HASSAM, LADITAN, RABOT & BRIGGS – Quantifying Whiplash and Non-Whiplash injuries together after the 31 May 2021 Whiplash tariff reforms – Consideration of the Court of Appeal judgments

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Whiplash reform recently came into force in England and Wales with the purpose of quantifying whiplash injuries in a different way to that was previously used (the Judicial College Guidelines). In essence, whiplash injuries incurred on or after 31 May 2021 became quantifiable based on a pre-determined tariff which awarded sums dependent on the duration of the whiplash injury. However, a question has lingered in the back of the minds of personal injury practitioners – if there is an overlapping non-whiplash injury (i.e., one that relies on quantification via the usual JC Guideline means), how should it be quantified?

Quantifying injuries has never been as simple as 'totting up' each injury to reach an overall sum. Instead, it is appropriate to consider overlapping injuries that have a crossover in terms of the pain, suffering and loss of amenity, to reach a figure that compensates for both injuries but does not duplicate an award. Logically, therefore, it would raise issues if a non-whiplash injury was overlapping with a 'whiplash' injury, not least because of the likely large gap in value between the tariff and common law quantification. Would the whiplash tariff prevail, would the JC Guidelines stand strong, or would there be a middle-ground interpolation? On 20 January 2023, a judgment was handed down by the Court of Appeal considering just that.

The Claimant in *Rabot* suffered a whiplash injury of 8-10 months alongside a moderate soft tissue injury to both knees with a 4–5-month prognosis. The judge valued the injury by adding the agreed tariff award (£1390) alongside the common law valued knee injury (£3890) and 'taking a step back' to reach an overlapping sum (£3100). The Defendant appealed on the basis that the calculation was wrong as a matter of law. In *Briggs* the Claimant had a 9-month whiplash injury with a 6-month prognosis for a soft tissue knee injury. The judge took a similar approach by adding the JC Guideline quantification (£3000) alongside the agreed tariff sum (£840) and reducing it to reflect the overlap (£2800).

Interestingly, the Claimants in the cases appealed the judgment, stating that the correct mechanism would be to simply 'add' the whiplash and non-whiplash injury, in a simple 'A+B' approach. By contrast, the Defendants argued that the 'bottom up' approach was the appropriate means of quantification. They stated that the tariff should be utilised to consider all the PSLA that was attributable to the whiplash injury, and one is to assess the common law value separately for what is left, increasing the overall sum to reach a similar number to the 'step back' approach that was utilised by the judges.

Expectedly, the majority judgment led by Nicola Davies LJ favoured the arguments put forward by the Defendants. Nicola Davies LJ stated that it was to be assumed that Parliament had not strayed further into the common law than necessary to remedy the issues that the reforms had presented. The purpose was to reduce the damages for whiplash injuries, but *not* to alter the position on non-whiplash injuries that relied on common law assessment through the Judicial College Guidelines. Stuart-Smith LJ went further and stated in the concurring judgment that reforms "removed certain claimants' rights to full compensation for whiplash injuries, but not for other kinds of injury".

Something that wasn't considered specifically in the caselaw and appeals, was what happens in a situation where there is a non-tariff injury coupled with a tariff injury, and the 'step back' is less than the tariff injury. Surely it would make no logical sense to reduce an award to less than the non-tariff/whiplash value?

For example, let's assume a non-tariff injury is £2700, and the tariff injury is £300. Combined, it totals £3000, but with a step back of around 20% (a figure that is artificial and is not a recognised formula but is merely being used for the purposes of this article), the total is £2400, which is less than what the Claimant would have received based on the non-whiplash injury alone. It must therefore logically follow that the decision in the Rabot judgment, (that Parliament's intention was not to reduce the non-whiplash injury value), means that in these circumstances there should be a *minimum* award that is at least equivalent to the value of the non-whiplash injury as valued by the JC Guidelines. If this was not true, there would simply be no reason to bring the whiplash claim, and Claimants need only rely on non-whiplash injuries to ensure higher compensation.

Whilst the judgment has reiterated the longstanding 'overlap' or step-back approach that has been utilised previously, practitioners are still left with little guidance on what the judgment means practically, going forward. No formula is offered on *how* to quantify injuries of this sort. It will logically, therefore, follow in future that Claimants and Defendants will be left in the hands of their legal representatives to fight for a reasonable and reflective figure for the injuries.

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Lydia has an extensive and broad legal background, having worked as a local authority prosecutor and as an independent mental health/capacity advocate before completing a specialist Personal Injury and Clinical Negligence Pupillage, inclusive of road traffic, credit hire and non-injury RTA claims.

Her experience includes working in group litigation, road traffic, industrial disease and clinical negligence - all of which she is happy to accept instructions in. Notably, Lydia spent time working alongside a partner at a leading firm of solicitors in Liverpool in Defendant clinical negligence work, assisting in serious injury claims valued at more than £24 million. Lydia has represented Claimants and Defendants alike and welcomes instructions from both.

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