



WHIPLASH REFORMS REVIEW



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WHIPLASH REFORMS REVIEW

On Friday 26th February the MOJ published their long awaited update to the Civil Procedure Rules (CPR), in respect of the whiplash reforms launch. The creation of the new 88 page pre action protocol, amendments to the existing protocols and new practice directions are looking to accommodate the changes brought in by the Civil Liability Act.

We have previously reported on the new Online injury claims portal (OICP) that will be used for claims that fall within the applicable scope, attention will now turn to fully digesting the rules, how they will be interpreted, what trends and behaviours (expected and unexpected) we may see as well as the requirement for claims teams to familiarise themselves with both the new rules and new portal.

The protocol applies to claims arising from road traffic accidents which occur on or after 31 May 2021 where the injuries are valued at not more than £5,000 and the overall value of the claim is not more than £10,000.

Scope

There are 9 general exclusions provided, with the new protocol not addressing the issue that many of our public sector clients face on a daily basis with the exclusion of claims where injury is suffered by a road user by a person who is not a road user, these claims will fall between the gaps of all the low value protocols.

Some further common exclusions are where the claimant;

- Is a child
- Is a "vulnerable" road user which includes motor and pedal cyclists and pedestrians
- Where the claimant or defendant is a protected party

Claims for "protocol vehicle costs", damage, recovery, storage and hire that are payable to the claimant personally are in scope. However, "non-protocol vehicle costs" (e.g. subrogated or credit claims) are excluded, save for when proceedings are issued.

The rules are somewhat surprisingly silent on rehabilitation, save as the position is now in that the claimant is asked to identify whether rehabilitation needs exist or have been recommended on the Small Claims Notification Form (SCNF)

The Protocol will no longer apply if;

- The claim is revalued and there is reasonable belief the overall claim is more than £10,000 or the claim for damages for injury is more than £5,000
- Either party becomes a protected party
- The insurer notifies the claimant that there are complex issues of fact or law (in contrast to the MOJP where the claimant also had this option)
- The insurer makes an allegation of fraud or fundamental dishonesty
- The insurer continues to deny causation of any injury after disclosure of the medical report
- The court orders in other proceedings that the injury claim must exit and be added to those proceedings

Importantly a claim that exits through value will proceed under the RTA Protocol, with the claimant required to submit a CNF accordingly, provided that liability (other than failure to wear a seatbelt) has not been disputed and the value remains under £25,000.

Claims that exit through denial of injury or causation after disclosure of the medical report will not be subject to any protocol whatsoever, and the claimant will be able to issue proceedings.



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Submission of a New Claim

The claimant (or their representative) completes SCNF via the new Portal. An unrepresented claimant can request assistance from the Portal Support Centre to enter the claim. The claimant will be asked to state whether they consider their whiplash injury was exceptionally severe or whether they have exceptional circumstances that have had an impact on their level of Pain Suffering and Loss of Amenity. The SCNF must be signed with a statement of truth (or the claimant's representative must confirm they hold a statement of truth signed by the claimant). The Portal will carry out a MID search (and an ASKCUEPI search) and send the claim to the compensator automatically, we have previously set out the logistical issues that exist for insurers and defendants where non-conventional programmes are in existence. In particular where outsourced claims handling occurs, the set up at an underwriting level and the requirement to 'pair' with a TPA will need to be in place prior to May 31st.

Liability & SCNF Response

Once the claim is received, the defendant will have 30 working days to provide a reply, this is twice as long as exists in the current RTA protocol.

The following options are available to a compensator when providing a reply:

- Make an admission of liability in full
- Make an admission of liability in part
- Deny liability; or
- Admit fault (in full or in part) for the accident, but dispute that the accident caused any injury to the claimant

Where a defendant has made an admission of liability in part but not in full the response must include the percentage for which they admit liability. Where a partial admittance or a denial is made the defendant's version of events must be set out together with any evidence in support.

Importantly if there is no response to the SCNF within the 30 days the rules state that the defendant would be deemed to have **ADMITTED** liability, claims handlers will therefore need to ensure robust processes are in place to allow for all claims to be reviewed adequately in good time, evidence gathered as early as possible and tactical decisions made in advance of the 30 day time frame.

What is interesting is that an admittance of liability is only binding on the Portal claim if settlement is agreed but is binding on all claims if proceedings are issued, defendants will need to be aware of all elements of the claim to ensure that decisions made on the Portal do not hamper any attempt to defend additional losses not presented in the Portal.

If the claimant rejects a partial admission, a counter proposal may be made and each party may make up to three proposals on liability. These proposals are without prejudice and are not binding (until the offer is accepted).

If liability is denied the claimant may start proceedings for a determination of liability only. The claim, once liability is decided, will return to the Portal if liability is established against the defendant in whole or in part. Of further importance is that this process will take place prior to medical evidence being obtained. All documentation/evidence that is to be relied on can be uploaded to the Portal prior to the liability court pack being generated. The claimant may proceed to obtain a medical report where there is a full or part admission or after the court has determined liability in the claimant's favour.

There is a provision to allow the defendant to withdraw the admission of liability when causation is raised as well as this, the admission is not binding on linked claims such as passengers or a counterclaim. It is likely however that any such admission will influence a separate but related claim.

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Allegation of Fraud/Causation

The defendant can allege fraud or fundamental dishonesty at any point in which case the claim will fall out of the process and into the old pre-action protocol for injury claims. If and when the claimant comes to issue proceedings, the claim will then either be allocated to the fast track or potentially the multi-track with costs applicable as now. The number of claims where, at the response to the SCNF stage, a defendant looks to formally allege fraud is still likely to be low as strategically it may make sense to allow for further investigation.

In terms of arguments around causation, in particular claims that are alleged to have been farmed and low velocity impact claims, there is now a provision to indicate within the 30 day period that fault is being conceded but not admit an injury was sustained and the claim will remain in the Portal. In such circumstances the response should set out the defendant's version of events and the medical expert must be told why the compensator disputes causation. Thereafter the medical expert will need to comment on whether the accident caused any injury if the claimant or defendant's account is found to be true.

Where the claimant has disclosed the medical report the compensator can then decide whether they want to maintain the denial on the basis of causation, or deal with the claim. If causation remains in dispute or is raised after receipt of the medical report, then the claim will drop out of the process and the claimant can either abandon/withdraw their claim or issue proceedings. Recoverable costs in such a scenario will fall under the amended Part 45 which contains a provision to provide for fixed costs in cases that drop from the SCT portal, and do not go into the existing RTA Low Value Protocol and portal.

Medical Evidence

We know that making pre medical offers for whiplash claims was to be banned, this is re-iterated in the protocol, however it is also stated that pre-medical offers may be made for other non-whiplash injuries, if an offer is to be made without evidence for non-whiplash injury this has to be done outside the Portal. This is an important aspect for compensators to be aware of as it may well give an option to the issue around the mixed tariff/non-tariff claims. How such claims play out will only be seen over time.

As with the current RTA protocol, the first report obtained must be a fixed cost medical report obtained through MedCo. A further medical report may only be allowed where:

- It is recommended in the first expert's report
- The first report does not provide a prognosis
- The claimant is receiving continuing treatment
- The claimant has not recovered within the prognosis

Where the claimant is unrepresented, the instructions to the expert are generated by the Portal. There is a requirement that the defendant compensator is responsible to pay the experts fees. If a further report is justified the defendant compensator must arrange and pay for it, instructions for the further report should be sent within 2 weeks.

If the defendant disputes that the accident caused any injury to the claimant, the defendant's version is included in the expert's instructions which will ask the expert to provide separate opinions if the claimant or defendant's accounts were found to be true. It is here also that if the claimant seeks the tariff uplift the instructions will request an opinion on whether there is any support for it.

Where the claim falls within the tariffs, the medical report should indicate which bracket of the tariff it falls into. The defendant compensator will effectively then not be making an offer rather simply applying the relevant sum from the tariff into the response pack.

It is important to note that where the claimant is unrepresented the insurer will always pay for the medical report, even if causation is disputed.

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The Tariff & Non Tariff Claims

The tariff has also been published, the major difference to the tariff proposed after the Civil Liability Bill was presented is that there is one tariff for whiplash only and a second slightly increased tariff for whiplash with a minor psychological injury.

Injury Duration (months)	Whiplash Tariff Excluding minor psychological injury	Whiplash Tariff Including minor psychological injury	Weighted average PSLA settlement (industry 2017)	Percentage Decrease (from 2017 industry average)	Numerical Difference (from industry average)
0-3	£240	£260	£1,800	86%	£1,560
4-6	£495	£520	£2,250	77%	£1,755
7-9	£840	£895	£2,700	67%	£1,860
10-12	£1,320	£1,390	£3,250	57%	£1,930
13-15	£2,040	£2,125	£3,650	42%	£1,610
16-18	£3,005	£3,100	£4,150	25%	£1,145
19-24	£4,215	£4,345	£4,750	9%	£535

The difficulty however will revolve around claims where the injured party suggests they have suffered non-tariff injuries as well as whiplash. In those circumstances, the whiplash will be valued by reference to the tariff, however the non-tariff injuries such as a bruised knee for example, will be valued by reference to the current JC Guidelines. So where an injury is reported to have lasted 6 months for the whiplash and say 3 months for the knee, the whiplash injury would receive a sum of £495 or £520 if minor psychological damage is claimed plus £2,000 or so for the bruised knee.

It is not beyond the realms of possibility to see more and more claims being presented with multiple non whiplash soft tissue elements to them, it is extremely likely we will see satellite litigation and test cases taken to the Court of Appeal. In the meantime this will be an area of challenge for compensators to consider.

Once the claimant submits their medical report and other protocol damages or 'list of losses', which includes fees and disbursements, and providing the injury element remains under £5,000 the defendant will have 20 days to make an offer.

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Where the claimant does not send documents in support of the list of losses e.g. loss of earnings, the compensator must still make an offer within the 4 week period for the injury and any items for which documents in support have been sent or for which documents would not be available. As mentioned above under the new rules so called non-protocol vehicle related damages cannot be included at this stage. The claimant can only claim for the injury related damages and for any vehicle related damages where they are responsible themselves for paying them e.g. a policy excess.

In total up to 3 offers and counter offers can be exchanged. The offer must be a single offer which will need to set out the tariff sum, any sum offered for non-whiplash injury (as above) and the sums offered for each other head of claim with an explanation why any item is disputed. The offer must also state the total value of the offer, the amount of any deductions for contributory negligence and repayable benefits all to be verified by a statement of truth.

Unlike the current process, there is no requirement for a claimant to make an offer first, the defendant compensator will now be required to make the first offer, if the offer is not accepted the claimant may;

- Reject the offer outright
- Make a counter-offer
- Put the claim on hold whilst they wait for developments in their claim. This includes waiting to see if their injuries resolve or improve as predicted in the medical report

Importantly here, if the compensator wishes to dispute the accident caused injury they may make an offer to settle the non-injury heads of loss which the claimant may accept in full and final settlement of the claim, effectively withdrawing the injury claim.

Settlement

Where settlement is agreed the compensator must pay the agreed damages within two weeks. Settlement of the claim does not prevent the claimant from pursuing any claim for non-protocol vehicle costs outside of the Portal.

However, if settlement cannot be agreed and where the claimant is the vehicle driver/owner they will be asked to complete questions to establish if there are any outstanding non-protocol vehicle claims that will need to be included in proceedings. If at this stage adding the additional heads of claim tips the value of the claim over £10,000, the claim will leave the Portal.

Once the additional question have been answered and the statement of truth is uploaded there is a further 15 days to provide a response after which the claimant may proceed to the court pack stage.

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Litigation

When the claimant wishes to start proceedings, the Portal will automatically provide the compensator with the appropriate section 152 RTA notice. The Portal will also determine the reason for starting proceedings from the steps taken in the claim. Where there are options provided for the reason, the claimant will first be asked to select the reason for starting court proceedings. This will enable the Portal to show the Court Pack contents from the relevant table and allow the claimant to select the documents to be included within the Court Pack. The 10 possible scenarios for issuing proceedings are;

- Liability dispute only – liability denied in full
- Claim value dispute: no liability dispute, no NVC claim or uplift request
- Claim value dispute: liability part disputed; may include NVC claim or uplift request
- Claim value dispute: liability not disputed; NVC claim; may include uplift request
- Claim value dispute: liability not disputed; no NVC claim; includes uplift request
- Application for interim payment
- Non-payment of agreed interim payment
- Starting due to limitation
- Dispute over fees
- Non-payment of agreed settlement sum

A new 78 page Practice Direction document details the 10 scenarios with the link found below.

The defendant compensator has 5 days to review the pack once received, add any documents and input solicitors' details should they wish to nominate.

Whilst the original claim and all subsequent communication would have been sent by electronic communication the claimant now must;

- Print off the court form and sign the statement of truth
- Print off the List of Documents for Court and the documents to be included in the Court Pack
- Put together the Court Pack, with the List of Documents for Court at the front and the other documents in the same order as listed

The signed court form and the Court Pack must be sent to the court with the relevant court fee to start proceedings. Just how many litigants in person will be in a position to easily print, sign and send the relevant court papers is not of course known.

Interim Payments

Claimants are able to request an interim payment, the difference within the new process is that the automatic entitlement to an interim payment of £1,000 for PSLA upon disclosure of the first medical report has been taken out.

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Conclusion

Clearly as mentioned above there is a need for defendants and claims handlers to ensure that responses to SCNFs received are made within the 30 working days provided, no longer can tactics previously used to allow a claim to drop out of the RTA Protocol be relied on as the claim will simply continue in the Portal with a deemed admission to liability made.

The issue of the tariff/non-tariff mix is something that will certainly bring challenges in assessing the correct level of damages to be paid in genuine claims, and also gives rise to the potential for exaggeration and fictitious injury.

The rules being relatively silent on the use of rehabilitation services also leaves the door open for CMCs and medical agencies to look to take advantage of this with the increased likelihood of claims layering strategies being used, a proactive approach from claims handlers will be required to combat this.

It will be interesting to see how behaviours both claimant and defendant develop around the admission of liability stage, claimants potentially holding back on non-protocol vehicle damage claims until an admission is determined may well become common place, defendants potentially looking to admit liability on more claims albeit partially to settle claims quickly and cheaply may give rise to a larger number of claims being paid.

We were already aware that children and protected parties would be allowed to recover the legal costs before the rules were published. The new rule stating that the Fast Track is the normal track for these claims brings clarity to that. Claims also from "vulnerable" claimants, including motor and pedal cyclists are excluded from the increase in the SCT limit. One of the effects of lockdown measures flowing from the COVID-19 pandemic has meant that there has been a large increase in vulnerable road users, and therefore potential claimants.

We also must remember that the MOJ have seen fit not to increase the SCT level for all remaining injury claims, as was originally set out with the Civil Liability Bill. Claims for children and vulnerable road users in RTA claims as well as Employers and Public Liability injury claims, where the SCT remains at £1,000 will prove to be very attractive to claimant law firms, and the recoverable costs they will bring. We may well see a shift in marketing and potential farming activity around such claims.

The reforms will certainly see a change in both how claims are presented and handled, the risk of a rise in claims that fall outside the new SCT limit combined with the very real position of claims teams seeing a huge rise in litigants in person and the administrative challenges that in itself brings certainly means we are in for an interesting few months and years as the market adapts to the latest raft of Civil Justice Reforms in personal injury claims.

Links to the CPR amendments and relevant updates can be found below;

Civil Procedure (Amendment No. 2) Rules 2021 and Practice Direction update 129 - GOV.UK (www.gov.uk)
cpr-pap-update-feb-2021.pdf (publishing.service.gov.uk)
[62nd] [or 63rd (publishing.service.gov.uk)



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