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Valuing Whiplash Claims

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Personal Injury

How should the court value claims that are subject to the Whiplash Injury Regulations 2021 when the claimant also suffers injuries which are outside the scope of the whiplash tariff? That is the question the Court of Appeal sought to answer when it handed down judgment in the cases of *Rabot v Hassam & Briggs v Laditan* [2023] EWCA Civ 19 on Friday. There are currently 24,000 claims proceeding through the Portal every month, so guidance has been sorely needed.

The Approach of the Judge at First Instance

The facts in both test cases are relatively straightforward. In *Rabot* the claimant sustained soft tissue injuries to the back (duration 8-10 months) alongside soft tissue injuries to both knees (duration 4-5 months). In *Briggs* the claimant suffered neck and back injuries (resolution between 6 and 9 months) as well as injuries to the elbow, knee and hips (resolution between 1 and 3 months).

The cases were heard by DJ Hennessy in the Birkenhead County Court. Her approach was to assess the tariff award, assess the non-tariff award and then 'step back' and consider the overall award in the round, making a discount for overlap following *Sadler v Filipiak* [2011] EWCA Civ 1728.

In *Rabot*, the Judge assessed the tariff award under the Whiplash Regulations as £1,390 and the non-tariff award as £2,500 making a total of £3,890. She then stepped back and assessed the overlap between the injuries and reduced the award to £3,100.

In *Briggs*, the Judge assessed the tariff award as £840 and the non-tariff award to be £3,000 (total £3,840). She then considered the overlap and reduced the award to £2,800.

The Defendants appealed both cases. They argued that the tariff award was the starting point and all PSLA common to both the tariff and non-tariff injuries should be treated as being encompassed within the tariff award. Only a further small amount should be awarded for additional PSLA which could be exclusively attributed to the non-tariff injuries. The Claimant in *Briggs* cross-appealed on the basis the Judge's final award was below the total for the non-tariff award.

Guidance from the Court of Appeal

The Court of Appeal has, broadly speaking, endorsed the District Judge's approach. Judges should:

1. assess the tariff award by reference to the Whiplash Regulations;
2. assess the award for non-tariff injuries on common law principles; and
3. "step back" in order to carry out the *Sadler v Filipiak* 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.

There is one important caveat: the final award cannot be less than that which would have been awarded for the non-tariff injuries alone. Otherwise, as Lady Justice Nicola Davies identified, the fact a claimant had sustained a whiplash injury alongside a non-tariff injury would have the effect of reducing the

compensation further than if they had simply suffered a non-tariff injury.

Accordingly, the appeal in *Rabot* was dismissed. The cross-appeal in *Briggs* was allowed; the Judge had reduced the award to a figure below that which she would have awarded for the non-tariff injuries alone. That was contrary to the caveat above and the Court of Appeal substituted an award of £3,500.

The Final Word?

The Master of the Rolls disagreed with the majority approach in a strong dissenting judgment. He relied on the Judge's findings that there was no additional loss of amenity caused by the non-tariff injuries and the tariff injuries persisted for longer than the other injuries. The Master of the Rolls concluded that PSLA concurrently caused by both tariff and non-tariff injuries was included in the tariff amount allowed for PSLA. In other words, he agreed with the Defendant's approach that only a small uplift to the tariff should be allowed for the additional non-tariff injuries. In his view, that was the only permissible interpretation of the Civil Liability Act 2018.

At the current time the majority view prevails, although the dissenting judgment may provide fruitful ground for a further appeal in due course. Watch this space!

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