Dear Scott

The BMA (British Medical Association) is an apolitical professional association and independent trade union, representing doctors and medical students from all branches of medicine across the UK and supporting them to deliver the highest standards of patient care. We have a membership of over 168,000 which continues to grow every year. The BMA welcomes the opportunity to respond to the consultation on ‘Reforming the Soft Tissue Injury (‘whiplash’) Claims Process.’

We have responded to the consultation under the following broad areas:

- Compensation
- Definition of minor injury
- Psychological injury
- Review of Medical records
- Medco
- Diagnosis approach
- Early notification of injury/intention to claim
- Small claims track limit
- Ban on Pre-medical Offers

If you have any enquiries or require further information, please do not hesitate to contact Reena Zapata, secretary to the Medico Legal Committee (rzapata@bma.org.uk)

Yours sincerely

Raj Jethwa

Director of Policy
BMA response to the Ministry of Justice consultation on reforming the soft tissue injury (‘whiplash’) claims process

A consultation on arrangements concerning personal injury claims in England and Wales.

Motorists and cyclists involved in road traffic accidents which are not their fault should be able to make a claim and be fully compensated for their injuries. The proposals to tackle the high numbers of minor (RTA) Road Traffic Accidents related soft tissue injury claims by either removing compensation for (PSLA) pain, suffering and loss of amenity or reduce compensation for PSLA for other RTA related soft tissue injury claims where recovery takes longer will cause unfairness between claimants with the same injury suffered in different circumstances and between claimants with the same injury whose symptoms last for different periods.

Compensation

The removal of compensation for pain would be unfair for those who have significant symptoms which have interfered with work duties and other activities. We are particularly concerned that the plans to restrict personal injury compensation will have an impact on the majority of cyclists’ injury claims which attract compensation under £5000.

Definition of minor injury

We do not agree with the Government’s proposal to use the RTA PAP 16 (A) definition for soft tissue injuries as there is currently no satisfactory international classification of diseases (version 10) classification for soft tissue injuries. ‘S16.1XXA – Strain of muscle, fascia and tendon at neck level’ is best for injuries not involving bones. The diagnosis here is almost entirely dependent on the patient’s history. If a patient states that they are suffering to the doctor, there is no test to prove that they are not.

Additionally, while there has been an increase in whiplash claims over the last 10 years there are a number of patients who suffer injuries which require surgical treatment, which may not be clearly evident during the initial diagnosis – for example, shoulder impingement after a RTA. There are also patients who have significant disturbance in function and pain after a RTA. Therefore to categorise all RTAs as minor is misleading. The diagnosis and investigation of soft tissue disorders is often disjointed with patients falling between their GP, physiotherapists and solicitors.

It is also important to note that medical experts do not take histories under oath, do not cross examine their patients forensically and are not trained to judge malingering except in cases where there is an obviously fraudulent claim. Doctors acting as experts to the court might well be suspicious of exaggerated or fraudulent histories but in the absence of any further and better information, they are obliged to report on the ‘balance of probabilities’. The BMA firmly believes that it is for the courts to determine the validity of a patient’s account, whilst agreeing that exaggerated claims are unrecognised; some authors have identified malingering in 29% of personal injury cases.

Instead of penalising all motorists who might have genuine claims, the BMA would suggest addressing the frauds directly. For example, the government could look at banning cold-calling for claims, tightening bans on referral fees and banning targeted advertising by ‘claims-handlers’ and Personal Injury lawyers.
Psychological injury

The BMA believes that a competent examination to identify psychological injury cannot be carried out in a time frame proportionate to the fee currently provided for within the medco scheme. It would leave the process vulnerable to rubber stamping of claims as the risks to the practitioner of a challenging interview that might identify exaggerated claims, exceed the rewards.

Review of Medical records

There is consensus that the medical expert should always be remunerated for the review of medical records.

Medco

Despite Medco being set up to reduce fraudulent claims and improve transparency, the stated cost savings to consumers have not materialised.

Diagnosis approach

The BMA does not believe that an examination at six months would enable the medical expert to assess whether the claimant was still suffering from pain or other symptoms related to injuries sustained in a RTA. The medical expert can only report what the patient asserts; there is no examination to corroborate a patient’s claims.

Furthermore, at 6 months patients may still have pain, and if a prognosis is provided it will be difficult for the expert to be accurate on all occasions.

Early notification of injury/intention to claim

Many patients do seek medical treatment within the first 7 days and / or first 4 weeks.

However, there are many soft tissue injuries that patients may feel their symptoms will resolve and adopting a watch and wait policy is reasonable. The first point of contact for many of these patients is their insurance company, and the advisers are not medically trained - their advice is variable but they will often adopt a system of defer to a medical assessment. This will lead to a greater burden on NHS resources - both A&E, minor injuries units and GPs. It is also inappropriate for non-trained insurance advisors to provide information on whether a patient should seek medical advice.

Small claims track limit

The BMA does not favour a small claims approach for all personal injuries as causation may be significantly more complex in medical, or employment-related settings, requiring expert input. A move to raise the small claims limit for all cases will significantly disadvantage those cases, as their fees can not be recovered. The BMA is concerned that this proposal seriously increases the risk of attracting poor medico legal reports.

Ban on Pre-medical Offers

The BMA has concerns about the quality of some medico legal reports that are intended to discourage fraudulent claims. A report that the accident may have caused an injury is not at a
level of ‘on the balance of probabilities’ the civil test. We are aware that report writers instructed through Tier 1 and Tier 2 Medical Reporting organisations see a fraction of the fee allowed under the Medco scheme, which acts as a disincentive to risk confrontation over an unfavourable report.

Notwithstanding, in Minor Injury claims, the marginal benefit of a Medco report over a statement of fact, and that undervaluing a minor injury claim will not seriously disadvantage claimants, we agree that no offer should be made without a medical report. We hold this position in the hope that reports will use the growing evidence base.

To conclude, the BMA firmly believes that all injured patients are deserving of care, compassion and compensation. Doctors should be allowed to remain independent, unbiased medical experts reporting to the courts in the whiplash claims process.


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