DOLMANS INSURANCE BULLETIN

Welcome to the April 2024 edition of the Dolmans Insurance Bulletin

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If there are any items you would like us to examine, or if you would like to include a comment on these pages, please e-mail the editor:

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REPORT ON

Highways Matters and the Small Claims Track

S B v Central Bedfordshire Council

Accidents on highways do not always result in personal injuries. There are, for example, occasions when a vehicle will hit a pothole in the carriageway resulting in vehicle damage with no personal injuries sustained. Notwithstanding that such vehicle damage claims are likely to be allocated to the Small Claims Track, the legal arguments regarding liability are the same as those where matters are allocated to other tracks. Section 41 and Section 58 of the Highways Act 1980 apply equally to claims involving adopted highways, whether a claim is allocated to the Small Claims Track, the Fast Track or the Multi Track, and now the Intermediary Track.

In addition, other arguments may arise that potentially complicate matters further, even in Small Claims matters. This was the situation in the recent case of *S B v Central Bedfordshire Council*, where Dolmans represented the Defendant Local Authority and arguments relating to Section 278 of the Highways Act 1980 were raised, in addition to the usual arguments under the said Act.

Background and Allegations

The Claimant alleged that he was driving along a road when his vehicle hit a trench in the carriageway, causing damage to a tyre and two wheels to buckle.

The Claimant was a litigant in person and although his case was not pleaded in any great detail it was apparent that he was alleging that the Defendant Local Authority had been negligent and/or in breach of its duty under Section 41 of the Highways Act 1980.

The Claimant did not suffer any personal injuries and his claim was limited to vehicle damage. Given the value of the Claimant's claim, the matter was allocated to the Small Claims Track.

REPORT ON

Status of Carriageway and Section 278 Agreement

The relevant carriageway was part of the adopted highway. However, at the time of the Claimant's alleged accident, there was an Agreement in place between the Defendant Local Authority and the Housing Developer of the land adjacent to the carriageway under Section 278 of the Highways Act 1980. This allowed the Housing Developer to enter into a legal agreement with the Defendant Local Authority to make permanent alterations or improvements to the public highway as part of a planning approval without requiring specific authority from the Defendant Local Authority to do so.

Under the said Agreement, the Housing Developer was to undertake highways improvement works in relation to its new development on adjacent land.

The alleged trench had been created by the said Housing Developer and it was argued on behalf of the Defendant Local Authority that the Housing Developer had control of the relevant site by way of the relevant Section 278 Agreement.

The trench resulted from the installation of a 300mm diameter culvert/crossing under the carriageway at the relevant location. The said installation was shown on a drawing within the Section 278 Agreement, under which any works were to be undertaken to the complete satisfaction of the Defendant Local Authority.

Section 41 and Section 58 of the Highways Act 1980

It was argued on behalf of the Defendant Local Authority that the trench was not dangerous for the purposes of Section 41 of the Highways Act 1980 and the Claimant was put to strict proof regarding the same.

The accuracy of the Claimant's measurements of the alleged defect were disputed. The said measurements had been photographed from an angle and without any level/straight edge.

As part of the adopted highway, the Defendant Local Authority had an appropriate system of regular driven inspections and maintenance in place. The Defendant Local Authority inspected the relevant location just three days prior to the date of the Claimant's alleged accident, when no actionable defects were noted and no action was deemed necessary at that time. There was also a reactive system of inspection and maintenance in place.

The relevant location had also been inspected approximately one week before this, following a complaint by a local resident, when it was noted that the temporary reinstatement of the trench was "failing fast"; although, again, not dangerous or actionable at that stage for the purposes of Section 41 of the Highways Act 1980. The matter was, however, reported to the Housing Developer who had created the trench, which was monitored by the Defendant Local Authority in the meantime.

There were no other reported complaints and/or other accidents regarding the trench during the twelve month period prior to the date of the Claimant's alleged accident.

The Defendant Local Authority argued, therefore, that it had an appropriate system in place and, as such, a Section 58 Defence in this particular matter.

REPORT ON

Terms of Section 278 Agreement and Indemnity Clause

The relevant Section 278 Agreement referred specifically to the Defendant Local Authority's construction specifications, which were also in the public domain and readily available to the Housing Developer. The Agreement clearly stated that improvement works shall be done in accordance with the above specifications and that such improvement works must be undertaken in a good and workmanlike manner, using all professional skill and care, and in accordance with good practice for works of the type, size and complexity comprised in the improvement works.

The Agreement also stated that the Housing Developer shall during the course of implementing the improvement works, and without prejudice to any policies of insurance at its own expense, reinstate or repair any damage caused or occurring through the fault of the Housing Developer or its contractors, servants, agents or workmen to any public highway or to any apparatus or services belonging to any statutory undertakers.

Under the said Section 278 Agreement, the Housing Developer was also responsible for ensuring that sufficient lighting and warning signs were present, although there was already a street light nearby which would have illuminated the relevant location.

Although not dangerous or actionable in accordance with the Defendant Local Authority's safety defect criteria for the adopted carriageway, the Defendant Local Authority considered that the improvement works had not been undertaken to the standards required by the Section 278 Agreement, hence its request that the Housing Developer complete the same to such standard prior to the date of the Claimant's alleged accident.

At the time of the Small Claims Hearing, permanent reinstatement had still not been completed, although further temporary works had been undertaken to the trench.

There was also a maintenance period built into the Section 278 Agreement which would begin after works had been completed and placed a duty upon the Housing Developer to maintain the works until a final certificate was issued. As the said works had not been completed, the final certificate had not, therefore, been issued, even at the time of the Small Claims Hearing.

Finally, the said Section 278 Agreement contained an indemnity clause, whereby the Housing Developer would effectively indemnify the Defendant Local Authority in respect of third party damage resulting from the improvement works undertaken by the Housing Developer. Hence, the Defendant Local Authority argued that the Housing Developer should indemnify in this particular matter and had put the Housing Developer on notice of the same by way of various letters sent both before and after Court proceedings were issued. The Housing Developer was also notified of the Small Claims Hearing date, but did not attend and did not respond to the relevant letters sent on behalf of the Defendant Local Authority.

REPORT ON

Evidence and Procedures

The detail provided in any Defence and witness evidence in a Small Claims matter is equally as important as in any other matter and, indeed, the Court will expect the same high degree of care to have been undertaken in preparing a matter for final hearing, irrespective of allocation.

In the current matter, a robust Defence was filed and served on behalf of the Defendant Local Authority disputing dangerousness, maintaining an appropriate Section 58 Defence and detailing the terms of the Section 278 Agreement with the Housing Developer.

Detailed witness evidence was obtained from relevant personnel within the Defendant Local Authority's Highways Department, who were also called to give oral evidence at the Small Claims Hearing.

The Defendant Local Authority's position was reserved regarding possible future action against the Housing Developer subject to the outcome of the Small Claims Hearing, and the Claimant chose not to join the Housing Developer into the current action despite having been made aware of the relevant issues.

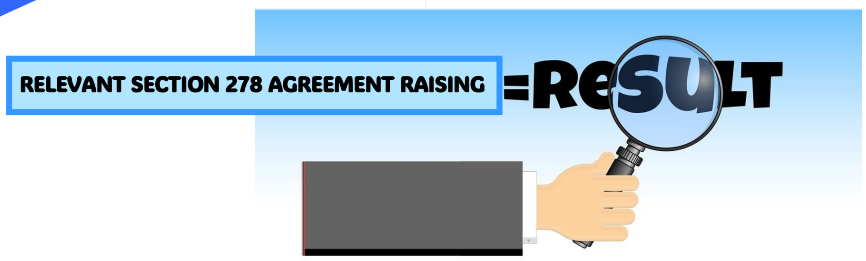
Judgment

The Judge had considered all of the said pleadings and written witness evidence, including the relevant Section 278 Agreement, prior to the Small Claims Hearing and was satisfied that the Claimant should be pursuing his claim against the Housing Developer and not the Defendant Local Authority.

As such, the Judge dismissed the claim against the Defendant Local Authority without needing to hear any oral evidence by the Defendant Local Authority's witnesses and granted the Claimant permission to join the Housing Developer into the action as a Defendant.

The Judge remained silent regarding costs, so that the Defendant Local Authority could pursue payment of its costs from the Housing Developer in accordance with the indemnity clause within the Section 278 Agreement.

REPORT ON



Comment

By raising the relevant Section 278 Agreement in the Defence and dealing with the same in some detail within the Defendant Local Authority's witness evidence, the Judge was able to identify the issues to such an extent that the court was able to dismiss the claim against the Defendant Local Authority and effectively deflect the same to the relevant Housing Developer without needing to hear any oral evidence.

Although the Claimant's costs in such a Small Claims matter would usually be limited to fixed costs and the Defendant unlikely to recover any such costs, the Defendant Local Authority in this particular matter was able to attempt to recover its total costs from the Housing Developer given the indemnity clause within the relevant Section 278 Agreement.

The approach taken to defend this particular matter, therefore, resulted not only in the Defendant Local Authority avoiding having to pay for the Claimant's alleged vehicle damage, but also potentially recovering all of its costs incurred in the matter.

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CASE UPDATES

Asbestos - Duty of Care - Foreseeability

White v Secretary of State for Health and Social Care;
Cuthbert v Taylor Woodrow Construction Holdings
[2024] EWCA Civ 244

In these conjoined appeals, the Court of Appeal upheld the dismissal of the Claimants' claims for damages attributable to the contraction of mesothelioma and subsequent deaths of those whose estates the Claimants represented. The appeals raised the issue of whether the Trial Judges had applied the correct legal test for establishing a duty of care.

At the respective trials, it was found that Mr White was exposed to asbestos from 1949 to 1960 when working at Sefton General Hospital and that the exposure was intermittent and in very low quantities. It was found that Mr Cuthbert's exposure to asbestos when working for his employers between 1956 and 1959 was 'of a low order, light and intermittent'. In both cases it was held that there had been no breach of duty. The Claimants appealed on the grounds that the Trial Judges had failed to apply the right test of foreseeability when deciding whether or not the employers owed a duty to their employees. It was submitted that the Trial Judges should have found that the employers owed a duty to take precautions against the risk of injury created by the exposure of their employees to asbestos. The Claimants relied primarily on observations in the cases of *Jeromson v Shell Tankers (UK) Ltd [2001]*, *Maguire v Harland & Wolff plc [2005]* and *Owen v IMI Yorkshire Copper Tubes Ltd (1995)* to the effect that from at least 1951 the risks of asbestos were sufficiently well known, and sufficiently uncertain in their extent and effect, for employers to be under a duty to reduce exposure to the greatest extent possible.

The Court of Appeal reviewed an agreed list of 28 publications regarding the state of knowledge of the risks of inhaling asbestos during the relevant periods of exposure in these claims, which the Court considered provided clear evidence in support of 8 propositions set out at paragraphs 104 to 111 of the Judgment. These included, in summary, that the risks which were appreciated to arise from the inhalation of asbestos were, until the 1960s, the risks of asbestosis and, later, lung cancer. The risks were thought to arise on what would now be regarded as substantial exposure to asbestos. There was a sea-change in the perception of risk after 1960 and dramatically so after the publication of a report in 1965 (Newhouse and Thompson). There is no evidence to support the proposition that employers before 1960 should have appreciated that exposure to asbestos at levels below what were thought necessary to create a risk of asbestosis (and subsequently lung cancer) would give rise to a foreseeable risk of pulmonary or other personal injury. Repeated references to MCPs, TLVs and enforcement levels were relevant evidence to support the proposition that, in the period up to the end of the 1950s, it was not reasonably foreseeable by employers that exposure to asbestos at levels significantly lower than those apparently endorsed thereafter gave rise to a significant foreseeable risk of injury.

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The Court noted that it is not, and never has been, the law that a person is obliged to take all possible steps to prevent the occurrence of a risk that is not reasonably foreseeable. A risk does not become foreseeable simply because hindsight shows that it has not been excluded; and the mere fact that a certain level of exposure to asbestos is recognised to be dangerous does not necessarily give rise to a foreseeable risk of injury in the event of different levels of exposure or different contexts.

It is now generally recognised that there is no safe level of exposure to asbestos. With the benefit of hindsight and current knowledge, it is, therefore, trite to say that an employer is under a duty to reduce exposure to the greatest extent possible. That proposition, however, is dependent upon current understanding of the risk of mesothelioma, which was not in contemplation before the 1960s. The only risks identified as foreseeable in the period before the 1960s were asbestosis and, subsequently, lung cancer, both of which were understood to be caused by substantial exposure.

The issue in the appeals was whether during the 1950s a reasonable and prudent employer, taking positive thought for the safety of their employees in the light of what they knew or ought to have known, should have appreciated that there was a foreseeable risk of personal injury if their employee was exposed to the levels of asbestos found by the respective Trial Judges in these cases. There was no evidence in the literature to suggest that there was any appreciation at that time that there was any foreseeable risk from exposure to asbestos other than asbestosis and lung cancer. The fact that the risks from lower levels of exposure had not been excluded was neither determinative nor particularly relevant. What mattered was whether there was a foreseeable risk of injury against which the employers should have protected their employees. There had been no error of law or approach by the Trial Judges in these cases. The findings in fact as to the level and frequency of exposure could not be impugned. The levels of exposure were very low or trivial. The conclusions that there was no breach of duty were upheld.

Fundamental Dishonesty - "Substantial Injustice"

Williams-Henry v Associated British Ports Holdings Limited [2024] EWHC 806 (KB)

In a claim for damages for personal injury where the Claimant was found to have been fundamentally dishonest within the meaning of the Criminal Justice and Courts Act 2015 s.57, the Court set out the factors which were relevant to any enquiry into "substantial injustice". A very detailed and lengthy Judgment contains a detailed consideration of the issues relating to the "substantial injustice" provisions of s.57, with particular reference to the facts of this case.

CASE UPDATES

Background

The Claimant's claim was a moderately severe brain injury and pain case. The claim was valued at £3.5 million on a full liability basis (liability was settled two-thirds in the Claimant's favour). The Counter Schedule served by the Defendant admitted either £374,000 or £552,000 on a full liability basis. The Claimant had made some recovery from her injuries and returned to work before the instruction of a case manager and neuropsychologist recommended that she cease work for rehabilitation. The Court found that this recommendation was iatrogenic and inappropriate, and was critical of the case manager and treating psychologist. It was contended that the Claimant had lost capacity largely because of her deteriorating mental health. She was not a good witness and the Court found her to be a fundamentally dishonest Claimant in light of contrasting DWP records, personnel records, social media depictions, extensive video surveillance and a life insurance application form arising after the accident.

Section 57(2)

Under s.57(2), where a Court has found that a claimant is entitled to damages but that they have been fundamentally dishonest, the Court has to dismiss the claim unless it is satisfied that the claimant would suffer "substantial injustice".

Section 57(3)

Under s. 57(3), the duty under s.57(2) includes the dismissal of any element of the claim in respect of which the claimant has not been dishonest. The aim of s.57(3) is to punish dishonesty by dismissal, but that was tempered by Parliament's inclusion of s.57(2).

"Substantial Injustice"

The Court held that the correct approach when deciding whether a substantial injustice arose was to balance all of the facts, factors and circumstances of the case.

The relevant factors were all of the circumstances and included:

(1) The amount claimed when compared with the amount awarded.

(2) The scope and depth of that dishonesty found to have been deployed by the claimant.

(3) The effect of the dishonesty on the construction of the claim by the claimant and the destruction/defence of the claim by the defendant.

(4) The scope and level of the claimant's assessed genuine disability caused by the defendant.

(5) The nature and culpability of the defendant's tort.

(6) The Court should consider what it would do in relation to costs if the claim was not dismissed – i.e. whether the Court would award most of the trial and/or pre-trial costs to the defendant in any event because fundamental dishonesty had been proven. Also, whether the claimant would have to pay some or all of their own lawyer's costs out of damages if the claim was not dismissed (this went towards determining what damages would be left for the claimant after costs awards, costs liabilities and adverse costs).

(7) Whether the defendant had made interim payments, how large they were and whether the claimant would be able to afford to pay them back.

(8) The effect that dismissing the claim would have on the claimant's life, such as whether they might lose their house, have to live on benefits or be unable to work.

Decision

In the instant case, the Court held that it would not be a substantial injustice to dismiss the Claimant's claim. Whilst the Claimant was being deprived of an award of £596,704 (after the deduction of the agreed contributory negligence), which was a large sum of money, by drafting and passing s.57 Parliament sought to stamp out dishonesty which was fundamental in a personal injury claim and the Claimant had breached that law. She had grossly exaggerated the effects of her injuries to medical experts, she had failed to disclose holidays abroad, spa trips, attendance at weddings, rock and pop concert attendances, all of which created a false impression of extensive disability for financial gain.

Further, the Claimant was wholly unrepentant when giving evidence and had sought, in parallel, to defraud the DWP and her insurer about her disabilities. She had exaggerated the effects of her injuries in a DWP claim for benefits. Whilst much of that was collateral, it gave the impression of a Claimant willing to lie for financial gain.

The Claimant's claim was dismissed in its entirety. The Claimant was allowed some mitigation in that she was not ordered to repay interim payments which had already been paid.

CASE UPDATES

Neglect - Failure to Remove - Human Rights

SZR v Blackburn with Darwen Borough Council [2024] EWHC 598 (KB)

The Claimant, a 24 year old woman who has autism, ADHD and learning difficulties, brings proceedings under the Human Rights Act 1998 alleging that she suffered serious neglect over a period of several years in her mother's care and the Defendant's social services' failure to take earlier action violated its positive obligations to protect her Article 3 and/or Article 8 ECHR rights. The Defendant unsuccessfully applied for summary judgment or an order striking out the claim.

The Defendant contended that the Claimant had no real prospect of succeeding on and/or no reasonable grounds for arguing that the treatment she was experiencing was of sufficient severity to cross the high threshold required for Art. 3; that the Defendant was on notice of a real and immediate risk of the Claimant experiencing such treatment; that the Defendant did not take reasonable measures to safeguard the Claimant from the risk of Art. 3 treatment and/or that but for the alleged breaches the Claimant would not have suffered the treatment said to cross the Art. 3 threshold. Further, no separate claim had been pleaded in respect of a breach of Art. 8 and that if the Art. 3 claim failed the Art. 8 claim would also necessarily fail.

The Judge noted that, unlike *AB v Worcestershire CC [2023]*, this claim did not revolve around a finite and relatively small number of incidents, but on the cumulative picture of various aspects of the Claimant's treatment over several years. The Claimant's pleaded claim involved a child rendered vulnerable by age and disability who was living in an extremely dirty house, was given dirty and inadequate clothing, at times had no footwear, was observed walking around in the filth with nothing on her feet, had an untreated ankle injury that was causing her to limp, had a poor diet, had poor personal hygiene, was infested with nits, had limited access to education, was living in an isolated family environment with limited social contact and had a mother whose parenting skills were severely restricted by her own learning difficulty, misuse of alcohol and poor mental health.

The Judge noted that the authorities are clear that the assessment of Art. 3 severity is fact specific. There were several features of this claim that were similar to the facts of *Z v UK (2002)*. In *AB*, the Court of Appeal confirmed that *Z v UK* indicates that, in the context of alleged failure to remove a child from the care of the parent, '*serious and prolonged ill-treatment and neglect, giving rise to physical or psychological suffering'* is capable of amounting to treatment contrary to Art. 3. That test was arguably met in this case.

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In relation to risk, the Defendant contended that it took reasonable steps to bring about improvements in the Claimant's home conditions which were effective, at least in the short term, such that at no point was the Defendant on notice of a real and immediate risk of Art. 3 treatment. The Claimant argued that to adopt an approach that limited the applicability of Art. 3 to the immediate alleviation of risk would render the right no longer practical and effective. The Judge considered this a novel legal issue which could only properly be resolved on the basis of findings of fact and it was, therefore, unsuitable for summary determination. Further, the Judge noted that even if the Defendant's analysis was correct, given what was known about the inability to sustain improvements and how rapidly any deterioration might re-start, it was arguable that risk of Art. 3 treatment to the Claimant remained present and continuing.

In relation to breach, the Claimant had supportive social work expert evidence. The Defendant submitted that the expert had not addressed the correct question, namely whether what the social workers had done was sufficient to ameliorate the Art. 3 risk, which the Defendant contended it was. Whilst the Judge noted that the Defendant might succeed at trial, they had not satisfied the Judge that the Claimant's case had no real prospect of success and/or no reasonable grounds for advancing it.

The Defendant's submission on causation did not reflect the fact that it was sufficient for the Claimant to show a real prospect of altering the outcome or mitigating the harm suffered, and the Defendant had, therefore, not proved summary judgment or strike out was appropriate on this issue.

As regards the Art. 8 claim, a person's 'private life' for Art. 8 purposes encompasses their physical and psychological integrity. The Judge considered there was nothing improper in the Claimant's Art. 8 claim having been pleaded on the same factual basis as her Art. 3 claim. Whilst it was right to recognise that an Art. 8 claim should not be treated as an alternative to an Art. 3 claim simply with a lower threshold, there had been cases in which a person's experiences had been found to be outwith Art. 3 but to engage Art. 8. The Judge, therefore, accepted the Claimant's submission that if her Art. 3 claim failed she may nevertheless succeed in her alternative claim under Art. 8. Prolonged neglect of the sort alleged here was clearly capable of impairing a person's physical and psychological integrity. The Judge considered the Claimant had reasonable prospects of showing at trial that the Defendant's failure to remove her from her mother's care violated her Art. 8 rights.

Accordingly, the Defendant's Applications were dismissed.

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Whiplash Injuries - Measure of Damages - PSLA

Hassam v Rabot
[2024] UKSC 11

The Supreme Court has set out the proper approach to assessing damages payable for PSLA where a personal injury claimant in a road traffic accident case has suffered both whiplash injury for which the Civil Liability Act 2018 s.3 limits the damages payable by reference to a tariff set out in the Whiplash Injury Regulations 2021 reg.2 and non-whiplash injury for which damages are not so limited.

Interpretation

The issue before the Supreme Court was one of statutory interpretation of Part 1 of the Civil Liability Act 2018, specifically the meaning of s.3:

"… (2) The amount of damages for the [PSLA] payable in respect of the whiplash injury is to be an amount specified in regulations … (8) 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 [PSLA] that reflects the combined effect of the person's injuries (subject to the limits imposed by regulations under this section)".

The Supreme Court held that the wording of s.3(2) makes it clear that the tariff amount is confined to damages for PSLA "*in respect of the whiplash injury or injuries*". That wording plainly does not extend the tariff amount to PSLA in respect of non-whiplash injuries.

The opening words of s.3(8), and the reference to an amount "*that reflects the combined effect*", indicates that the statute is, in general, not departing from the standard common law approach to assessing damages for multiple injuries, but the closing bracketed words show that the common law approach must not be applied in such a way as to be inconsistent with imposing the tariff amount laid down in the 2021 regulations.

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The Correct Approach

The Supreme Court held that the correct approach, based upon the wording of s.3(2) and 3(8), was that one should first add together the tariff amount for the whiplash injury and the common law damages for PSLA for the non-whiplash injury. Then one should stand back to consider whether to make a deduction to reflect any overlap between the two amounts (i.e. where both amounts cover the same PSLA), but any deduction must be made from the damages for the non-whiplash injury because the tariff amount, if a statutory fixed sum, and the deduction should not reduce the overall amount of damages to be awarded below the amount that would be awarded for the non-whiplash injury alone. This was the approach laid down by the majority of the Court of Appeal in this test case (and was the approach basically adopted by the Judge at first instance).

Having determined the correct approach to take, the Supreme Court considered that it may be helpful to spell out precisely what that approach required.

Where a claimant is seeking damages for PSLA in respect of whiplash injuries (covered by the 2018 Act) and non-whiplash injuries a Court should:

(i) Assess the tariff amount by applying the table in the 2021 Regulations.

(ii) Assess the common law damages for PSLA for the non-whiplash injuries.

(iii) Add those two amounts together.

(iv) Step back and consider whether one should make an adjustment. The adjustment must reflect, albeit in a rough and ready way, the need to avoid double recovery for the same PSLA.

(v) If it is decided that a deduction is needed, that must be made from the common law damages.

(vi) However, this is subject to the "caveat" that the final award cannot be lower than would have been awarded as common law damages for PSLA for the non-whiplash injuries had the claim been only for those injuries.

(vii) Where the exceptionality requirement applies (where the whiplash injuries are "exceptionally severe" or where the person's exceptional circumstances increase the PSLA), the tariff amount being assessed at the first step may be increased by up to 20%.

For further information on any of the above cases, please contact:

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