical report, rather than relying upon the insurers own belief or interpretation of events. This is crucial where an issue of causation arises. Written authority should mean electronic authority so that email confirmation from the insured can be relied upon by the insurer.

4. Do you agree with the proposal that claimant and defendant representatives may only commission a specified proportion of medical reports via any given intermediary? If so, what should the proportion be and why?

Yes, we believe that limiting the number of reports that any legal representative can obtain from a medical reporting organisation would be of benefit in that it would limit the benefit to those with a financial interest in an intermediary, in cross referring business on a reciprocal basis to another medical reporting organisation. The proposed solution would clearly not prevent this from happening entirely, but would dilute the process to such an extent that the impact on independence would be minimal.

We would suggest that no more than 20% of medical reports should be obtained from any one intermediary. We consider that a lower percentage would make the proposition too onerous for those obtaining medical reports, while any higher percentage would take away from the benefit that is intended.

5. Do you agree with the proposal that representatives should be required to commission reports on a rota basis from a variety of intermediaries?

We would suggest that the proposal at question 4 would be a better way of ensuring proportionality than a rota.

6. Do you have any other proposals as to how such independence could best be secured?

We have no further comment.

7. Do you agree with the proposal that the cost of the report is not recoverable if the report is commissioned outside the fixed fee scheme?

We support this proposal, those who operate outside the scheme should not benefit.



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8. **Do you agree the above proposal is a sufficient deterrent?**
9. **Do you agree with the proposal that a pre-medical offer could be made if a report is commissioned outside the fixed fee scheme?**

We do not believe that making the cost of the report unrecoverable will be sufficient, we would suggest that a better deterrent against non-compliance with the proposed RTA Portal Rules is that a claimant cannot rely on a report that is commissioned outside of the fixed fee regime.

This would be the most effective deterrent as there would be no reason for a claimant in these circumstances to seek to gain an advantage by operating outside of the fixed fee scheme.

If a claimant cannot rely on the report, then it should not be able to rely on it as part of the Stage 2 settlement pack, or on the issue of proceedings at Stage 3. This would force claimants to provide a report within the fixed fee regime, as otherwise the report would have no effect and the case cannot progress.

Closing Comments

We trust our comments will help to add value to the debate on how to reduce the number and costs of whiplash claims. Should you require any additional information or clarification then please do not hesitate to contact us.

Leasing Members

In general, vehicle leasing is an arrangement where the user simply hires the use of the vehicle and assumes operational responsibility for a predetermined period and mileage at fixed monthly rental from the owner (the leasing company). Legal ownership is, in the majority of cases, retained by the leasing company.

Short Term Rental Members

Rental Members offer hourly, daily, weekly and monthly rental of vehicles to corporate customers and consumers. As explained above, rental members are the owners of the vehicle.



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Bona-fides **BVRLA, the industry and its members**

- The BVRLA is the trade body for companies engaged in the leasing and rental of cars and commercial vehicles. Its members provide rental, leasing and fleet management services to corporate users and consumers. They operate a combined fleet of 2.75 million cars, vans and trucks, buying nearly half of all new vehicles sold in the UK.
- Through its members and their customers, the BVRLA represents the interests of more than two million business car drivers and the millions of people who use a rental vehicle each year. As well as lobbying the Government on key issues affecting the sector, the BVRLA regulates the industry through a mandatory code of conduct.
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