

Written evidence submitted by DAC Beachcroft Claims Limited (PCB 17)

The Prisons and Courts Bill – Part 5: Whiplash

About DAC Beachcroft Claims Limited

DAC Beachcroft Claims Ltd provides general insurance claims litigation and claims handling services to insurers in England and Wales. A subsidiary of DAC Beachcroft LLP which services Scotland, Ireland and global markets, we have more than 500 insurance professionals and act for nine of the top ten UK general insurers and have expertise and experience across the entire sector. Our long history of commitment to, and investment in, the insurance sector means that we have an unrivalled depth of experience and breadth of insight. Our claims business reacts quickly to the dynamic claims industry and the changing needs of our clients whilst providing a local service with the support of a global network.

Our personal injury team has a deserved market-leading reputation for providing innovative and pragmatic solutions to liability claims disputes of all types and insurance issues generally. We pride ourselves on delivering commercial, value-driven legal services. With specialist expertise covering catastrophic injury, claims validation, costs, credit hire, disease and safety, health and environment law, the team covers the full range of personal injury work. Our strategic litigation unit offers a unique service for insurers dealing with emerging and important market issues.

DAC Beachcroft Claims Limited has responded to previous consultation papers regarding the government's whiplash reform programme, including '*Reducing the number and cost of whiplash claims*' dated 7 March 2013, '*Whiplash Reform: Consultation on independence in medical reporting and expert accreditation*' dated 13 September 2014, and '*Reforming the soft tissue injury (whiplash) claims process*' dated 17 November 2016.

As a key stakeholder in the defendant personal injury claims market, DAC Beachcroft Claims Limited is delighted to have the opportunity to give its views on the Prisons and Courts Bill 2017 and the arrangements it includes to address the government's stated policy objectives of cutting the number of minor, exaggerated and fraudulent claims in order to reduce insurance premiums for motorists.

Executive Summary

1. The Prisons and Courts Bill, as currently drafted, may unintentionally exclude from the scope of the tariff scheme the following:
 - lower back and shoulder injuries and injuries to the upper torso where there is no injury to the neck.
 - claims resulting from a collision on private property or property to which access is restricted

- claims where the victim is being driven in the course of employment or in which arguments exist that there was a breach of statutory duty, notwithstanding the fact that the breach does not found a cause of action
2. Through amendment to the Bill, claims which it is intended to include within the tariff scheme can be brought within its remit, rather than unintentionally excluded from it.

Clause 61(1) and (2): Whiplash Injury etc.

The current definition of a whiplash injury is unclear and will not include a proportion of the claims intended

3. At present, the definition of a whiplash injury means an injury or set of injuries of the neck or the neck and upper torso.
4. It excludes any whiplash injury to:
 - the lower back or shoulder both of which are very common as neither of these fit within the definition of "upper torso"; and
 - an injury to the upper back but not the neck.
5. It is also not clear how the tariff would be applied to a case where there is a "whiplash injury" and some other minor injury (for example bruising to leg or arm), but it appears possible that damages for such claims could actually increase unless such minor injuries were captured within the definition.
6. The definition does not cover minor psychological injury, which is currently dealt with in clause 62, but is completely undefined. It would appear better to capture this within the definition of whiplash itself.
7. Should the definition remain as it is in clause 61, there is a risk that there will be a significant disparity in damages paid between Claimants who suffer a soft tissue injury to the neck alone, and those who suffer such an injury together with minor bruising to another part of the body, for example due to their knee colliding with the interior of their vehicle. At present the bill would allow for additional damages to be paid for such minor injuries, which could in fact lead to an increase as against current levels of general damage, which is not the Government's stated intention.
8. One of the intentions of the proposed legislation is to reduce the proportion of claims presented which are fraudulent, and to tackle the 'compensation culture'. The wording of the Bill, as currently drafted, will enable Claimants to assert that their injuries fall outside the remit of the tariff scheme by arguing that injury sustained was to the upper torso or back alone; this will facilitate Claimants' escaping the tariff scheme and reduce significantly the savings which are the stated intention of this Bill.
9. These problems can be easily solved by a more open definition in the Bill, with the detail of what should be included or excluded more closely defined in Regulations. The Regulations

are already subject to the affirmative resolution procedure, and therefore Parliament will have the opportunity to scrutinise the final proposal.

Proposed new wording of 61(1)

Alternative A

10. If there is no need to be specific in the statute as to the type of injury, then this option would give maximum flexibility to be more specific in the Regulations:

"In this Part "whiplash injury" means an injury, or a set of injuries, that is of a description specified in regulations to be made by the Lord Chancellor."

Alternative B

11. If Alternative A is thought too wide or if a part of the body has to be specified, then this might be suitable:

"In this Part "whiplash injury" means an injury, or a set of injuries, that-

- (a) consists of or includes an injury to the neck or body;*
- (b) may include a minor psychological injury; and*
- (c) is of a description specified in regulations to be made by the Lord Chancellor."*

Alternative C

12. This alternative is also proposed, being more specific than Alternative A as it refers to soft-tissue injuries:

"In this Part "whiplash injury" means a soft-tissue injury or psychological injury, or a set of injuries including soft-tissue injury or psychological injury, that is of a description specified in regulations to be made by the Lord Chancellor."

13. Insofar as the regulations are concerned, we note that the definition used by MedCo since October 2014 is broadly drawn and has worked well in practice.

14. The current definition used by MedCo, set out in the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents paragraph 1.1(16A) is as follows:

"soft tissue injury claim' means a claim brought by an occupant of a motor vehicle where the significant physical injury caused is a soft tissue injury and includes claims where there is a minor psychological injury secondary in significance to the physical injury"

15. We propose using a wording which remains broad in scope, but which also expressly includes minor psychological injury claims where there is no physical injury claimed, and propose a wording as follows:

"a claim brought by the occupant of a motor vehicle where the main physical injury caused is a soft tissue injury and extends to claims where there is a psychological injury (whether or not associated with a physical injury)."

16. Any cases which should not be caught by this definition can be specifically excluded, for example a soft-tissue injury to the arm or leg which does not also involve an injury to the neck or body, or specific clinically diagnosed conditions such as Post Traumatic Stress Disorder.

Clause 61(3)(a) and (c): Whiplash Injury etc.

The current wording of the Bill will exclude a number of claims due to the location in which the collision takes place

17. At present, the wording of the Bill requires the collision to take place *on a road or other public place in England and Wales*. This is consistent with the requirements of s.143 of the Road Traffic Act 1988, but is not consistent with the decision of the Court of Justice of the European Union in *Damijan Vnuk v Zavarovalnica Triglav*. We note the ongoing consultation in relation to motor insurance, which closes on 13 April 2017.
18. This definition will exclude a number of collisions which take place on private property, on which the parties involved in the accident are lawful visitors, and may exclude collisions in which one party was permitted to be driving in the location and the other was not, for example if the person suffering the injury was trespassing on private property.
19. Locations in which collisions would be excluded should be expected to include roads within Royal Estates and Parks, National Trust or English Heritage properties, private estates and properties, and the land controlled by the Ministry of Defence including roadways around accommodation quarters.
20. We propose amending the definition, to conform with any amendment to the Road Traffic Act 1988 if it is amended in order to comply with *Vnuk*.

Clause 61(3), (4) and (5): Whiplash Injury etc.

The current wording of the bill will exclude a proportion of claims due to the presence of a breach of statutory duty

21. The Explanatory Notes to the Prisons and Courts Bill state that:

The effect of subsection (5) is to include cases where a driver has caused an RTA by their negligence, but the acts constituting the negligence could also be relied on to establish another cause of action, such as a breach of statutory duty, against them or somebody else.

(<https://www.publications.parliament.uk/pa/bills/cbill/2016-2017/0145/en/17145en.pdf>)

22. Unfortunately, the current drafting of clause 61(3)(e), in combination with 61(4) and 61(5) does not fulfil the stated aim of the Bill.

23. At present, the wording of the relevant clauses of the Bill is as follows:

(3) (e) *the case is not excluded by subsection (4).*

(4) A case is excluded by this subsection if the act or any one or more of the acts causing the injury also constitutes or together constitute a breach of one or more relevant statutory provisions.

(5) The requirement in subsection (3)(b) is to be treated as satisfied in a case where the act or acts constituting the negligence of the other person or persons is or are also sufficient to establish another cause of action (subject to subsection (3)(e)).

24. The wording of Clause 61(4), rather than including claims where there may have been a breach of statutory duty, specifically excludes them.

25. Whilst the implementation of The Enterprise and Regulatory Reform Act 2013 s.69 provides an amendment to The Health and Safety at Work etc. Act 1974 s.47, with the result that:

Breach of a duty imposed by a statutory instrument containing (whether alone or with other provision) health and safety regulations shall not be actionable except to the extent that regulations under this section so provide.

the statutory duties continue to exist, and it is foreseeable that the circumstances of a road traffic collision may give rise to arguments that there was a breach of statutory duty.

26. Examples of the circumstances in which there may be a breach of statutory duty include road traffic accidents in which an employer's employees are both driver and passenger in a vehicle. Alongside allegations of negligence on the part of the driver, the employee passenger may argue that the employer was in breach of statutory duty, for example:

- breach of reg.4(3) of the Provision and Use of Work Equipment Regulations 1998, should the weather conditions be such there was a foreseeable risk of accident;
- breach of reg.9 of the of the Provision and Use of Work Equipment Regulations 1998, through argument that the driver employee was not provided with adequate training (e.g. in the use of a pool or hire car);
- breach of reg.3 of the Management (Health Safety and Welfare) Regulations 1999, on the basis that the employer failed to perform an adequate risk assessment for use of a vehicle (e.g. a hire car) or the journey in question.

27. Although the alleged breach of statutory duty would not be sufficient alone to found a cause of action, following the implementation of the Enterprise and Regulatory Reform Act 2013, the presence of the breach of statutory duty, which may or may not also constitute negligence, would see the claim excluded from the tariff scheme.

28. In turn, as presently drafted, the exclusion of claims where there is an argument that breach of statutory duty caused the accident will see a large number of claims excluded from the scope of the tariff, resulting in a disparity in the level of damages awarded between those within and those excluded from the scheme, and a significant amount of satellite litigation over whether accidents were caused by the breach of statutory duty, or the breach of statutory duty was part of the circumstances of the case but not causative of the accident.

29. An example of a case which be excluded from the tariff scheme due to the current wording would be that of *John Holey v Tuffnells Parcels Express*, which is set out in Appendix 1 below.

Proposed new wording of 61(3)(e), (4) and (5)

30. In order to ensure that the Bill has the stated aim set out above, we propose the following amendments:

~~(3) — (e) — the case is not excluded by subsection (4).~~

~~(4) — A case is excluded by this subsection if the act or any one or more of the acts causing the injury also constitutes or together constitute a breach of one or more relevant statutory provisions.~~

(5) The requirement in subsection (3)(b) is to be treated as satisfied in a case where the act or acts constituting the negligence of the other person or persons is or are also sufficient to establish another cause of action ~~(subject to subsection (3)(e)).~~

31. Through the deletion of clause 61(3)(e) and (4), and the deletion of the final clause of 61(5), the stated aim set out in the explanatory notes should be met.

Appendix 1

John Holey v Tuffnells Parcels Express

His Honour Judge Gosnell in the County Court at Leeds, 10 September 2013
Case No 2YN12115.

32. The Claimant alleged that, due to the presence of a warning light in his vehicle's cab, he was caused to stop on the hard shoulder of a motorway, and, in descending the steps from his cab, slipped and fell; he alleged that, as the warning light was illuminated, the vehicle was either defective or not in efficient working order, and that this caused his injuries. Although an employer's liability claim presented for injuries suffered in the course of his employment, rather than following a road traffic accident, this case is a good example of one in which a breach of statutory duty was alleged to have played a causative role when, in reality, it formed part of the background circumstances giving rise to the accident.
33. Should the wording of Clause 61 remain as it is, satellite litigation over whether a breach of statutory duty played a causative role in an accident should be anticipated, taking up a significant amount of the courts' time and wiping out the savings this Bill is intended to deliver.