



Neutral Citation Number: [2023] EWCA Civ 19

Case No: CA-2022-001805; CA-2022-001806; CA-2022-001915

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT BIRKENHEAD
DISTRICT JUDGE HENNESSY

Claim No: J10Y826 (Rabot)

Claim No: J10YJ855 (Briggs)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 January 2023

Before :

THE MASTER OF THE ROLLS
LADY JUSTICE NICOLA DAVIES

and

LORD JUSTICE STUART-SMITH

Between :

CHARLOTTE VICTORIA HASSAM

- and -

BOLUWATIFE LADITAN

Appellants

- AND -

YOANN SAMUEL RABOT

- and -

MATTHEW DAVID BRIGGS

Respondents

- AND -

THE ASSOCIATION OF PERSONAL INJURY LAWYERS
AND THE MOTOR ACCIDENT SOLICITORS SOCIETY

Interveners

Darryl Allen KC (instructed by DAC Beachcroft) for the Appellants
Benjamin Williams KC and Shannon Eastwood (instructed by Robert James Solicitors) for
the Respondents
Robert Weir KC and Sam Way (instructed by Hugh James Solicitors) for the Interveners

Hearing date : 30 November 2022

Approved Judgment

This judgment was handed down remotely at 10.00am on 20 January 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Nicola Davies :

1. These appeals have been accepted by the Court of Appeal from the County Court in Birkenhead because they raise an important question as to the construction of section 3 of the Civil Liability Act 2018 (“the 2018 Act”). The question raised is: how is the court to assess damages for pain, suffering and loss of amenity (“PSLA”) where the claimant suffers a whiplash injury which comes within the scope of the 2018 Act and attracts a tariff award stipulated by the Whiplash Injury Regulations 2021 (“the Regulations”), but also suffers additional injury which falls outside the scope of the 2018 Act and does not attract a tariff award?
2. The appeal and cross appeal in *Rabot v Hassam* (“*Rabot*”) and the appeal and cross appeal in *Briggs v Laditan* (“*Briggs*”) concern claims which arise out of a road traffic accident (“RTA”) as a result of which each claimant suffered whiplash and other injuries.

The whiplash injury reforms

3. The Explanatory Notes to the 2018 Act identify the purpose of the legislation as being “...to reform the claims process for road traffic accident related whiplash injuries, and to make changes to the way in which the personal injury discount rate ... is set.”
4. The mischief at which the legislation was directed is identified in the Explanatory Notes namely:

“Policy background

3. In June 2017, the Conservative party formed a Government with a manifesto to “reduce insurance costs for ordinary motorists by tackling the continuing high number and cost of whiplash claims”. The Act contains measures that give effect to policies outlined in previous Government consultation responses regarding whiplash injuries arising from road traffic accidents
.....

Whiplash

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7. The continuing high number of whiplash claims increases the cost of motor insurance premiums, paid by motorists in England and Wales. The Government has set out its view that the level of compensation paid to claimants for these claims is also out of proportion to the level of injury suffered, and that it intended to introduce measures to reduce the costs of civil litigation whilst ensuring genuinely injured claimants continue to receive a proportionate amount of compensation. These measures disincentivise minor, exaggerated and fraudulent claims....
.....

Legal Background

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Whiplash

There are currently no legislative provisions that seek to regulate damages for pain, suffering and loss of amenity for road traffic accident related (“RTA”) whiplash injuries. The assessment and award of such damages is a matter for the court by reference to the facts of the case, including the severity of the injuries and previous awards for similar injuries. Guidance on damages is provided in the Judicial College Guidelines for the Assessment of General Damages in Personal Injury Cases.

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Territorial extent and application

....

Part 1

21 The provisions concerning whiplash injuries and damages extend and apply to England and Wales only.”

5. The Explanatory Memorandum to the 2021 Regulations is to like effect namely the focus upon a whiplash injury or injuries and states:

“3.4 ... the purpose of this legislation is to address the continued high number and cost of whiplash related personal injury claims (as defined in Part One of the CLA 2018)

7.1 ... As such, controlling the costs of civil litigation for whiplash claims whilst ensuring proportionate compensation is paid to genuinely injured claimants is a government priority...”

6. The heading to the 2018 Act states: “An Act to make provision about whiplash claims...”.
7. The determination by a court of damages for PSLA in such cases is governed by section 3 of the 2018 Act. The relevant provisions include:

“3 Damages for whiplash injuries

(1) This section applies in relation to the determination by a court of damages for pain, suffering and loss of amenity in a case where—

(a) a person (“the claimant”) suffers a whiplash injury because of driver negligence, and

(b) the duration of the whiplash injury or any of the whiplash injuries suffered on that occasion—

(i) does not exceed, or is not likely to exceed, two years, or

(ii) would not have exceeded, or would not be likely to exceed, two years but for the claimant’s failure to take reasonable steps to mitigate its effect.

(2) The amount of damages for pain, suffering and loss of amenity payable in respect of the whiplash injury or injuries, taken together, is to be an amount specified in regulations made by the Lord Chancellor.

(3) If the claimant suffers one or more minor psychological injuries on the same occasion as the whiplash injury or injuries, the amount of damages for pain, suffering and loss of amenity payable in respect of the minor psychological injury or the minor psychological injuries, taken together, is to be an amount specified in regulations made by the Lord Chancellor.....”

8. The 2018 Act recognises that there will be cases in which an assessment of damages for PSLA reflecting the combined effect of injuries in cases of tariff and non-tariff (mixed injury cases) will be carried out. Section 3(8) of the Act provides:

“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 pain, suffering and loss of amenity that reflects the combined effect of the person's injuries (subject to the limits imposed by regulations under this section).”

The Act and the Regulations are silent as to how the courts are to assess damages in these mixed injury cases.

9. The amounts payable in respect of a whiplash injury and a whiplash injury with minor psychological injury are set out in the Regulations. The figures prescribed by the Regulations are substantially lower than the PSLA awards made by the courts following a common law assessment which takes account of the guidance provided by the Judicial College for the quantification of damages for such injuries. The figures are contained in Regulation 2:

“2.— Damages for whiplash injuries

“(1) Subject to regulation 3—

(a) the total amount of damages for pain, suffering and loss of amenity payable in relation to one or more whiplash injuries, taken together ("the tariff amount" for the purposes of section 5(7)(a) of the Act), is the figure specified in the second column of the following table; and

(b) the total amount of damages for pain, suffering and loss of amenity payable in relation to both one or more whiplash injuries and one or more minor psychological injuries suffered on the same occasion as the whiplash injury or injuries, taken together ("the tariff amount" for the purposes of section 5(7)(b) of the Act), is the figure specified in the third column of the following table—

Duration of injury	<i>Amount – Regulation 2(1)(a)</i>	<i>Amount – Regulation 2(1)(b)</i>
Not more than 3 months	£240	£260
More than 3 months, but not more than 6 months	£495	£520
More than 6 months, but not more than 9 months	£840	£895
More than 9 months, but not more than 12 months	£1,320	£1,390
More than 12 months, but not more than 15 months	£2,040	£2,125
More than 15 months, but not more than 18 months	£3,005	£3,100
More than 18 months, but not more than 24 months	£4,215	£4,345.

10. Scope for a court to order a higher figure is limited: the court must be satisfied that the severity of the whiplash injury is “*exceptionally severe*” or that the claimant’s individual circumstances (resulting in increased PSLA) are “*exceptional*” (regulation 3.2(b)). If the exceptionality test is satisfied the court must also be satisfied that it is appropriate to apply an uplift (regulation 3(2)(a)). The court cannot increase the tariff award by more than 20% (regulation 3(3)). Those provisions apply to any award made under the tariff in mixed injury cases (regulation 3(1)).

The valuation of non-tariff injuries – common law principles

11. As a general rule, the quantification of damages for PSLA is governed by the common law of England and Wales; *Attorney General of St Helena v AB [2020] UKPC 1* Lord Briggs at [16]. Lord Briggs, recognising the principle of restitution as being at the core of an award of PSLA damages at [22] stated:

“The core function of PSLA damages, like any other type of damages for the commission of a tort, is that identified by Lord Blackburn in *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39:

“where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong ...”

In *Heil v Rankin* [2001] QB 272, after citing that passage, Lord Woolf MR continued, at para 23, as follows:

“23. This principle of ‘full compensation’ applies to pecuniary and non-pecuniary damage alike. But, as Dickson J indicated in the passage cited from his judgment in *Andrews v Grand & Toy Alberta Ltd*, 83 DLR (3d) 452, 475-476, this statement immediately raises a problem in a situation where what is in issue is what the appropriate level of ‘full compensation’ for non pecuniary injury is when the compensation has to be expressed in pecuniary terms. There is no simple formula for converting the pain and suffering, the loss of function, the loss of amenity and disability which an injured person has sustained, into monetary terms. Any process of conversion must be essentially artificial. Lord Pearce expressed it well in *H West & Son Ltd v Shephard* [1964] AC 326, 364 when he said:

‘The court has to perform the difficult and artificial task of converting into monetary damages the physical injury and deprivation and pain and to give judgment for what it considers to be a reasonable sum. It does not look beyond the judgment to the spending of the damages.’”

12. The starting point of such an assessment is to return the claimant to the position they would have enjoyed absent the wrong. At [23] Lord Briggs stated that “an important part of the purpose of PSLA damages is that they should reflect what society as a whole considers to be fair and reasonable compensation for the victim or, as the Supreme Court of Canada put it in *Andrews v Grand & Toy Alberta Ltd* [1978] 2 SCR 229: “reasonable solace for his misfortune”.
13. Where a number of injuries are sustained there will frequently be an overlap in the various symptoms such that a simple aggregation of the individual injuries would represent overcompensation. The approach in such circumstances was identified by Pitchford LJ in *Sadler v Filipiak* [2011] EWCA Civ 1728 at [34] as follows:

“It is in my judgment always necessary to stand back from the compilation of individual figures, whether assistance has been

derived from comparable cases or from the JSB guideline advice, to consider whether the award for pain, suffering and loss of amenity should be greater than the sum of the parts in order properly to reflect the combined effect of all the injuries upon the injured person's recovering quality of life or, on the contrary, should be smaller than the sum of the parts in order to remove an element of double counting. In some cases, no doubt a minority, no adjustment will be necessary because the total will properly reflect the overall pain, suffering and loss of amenity endured. In others, and probably the majority, an adjustment and occasionally a significant adjustment may be necessary.”

14. In *Sadler* the court was required to “stand back”. In *Dureau v Evans* (unreported 13 October 1995), Kennedy LJ observed that the court is required to take “an overall view so as to ensure that the principle of full compensation is achieved”.

The facts of *Rabot* and *Briggs*

15. In *Rabot* the claimant suffered whiplash injuries, soft tissue injuries to the cervical spine and lumbo-sacral area (tariff injuries) together with soft tissue injuries to both knees (non-tariff injuries). On 22 July 2021 a claim was commenced by means of a small claims notification form (“SCNF”) on the Official Injury Claim portal (“OIC”) which enables represented and unrepresented claimants to process and settle RTA related personal injury claims valued at no more than £5,000. Where the parties in such claims have been unable to achieve resolution, CPR PD 27B sets out the procedure to be followed. The relevant evidence will be contained in a Court Pack. In respect of a quantum only case with no uplift requested, PD 27B 3.7(3) states that: “The purpose of the Court Pack is to provide in one set of documents all the facts and evidence on which both parties intend to rely....”.
16. A medical report prepared on behalf of the claimant was included in the Court Pack. It identified the nature and duration of the injuries as being: injury to the cervical spine, resolution 8 to 10 months; injuries to the lumbo-sacral area, resolution 8 to 10 months; injuries to both knees, resolution 4 to 5 months; travel anxiety, resolution within 3 months. The claimant also experienced difficulty in a number of activities.
17. At the quantum only hearing before District Judge Hennessy (“the Judge”) the tariff award was assessed to be £1,390 and the non-tariff award to be £2,500, an overall figure of £3,890. Following the guidance of Pitchford LJ in *Sadler*, the Judge added the two figures and then “stepped back” in order to reach a final figure by making an appropriate deduction. The Judge identified the clear overlap between the injuries based upon the medical evidence and noted that in terms of loss of amenity there was nothing that could be attributed to the knee injuries alone. The ‘overall award’ was assessed to be £3,100.

Briggs

18. The claimant suffered soft tissue injuries to the neck, upper and lower back (tariff injuries) and to the left elbow, knee and the hips (non-tariff injuries). His claim proceeded through the OIC. The injuries to the hips, chest and elbow resolved respectively within 1, 2 and 3 months. Resolution of further injuries was: the neck, 9

months; the knee, 6 months; the upper and lower back, 9 months. The claimant, a taxi driver, lost 4 days work.

19. At the quantum only hearing before the same judge the Court Pack included the court valuation form, the claimant's list of losses, evidence to support the claim, a medical report and other documents. The Judge identified her approach as being that applied in *Rabot* namely:
 - (a) determine what each injury is;
 - (b) value each injury in accordance with whatever scheme/regime is appropriate;
 - (c) add them and then step back exercising the type of judicial discretion that judges have been doing over many years;
 - (d) reach a final figure by making an appropriate deduction (if any).
20. The Judge stated that the reduction has to be from the non-tariff amount given that the tariff valuation is fixed. She accepted that the overlap represented an overlap in PSLA recognised within each award. The judge noted that the majority of the pain, suffering and limited loss of amenity appeared to flow from the whiplash injury.
21. The Judge assessed the tariff award to be £840, the non-tariff award to be £3,000 and reduced the latter figure by £1,040 to recognise the "clear overlap on the basis of the medical evidence". She made a total award of £2,800.

Grounds of appeal

22. The primary grounds of appeal are focused upon the approach of the courts to an assessment of damages in mixed injury cases. The following approaches have been identified by the parties:
 - (i) A tariff award should be made for the whiplash injury and a conventional common law general damages award for the other injuries. The two awards should then be aggregated. This is the claimants' primary case on appeal;
 - (ii) A tariff award should be made for the whiplash injury and a conventional common law general damages award for each of the other injuries but in addition the court should apply a "totality" principle and discount the overall award to allow for any overlap between the PSLA, common both to the whiplash and non whiplash injuries. The discounting process should only be completed when the appropriate awards for the tariff and non-tariff injuries have been combined. This is the claimants' secondary case and the approach adopted by the Judge. It is accepted by the claimants that no reduction can be made to the tariff award;
 - (iii) The tariff award is the starting point. All PSLA common to (i.e. concurrently caused by) both the tariff and non-tariff injuries is to be treated as fully compensated for by the tariff award. Thus only a further small amount would be appropriate for any additional PSLA, if any can be exclusively attributed to the other injuries as being solely caused by them. This is the defendants' approach;

- (iv) Pursuant to section 3(8) when the court is making an assessment of the non-scheme injury, it must make an award of PSLA which “reflects the combined effect” of the tariff and non-tariff injuries. The non-tariff award should reflect and include the totality of any overlap between the PSLA, common both to the whiplash and non whiplash injuries. This is the approach of the interveners.

Claimants’ cross-appeals

Rabot

23. The claimant takes no issue with the judge’s original assessments of the tariff and non-tariff injuries but contends that the judge was wrong to make any further deduction to the amount and reduce the combined judgment sum to £3,100 on the basis there was an overlap in the PSLA between the two heads of loss.

Briggs

24. The claimant’s primary case is that the judge should not have made a totality adjustment and should have aggregated the award which would have resulted in a total award of £3,840. The claimant’s secondary case is that even if the judge was correct in her approach the totality adjustment was too great. The adjustment of the total figure from £3,840 to £2,800 led to a total award of less than had previously been attributed to the non-whiplash injuries. Thus even if the court confirms the judge’s methodology and allowed a *Sadler* adjustment this should not have reduced the total damages to less than £3,700 as the figure reflects the fact that the judge’s composite figure for general damages for the non-whiplash injuries was £3,000.

Discussion

25. The 2018 Act and the Regulations represent a statutory incursion into the common law method of assessing damages and a radical departure from the common law approach to such an assessment in that they abandon the “fair and reasonable” approach to the assessment of whiplash injuries and minor psychological injuries in cases falling within the scope of the legislation.
26. The mischief at which the legislation is directed is minor whiplash claims resulting from a motor vehicle accident. There is nothing in the wording of the statute or in the extra Parliamentary material which suggests, let alone demonstrates, an intention to alter the common law process of assessment for, or the value of, non-tariff injuries. The legislation was directed to and confined exclusively to whiplash injuries. There is no mischief which Parliament attempted to remedy in respect of the common law assessment of non-tariff injuries.
27. Parliament has chosen to legislate into the area of the common law of England and Wales but having done so, and in the absence of any clear indication to the contrary, it is presumed not to have altered the common law further than was necessary in order to remedy the mischief which was the focus of the 2018 Act. In *Lachaux v Independent Print Ltd* [2020] AC 612 at [13] Lord Sumption identified presumptions which apply in such circumstances namely:

- (a) Parliament is taken to have known what the law was prior to the enactment, including the principle of full compensation and the Judicial College Guidelines provided as to the quantification of the PSLA at common law;
 - (b) there is a presumption that a statute (in this case the 2018 Act) does not alter the common law unless it so provides, either expressly or by necessary implication;
 - (c) there is a presumption that Parliament has not altered the common law further than was necessary.
28. The whiplash reform programme was designed to reduce the amount of damages recoverable for the whiplash injury in order to discourage false or exaggerated whiplash claims. The compromise effected by the legislation derogates from the principle of 100% compensation pursuant to the common law. An award pursuant to the legislation is significantly lower than a common law assessment of damages made pursuant to the Judicial College Guidelines.
29. Concurrent with the objective of reducing damages, the reforms seek to reduce the costs associated with claiming damages for whiplash injuries by introducing a bespoke portal process which is intended to provide a mechanism for the swift and straightforward resolution of claims falling within its scope.
30. At an assessment of damages hearing pursuant to the 2018 Act, the court retains a discretion as to whether to determine the case on the papers or by way of an oral hearing. The time given for such a hearing is limited, taking place as it does during the district judge's daily list. The time listing for the cases of *Briggs* and *Rabot* was 45 minutes each. At the hearing evidence is generally limited to that contained within the Court Pack. In *Briggs* and *Rabot* no oral evidence was received by the court.
31. Pursuant to sections 3(2) and 3(3) of the 2018 Act, the amount of damages for PSLA for the whiplash injury or injuries is the amount specified in the Regulations. The court's role in assessing the appropriate figure for PSLA for a tariff injury is circumscribed by section 3(2) and, where appropriate, section 3(3), and by the Regulations. It is limited to an assessment of the duration of the whiplash injury save where the claimant seeks an uplift under Regulation 3. The award is based upon the duration of the symptoms regardless of the level of pain, suffering and loss of amenity actually suffered by a claimant.
32. Section 3(8) recognises the need for an assessment for an award of damages in respect of injuries additional to those suffered and contained within the section 3(2) or 3(3) injuries.
33. In such a mixed injury case, given the differing bases of the section 3(2), 3(3) (tariff) and s.3(8) (non-tariff) assessments, the court is required to carry out two separate assessments. The issue is how an assessment is to be made for PSLA which is concurrently caused by both the tariff and non-tariff injuries. In my view, the approach of the court begins from the premise that the focus of the 2018 Act and the Regulations is directed to whiplash injuries: they were not intended to and did not alter the common law assessment of non-whiplash injuries. Parliament is taken to have known the principle of full compensation and the quantification of the same at common law.

34. Neither section 3(8), nor any other provision of the 2018 Act, either expressly or by necessary implication provides that non-tariff injuries should be assessed by reference to anything other than common law principles. The words in section 3(8) that “Nothing in this section prevents....” indicate that it is open to the court, in a case where the claimant suffers injuries additional to those assessed pursuant to section 3 of the 2018 Act, to make an award that “reflects the combined effect of the person’s injuries”. I regard these latter words as critical to the court’s assessment upon common law principles in respect of any award pursuant to section 3(8). This is particularly so when the tariff award cannot be said to reflect full compensation for the person’s injuries assessed on common law principles.
35. An intrinsic part of a common law assessment in which more than one injury is sustained is, following *Sadler*, to step back and to assess whether the total award represents double counting or overcompensation. Such an approach is appropriate where both injuries are assessed pursuant to common law principles. In a case where one award is in respect of a tariff injury which has not been assessed pursuant to common law principles and thus represents a lower figure than would have been awarded had such an assessment been made, the court is faced with the difficulty of not knowing what, if any, allowance has been made in the tariff award for PSLA arising from a concurrent cause.
36. It is of note that the words in section 3(8) replicate the expression used by Pitchford LJ in *Sadler* when he stated that it is necessary to stand back from the compilation of the individual figures in considering whether the award for PSLA should be greater than the sum of the parts “in order properly to reflect the combined effect of all the injuries upon the injured person’s recovering quality of life...”. That Parliament has used the same expression, in my view, adds weight to the contention that the approach to be taken pursuant to section 3(8) is that the award must reflect a common law assessment of the combined effect of all the PSLA which is the result of concurrently caused injuries in both the tariff and non-tariff awards subject only to the limits imposed by the section on the amount recoverable for the tariff injury. A factor in support of this approach is that in standing back, a court will be aware that it is only the non-tariff award which can be reduced.
37. Further, any fear of windfall damages is negated by the fact that Parliament has significantly depressed the value of PSLA for the tariff injury.
38. It follows that the approach of the court to an assessment of damages in respect of a tariff and non-tariff award where concurrently caused PSLA is present is that the court should:
- (i) assess the tariff award by reference to the Regulations;
 - (ii) assess the award for non-tariff injuries on common law principles; and
 - (iii) “step back” in order to carry out the *Sadler* adjustment, recognising that the sum included in the tariff award for the whiplash component is unknown but is smaller than it would be if damages for the whiplash component had been assessed applying common law principles.

There is one caveat, namely that the final award cannot be less than would be awarded for the non-tariff injuries if they had been the only injuries suffered by the claimant.

39. The defendant's approach would result in the claimant's right to common law compensation for PSLA caused by the non-tariff injury where the whiplash injury is a concurrent cause being effectively extinguished. It would serve to extend the compass of the 2018 Act to the non-whiplash injury which is contrary to the stated purpose of the statute and not required by necessary implication. It would also have the effect of claimants being compensated in radically different amounts for their non-whiplash injuries depending upon whether a qualifying whiplash injury has been sustained. It could lead to a position where a claimant would not pursue a claim for whiplash injury as it would have the effect of reducing any award for compensation for the non-tariff injury. I regard such an approach as untenable. Accordingly, and for the reasons given and subject to the views of the Master of the Rolls and Stuart Smith LJ, I would dismiss the appeals in *Rabot* and *Briggs*.
40. As to the cross appeals: I am unable to find that the deduction made by the judge in *Rabot* was wrong in principle or unreasonable. Accordingly, and subject to the views of the Master of the Rolls and Stuart-Smith LJ, I would dismiss the cross appeal in *Rabot*.
41. In *Briggs* the judge's adjustment resulted in a total figure which was lower than the assessment for the non-tariff injury. Given the fact that the tariff award was lower than an award assessed pursuant to common law principles, I regard the adjustment as too great. In my view a reduction of £340 to the non-tariff award, giving a total award of £3,500 would represent appropriate compensation for the injuries sustained. To this extent, and subject to the views of the Master of the Rolls and Stuart-Smith LJ, I would allow the cross appeal in *Briggs*.

Lord Justice Stuart-Smith :

42. I agree with the judgment of Nicola Davies LJ and the disposition of these appeals that she proposes. I add to her judgment only to explain why I am respectfully unable to agree with the judgment of the Master of the Rolls, which I have seen in draft.
43. The Master of the Rolls starts with an acceptance that the 2018 Act "removed certain claimants' rights to full compensation for whiplash injuries, *but not for other kinds of injury*"; but he reaches the conclusion that "Parliament has legislated for the reduction of general damages for non-whiplash personal injuries in cases where whiplash injuries have been sustained, *even though the statute does not appear specifically to be directed at non-whiplash cases.*" (My emphasis). There is an obvious tension between these two statements. Since it is accepted that the 2018 Act does not remove any claimants' rights to full compensation for other kinds of injury, the conclusion can only be supported if the terms of the statute effect the change by necessary implication and the consequential alteration to the common law was necessary and no more than necessary: see *Lachaux* at [13], cited by Nicola Davies LJ above. Neither of these requirements are satisfied in the present case. Put shortly, it was not necessary to affect the common law assessment of damages for non-whiplash injuries at all in order to effect the change in the assessment of damages for whiplash injuries, which were the sole subject and object of the 2018 Act.

44. The foundation for the conclusion appears to be the interpretation placed upon sections 3(1) and 3(2) of the 2018 Act in the Master of the Rolls' first and second reasons. Specifically, reliance is placed upon the reference to "a case" rather than "a claim" in section 3(1). But once section 3(1) is read in full and in context, it seems to me that the reliance is misplaced.
45. Taken at their highest, the words in section 3(1) highlighted by the Master of the Rolls when viewed on their own and in isolation are no more than consistent with being applicable in a case where both whiplash and non-whiplash injuries have been suffered but no claim is made in respect of the qualifying whiplash. However, the words of section 3(1) should not be viewed on their own or in isolation. Once they are viewed in context with section 3(2), it is plain that sections 3(1) and 3(2) go together and are directed to cases where a claim in respect of "the whiplash injury or injuries" is made: "*the* whiplash injury or injuries" in section 3(2) are the whiplash injury or injuries referred to in section 3(1). Sections 3(1) and (2) say nothing, either expressly or by necessary implication, about the assessment of damages for other injuries, whether or not those other injuries give rise to overlapping (i.e. concurrently caused) symptoms or loss of amenities. They do not, in my judgment, support an argument that the Act has, without mentioning them, fundamentally altered the basis of assessment of damages for those other injuries. To the contrary, by their express terms, they are limited to the assessment of damages for qualifying whiplash injuries. No other provision of the 2018 Act either states expressly or necessarily implies that the statute has prescribed or affected the assessment of any part of the (full) compensation for other injuries.
46. If further support for this more limited interpretation of sections 3(1) and 3(2) were required, it is to be found in the clear statements of (political and) legal policy set out by Nicola Davies LJ at [3]-[6] above. It is also to be derived from the fact that, where the statute intends to refer to the assessment of damages for other injuries, it does so expressly: see section 3(8)
47. It follows that there is no violation of section 3(2) if a claimant asserts a claim for other injuries or to have them assessed by reference to common law principles. The only qualification under section 3(8) upon the assessment of damages in a case where a person claims in respect of both a qualifying whiplash injury and other injuries is that the overall award, while reflecting the combined effect of the person's injuries shall be "subject to the limits imposed by [the Regulations made under section 3]". The approach adopted by Nicola Davies LJ respects that qualification since no adjustment is made to the tariff award and there is no realistic scope for over-compensation.
48. For these reasons, which I take to be the same as those explained by Nicola Davies LJ in her judgment, there is no question of a claimant "circumventing" the Act by claiming for non-whiplash injuries but not for qualifying whiplash injuries. I agree with Nicola Davies LJ's observation that the consequences that would follow if the defendants' interpretation were to be adopted show that this approach is untenable. It is axiomatic that no person can be compelled to bring proceedings for injury or loss or damage caused by the tort of another, so that a person who was competent to litigate is entitled to decide who they would sue and what causes of action they would pursue against them, even if that choice impacts on the application of relevant limitation periods: see *Shade v Compton Partnership* [2000] PNLR 218 and *Pawley v Whitecross Dental Care Ltd and another* [2021] EWCA Civ 1827, [2022] 1 WLR 2577 at [32] and, more importantly, [52]. It is, to my mind, inconceivable that Parliament would have

legislated in the terms of section 3 of the 2018 Act if its intention had been to undermine or remove this fundamental tenet of the common law as well as the right to a common law assessment of non-whiplash injuries. It is therefore beside the point, when assessing damages for PSLA for non-whiplash injuries, that Parliament has regulated the sums recoverable in respect of one or more qualifying whiplash injuries.

49. In the face of wording which is specific in applying only to damages for qualifying whiplash injuries and where all the contextual materials demonstrate that the (political and) legal policy motivating and underpinning the passing of the legislation was confined solely to the perceived mischief of excessive whiplash claims, it is not open to the Courts to extend the effect of the language of the 2018 Act so that, by a sidewind, it removes the right to a common law assessment of other injuries. If such a step is to be taken, it must be taken by Parliament. No doubt, if Parliament takes that step, it will legislate in clear terms that leave no doubt as to the scope of the alteration it wishes to make to the existing common law, just as (in my judgment) it has done in its alteration of the common law relating to the assessment of damages for PSLA for qualifying whiplash claims by the 2018 Act.

The Master of the Rolls:

Introduction

50. These two test cases have been leapfrogged from the County Court at Birkenhead to the Court of Appeal because they raise an important question as to the proper construction of section 3 (section 3) of the Civil Liability Act 2018 (the 2018 Act). The issues arise because the 2018 Act removed certain claimants' rights to full compensation for whiplash injuries, but not for other kinds of injury. In many of the small claims covered by the 2018 Act, claimants often allege that they have sustained injuries in addition to whiplash.
51. Small whiplash claims are now generally initiated through a pre-action online portal known as the Official Injury Claim Service (the Whiplash portal), which was developed by the Motor Insurers' Bureau. The Whiplash portal began on 31 May 2021, and is governed by the Pre-Action Protocol for Personal Injury Claims below the Small Claims Limit in Road Traffic Accidents (now £5,000) (the protocol). It is accessible both by litigants in person and by represented parties, but the latest data shows that some 91% of claimants are actually represented. No costs are recoverable for the period up to the issue of formal court proceedings. Some 24,000 claims per month are currently being brought within the Whiplash portal. The protocol applies where a claimant who has suffered personal injuries, including but not limited to whiplash injuries, because of a road traffic accident (RTA) wishes to make a claim of not more than £5,000 for compensation for the injuries, and not more than £10,000 overall (see [2.1(1)] of the protocol).
52. District Judge Hennessy (the judge) adopted broadly the same approach to the assessment of the claimant's damages for pain and suffering and loss of amenity in respect of whiplash and other injuries in each of these two cases (*Rabot* and *Briggs*). She determined the nature of each injury, valued the whiplash injury in accordance with the tariff laid down by the Whiplash Injury Regulations 2021 (the Regulations) and valued the other injuries in accordance with the common law, added the two figures together, and then took a "step back exercising the type of judicial discretion that

[j]udges have been doing over many years”, before reaching a final figure by making an appropriate deduction if any (see [38] in her judgment in *Rabot* and [61] in *Briggs*). In *Briggs*, the judge made clear that the deduction was to be made from the non-tariff damages, because the tariff damages were fixed.

53. The judge was avowedly applying [34] of Pitchford LJ’s judgment in *Sadler v. Filipiak* [2011] EWCA Civ 1728 (*Sadler*), where he had said:

It is ... always necessary to stand back from the compilation of individual figures, whether assistance has been derived from comparable cases or from the [Judicial College] guideline advice, to consider whether the award for pain, suffering and loss of amenity should be greater than the sum of the parts in order properly to reflect the combined effect of all the injuries upon the injured person’s recovering quality of life or, on the contrary, should be smaller than the sum of the parts in order to remove an element of double counting. In some cases, no doubt a minority, no adjustment will be necessary because the total will properly reflect the overall pain, suffering and loss of amenity endured. In others, and probably the majority, an adjustment and occasionally a significant adjustment may be necessary.

54. In *Rabot*, the judge determined the tariff award for the whiplash injuries (8-10 months whiplash and 3 months travel anxiety) at £1,390, and the common law general damages for injuries to both knees at £2,500. Those two figures totalled £3,890, and “stepping back” the judge said that the “overall award [was] £3,100 to recognise the clear overlap on the basis of the medical evidence”. The judge determined at [41] that there was no loss of amenity attributable to the knee injuries alone.
55. In *Briggs*, the judge determined the tariff award for the whiplash injuries (9 months whiplash) at £840, and the common law general damages for injuries to left knee (6 months), right elbow (3 months), chest (2 months) and hips (1 month) at £3,000. Those two figures totalled £3,840, and “stepping back” the judge determined the overall award at £2,800. The judge determined at [64] that there was no loss of amenity attributable to the knee, elbow, chest and hip injuries alone.
56. It can be seen from these summaries of the findings that: (a) *Rabot* and *Briggs* were both cases in which there was no loss of amenity caused by the additional injuries that was not also caused by the whiplash, and (b) that the whiplash in each case was longer lasting than any of the other injuries.
57. Against this background, it was suggested in the course of oral argument that the case was really about whether, in cases of this kind, the damages allowed for pain and suffering and loss of amenity (PSLA) concurrently caused by **both** whiplash and other injuries are to be: (i) **only** that part of the tariff amount allowed for PSLA, or (ii) the part of the tariff amount allowed for PSLA **and** the amount allowed for PSLA by the normal common law compensation for the other injuries, or (iii) something in between adopting an approach of the kind employed by the judge. In essence, the defendants supported the first solution, the interveners supported the second solution, and the claimants supported the second, alternatively the third, solution.
58. I have concluded that the wording of section 3 of the 2018 Act leads inexorably to the conclusion that the first solution is the correct one as a matter of statutory construction. The effect of this conclusion is that Parliament has legislated for the reduction of

general damages for non-whiplash personal injuries in cases where whiplash injuries have been sustained, even though the statute does not appear specifically to be directed at non-whiplash cases.

The statutory provisions

59. Section 3 of the 2018 Act provides as follows:

Damages for whiplash injuries

(1) This section applies in relation to the determination by a court of damages for pain, suffering and loss of amenity in a case where—

(a) a person (“the claimant”) suffers a whiplash injury because of driver negligence, and

(b) the duration of the whiplash injury or any of the whiplash injuries suffered on that occasion—

(i) does not exceed, or is not likely to exceed, two years, or

(ii) would not have exceeded, or would not be likely to exceed, two years but for the claimant’s failure to take reasonable steps to mitigate its effect.

(2) The amount of damages for pain, suffering and loss of amenity payable in respect of the whiplash injury or injuries, taken together, is to be an amount specified in regulations made by the Lord Chancellor. ...

(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 pain, suffering and loss of amenity that reflects the combined effect of the person’s injuries (subject to the limits imposed by regulations under this section).

(9) Nothing in this section prevents the amount of damages payable being reduced by virtue of section 1 of the Law Reform (Contributory Negligence) Act 1945.

60. The Regulations were made under section 3(2) setting out the tariff for whiplash damages based on their duration. Regulation 2 provides as follows:

2.—(1) Subject to regulation 3 —

(a) the total amount of damages for pain, suffering and loss of amenity payable in relation to one or more whiplash injuries, taken together (“the tariff amount” for the purposes of section 5(7)(a) of the Act), is the figure specified in the second column of the following table; and

(b) the total amount of damages for pain, suffering and loss of amenity payable in relation to both one or more whiplash injuries and one or more minor psychological injuries suffered on the same occasion as the whiplash injury or injuries, taken together (“the tariff amount” for the purposes of section 5(7)(b) of the Act), is the figure specified in the third column of the following table—

<i>Duration of injury</i>	<i>Amount – Regulation 2(1)(a)</i>	<i>Amount – Regulation 2(1)(b)</i>
Not more than 3 months	£240	£260
More than 3 months, but not more than 6 months	£495	£520
More than 6 months, but not more than 9 months	£840	£895
More than 9 months, but not more than 12 months	£1,320	£1,390
More than 12 months, but not more than 15 months	£2,040	£2,125
More than 15 months, but not more than 18 months	£3,005	£3,100
More than 18 months, but not more than 24 months	£4,215	£4,345

Discussion

61. The claimants and the interveners argued forcefully that the defendants’ solution would have the unintended consequence of depriving claimants of full compensation for their other injuries. They submitted that the principle of full compensation was applicable to damages for PSLA. As Lord Blackburn had said in *Livingstone v. Rawyards Coal Co* (1880) 5 App Cas 25 (*Livingstone*) at page 39: “where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured ... in the same position as he would have been in if he had not sustained the wrong ...”. Lord Briggs said at [23] in *Attorney General of St Helena v. AB* [2020] UKPC 1 (*AG of St Helena*) that “[a]n important part of the purpose of PSLA damages is that they should reflect what society as a whole considers to be fair and reasonable compensation for the victim”. They submitted that the principle of double recovery only applied where there was full compensation, and the 2018 Act provided for much reduced, rather than full, compensation. Moreover, Parliament had not legislated to reduce the damages payable for non-whiplash injuries. The defendants’ solution would lead to highly undesirable practical consequences, which would require detailed analysis of the causal consequences of every whiplash claim, which was specifically not required by the 2018 Act, which operated on a simple parameter of how long the whiplash injury and any accompanying minor psychological injury lasted. The latest data showed that 67.3% of whiplash claims were, in fact mixed injury claims.
62. In my view, the key to this question lies in the wording of section 3.

63. First, section 3(1) provides that “[t]his section applies in relation to the determination by a court of damages for pain, suffering and loss of amenity **in a case where ... a person ... suffers a whiplash injury** because of driver negligence ...” (emphasis added). Section 3(1) does not say that it applies where a person **makes a claim** for PSLA damages for a whiplash injury. The provisions, therefore, would at first sight have to be considered if the claimant suffered whiplash injury whether or not that person claimed for it, and even if that person chose to claim only for additional injuries in an attempt to circumvent the legislation and increase their recovery.
64. Secondly, section 3(2) lays down that: “[t]he amount of damages for pain, suffering and loss of amenity payable in respect of the whiplash injury ... **is to be**” (emphasis added) the amount in the Regulations. In cases, such as these, where the judge has made the specific finding on the evidence that the additional injuries did not cause any loss of amenity that was not caused also by the whiplash injuries, the statute therefore provides that the amount of damages for the loss of amenity caused by the whiplash is the tariff amount. Once that has been paid, the claimant cannot claim compensation for the same loss of amenity caused also by another injury on a different common law basis. The statute has dictated the compensation that is to be paid for that very loss. Seeking more would violate section 3(2). It is not, therefore, accurate to say that the statute only legislated for compensation for whiplash and cannot affect the common law compensation for other injuries. It can affect that compensation in the specific circumstances of these cases, where the PSLA or parts of it has concurrent causes. The damages claimed for the pain and suffering caused by the knee injury in *Rabot* and by the knee, elbow, chest and hip injuries in *Briggs* are, of course, not covered by the statutory provision limiting the amount of damages for the PSLA caused by the whiplash, because that pain and suffering caused by those injuries was not the same as the pain and suffering caused by the whiplash.
65. Thirdly, nothing in section 3(8) overrides the clear provisions of sections 3(1) and (2). All section 3(8) says is that: “[n]othing in this section prevents a court [in an additional injuries case] awarding an amount of damages for pain, suffering and loss of amenity that reflects the combined effect of the person’s injuries (subject to the limits imposed by regulations under this section)”. An award on any of the three bases proposed by the parties would reflect “the combined effect of the person’s injuries”. The question is how it should do so, and section 3(8) gives no assistance in that regard, save to say in parentheses that the limits in the Regulations must be respected. In my judgment, the limits in the Regulations are, in fact, only respected if the defendants’ solution is adopted. There will of course be cases where, despite the concurrent causes, a higher than tariff award for loss of amenity will be required. That would, for example, be the case where the non-tariff injury persisted longer than the whiplash injury, which was not the case here.
66. Fourthly, I should make it clear that I do not think that the judge’s approach does respect the limits in the Regulations for the first and second reasons I have given above. It is unprincipled to make an allowance to reduce the common law damages for PSLA for the other injuries to take into account the overlap between the consequences of the whiplash and the consequences of the other injuries, when the statute has provided for the level of compensation for some of those consequences. The principled solution is to apply the statute and then work out what consequences of the other injuries are not caused by the whiplash as well, and assess the proper common law compensation for

those additional consequences – in these cases the pain and suffering caused by the other injuries.

67. Fifthly, as I have already indicated, the claimant cannot get round the tariff by failing to claim for the whiplash and claiming only for the other injuries, because the wording of section 3(1) means that the limitation still applies if a whiplash injury is suffered. That may produce difficulties where attempts are made to circumvent the effects of the statute, but every solution has some consequences that may prove practically problematic.
68. Sixthly, the solution proposed by the defendants does not give undue preference to the whiplash injury as suggested by the claimants. The same result is reached even if you start by assessing the damages for the other injuries, because there has to be a deduction from that assessment to reflect the concurrently caused consequences of the whiplash injuries where the statute mandates tariff levels of compensation. It does not normally matter that the court does not know what the tariff sum includes for the elements of PSLA, because the deduction is in respect of the common law assessment for, in the example of these cases, the loss of amenity already compensated by the tariff amount. It could matter in the example I have given at the end of [65] above. But in such a case, the court would need to undertake a variant of the “standing back” exercise advocated in *Sadler*.
69. Finally, the solution adopted by the judge and favoured by the majority in this court might, in some cases, achieve the result dictated by the 2018 Act, but does not seem to me to be adequately scientific. The “standing back” exercise in *Sadler* was intended to remove the element of double counting where all the injuries were to receive full compensation. Parliament has directed in section 3(2) that damages for PSLA in respect of whiplash injuries are **not** to be awarded on the 100% principles enunciated in *Livingstone* and *AG of St Helena*. The tariff awards laid down by Parliament for the same concurrently caused losses (for example, the loss of amenity in these cases) cannot be topped up by using the device of claiming also in respect of other injuries.
70. In conclusion, therefore, I would allow the defendants’ appeal. I would have sent the cases back to the judge to assess damages on the basis of this judgment. Since the majority disagree, their judgment will prevail.