

J10YJ826

Rabot v Hassam

Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic

1. This is the reserved judgment in the matter that was heard on 8 June 2022. A combination of a lack of Court time and the submissions regarding the “new” scheme for the determination of Road Traffic Accident Small Claims pursuant to CPR PD27B lead me to reserve the Judgment.
2. The matter arises out of a road traffic accident which occurred on the 16 July 2021. The claim was, properly, entered onto the OIC by SCNF dated the 22 July 2021. In the Compensator Response Form, dated 2 September 2021, liability was admitted in full. The parties have been unable to agree the value of the Claim and, therefore, a Form RTASC Q was issued by the Court on 10 March 2022 with the date of service being 17 March 2022. The Court Valuation Form set out that the Claimant claimed £1,390.00 in respect of a Tariff injury and £2,500.00 in respect of a non-tariff injury. The Compensator offers are £1,390.00 and £465.00 respectively.
3. Directions were given on 11 May 2022 which listed the matter for a preliminary hearing to determine the issues in the case. The order made clear that, if the parties agreed, the Court would use the hearing as a final hearing pursuant to CPR 27.4(3)(b) and would assess quantum on the basis of submissions. The parties agreed.
4. Accordingly, submissions as to quantum, and particularly the approach to quantum, were made.

Damages for the Injuries

The legislation

5. Clearly, at least part of this claim relates to a whiplash injury as defined by the Civil Liability Act 2018 which came into force in respect of all whiplash injuries after 31 May 2021.

6. The Act defines Whiplash injury as:

1. **Whiplash Injury etc:**

(1) In this Part “Whiplash injury” means an injury of a soft tissue in the neck, back or shoulder that is of a description falling within subsection (2), but not including an injury excepted by subsection (3).

(2) An injury falls within this subsection if it is –

- a. *A sprain, strain, tear, rupture or lesser damage of a muscle, tendon or ligament in the neck, back or shoulder, or*
- b. *An injury of a soft tissue associated with a muscle, tendon or ligament in the neck, or shoulder.*

(3) An injury is excepted by this subsection if –

- a. *It is an injury of soft tissue which is part of or connected to another injury; and*
- b. *The injury is not an injury of soft tissue in the neck, back or shoulder of a description falling within subsection (2).*

7. The level of damages for Whiplash injuries are to be assessed in accordance with the Whiplash Injury Regulations 2021 SI 2021 No. 642.
8. Both parties agree that the Claimant sustained a whiplash injury within the meaning of the Act and, given the prognosis is one of 8 - 10 months (treated as 9) with travel anxiety, the relevant tariff amount is £1,390.00.
9. The parties agree that, in this case, there is clearly a non-tariff element to this injury which will fall to be quantified in the traditional way and in accordance with the JC Guidelines. For the avoidance of doubt, the Claimant accepts that there is to be a deduction in the overall award to represent the overlap in pain, suffering and loss of amenity occasioned by each injury and that is the basis I work on.

The Claimant's case

10. The Claimant was examined at about 2 ½ months post-accident by Dr Jabbar. The conclusion was that the Claimant sustained an injury to the cervical spine and to the lumbo sacral area. The prognosis period for both was 8 – 10 months. There was also some travel anxiety for 3 months. The effects of an earlier road traffic accident were discounted. All of those injuries, of course, fall within the tariff. In addition, there was an injury to both knees with a prognosis period of 4 – 5 months. That is the non-tariff element.
11. The injury to the knees is said to have commenced 45 minutes post-accident with a pain severity of 4-5/10. After 8 weeks, that had reduced to 2-3/10.
12. The Claimant visited his G.P. on one occasion and used heat, massage, paracetamol, and ibuprofen as required. It is accepted that at least some of that treatment will have been linked to the spinal injuries.
13. The loss of amenity is said to have been in the following areas:
- a. Sleep pattern disturbed with stiffness on waking.
 - b. Carrying heavy items.
 - c. Bending.
 - d. Exercising.
 - e. Driving for long periods.
 - f. Going out to see family and friends.
 - g. Putting the bins out
14. To some extent, all of these problems persisted at examination.
15. The Claimant accepts that some, if not all, of these issues will have been affected by the spinal injury rather than just the injury to the knees. However, there was a 15% reduction in flexion in both knees (according to the Claimant given the remote nature of the examination).
16. Overall, the conclusion is that there was a soft tissue injury to the knees and continued use of pain killing medication would be of benefit. Physiotherapy was suggested (although not undertaken). The overall prognosis was one of 4 – 5 months (so treated as 4 ½ months for the purposes of this case).
17. Mr Seed for the Claimant valued the knee injury as an individual injury at about £3,000.00. Had it been one knee, he placed the figure at £2,700.00 - £2,750.00. That is based upon the Minor Injuries chapter of the JC Guidelines 16th Edition (which gives a figure of £2,450.00 at the top end of the bracket for 3 months) together with (K) Knee Injuries (b) Moderate (iii) which concludes as follows:

A soft tissue strain-type injury that does not significantly impact on daily activities and gradually resolves within six to seven months might be expected to attract an award in the region of 2,250.00

18. His overall figure is one of £4,250.00 (which is reached by adding the figures to give £4,390.00 and making a fairly minimal deduction). He states that the injuries are not anatomically proximate and, in any event, if one is examining overlap in loss of amenity, there is not a great deal to be taken into account.
19. Mr Seed argues that the Regulations support him in this given that Reg. 2 is entitled, "Duration of Injury". He suggests that the tariff amount pays little regard to loss of amenity or, within various brackets, the actual duration. He points out that, if one has a whiplash injury of a duration of 3 – 6 months, one falls within that bracket and the award is £495.00. Unless and until one reaches the threshold for "exceptional circumstances" which triggers an uplift in the award, there is no consideration at all as to the effect of the injury or the loss of amenity so caused. Therefore, he effectively says that any overlap must be minimal.
20. He gives an example. A heavily pregnant woman is injured. Following the birth of the child, she finds breast feeding difficult due to pain. He ventures to suggest this would be exception, triggering an uplift. In itself, that may well be right. However, he then goes on to say, the knee injury would remain unaffected by the operation of the tariff, uplift or resulting considerations. To that end, the method of valuation of that injury would have to remain unaffected. In other words, the fact that there is also a tariff injury does not affect the process.
21. He states that, once it is accepted that there is Judicial discretion to assess the non-tariff injuries in the traditional way, that must be the starting point and the tariff is added. It is then that any deduction is made by looking critically at what the "overlap" actually is. In this case, his conclusion is that it is minimal.
22. As an aside, Mr Seed accepts his figure for the knee injury exceeds that placed on the Court Valuation Pack. He, correctly, points out that since that document was completed, the JC Guidelines have been updated. Clearly, the Defendant does not accept the Claimant's arguments but I have heard no suggestion from them that departure from the Court Valuation Pack is not permitted.

The Defendant's submissions

23. Mr Taylor started his submissions by comparing the spinal injuries with the knee injury within the medical report. He points out that the injuries to the neck and back scored 9/10 in terms of pain in the aftermath of the accident whereas the

knee injury was only 4-5/10. Whilst improved at the time of examination, there remained a disparity in the pain. Further, looking at the loss of amenity, he says it is unlikely that there was anything attributable solely to the knees.

24. He points to the traditional approach and the pre-amble to the JC Guidelines at page xix. In particular, paragraph 34 of the judgment of Pitchford LJ in Sadler v Filipak [2011] EWCA Civ 1728

It is in my judgment always necessary to stand back from the complication of individual figures, whether assistance has been derived from comparable cases or from the [Judicial College] guideline advice, to consider whether the award for pain, suffering and loss of amenity should be greater than the sum of the parts in order properly to reflect the combined effect of all the injuries upon the injured person's recovering quality of life or, on the contrary, should be smaller than the sum of the parts in order to remove an element of double counting. In some cases, no doubt a minority, no adjustment will be necessary because the total will properly reflect the overall pain, suffering and loss of amenity endured. In others, and probably the majority, an adjustment and occasionally a significant adjustment may be necessary.

25. The defendant says that the traditional approach can be strained but the practical route is to look at the primary injury first and then add to it. If one follows this route, they say that the primary injury is the whiplash (so £1,390.00) and adding £465.50 would be sufficient to recognise the extra element of pain, suffering and loss of amenity occasioned by the non-tariff (knee) injury in this case.

26. In any event, the Defendant says that, looking at the JC Guidelines for knee injuries, £2,250.00 is the upper end of the bracket for a 6 – 7 month injury therefore, even with the injury being to both knees, £3,000.00 is too high. They say the figure is definitely below £2,000.00 even if one adopts the Claimant's approach (an approach that is not accepted).

27. As to Mr Seed's point about the Regulations lending weight to his argument, the Defendant says that severity of injury/loss of amenity must be taken into account within the tariff given that there is an upper threshold of "exceptional circumstances". In other words, the tariff is where there are no exceptional circumstances, not where there is no loss of amenity.

28. Overall, they say there are two issues:

a. Methodology – if you discount, how?

- b. If one is considering the combined effect of two awards, there has to be some evidential view in the medical report of what it covers i.e. the medical evidence has to tease out what is caused by what injury to allow a proper view to be taken. Essentially, if the evidence is not there, “minimal” or “reduced” overlap cannot just be assumed.

Conclusion

29. It seems to me that the question raised in this case is, “when there is a tariff and non-tariff element to the injury, what is the methodology that should be employed to quantify the injury as a whole?”. In my view, based upon the arguments raised, that question can be broken down into the following issues:

- a. Is the non-tariff injury quantified first and the tariff added (with deduction) or is the whiplash to be viewed as the “main” injury with the addition of a sum in respect of the non-tariff injury or does it matter?
- b. Accordingly, what is the appropriate award in respect of the non-tariff element of the injury?
- c. What is to be deducted for an overlap in the awards and, therefore, what is the overall figure for the totality of the injuries?

Is the non-tariff injury quantified first and the tariff added (with deduction) or is the whiplash to be viewed as the “main” injury with the addition of a sum in respect of the non-tariff injury or does it matter?

30. For my part, I cannot see how which element I value first should matter or, more properly, should lead to a different result. Once it is accepted that there should be a deduction for overlap (as here), just because the value of the whiplash element is the now fixed (as opposed to to be assessed), I cannot see the methodology to be used should differ from that which it was before when it comes to considering multiple injuries, as set out in Sadler. That judgment tells me that I must look at the individual injuries, consider individual awards for them and then take a step back to reach an overall conclusion. Which injury I start with is not suggested.

31. Taking the Defendant’s approach is to say that I should treat the whiplash as the primary injury; doubtless because, medically, it is the most serious. But why is it wrong to say the most valuable is the primary injury and work from there?

32. The fact is that the tariff only applies to whiplash injuries. It seems to me had Parliament wished to develop a CICA-type tariff with percentages for the second and third injuries, they could and would have done so. Accordingly, to my mind,

I must fall back on well-established principles to value the non-tariff injuries and then the injury as a whole.

33. Further, in terms of the actual valuation of the non-tariff injury, if I have two claimants with identical knee injuries, one caused in an RTA where the Claimant also has the misfortune to have a whiplash injury and one caused when the Claimant fell from a ladder at work, why should the valuation to be placed on the knee injury in any way differ? It seems to me that the distinction between the awards is simply the additional sum for the whiplash and a deduction for the overlap. The starting point must be the same in my view.

34. I am driven to the conclusion I quantify both injuries separately and I then take a step back.

35. Plainly, my valuation of the knee injuries is assessed on the basis of the pain suffering and loss of amenity caused by the knee injuries.

36. The Whiplash injury (and the travel anxiety) are quantified in accordance with the tariff which does not allow for any nuance in duration, let alone effect (save for once the threshold for “exceptional circumstances” is reached) but, in my view, it cannot be right to say that the tariff takes no account of the effects of such an injury. After all, duration (albeit by bracket) has an effect. 6 – 9 months have a greater effect than 3 month’s duration; hence the variance in award. Therefore, I am of the view that loss of amenity is covered within each figure, including, to at least some extent, the tariff figure, even if only on a broad-brush basis. Perhaps the more appropriate way to look at it is to say that any (extra) loss of amenity occasioned by the tariff injuries is not to be specifically considered until it is exceptional.

37. I must then look at the overlap in pain, suffering and loss of amenity based on the (medical) evidence before me.

38. Accordingly, my approach is as follows:

- a. Determine what each injury is;
- b. Value each injury in accordance with whatever scheme/regime is appropriate;
- c. Add them and then step back exercising the type of Judicial discretion that Judges have been doing over many years;
- d. Reach a final figure by making an appropriate deduction (if any).

39. In other words, I am following the guidance set out in Sadler.

Accordingly, what is the appropriate award in respect of the non-tariff element of the injury?

40. I take into account that the injury was to both knees. I also look to the JC Guidelines to which I have been referred. I cannot discern any particular difficulty occasioned by the knee injury but it was clearly painful to a degree over a period of time. Overall, I think a free-standing award would be in the region of £2,500.00.

What is to be deducted for an overlap in the awards and, therefore, what is the overall figure for the totality of the injuries?

41. The tariff award is £1,390.00. Added to the £2,500.00, that gives an overall sum of £3,890.00. Stepping back, I think the overall award is £3,100.00 to recognise the clear overlap on the basis of the medical evidence I have before me. Were that more nuanced, were the details “teased out” as the Defendant put it, there may have been less of a deduction but, evidentially, that is the position that is supported in my view. There is nothing highlighted in terms of particular loss of amenity that can be attributed to the knee injuries alone.

42. Given the interest in the outcome of this case and the potential effect on matters listed before me in the forthcoming days/weeks, this judgment should be considered as handed down in writing at 9:30 am 23 June 2022 and Judgment will be entered for the Claimant accordingly. However, there will be a telephone hearing on 5 July 2022 at 10 am (elh 30 minutes) to consider the question of any interest plus costs given that, as at the date of the hearing, the appropriate costs remained in issue. If the parties are able to agree a consent Order to deal with those outstanding issues, they are welcome to forward it to me prior to the hearing and no attendance will be necessary.

DJ Hennessy

22 June 2022

