Ministry of Justice Consultation:

Future Provision of Medical Reports in Road Traffic Accident related personal injury claims

Response from the Motor Accident Solicitors Society

May 2019

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

MASS is a Society of solicitors acting for the victims of motor accidents, including those involving personal injury (PI). MASS has over 100 solicitor firm Members, representing approximately 2000 claims handlers. We estimate that member firms conduct in the region of 400,000 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.

Contact:

If you have any queries or would like further information, please contact at first instance - Jane Loney at:

MASS
19-20 St Augustines Parade
Bristol. BS1 4UL

Tel: 0117 925 9604
Email: jane@mass.org.uk
www.mass.org.uk

1. Executive Summary

MASS's primary concern with medical reports is that the accident victim must be fully protected and provided for from the first day of operation of any new system.

It is essential that the unrepresented claimant fully understands the process and is adequately supported throughout the claims process. They need to: understand how medical reports are commissioned; understand the actual reports; know when, who and how to commission additional experts if their injuries require it; how they can challenge the findings of reports; understand the related issues around settlement; and understand who pays and when.

It is unacceptable and discriminatory that there might be any doubt over the affordability of obtaining a medical report: "Costs for obtaining this evidence, would also likely need to be funded up front by the claimant, albeit this would likely be reimbursed by the compensator as part of the final settlement" (Paragraph 19). Not being able to afford a medical report must never be a barrier to claimants being able to pursue their claim.

If MedCo is to be expanded to include experts for non-soft tissue injuries, they must be fully accredited with strict entry requirements, training, monitoring and auditing, to the level and standard of those MROs who provide reports on soft-tissue injuries. It would be unacceptable for them to provide expert advice to claimants at a lower level of standards.

We have serious concerns that the proposed fixed fee of £180 is too low for non-soft tissue injury experts and will lead to a sub-optimal service for accident victims, with reduced or fast-tracked time spent on examination and the report, inevitably impacting the accuracy and quality of the report.

MedCo has experienced many issues and problems since it was set up. Many of these issues could have been avoided if the process establishing MedCo had been less rushed and more carefully considered. Given the proposed extension of MedCo's role, and the pressures that it already experiences, we have considerable concerns about the huge amount of extra work and testing that will be required ahead of full implementation in April 2020.

.

2. Questions

Question 1: The Government proposes to extend the scope of MedCo so that all initial medical reports for all RTA related PI claims under the SCT are provided under a single system. Do you agree with this proposal? Please provide any evidence and further information in support of your answer.

In principle MASS agrees that this would be the most straightforward and user-friendly way for unrepresented claimants to obtain a medical report. MedCo has some of the processes and procedures in place that would enable it to provide medical reports for injuries that do not fall under its current remit. However, careful consideration needs to be given to what changes need to be made to enable MedCo to offer an appropriate service to claimants with a range of injury types. The alternatives appear to be that:

- MedCo offers a service which in some cases will be little more than a triage service, using its existing experts, most of whom are GPs, to assess the claimant's injuries and if within their expertise they prepare a final report, and if not, indicates the specialism from which an appropriate expert should be sourced (e.g. dental expert, psychiatrist or psychologist), or
- MedCo recruits a wider range of experts so that claimants can be offered the appropriate type of expert for a first report.

The disadvantage of the first option is that in some cases the claimant may feel that the first medical examination was a waste of his time.

There are several challenges posed by the second option:

- Experts from other specialist fields may not wish to register with MedCo, particularly if the low level of the existing fixed report fee is maintained;
- There is only limited time available for MedCo to recruit experts before full implementation;
- Solicitors understand the various of specialisms of experts, but unrepresented claimants may not know what type of expert(s) they require;
- Unrepresented claimants will likely not know how best to choose a suitable expert and will likely need a 'help' facility to identify the type of expert required and assistance in their selection.

As a general comment on extending MedCo, MASS is concerned that this may require MedCo to do a very large amount of work in a limited timescale with limited resources, including:

- Building/developing training materials;
- Extending its register of experts;
- Integration between MedCo and the new LIP Portal;
- Considering how unrepresented claimants will question experts or seek amendments or corrections to reports, and what SLAs are appropriate.

Even before the considered expansion, MedCo has resource difficulties coping with the volume and complexity of the system. Our members report that abuses or shortcomings in reports are often inadequately dealt with. The auditing and monitoring of existing MROs has been a major issue for MedCo, and we would question how they would cope with an expanded role and an array of new and varied experts.

The problems encountered by MedCo since it was set up are well known and documented. MedCo was initially launched too hastily and its effectiveness has suffered as a result of this. There is a real risk that the proposed radical changes to the way that MedCo works are similarly being rushed ahead of implementation. The lessons from the past must be fully taken on board and any new systems/processes must be fully tested and fully operational before going live. If the system is not ready or significant problems are identified, then implementation must be delayed.

Question 2: If you have suggestions for alternative approaches please provide details and, in particular, how they would work in practice.

Whilst MASS has concerns about the practicalities of using MedCo, given the structure of the proposed new claims system being imposed, we cannot see that any alternative, such as

simply signposting unrepresented claimants towards directories of experts and providing guidance on the types of expert who would be suitable for particular injuries, would be acceptable either in terms of user-journey for the claimant or in offering appropriate protection for unrepresented claimants.

Whilst we do not have any meaningful data, our members broadly felt that more than 5% of RTA claims require some more specialist report.

Question 3: If MedCo is extended to cover all types of medical reports for RTA related personal injury claims under the SCT, should other types of medical expert be added to those currently available for the purpose of providing medical reports?

See our reply to Question 1.

Question 4: If additional specialists are added, should they be restricted to providing initial reports for claims which involve their specialisms or should they be allowed to complete the full accreditation process and be allowed to provide all initial reports?

Additional experts must be sufficiently accredited with strict entry requirements and monitoring. It would not be acceptable to cut corners and reduce the accreditation process. New experts to be commissioned to work through MedCo would require training, full accreditation and auditing, and given the planned implementation date of April 2020, it is highly doubtful whether this could be accomplished in time.

Clearly a dental expert would not have the appropriate expertise to comment on a soft-tissue injury even after completing the full accreditation process, and whilst GP experts and other specialist doctors may well be able to provide reports on soft-tissue injuries as well as other types of injury, experts such as psychologists would not. It would make it complicated for claimants with a range of injuries to select the appropriate expert.

Any suggestion that experts for non-soft tissue injuries can simply be added as an extra, without full accreditation, training and auditing, is undoubtedly insulting to those professionals and certainly belittling of these other injuries.

Question 5: Do you agree that other types of practitioner (such as osteopaths or chiropractors) be included in the list of experts who can provide medical reports for claims subject to the new RTA SCT limit?

In principle other types of practitioner may have the knowledge and expertise to provide medical reports. However, osteopaths and chiropractors are not required to undergo the extensive training that medical doctors undergo, and if they were to be added to the approved list, and they would probably need to be, MASS believes careful consideration should be given to requiring them to demonstrate adequate experience in practice post-qualification to give some assurance that they have appropriate expertise. One of the minimum requirements would need to be that they are able to demonstrate full membership of and regulation by their field of practice professional or regulatory bodies.

We would also be concerned that the addition of other types of practitioner could cause further confusion for unrepresented claimants and possibly raise an expectation that they would receive treatment as well as a medical report.

Question 6: Should the current fixed recoverable cost regime for initial soft tissue injury medical reports be extended to cover initial reports for all RTA related PI claims under the SCT?

Although most soft tissue injury claims will fall within the proposed scope of the SCT, MROs or DMEs will be asked to provide a service at a fixed fee which may subsequently fall outside the SCT, given that the value of a claim will be unknown until after the assessment and report.

A fixed cost, whether at the present level or some other level, might appear attractive in delivering simplicity and clarity. However, further consideration needs to be given as to whether enough experts from specialisms outside soft-tissue injuries would be willing to carry out the work for the existing fixed fee of £180. There are already difficulties in finding experts willing to provide these reports at a fixed cost irrespective of the level of work required to produce the report. The cost of registering with MedCo might make registration uneconomical for some experts.

Insufficient pay will lead to a sub-optimal service for accident victims, with reduced or fast-tracked time spent on examination and the report, and this would inevitably impact the accuracy and quality of the report, which may lead to a weak case for the claimant. Low fixed costs are also likely to increase the prospects of fraudulent behaviour. If a fixed fee is set, it needs to be subject to full and regular reviews.

It is recognised that experts instructed through MROs or insurers only receive a percentage, sometimes only 50%, of the total fee. Consequently, it simply may not be possible to attract experts of the appropriate calibre, or for them to devote the appropriate amount of time to doing the job properly, if the fixed fee is too low. What happens if not enough DMEs/MROs 'opt-in' to the process for unrepresented claimants?

Whilst advantageous in terms of attracting more experts and helping to maintain quality standards, any increase in the fee, or setting a higher fee for certain types of claim, may however increase the difficulties for claimants.

MASS believes that where an unrepresented claimant is paying for the report themselves, a fee of £180 plus VAT may be a considerable barrier to access to justice, with some less well-off claimants prevented from bringing a disputed claim to trial before a court simply because they are unable to afford a medical report.

Question 7: Should the fixed recoverable cost regime be extended to all initial reports for claims that fall under the revised SCT in the new IT platform, if additional experts are added to and sourced through MedCo.

See reply to question 6.

Question 8: When extending the current MedCo search system to unrepresented claimants, what, if any, changes should be made to the current MedCo Qualifying Criteria?

The Qualifying Criteria should be extended to cover the practical elements of dealing with unrepresented claimants. The Service Level Agreements (SLAs) should also be extended to give clarity to unrepresented claimants as to what they can expect in terms of service and response times, length of appointment and appropriate type of venue for examination.

Whilst possibly not an issue for SLAs, guidance will have to be given to unrepresented claimants on how to interpret medical reports and how to question the expert and where appropriate seek amendment or correction of errors in the report. It will also be necessary to enable audits of MROs and experts on the level of service they are providing to unrepresented claimants.

Consideration should be given to obtaining feedback from unrepresented claimants on their experience with the medico-legal process, including the consultation with the expert, the contents of the report, and responses to any follow-up questions or requests. MROs and DMEs will probably also have to collect and provide MedCo with additional data about follow-up questions and how they are dealt with.

There will need to be strict corporate sanctions to deal with MROs/DMEs who do not adhere to SLAs, guidance and the rules that are established. The LIP/unrepresented claimant must be able to challenge and liaise with experts on the consultation process and inaccuracies in the medical report and there must be some mechanism where claimants are protected.

Unrepresented claimants will require considerable assistance throughout the process. One major concern that we have would occur near settlement. When an expert's prognosis has been provided to the unrepresented claimant, how and who will advise them on the implications of settlement at that stage? Claimants may not be aware of the option to wait and obtain a further report if they do not recover as originally anticipated.

Question 9: When extending the current MedCo search system to unrepresented claimants, what changes would you like to see as to how the information returned should be presented (i.e. currently only contact details are returned, but should more information about the provider and their service offering be provided)?

The current MedCo search response would be impenetrable to most unrepresented claimants. They would need to be provided with information about the distinction between a T1 and a T2 MRO and a DME, and whilst further resources such as links to websites for MROs and CVs for DMEs might be of assistance to some unrepresented claimants, for many this will simply add to the confusion and difficulty of negotiating the process of making a claim without legal representation.

Beyond the initial search system, support and guidance must be offered to unrepresented claimants to ensure that they understand the report

Question 10: If you are an MRO or a DME will you be opting in to the new service providing medical reports for unrepresented claimants at £180 (plus VAT) rate?

MASS is not an MRO or a DME.

Question 11: When extending the current MedCo search to unrepresented claimants, do you think it should include a standardised set of service level agreements?

Yes, see our response to Q8.

Question 12: What other changes do you think would need to be made to the current MedCo system for unrepresented claimants to be able to obtain a medical report?

MASS believes that the system would work better for unrepresented claimants if they were given a narrower range of choices (see our reply to Q9).

Unrepresented claimants may also need assistance in sending letters of instructions or some form of standard questionnaire to complete in place of a solicitors' letter of instructions. Claimants are often provided a questionnaire at the time of the appointment, but this is often difficult to complete or there is no time. It would need to be standardised and provided in advance of the appointment.

The system will need to be able to adapt if the claimant's circumstances change and their claims status switches from unrepresented to represented.

Question 13: Please provide with supporting evidence the average cost of an initial medical report for non-soft tissue RTA related PI injuries.

MASS does not hold this information and claimant firms are very unlikely to collate such information, which is best supplied by relevant experts and MROs.

Question 14: Do you agree with an assumption that around 400,000 claims would be processed through the MedCo portal; and of these, around 10,000 (5%) would be non-soft tissue claims.

It is very difficult to make any prediction about the number of claims post-implementation in April 2020. On current Portal figures the estimate of 400,000 is probably on the low side. Whilst claim numbers, which have already been falling for some time, may continue to drop, we remain concerned that claim numbers may rise significantly because of increased CMC activity having been granted full access to the new claims process for the first time. A medical report will be required in all claims including those valued at less than £1,000.

In terms of the percentage that will be non-soft tissue claims, certainly the percentage would be relatively low, but MASS cannot comment further, not knowing which figure – 10,000 or 5% - was intended given the mathematical error in the calculation (20,000 or 2.5%?).

Question 15: Do you agree with the assumptions that around two thirds of claims processed on the MedCo system would be with legal representation (made up of just under 50% of

claims with BTE insurance and under 20% with other legal representation) and one third of claims without legal representation?

No, we do not agree.

It is difficult to make predictions, but MASS believes that the estimate of 50% of claims brought with BTE insurance is too high. Reports from our members suggest that currently fewer than 50% of claimants have BTE. Most insurers currently offer BTE only as an optional extra and do not include it within the main premium policy.

If, as appears inevitable, BTE premiums will be higher after the introduction of the new claims process, the uptake is likely to reduce, at least in the short-term. In the longer term, public awareness of the benefit of BTE insurance in circumstances where legal costs are not recoverable by successful parties might develop later. Based on the information currently available about the new claims process, our estimation would be that significantly more than one third of claimants would not have legal representation.

The level of legal representation will of course depend on the level of compensation. If the tariff system is introduced at the levels proposed in 2018, claimants without BTE will not be able to afford to instruct a solicitor.