The Whiplash Injury Regulations 2021 and Mixed Injuries:

Case Summary and Comment on Rabot v Hassam and Briggs v Laditan [2023] EWCA Civ 19

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Introduction

1. These cases, which were appeals from the County Court to the Court of Appeal, dealt with the construction of section 3 of the Civil Liability Act 2018 ("the Act"). The Court of Appeal was divided on a 2:1 majority (with the Master of the Rolls dissenting). This summary will focus of the binding decision of the majority judgment.

2. The key question was how the court should assess general damages for pain, suffering and loss of amenity ("PSLA") where the claimant suffers a whiplash injury that comes in the scope of the Act and is subject to a tariff award pursuant to the Whiplash Injury Regulations 2021 ("the Regulations"), but also suffers additional injury which does not (a "mixed injury" case).

3. In both cases at first instance, District Judge Hennessy ("the judge") assessed the whiplash injury that came within the scope of the Regulations by taking the fixed tariff, then assessed the non-tariff injury according to the usual common law principles (by reference to the Judicial College Guidelines for the assessment of general damages in personal injury cases), and finally added the figures together before (as one normally would in a PSLA assessment) 'stepping back' and making an appropriate deduction to avoid double-counting and overlap (often known as the Sadler adjustment). The judge stated that any deduction must be from the non-tariff amount.

4. This process she took was set out as follows:

    1. Determine what each injury is;

    2. Value each injury in accordance with whatever scheme/regime is appropriate;

3. Add them and then step back exercising the type of judicial discretion that judges have been doing over many years; and

4. Reach a final figure by making an appropriate deduction (if any).

The Court of Appeal decision

5. The principal judgment was elaborated by Davies LJ, with a key focus being placed on the relevant political and statutory analysis. The context, as expressed by her, was that the Act and Regulations "represent a statutory incursion into the common law" and that the "mischief at which the legislation is directed is minor whiplash claims resulting from a motor traffic accident". She stated further that there "is nothing in the wording of the statute or in the extra Parliamentary material which suggests… an intention to alter the common law process of assessment for, or the value of, non-tariff injuries". Crucially for her, "in the absence of any clear indication to the contrary, [Parliament] is presumed not to have altered the common law further than was necessary in order to remedy the mischief which was the focus" of the Act.

6. Davies LJ therefore broadly upheld the approach of the judge, setting out the appropriate process in a mixed injury case as:

    1. Assess the tariff award by reference to the Regulations;

    2. Assess the award for non-tariff injuries on common law principles; and

    3. "Step back" in order to carry out the Sadler adjustment, recognising that the sum included in the tariff award for the whiplash component is unknown but is smaller than it would be if damages for the whiplash component had been assessed applying common law principles.

7. She added the caveat that "the final award cannot be less than would be awarded for the non-tariff injuries if they had been the only injuries suffered by the claimant" (which, in the case of Briggs, she found meant that the compensation award had been too low).

8. Stuart-Smith LJ agreed with Davies LJ, with his comments as follows worth repeating: "[i]n the face of wording which is specific in applying only to damages for qualifying whiplash injuries and where all the contextual materials demonstrate that the (political and) legal policy motivating and underpinning the passing of the legislation was confined solely to the perceived mischief of excessive whiplash claims, it is not open to the Courts to extend the effect of the language of the 2018 Act so that, by a sidewind, it removes

the right to a common law assessment of other injuries. If such a step is to be taken, it must be taken by Parliament".

Comment

9. In essence, the approach to be taken when assessing PSLA in mixed injuries cases is very similar to that previously taken: namely, awards are assessed and aggregated for the different injuries, with the overall award (usually) being reduced in line with the Sadler adjustment. The difference now is that the award(s) for injuries which fall within the scope of the Regulations are allocated to the correct tariff rather than being assessed on usual common law principles, before the rest of the usual process of assessing PSLA continues.

10. The judgment therefore has a helpful simplicity to it and, while arguably little guidance was given, the guidance that was given has clarified the correct process to follow. The focus, moreover, on the purpose of the Act helps to remind practitioners that what has changed in relation such cases is relatively limited: there is a specific subset of injuries which has been carved out from the usual common law position of PSLA assessment for a specific reason and matters outside that defined scope remain, in effect, unchanged.

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