Ministry of Justice Consultation:

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

Response from the Motor Accident Solicitors Society

May 2014

Introduction

This response is prepared on behalf of the Motor Accident Solicitors Society (MASS) and submitted by the Chairman, Craig Budsworth.

MASS is a Society of solicitors acting for the victims of motor accidents, including those involving personal injury (PI). MASS has over 150 solicitor firm Members, representing over 2000 claims handlers. We estimate that member firms conduct upwards of 500,000 PI motor accident claims annually on behalf of the victims of those accidents. The Society's membership is spread throughout the United Kingdom.

The objective of the Society is to promote the best interests of the motor accident victim. This is central, and core to our activity. We seek to promote only those policy and other objectives which are consistent with the best interests of the accident victim. We seek to set aside any self interest in promoting these arguments, recognising that we are in a position of trust, and best placed to observe the best interests of motor accident PI victims first hand. We are a not for profit organisation, which requires specialism in motor accident claimant work as a pre-requisite for membership. We also have a Code of Conduct which member firms are required to abide by, which is directed to the best interests of the motor accident victim.

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Executive Summary

- MASS agrees with the introduction of mandatory fixed fees for initial medical reports undertaken by the experts proposed.

- MASS agrees with the proposed level of fees, but would emphasise the importance of ensuring that the level of fees does not impact on the quality of examination or report.

- MASS stresses that further consideration must be given to the level of fees once the accreditation scheme has been built and agreed, to ensure that they are set at the appropriate level to reflect the work involved and level of skill and experience required.

- MASS would urge careful consideration if the defendants version of events is to be submitted to the medical expert as this process is for straightforward claims that remain in the Protocol. Should the defendant dispute the version of events the claim should exit the Protocol.

- Should the defendant be required to provide his version of events, then MASS believes that it must be verified by the at-fault driver and not by the policyholder, employer or insurer claims handler.

- MASS believes that the expert should not become the 'judge'. If there is a dispute in the version of events, clear guidelines and training would need to be provided for such circumstances.

- MASS does not believe that the proposals outlined concerning independence will have the desired effect or be a practical solution and would advocate that a robust accreditation scheme will have far more effect in addressing any associated risks.

- MASS believes that a more effective approach would be through ensuring the independence of the individual medical expert supported by a robust accreditation process.

- MASS agrees that the cost of a medical report should not be recoverable if commissioned outside of the proposed fixed fee scheme.

- MASS strongly believes that any pre-medical offers should not be permitted.

- MASS believes that these changes provide the ideal opportunity to end pre-medical offers once and for all and suggests the insurance industry as a whole (or at least ABI membership) bring this practice to an end.

Fixed Fees

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

MASS supports the proposal to introduce mandatory fixed fees for initial medical reports in this type of case.

In relation to the categories of expert, while it is of course accepted that most reports in cases like this are obtained from general practitioners, we would suggest that the definition under type (i) be extended to cover other suitably qualified medical practitioners such as Accident and Emergency Consultants. Although it is relatively rare for A & E Consultants to be instructed in cases like these, we do not believe it would be appropriate to exclude them altogether.

We would suggest that, to avoid unnecessary disputes arising, if a Consultant Orthopaedic Surgeon (COS) is to be instructed, this be permitted only where the insurer agrees within a specified period (say 7 days). If the insurer does not agree within this period, the initial report is prepared by a GP and the GP recommends a COS report, the insurer cannot then argue that it should not be liable for the cost of both reports.

Question 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 your argument.

The level of fees is not strictly speaking a matter for practitioners but one for the medical experts and agencies to comment on and propose the level of fee that will attract medical practitioners with the appropriate skills and experience and that will enable them to be fairly remunerated for the work involved. We would however comment that it is imperative that the level of fixed fee does not in any way impact on the quality of the examination and subsequent report produced.

At this stage, pending the building of an accreditation scheme that will give guidance as to the requirements for examination and contents of report, if the fees set are regarded as reasonable by medical experts and agencies and accepted by the insurance industry, we would not dispute them. We would just ask that careful consideration be given to the level of fees set once the accreditation scheme is in place, and ensure that the fees take into account the additional cost to experts of gaining and maintaining accreditation (any fees involved and the cost of any additional training or compulsory CPD) to ensure that the right calibre of expert continues to be available to act as medical experts in these cases.

Extra Information for Medical Experts

Question 3: If the 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

This issue, which on the face of it appears to be simple and unobjectionable, has the potential unless its ambit is made very clear, to create considerable difficulties for the parties and for the medical experts. This fixed fee scheme is limited to claims that remain within the Protocol and therefore by definition claims where the defendant accepts liability and accepts that the claimant suffered injury as a result of the collision. It must be understood by all parties that it is not open to the defendant himself to comment on whether the claimant appeared to have been injured or on whether he believes injury was likely to be suffered in

the collision. If the defendant wishes to dispute the issue of whether the claimant was injured (such claims are commonly referred to as low velocity impact or LVI claims, where the defendant argues that it is not credible that the claimant could have suffered injury as the force of impact was insufficient to cause injury to vehicle occupant), the claim should exit the Protocol.

The medical expert is not the judge and it is not his or her job to assess the claimant's credibility, so we also have a concern as to what the expert should do if there were two conflicting versions of events. Training on this issue, as on other elements of the role of the expert, may well form part of the accreditation scheme, but pending that scheme being in place we anticipate difficulties for the experts and variations between experts in how they interpret their responsibilities in these situations.

There may be rare cases where a defendant is prompted by the claimant's description of the accident to wish it to be drawn to the attention of the claimant and the medical expert that his version differs; for example if a claimant describes a collision at high speed which caused extensive vehicle damage whereas the defendant describes a minor impact causing only slight damage to the bumper. In these cases, under the current system this difference is generally drawn to the medical expert's attention by way of P35 questions after he has done his report. These cases then become complex and the issues frequently have to be resolved by the courts, and it is in fact difficult to see how the issues between the parties can be resolved by the medical expert or indeed within the Protocol, which is intended for straightforward cases.

If it is considered appropriate in these rare cases for the defendant's version of events to be put to the medical expert, we believe it is essential to ensure that the version is the defendant driver's version, not that for example of a policyholder or employer who was not present, or the insurance claims handler. Accordingly we believe that a document containing a statement of truth must be signed by the driver. We accept the procedural difficulty created in mirroring the requirement for the statement of truth by the claimant on the CNF (the fact that the defendant is not at that stage represented by a solicitor and cannot himself sign the insurer response to the CNF), so believe the requirement must be that the insurer holds a document containing a statement of truth signed by the at-fault driver.

Independence

Question 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?

MASS understands the issue this proposal is intended to resolve, but does not believe that requiring a claimant solicitor to obtain reports from a number of different intermediaries would be practical or effective. For solicitors who do only a few of these cases it would be impracticable, and for those doing very large numbers, there would be a variety of means of bypassing its intended effects, either by changing the corporate structure of the intermediaries or by entering into reciprocal arrangements with similar organisations. Furthermore, we believe that a robust accreditation system will address any issues of independence. We do not consider it necessary to ban a firm of solicitors from owning or running intermediaries.

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

This suggestion appears to be based on the premise that a list of organisations perceived to be independent would be selected, and claimant law firms would be required to obtain

reports only from those selected organisations on a rota basis. It ignores the fact that there are a wide range of different practices in the industry, ranging from law firms in small towns or villages instructing a trusted local expert on a regular basis, to law firms that already instruct a variety of agencies or preferred individual experts selected by the law firm but instructed via an agency. The issue sought to be addressed here, the situation where a law firm or ABS sets up a medical agency, refers all its own clients to that agency, and makes additional profits as a result, is only part of the picture.

We reiterate that a robust accreditation system will address any risks associated with independence. We see no reason why a law firm or ABS cannot use their own agency to obtain medical evidence in accordance with an accreditation process.

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

MASS believes that any attempt to control the market in the ways suggested is likely to backfire. MASS has no particular position on whether law firms or ABSs should be permitted to own medical agencies, but we anticipate that a prohibition on ownership would be ineffective in securing independence. We believe that independence should be looked at from the perspective of the individual medical expert preparing the report and supported by a robust accreditation process. This is in fact already a requirement, the expert's overriding duty being to the court and, as expressly stated in P35 of the CPR, this duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid. The accreditation scheme needs to be sufficiently robust to identify any experts not complying with P35, and removing their accreditation.

Reports Commissioned outside the Fixed Fee Scheme

Question 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?

Yes

Question 8: Do you agree that the above proposal is a sufficient deterrent?

Yes

Question 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?

MASS firmly believes that pre-medical offers should not be permitted in claims like this and has campaigned against them in recent years. We welcome the Minister's recognition that they should be discouraged. We believe however that it will be difficult to change the behaviour of insurers, and that if there were anything like this within the Protocol that preserved pre-medical offers in any circumstances, it would counteract the attempt to discourage them and ultimately we hope drive them out altogether. We do not feel that allowing pre-medical offers if reports were commissioned outside the fixed fee scheme is appropriate or likely to be necessary. It would not in most cases be a pre-medical offer, as a medical report would usually already have been sent to the insurer, so in practice the effect would overlap with the effect of preventing the claimant solicitor from recovering the fee paid for the non-compliant report.

If it is intended that this should apply in cases where the claimant solicitor has told the insurer they have commissioned a non-compliant report before they have served the report, we suspect this is a highly unlikely scenario, and if a situation arose where insurers became

aware that a particular law firm was flouting the fixed fee scheme, the proposal to prevent them from covering the cost of the report should be an adequate and far more effective deterrent.

We support the proposed addition of para 3.2 to the Protocol but believe that the amendment at 7.44A should be limited to “In a soft tissue injury claim, neither party may make an offer to settle until a fixed cost medical report has been obtained”. It might be appropriate to be clear on the penalty on the defendant if such an offer is made, which we suggest should be that the claimant is entitle to exit the Protocol.

Further Comments

Question 10: Please also provide any further comments you may have in relation to any of the proposals or amendments covered by this letter and its annexes.

Pre-medical offers

As indicated in reply to 9 above, we are pleased at the proposals in relation to pre-medical offers within the Protocol and believe they are likely to end the practice on claims that enter the Protocol. To deal with the practice outside the Protocol, bearing in mind that many pre-medical offers are made before the submission of the CNF, we would suggest that the ABI be asked to put forward proposals as to how the practice can be brought to an end within the insurance industry, or at least the very high proportion of the motor insurance industry that holds ABI membership.

Ownership of medical agencies

We understand the concerns about ownership of medical agencies by claimant law firms or ABSs, including ABSs controlled by insurers. Where practices that incur unnecessary additional costs are being driven by these commercial interests, we agree that the practices should be discouraged. The best way to achieve this in our view is with robust accreditation and / or regulation. We have a serious concern that an attempt to do so by prohibiting law firms from instructing a medical agency in which it has a financial interest will be ineffective in achieving this objective and will be very easy to bypass and may simply lead to commercial arrangements which are now transparent becoming less so, for example placing ownership of the medical agency (or several medical agencies if the proposal to commission reports from different intermediaries were implemented) outside the law firm but under the control of parties connected with the individuals controlling the law firm.

We would also be concerned to see a situation created where a few large independent medical agencies would be able to control the market, both for medical experts who in practice would need to be registered with one or more of them in order to secure instructions, and for law firms which for convenience and efficiency would need to use the agencies as for volume work it is not practical to instruct experts direct.

Whilst there may be a perception that some law firms engage in undesirable practices which add costs to the process, there are many ethical operations owned by law firms which have been set up to deliver an efficient and tailored service for their clients. A concern some of our members have is that under the current system operated by some agencies and the fee structures within which the experts are working, the time spent with the claimant is insufficient to allow a full examination to be done or a full history to be taken, and as a consequence some of the reports produced are of poor quality. This concern has led to some law firms setting up their own agencies to enable them to control the quality of the examination and ensure that it is robust. It is certainly a matter that must be addressed, and

we envisage that there will be rules within the accreditation scheme to stipulate what the expert is required to do when examining and interviewing the claimant.

Furthermore, law firms have a duty to act in the best interests of their clients. That law firm must be free to choose who they instruct not compelled to use a particular intermediary who might have a track record of providing a poor service.

Should the MoJ still feel such a measure is necessary, MASS would urge that a clear and strong definition of ‘ownership’, (be it direct or indirect) is considered and agreed.