

BMA House
Tavistock Square
London WC1H 9JP

T 020 7383 6042

E rzapata@bma.org.uk

BMA

England

**Whiplash Reform Team
Ministry of Justice
Post Point 10.18, 10th Floor
102 Petty France
London SW1H 9A**

Sent by email: whiplashcondoc@justice.gov.uk

17 May 2019

Dear Sir/Madam

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.

The BMA welcomes the opportunity to respond to the MoJ consultation on the future provision of medical reports in Road Traffic Accident related personal injury claims. We have focused on 4 particular questions, outlined below.

We hope that our submission is useful. Please do not hesitate to contact Reena Zapata, Senior Policy Advisor at rzapata@bma.org.uk for more information if required.

Yours sincerely



Angela Kyle
Head of Committee Services

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British Medical Association
bma.org.uk

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? Please give examples of who should be added along with your reasons.

Dictionary definitions of 'medical' include: "of or relating to medicine or for the treatment of disease or injury."¹ As such, the BMA believes that medical experts should only include doctors registered with the General Medical Council. A medical report can only be made by a member of the medical profession. Reports from other healthcare professionals must be defined as 'injury reports' or 'physiotherapy reports'. It is misleading to the patients to give the impression that non-medical professionals can provide 'medical' expertise, including 'medical reports'. This is a necessary precaution in order that claimants/patients can be protected and give properly informed consent with an understanding of the professional status of those they are dealing with.

While doctors must undergo a rigorous system of regular appraisals and revalidation, as far as the BMA is aware there is no equivalent rigorous systems for physiotherapists or other alternative therapy professionals.

If other specialties are going to be included, we would include psychiatrists if psychiatric elements are included in the definition of personal injury. Further as a significant number of personal injury cases have imaging and other investigations involved- typically, in a personal injury, an MR scan of the spine would be carried out. As such, we would argue that a medical report from a radiologist may be required.

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? Please give reasons for your answer.

No expert should report outside their area of expertise. According to the General Medical Council, "You must only give expert testimony and opinions about issues that are within your professional competence or about which you have relevant knowledge including, for example, knowledge of the standards and nature of practice at the time of the incident or events that are the subject of the proceedings."² If a particular question or issue falls outside your area of expertise, you should either refuse to answer or answer to the best of your ability but make it clear that you consider the matter to be outside your competence.³ We hold the view that the same level of rigour should be applied to any other allied health care practitioners brought into the reporting process.

¹ <https://dictionary.cambridge.org/dictionary/english/medical>

² <https://www.gmc-uk.org/ethical-guidance/ethical-guidance-for-doctors/acting-as-a-witness/acting-as-a-witness-in-legal-proceedings>

³ The Right Honourable Justice Wall (2007) *A handbook for expert witnesses in Children Act cases* Bristol: Jordans, 2nd edition.

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? If you agree, please describe which types of additional practitioner should be included and why? If you disagree, please give reasons why

Osteopaths and chiropractors conduct practices based on philosophies which are not evidence based and not subject to scientific methods like modern evidence-based medicine. They are practitioners of 'alternative medicine' and whilst they may well provide support to injured patients, they are not trained to adequate standards to be registerable with the General Medical Council. Additionally, chiropractors and osteopaths may be self-declared, and this seems to open up a rich field of litigation. As they operate solely in the private sector, they might have a vested interest. Furthermore, osteopaths and chiropractors are not subject to the same safeguards and oversight as doctors. There remain grave concerns about practitioners who used a national organisation to suppress debate about the validity of its claims that it treated many medical conditions.⁴

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

The fee should be proportionate to the work necessary to produce the report, not the value of the claim. It does not matter how low the claim value is, the medical evidence value and work required is the same. The proposals do not seem to take account of the complexity of clinical negligence cases and the amount of associated reading and paperwork which is involved in writing expert reports for such cases. This type of work is bespoke and tailor-made and as such, it is difficult to streamline the actual professional work although it is accepted that processes can be streamlined. There is a risk that few experts will take on the work if the hourly rate is too low.

Unless appropriate time and expertise are allowed for expert witness work in medical negligence claims, there is a substantial risk that the evidence for symptom exaggeration or inconsistency will be missed. Research has shown that in up to 30% of claims⁵, there was evidence of exaggeration or inconsistency suggesting malingering and failing to allow the expertise and time required to elicit this would result in accepting claims that are not meritorious.

Furthermore, the following two components should be considered when setting a fee - firstly the labour component and secondly the overheads associated with the delivery of work.

Amongst those overheads are the following items

- Costs of medical indemnity

⁴ <https://www.5rb.com/wp-content/uploads/2013/10/BCA-v-Singh-2010-EWCA-Civ-350.pdf>

⁵ Base rates of malingering and symptom exaggeration. *J Clin Exp Neuropsychol*. 2002 Dec;24(8):1094-102. [Mittenberg W¹](#), [Patton C](#), [Canyock EM](#), [Condit DC](#).

- Costs of continuing medical education
- Costs of revalidation and appraisal
- Office Costs such as heat, light and rent
- Secretarial costs
- Regulatory compliance costs.

Additional comments

MROs usually only provide value to legal firms which cannot otherwise make their own arrangements. The BMA is concerned that medical experts can feel obligated to the MRO and this may not necessarily be in the interests of justice. The BMA therefore supports Direct Medical Expert (DME) model as the preferred option.