Ministry of Justice Whiplash Reform Programme:

consultation on independence in medical reporting and expert accreditation

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Question 1: Do you agree that the proposed amendments to paragraphs 7.1A(1) and 7.32A of the Pre-Action Protocol and miscellaneous amendments to the CPR in annex C are sufficient to ensure that claimant representatives comply with the requirement to commission an initial fixed costs medical report from an accredited expert via the MedCo Portal?

This question starts from the premise that there should be amendments. We do not agree that this should be a given and do not accept that the amendments are needed as suggested or at all.

Paragraphs 7.1A(1) and 7.32A would make it mandatory for claimants to commission medical reports from an accredited medical expert through an organisation, MedCo. We understand that claimants will also be able to commission reports from accredited medical reporting agencies, but this is not made clear in the rules as currently drafted. In our long experience of different medical reporting regimes we have found agencies offer a highly organised, cost-effective and efficient service. A service that limits lawyer involvement yet retains true choice both keeps costs down for the defendant insurer and is better for the claimant. The rules will however require amendment to ensure that they refer to medical reporting agencies as well as to individual medical experts.

The Protocol does not provide a definition for an "accredited medical expert". What criteria will be involved in the accreditation process and who will draw up the accreditation criteria? Who will have responsibility for the accreditation? Will there be an appeal process if an expert fails the accreditation criteria and if so how will this operate? Will agencies have to be accredited and if so how will this accreditation system operate? Will words "accredited medical expert" in 7.1A(1) and 7.32A apply equally to accredited medical reporting agencies?

Similarly, there is no clear definition of what injuries constitute a "soft tissue injury claim". A detailed definition of what will and what will not constitute a "soft tissue injury claim" is required to prevent confusion and a return to the "costs wars".

Question 2: It is anticipated that access to the MedCo Portal will be available to litigants in person. Do you have any views on whether use of the MedCo Portal should be mandatory for litigants in person?

Allowing claimants to pursue claims as litigants in person to have access to MedCo is, from our perspective, all about discouraging the use of independent expert assistance of specialist lawyers. This is the government accepting insurance company claims that they deal with claimants fairly and equally. They usually produce a report from Frontier Economics that in fact compared apples with pears and that we have comprehensively challenged statistically. In fact all the evidence and all our experience is that insurers always under settle claims when they deal direct with claimants, very few of whom have any idea of the true value of their claim. This proposal will expose often vulnerable claimants yet further to insurers directly which will create even more opportunities for them to pretend that they are providing a fair deal to claimants when in fact the reverse will almost certainly be the case.

Insurers have their shareholders to answer to and we understand why they want to get the best deal they can by paying out as little as possible. Our objection is to the pretence that it is otherwise and to the government 'buying into' that deception. The more that it become established that insurers offer a fair deal direct without independent oversight the more that the insurers will be able to establish lower payments over all and reduce their liabilities in the medium to long term.

If there is a need for such restrictions on the use of non-MedCo experts (which we dispute) then the exclusion of LIPs from the scheme will create a clear loophole for exploitation – and suggests that the real purpose of these proposals are to increase the control of insurers over the process.

Put simply, we believe this idea is more about driving a wedge between claimants and personal injury lawyers, rather than creating a more efficient, cost effective and safer medical reporting system.

Question 3: The results of a search in the MedCo Portal can be displayed in different ways. Do you have any views on whether the MedCo search results should offer commissioning practitioners a choice of named medical experts and/or medical reporting organisations?

We strongly believe that MedCo Search results should offer commissioning practitioners a choice of named independent medical experts and/or medical reporting organisations. To do otherwise would remove a significant freedom in the litigation process. It is quite astonishing that this suggestion has even been raised, and we suspect it is motivated once again by an impulse to give insurers greater control over which medical experts can be used. Insurers instinctively would give only very limited choices of experts and organisations that they perceive suit the best outcome for them, why would they do otherwise, they have no independent or altruistic obligations? A move down this road will limit the ability of claimant lawyers to deliver a cost effective, reliable and independent medical report for injured people.

The possibility of not providing a full choice of experts and reporting organisations raises concerns that are not answered in these proposals, such as who chooses who is accredited and what criteria would apply? We are surprised that this government would be party to an attempt to stifle freedom of choice and be anti -competitive. We firmly believe that personal injury lawyers and their clients should have a full choice of commissioning agencies and medical practitioners.

Question 4: Do you agree that the proposed amendments to paragraphs 1.1(A1), and 1.1(10A) of the pre action protocol, rules 45.19, 45.29I of Part 45 and miscellaneous amendments to the CPR in annex C are sufficient to ensure that only accredited medical experts are instructed to provide fixed cost medical reports in whiplash cases? Do you agree that the transitional provisions in paragraph 4.7 are appropriate?

The terminology used in this question differs from the terminology set out in the pre-action protocol. In the question reference is made to "whiplash cases", whereas the protocol refers to "soft tissue injury claims". There is a significant difference between these in that soft tissue injuries will incorporate a multitude of different injuries including hernias, deep vein thrombosis and disc prolapses.

If a client experiences a "soft tissue injury", the rules as drafted will not permit the claimant to commission a report for example from a general surgeon or a vascular surgeon as the recoverable fees are far too low. It would not be appropriate to obtain a report from a GP, orthopaedic surgeon or A&E consultant as these experts do not have the correct qualification and expertise. The rules must be amended to permit a claimant to commission a report from an appropriate expert.

We have already advised that the proposed amendments are not appropriate. As we have already indicated, we could not agree to their sufficiency without being provided with a clear definition of what 'accredited expert' means in this context.

There are already systems of accreditation in place - rules that govern medical experts – and an agreed format laid out by the Ministry of Justice for medical reporting. Before thinking about whether these should be amended, the government should consider how the current system could be changed or improved upon. We argue that the current system works effectively and therefore change is not necessary. From a medical expert's point of view, why would they agree to being forced to sign up to be accredited without knowing how it will be run? They are already having their allowed fees reduced and this is likely to dis-incentivise existing experts yet further.

Question 5: The Government is working closely with stakeholder representatives to develop a proportionate accreditation process; we would welcome any views or suggestions relating to standards, criteria or training.

We question the assertion that the government is working closely with stakeholder representatives. We challenge the government to be transparent about which representatives it has approached to develop an accreditation process.

Thompsons currently have in place a cost effective and efficient system of commissioning reliable independent medical experts through an independent medical reporting agency 'MAPS', yet neither we nor we understand MAPS have been approached by the government. We would be pleased to explain how our system operates for the benefit of the claimant and (in its cost effectiveness) for the defendant insurer and we know MAPS would too.

Why, we would ask, if relevant experts are already 'accredited' by virtue of being qualified doctors, is anything else needed? They have a duty to provide objective and unbiased evidence to the Court - where are the examples of their failing to do so? Where are the examples of medical experts being currently in breach of the Court Procedure Rules (CPR 35.3)?

In addition to this, there is no explanation as to how MedCo will be constituted and how the system will operate in practice. There are serious questions of corporate governance to be answered before any changes go ahead. Will there be an amendment to the CPR to establish MedCo as an organisation to be used by claimant firms to select medical experts? Who will be on the MedCo Board and how will these representatives be selected? Will the Board reflect the main stakeholders in this process (as we believe it should) - the claimant representatives and medical experts?

The Civil Justice Council only last month published updated 'Guidance for the instruction of experts in civil claims' is the government saying that this is inadequate or in some way tainted?

The mechanisms are in already to place to ensure doctors prepare adequate and suitable reports. If insurers suspect that a small minority of doctors are not complying with these in significant ways then they can and should use existing procedures to expose them and have them discredited, not seek to undermine the whole structure and bring in a new bureaucratic and costly accreditation and selection system.

In the absence of examples and evidence which is wholly lacking we can only conclude that yet again the government is colluding with the insurers to reach a deal which favours the corporate defendant at the expense of the injured claimant.

If accreditation is brought in it is vital that only those who are clearly proven to be unfit to prepare reports in whiplash cases are excluded from accreditation. Those circumstances should be limited in the extreme and should be considered by way of peer review.

Question 6: Do you agree that the proposed new paragraph 6.3A in the Pre-Action Protocol is sufficient to ensure that claimant representatives undertake a 'previous claims' data search prior to accepting new claims?

We are concerned that this change would lead to a misuse of statistics to try to argue that anyone who has misfortune to have had suffered more than one injury, such as whiplash, will face allegations of fraud.

Many regular cyclists will, statistically, have several accidents over their lifetime, yet this does not mean that any one of their claims is fraudulent. The new paragraph 6.3A exposes the statistical myth that anyone with several claims for any type of accident is likely to be committing fraud.

We also question why the search facility must be compulsory and why the responsibility for identifying "dodgy" or fraudulent behaviour is being foisted onto solicitors. Solicitors are experts in the law but are not qualified to identify fraud. Being asked to do so adds yet more administrative burdens to claimant lawyers, hindering our ability to deliver a cost effective legal service to our clients.

We would suggest changing the protocol so that, in the letter of response, the insurer must list all previous claims upon which it may rely at trial in order to question the claimant's credibility. The onus should be on the insurer, not on the claimant's solicitor to identify fraud. The rules are currently very clear: if you want to allege fraud, the insurer must say so clearly (and must not do so without adequate prima facie evidence).

We also question whether claimants will recover additional costs to pay for the additional work that will be involved in selecting an expert via MedCo and completing the information to be sent to the insurers in connection with compensation claims. The government have already slashed the fees payable in RTA claims and are now intent on introducing a system which will only serve to increase the administrative burden on firms. The increase in the work required to be undertaken by firms in preparing for and implementing the changes and in actually representing injured claimants should be reflected in an increase in the costs recoverable from the defendant. It is wholly unfair to increase this burden without increasing the level of fixed costs payable.

For further information:

Tom Jones
Thompsons Solicitors
Congress House
Great Russell Street
London
WC1B 3LW

tomjones@thompsons.law.co.uk