MoJ Part II whiplash consultation response

What's missing?

Five years after publishing Part 1 of its response to the 'Reforming the soft tissue injury ('whiplash') claims process' consultation, which closed on 6 January 2017, The Ministry of Justice has published Part 2 of its consultation response which can be found here.

Rather than preparing a summary of a consultation response which essentially says 'we're taking no action yet', we consider below what the consultation is missing, and what meaningful reform should be taken forward in the first five of the sevendifferent areas considered by the original consultation.

What areas did the consultation consider?

- **Fraud** and recommendations made by the Insurance Fraud Taskforce
- **Credit hire**
- Options relating to the **early notification of claims**
- The provision of **rehabilitation** treatment for injured claimants
- Potential changes to the **recoverability of disbursements**
- The introduction of a European style **Barème system** for PI claims
- How Government reform could help **control the costs of civil litigation**

Insurance Fraud Taskforce (IFT) recommendations on QOCS

The recommendation: The IFT's PI Sub-group recommended that claimants should be required to seek the court's permission to discontinue their claim if they wish to do so less than 28 days before trial. The aim of the recommendation was to reduce unnecessary costs for these claims, which are ultimately passed on to consumers. The working group suggested that where fraud is raised in the defence, it is possible to take advantage of QOCS protection by running claims until shortly before trial, then discontinuing them. By discontinuing rather than proceeding to trial it is possible to avoid a finding of fundamental dishonestly and possible criminal proceedings. The group asserted that the proposed change would lead to more prosecutions and provide for both more customer visibility and a view that justice will be "seen to be done".

MoJ response: the MoJ say that as there is no clear agreement from stakeholders on this issue and with both good arguments for and against making changes in this area, combined with the fact that the CJC could not come to a consensus on this point, Government does not propose to proceed with the changes but will continue to monitor behaviours and may return to the issue in the future.

Keoghs thoughts

The concept of QOCS was to "even up" the playing field in relation to costs in PI cases, with the intention not to allow an increase in the "have a go" culture. As it currently stands, where a pleading of fraud or fundamental dishonesty is made, defendants can seek to set aside that discontinuance and ask the court to hear the evidence and lift the QOCS assumption. However, the difficulty comes in the greyer cases where the evidence is not so clear cut. Insurers may have legitimate concerns that need to be heard at court, where a decision can be made as to fundamental dishonesty or not, but if the case never gets to trial then this opportunity doesn't arise.

The current system therefore does indeed encourage the "have a go" culture it wanted to avoid and when considered in tandem with the impact of the recent case of **Ho v Adelekun** it is an even bigger problem for insurers. They no longer have protection when making a Part 36 offer to resolve some of these grey cases pre litigation, or to settle the genuine elements of a case as the claimant is provided with double protection of QOCS meaning they will face no costs and they can accept a Part 36 offer even at the last possible moment, without facing any costs consequences. There is a clear and urgent need for a change to the current rules to prevent the continuation of this "have a go" culture which all consumers are left paying the costs of.

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Credit Hire

The consultation sought views on the following potential models for reform to the way credit hire agreements are dealt with in the future:

- First Party Model
- Regulatory Model
- Industry Code of Conduct
- Competitive Offer Model
- Other

Consultation Response:
Out of the potential models under consideration, those responding favoured an Industry Code of Conduct, with 183 supporting respondents.

In addition 244 respondents made further suggestions for reform to the credit hire system, including how the system could be made more efficient by, for example, encouraging early sharing of information and quicker settlements by at-fault compensators.

MoJ response: Government will continue to work with key stakeholders in the credit hire sector to monitor and improve the use of industry agreements, including the GTA. Further consideration will also be given to whether it would be beneficial to make the use of such agreements mandatory. Such changes would be subject to Government priorities given the needfor primary legislation (in our opinion, given other Government commitments and strains on parliamentary time, such reform is unlikely to happen).

Keoghs thoughts

Market opinion is divided on whether the scope and effectiveness of the GTA and other voluntary bi-lateral agreements in self-regulating the credit hire market has been overestimated, particularly at a time when many of those agreements are coming under pressure as a result of the current market conditions and inflationary factors.

Clients are informing us of what appears to be a concerted drive from a cross-section of the claimant market to renegotiate the terms of certain bi-lateral agreements which, whilst understandable, may well result in either stalemate or a breakdown of some existing agreements.

Alternatively, any agreements which are successfully renegotiated to reflect current inflationary factors may become unfeasible or unattractive in the longer term once conditions normalise. As a result, there is a risk that the number of bi-lateral agreements may in fact diminish in both the short and longer term. Moreover, with the number of signatories to the GTA already having reduced following a number of high profile exits over the last decade, the current market conditions pose a risk that this trend may be accelerated; with the overall consequence being that a far higher proportion of the credit hire market operates outside any protocol arrangement at all.

In our view, therefore, Government must be cautious in its approach and expectation that these existing methods of market control will have the longevity they seek.

Meanwhile, we anticipate that higher volumes of credithire claims will continue to be driven by a number of factors, including:

- Migration from the personal injury space subsequent to the introduction of the Civil Liability Act
- The continued availability of standard basis legal costs for credit hire and vehicle damage only claims exceeding £10,000
- The absence of any prescribed sanctions in respect of fundamentally dishonest credit hire claims
- The rapid expansion of certain industry participants

We therefore remain of the view that the current parameters of consultation do not go far enough to tackle the impact credit hire will continue to have on insurance premiums.

The current consultation response has not addressed what we perceive to be a number of incoherent anomalies between the legislative and procedural frameworks governing credit hire claims, versus those applicable to other similar claim types.

For example, it is difficult to see why FCA regulation, specific pre-action protocols, fixed costs, Qualified One Way Costs Shifting and fundamental dishonesty sanctions all apply to personal injury claims but not to claims for credit hire.

In particular, we continue to regard a pre-action protocol for credit hire claims to be clearly desirable for the purposes of reducing the substantial volume of contested litigation where the only issue is an assessment of damages.

We will continue to attempt to drive positive change in this area, by way of judicial precedent and by making the case for reform.

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Early notification of claims & seeking treatment within a set period of time

Consultation Response: On the question of whether a system of early notification of claims should be introduced, 181 respondents were in favour, 246 were against and 33 were unsure with 59 duplicate responses.

On the question of whether claimants should be required to seek medical treatment within a set period of time, and if treatment is not sought within this time, claims will be presumed to be 'minor' – 61 were in favour and 396 respondents opposed the proposal, with 33 unsure.

MoJ response: the Government does not intend to pursue this option but will keep it under review.

Keoghs thoughts

The ability for claimants to seek early medical treatment for whiplash and other minor injuries should be a cornerstoneof claims notification and be facilitated within the OIC portal process in order to allow for rehabilitation treatment such as physiotherapy to be arranged and funded by the compensator. In the absence of any structural reform from Government all stakeholders need to continue to collaborateon a self-governing process which allows for earlyintervention when suitable with the compensator at thecentre of the provision and funding of treatment.

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Recoverability of Disbursements

The consultation queried whether the Government should explore restricting the recoverability of disbursements.

Consultation Response: 396 respondents opposed limiting the recovery of disbursements and 57 were in favour.

MoJ response: with very little support for this option, and with the whiplash reforms having a significant impact on reducing costs, Government believes that adding further restrictions on the recoverability of disbursements would put undue burdens on unrepresented claimants. The Government has therefore decided not to pursue this option.

Keoghs thoughts

Sadly, the consultation asked the wrong question - the issue was not about recoverability as those disbursements that are reasonably incurred should be recoverable from paying parties. The issue that was overlooked is the amount of each disbursement that is recoverable.

The introduction of fixed recoverable costs was intended to avoid frictional litigation over costs and yet here we are almost 20 years on from their introduction and we are still having hearings over the amount of disbursements on these low value FRC claims.

Is it perhaps time for the Civil justice Council to tackle this problem and discuss the level at which each disbursement should be fixed?

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Rehabilitation

The consultation sought views on various options to tackle the developing issues in the rehabilitation sector:

- Rehabilitation vouchers
- All rehabilitation arranged and paid for by the defendant
- No compensation payment made towards rehabilitation in low value claims
- MedCo to be expanded to include rehabilitation
- Introducing fixed recoverable damages for rehabilitation treatment
- Other

Consultation Response: Out of the options under consideration, option 4 – extending MedCo - was the option that received the most support, followed by option 2, defendants paying for all rehabilitation costs. The least supported option was Option 3 – removing compensation for rehabilitation.

MoJ response: since the consultation closed the MoJ has engaged with the FOIL cross-industry working group and the Association of Consumer Support Organisations (ACSO) which has 'enabled productive dialogue to continue with industry stakeholders...'. The Government remains committed to regular discussion with industry bodies and other rehabilitation organisations and will continue to engage with the sector through FOIL, ACSO and other key stakeholders, to support the development of an industry Rehabilitation Code with a view to agreeing a cross-sector approach to rehabilitation.

Additionally the MoJ will monitor the provision of rehabilitation within the OIC and give further consideration of the feasibility of expanding the MedCo system to support the provision of rehabilitation as a longer-term option.

Keoghs thoughts

The FOIL cross-industry working group and ACSO have been working together on a rehabilitation process which was to form an integral part of the OIC portal. The aim has been to produce a streamlined friction-free process to facilitate the early and correct assessment of rehabilitation needs and the provision of that treatment at a known cost. An essential part of that process is the elimination of delays caused by validation investigations which arise from adverse behaviours already seen in the rehabilitation claims industry. The current Rehabilitation Code is not mandatory and it has proven insufficient to address these adverse behaviours. The hope had been that this new process would become mandatory by way of robust governance and integration with the pre-action protocols and the Civil Procedure Rules, and with the involvement of MedCo in the selection of accredited providers.

It is disappointing that the MoJ has said that it is not looking at any rule changes or further development of the OIC portal at this time. The MoJ has said that it would prefer any change to be industry led and they would only step in if there is a proven market failure. Arguably there has already been a market failure and the cost of this is borne not only by compensators but also by the reputable rehabilitation industry which is adversely affected by validation delays and arguments over necessity and extent of treatment and cost. Those that will sign up to a voluntary process are not the problem and a mandatory process is arguably a necessary step to counter adverse behaviours and remove bad actors from the claims industry.

The MoJ response supports the groups' decision to continue work to develop an agreed process and governance structure which, with ongoing monitoring, may in time lead to the development of a mandatory process integrated with the OIC portal and MedCo. It is also necessary to widen the scope and consider rehabilitation claims outside the OIC portal and those that involve other methods of treatment for other injury types, such as CBT. The rehabilitation code itself perhaps could be made mandatory to address adverse behaviours in all rehabilitation claim types.

Compensators do have, and have utilised, the option in litigation of seeking findings that claims for rehabilitation are fundamentally dishonest in order to have whole claims dismissed and secure enforceable orders. However, getting to that point is costly, usually outweighs a claims value and can take up significant court resource. It is also often the experience that Judges are reluctant to find a claim fundamentally dishonest simply due to a problem with the rehabilitation element of the claim; often finding that claimants are unaware or inattentive or simply confused about the claims being made in their name. Whilst it is correct in the right claim to pursue such a finding, this is not a solution to the problem. The most appropriate way to combat the adverse behaviours is by way of rule changes, mandatory processes and, in litigation, wasted and non-party costs orders against those actually responsible.

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Conclusion

Judging by the Government's latest response to the consultation, little to no further reform is required, however we hope we have demonstrated above how much further we have to go as an industry to close the current loopholes and create a level playing field for whiplash and credit hire claims.

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