Fair and Reasonable Compensation? Assessing Damages for PSLA for Mixed Tariff and Non-tariff Injuries

Posted On: 26/01/2023
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In *Rabot v Hassam; Briggs v Laditan* [2023] EWCA Civ 19 the Court of Appeal considered how to assess quantum for pain, suffering and loss of amenity ("PSLA") where a claimant suffers whiplash injury which falls within the scope of the fixed tariff system contained within the Whiplash Injury Regulations 2021 ("the Regulations"), pursuant to the Civil Liability Act 2018 ("the 2018 Act"), but also suffers additional injury which does not fall within the tariff system. The claims arose out of road traffic accidents following which each claimant suffered whiplash and other injuries.

The full judgment may be found here.

The 2018 Act and the Regulations

The purpose of the legislation, as set out in the Explanatory Notes to the 2018 Act, was to reform the claims process for road traffic accident related whiplash injuries. The political agenda was to reduce car insurance costs by tackling the perceived mischief of an increasing number of whiplash claims, with the Government's view being that the level of compensation for such claims is out of proportion to the level of injury suffered.

Section 3 of the 2018 Act governs the determination by a court of damages for PSLA in cases involving whiplash injuries resulting from road traffic accidents occurring on or after 31 May 2021. Whiplash injuries are defined within s. 1 of the 2018 Act. The determination of damages under s. 3(2) and s. 3(3) is confined to whiplash injuries which do not exceed, or is not likely to exceed two years, or would not have exceeded, or would not be likely to exceed, two years but for the claimant's failure to take reasonable steps to mitigate its effect (s. 3(1)(b)). Provided that the above criteria are met, there will be a qualifying whiplash injury or injuries and, in those circumstances, the amount of damages for PSLA for the whiplash injury or injuries is by reference to the legislative tariff specified in the Regulations (reg. 2). These will be referred to as tariff injuries.

For cases that do not satisfy the legislative criteria (non-tariff injuries), damages will be assessed by reference to common law principles with the purpose of general damages for PSLA being to reflect fair and reasonable compensation for the victim. In applying the common law principles, a court will usually refer to the *Judicial College Guidelines* for guidance and, less so, to reported quantum cases.

What then of the assessment of damages for PSLA in cases in which the claimant has sustained a mixture of tariff and non-tariff injuries.

The 2018 Act recognises that there may be cases in which the assessment of damages for PSLA should reflect the combined effect of tariff and non-tariff injuries as s. 3(8) provides:

Nothing in this section prevents a court, in a case where a person suffers an injury or injuries in addition to an injury or injuries to which regulations under this section apply, awarding an amount of damages for pain, suffering and loss of amenity that reflects the combined effect of the person's injuries (subject to the limits imposed by regulations under this section).

The 2018 Act and the Regulations provide no further assistance as to how a court is to conduct such an assessment in mixed injury cases. The 16th Edition of the *Judicial College Guidelines* refers to the Regulations within the Introduction, warning that "*the legislative scheme will in practice no doubt generate interesting and tricky issues, not least the approach of the courts to an award for damages for whiplash injuries in combination with other injuries*." However, in the absence of reported decisions and judicial determination the Guidance could provide no further assistance.

The First Instance Decisions in *Rabot* and *Briggs*

In *Rabot*, the claimant suffered whiplash injuries, soft tissue injuries to the cervical spine and lumbo-sacral area lasting eight to ten months and travel anxiety lasting three months (tariff injuries), together with soft tissue injuries to both knees lasting four to five months (non-tariff injuries).

At the quantum only hearing before District Judge Hennessy the tariff award was assessed to be £1,390 and the non-tariff award to be £2,500, an overall figure of £3,890. This figure was reduced to £3,100 to reflect the overlap between the injuries when, following the guidance of Pitchford LJ in *Sadler v Filipiak* [2011] EWCA Civ 1728, a step back was taken from the compilation of the individual figures to determine whether any adjustments should be made to properly reflect the combined effect of the injuries.

In *Briggs*, the claimant suffered the following tariff injuries: soft tissue injuries to the neck (six months) and upper and lower back (nine months). He also sustained the following non-tariff injuries: knee (six months), left elbow (three months), chest (two months) and the hips (one month).

At the quantum only hearing before District Judge Hennessy she assessed the tariff award to be £840, the non-tariff award to be £3,000 and reduced the latter figure by £1,040 to recognise the "*clear overlap on the basis of the medical evidence*". She made a total award of £2,800. District Judge Hennessy stated that the reduction has to be from the non-tariff amount given that the tariff valuation is fixed. The judge noted that the majority of the pain, suffering and limited loss of amenity appeared to flow from the whiplash injury.

How to Assess Damages for PSLA in Mixed Cases?

The primary grounds of appeal focused upon the approach of the courts to an assessment of damages in mixed injury cases, those approaches being set out at [22].

In considering the 2018 Act and the Regulations at [26], Nicola Davies LJ noted:

The mischief at which the legislation is directed is minor whiplash claims resulting from a motor vehicle accident. There is nothing in the wording of the statute or in the extra Parliamentary material which suggests, let alone demonstrates, an intention to alter the common law process of assessment for, or the value of, non-tariff injuries. The legislation was directed to and confined exclusively to whiplash injuries. There is no mischief which Parliament attempted to remedy in respect of the common law assessment of non-tariff injuries.

Accordingly, the presumption is that the common law is unaltered to the extent that it applies to non-tariff injuries.

Nicola Davies LJ considered the question of how an assessment is to be made for PSLA which is concurrently caused by both the tariff and non-tariff injuries and at [38] stated that the court when making that assessment should:

(i) assess the tariff award by reference to the Regulations;

(ii) assess the award for non-tariff injuries on common law principles; and

(iii) "step back" in order to carry out the Sadler *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 caveat, namely that the final award cannot be less than would be awarded for the non-tariff injuries if they had been the only injuries suffered by the claimant.

Stuart-Smith LJ agreed with the judgment of Nicola Davies LJ. The Master of the Rolls dissented.

Comment

The adoption of the approach advocated by the majority in *Rabot* and *Briggs* will ensure, as far as possible, that there is consistency in awards between claimants who suffer non-tariff injuries solely and those who suffer mixed injuries.

More significantly, this approach preserves, as far as possible, the common law principles applied when assessing damages for PSLA by curtailing any attempts to allow the 2018 Act and the Regulations to extend beyond the boundaries of qualifying whiplash injuries. The rights to fair and reasonable compensation for non-tariff injuries is retained, for now.