



Informing Progress - Shaping the Future

## FOIL UPDATE

March 2021



## The Whiplash Reforms

Following publication of the new PAP for Personal Injury Claims below the Small Claims Limit in Road Traffic Accidents, the PD, and the SIs, the MIB ran a seminar on the OIC on 2 March, and the Motor and Credit Hire SFTs have met to consider the detail of the new rules. A number of points of interest have been highlighted.

(All PAP paragraph references relate to the Personal Injury Claims Below the Small Claims Limit in Road Traffic Accidents PAP (the PAP) unless otherwise stated. All information from the MIB below comes from the seminar on 2 March.)

### Scope of damages within the new Protocol

Under the PAP, damages are divided into different categories as:

- **'Damages for injury'** – PSLA damages
- **'Other protocol damages'** - special damages, which are divided into:
  - **'Other damages – injury related'** which include costs of treatment, loss of earnings and damaged clothing. The protocol indicates that *"any liability for the claimant to repay another person or business is included in this definition"*.
  - **'Other damages – property'** which covers damage not linked to the injury, including, as stated in the PAP, damage to shopping or personal items in the vehicle. These can be claimed as part of an OIC claim together with some vehicle related damages (**'protocol vehicle costs'**), which include:
    - Vehicle costs which have been paid by the claimant or by an individual on his or her behalf, including any vehicle insurance excess.
    - The pre-accident value of the vehicle claimed by the claimant personally and not repayable to the claimant's insurers.
    - An estimate of repair costs which the claimant, or an individual on their behalf, intends to pay personally.

- **Non-protocol vehicle costs'** are those which are payable by the claimant to third party businesses or organisations, which are not included within the OIC. These would include credit hire and credit repair and storage and recovery paid for by a third-party organisation, as well as the subrogated outlay of the insurer.

From the definitions above it would appear that credit rehabilitation costs will be included within the OIC claim as 'Other damages – injury related'. This view is supported by the fact that there is no category of 'non-protocol injury costs' into which credit rehab might fall and so be excluded from the OIC, as with 'non-protocol vehicle costs'. The MIB was asked by an attendee to confirm the position but surprisingly indicated that the issue should be taken up with the MOJ. Despite that cautious response it is presumed that credit rehab, together with contractually repayable sick pay and gratuitous care claims, will be within the OIC.

### Excluded claims

Exclusions from the new process for vulnerable road users and children and protected parties were expected and the full details of claims outside the new SCT limit, the tariff and the OIC are now discernible from the Act, the PAP, and The Civil Procedure (Amendment No 2) Rules 2021.

Children and protected parties	<p>Within the Civil Liability Act so subject to the tariff but outside the OIC. SCT limit remains at £1k.</p> <p>Under para 5(5)(c) of the SI, further provisions are inserted into CPR r 26 indicating that the fast track is the normal track for a whiplash claim brought by a child or a protected party in relation to an accident after 31 May 2021 and that where this rule applies the claim must not be allocated to the SCT – in effect the SCT limit in these claims is removed.</p> <p>All whiplash claims worth from zero to £25k brought by a child following an accident after 31 May will therefore be handled through the existing Claims Portal. A new para 4.1A will be added into the current PAP for low value RTA claims confirming that.</p> <p>As now, claims brought by a protected party will not be handled within the existing Claims Portal. Whiplash claims brought by a protected party will be dealt with by court proceedings and will be allocated to the Fast Track even if they are worth under £1k.</p>
Motorcycle riders and passengers	<p>Outside the Civil Liability Act, outside the tariff and the OIC. SCT limit remains at £1k.</p>
Vulnerable road users using a wheelchair, , bicycle or other pedal cycle, horse riders and pedestrians	<p>Outside the Civil Liability Act, outside the tariff and the OIC. SCT limit remains at £1k.</p> <p>A Slater and Gordon representative at the MIB seminar asked if a claimant riding an electric scooter was within the OIC. The question was not one of those answered, but it would appear that, as an electric scooter is defined as a motor vehicle, the claim will be</p>

	<p>within the tariff, and within the OIC and subject to the £5k SCT limit.</p> <p>E-bike riders are not included within the express wording. Under the Electrically Assisted Pedal Cycles (Amendment) Regulations 2015, e-bikes are excluded from motor vehicle registration, and are arguably not mechanically propelled, so would appear to be outside the Civil Liability Act and therefore outside the tariff. It is unclear whether they are within the definition of a vulnerable road user in the PAP and the SI, which excludes claimants riding "<i>bicycles and other pedal cycles</i>". If they are not classed as a "<i>pedal cycle</i>" they will be subject to the new £5k SCT limit and be within the OIC.</p>
Mobility scooter users	<p>It is made clear in the PAP and the Civil Procedure (Amendment No.2) Rules 2021, that a claimant using a mobility scooter will be outside the OIC and subject to a SCT limit of £1k.</p> <p>Are mobility scooters users within the Civil Liability Act and therefore subject to the tariff? Whilst it seems logical that mobility scooter users, like other vulnerable road users, will be outside the tariff, a claimant is within the Act if they were using a motor vehicle on a road or other public place, with motor vehicle defined as "<i>a mechanically propelled vehicle intended or adapted for use on roads</i>". There appears to be an argument that a Class 3 mobility scooter falls within that definition.</p>
Claimant is an undischarged bankrupt or claimant or defendant is acting as a personal representative	Subject to the tariff. Outside the OIC. SCT limit remains at £1k
Except for claims involving a child or protected party, where the defendant's vehicle was registered outside the UK.	Subject to the tariff. Outside the OIC. SCT limit remains at £1k.

## Rehabilitation

The MOJ had previously confirmed it was looking into signposting to rehabilitation within the OIC. The MIB has confirmed that rehabilitation for represented claimants will be "*as now*". However, under the PAP, LIPs will be asked for details of the injury and asked whether they have been "*advised to seek further medical treatment such as physiotherapy for their injuries*". The question appears to presume that the claimant will have already received some medical attention. The information provided will be shared with the compensator who can then decide whether to offer rehabilitation.

## **Valuation of Claims within the OIC**

The PAP applies when the claim for injuries is not more than £5,000 and the overall claim is not more than £10,000. 'Non-protocol vehicle costs' as set out above – including credit hire and credit repair costs – are excluded from the valuation but, in contrast to the position under the existing portal, other vehicle damage ('protocol vehicle costs' as set out above) is included. A sizable claim, therefore, for pre-accident value of the vehicle or repairs that the claimant has paid or will pay for personally, will take the claim out of the OIC.

## **Time limits**

A compensator has longer to respond to a claim within the OIC than in the existing portal: 30 days for an insurer and 40 days for the MIB/RTA insurer. In contrast to the existing portal, where no response is submitted in the OIC the claim does not exit the process but instead liability is taken to have been admitted in full.

## **The tariffs**

Although it had been expected that a single tariff would be set to cover whiplash and minor psychological injuries, a dual tariff has been set including a second scale with sums increased by £20 at the lower end and £130 at the upper end, to apply where minor psychological injuries have also been suffered.

The tariffs are slightly higher than previously indicated. Initial tariff sums were set out in the Part 1 MOJ response to the whiplash reforms in February 2017, and figures 4-5% higher were later included in the Impact Assessment to the Civil Liability Bill, a rise which was presumed to reflect inflation. The figures now published in the Whiplash Regulations 2021 are further increased by £5 at the bottom end and £435 at the upper end. Apart from the increase to the lowest banding (injury duration of no more than 3 months, where the increase is very small) the increases are around 11%, with no clear link to inflation. It is possible that the increases are as a result of the required consultation with the Lord Chief Justice on the tariff under the Civil Liability Act.

## **Non-Protocol Vehicle Costs**

Credit hire and credit repairs, storage and recovery costs not paid by the claimant will be outside the OIC. It is expected that they will be resolved by liaison between the third-party organisation and the compensator. However, if the OIC claim is to exit the process and go to court, any 'non-protocol vehicle costs' need to be added-in. The MIB says that the claimant will be asked a series of Yes/No questions, prompting the claimant to ask the insurer or the CHO for appropriate information. The form to be completed by the claimant is included as Annex C in the PAP. It asks for details of the costs claimed, hire period, the need for a replacement vehicle, daily hire rates, and impecuniosity. It will clearly be a challenge for a LIP to provide the required information and documentation unless they receive significant support.

## **The Guide to Making a Claim under the RTA Small Claims Protocol**

The guide is being produced to assist LIPs. The MIB reports that it is "*substantially complete*". It is being finalised by the MOJ and will be made available as soon as possible.

## **MID results**

Upon commencement of a claim, the system will undertake a MID search and will send the name of the defendant's insurer to the claimant. The MIB has highlighted two exceptions to that process:

A 'double-hit' – two insurers identified. In this situation the Portal Support Centre will apparently step in and address with the compensators who is to deal with the claim and assign it accordingly.

No MID match - if there is no match or the intervention of the Support Centre above does not identify a compensator, this is a potential route to the MIB.

It appears that one of the aims of the OIC is that the claimant should not be left "*high and dry*" if there is uncertainty over the insurer or a denial of cover. The MIB says that an identified insurer who denies that it is 'on risk' will have to handle the claim, which will then become a liability dispute between that insurer and the claimant. There will need to be a "*conversation*" to get the claim to the correct compensator, although it is unclear how this will work in practice. It appears that issues around cover which would usually be addressed behind the scenes will now involve the claimant.

### **Non-whiplash injuries**

The handling of additional injuries alongside whiplash has been a key issue throughout the development of the OIC. The MIB has made it clear that the OIC will not advise on the level of an offer but will steer claimants towards the Judicial College Guidelines. It is not clear if that is a reference to the full JCG or an edited version. It is anticipated that a test case will be brought to enable the courts to advise on how additional claims are to be treated alongside whiplash, although that will leave compensators to deal with the issue in the meantime.

### **Report fees**

In a claim involving whiplash, as soon as there is an admission of liability in full or in part, a medical report will be obtained. For a represented claimant the MedCo process will work exactly as now. An unrepresented claimant will also obtain a report through MedCo, with the cost to be paid directly by the compensator.

If a police report is required, the cost will be included as a disbursement within the claim and it will be for the compensator to then decide if it was obtained appropriately and if the fee will be included in the settlement offer.

### **Court decisions**

If a dispute arises on liability or quantum which cannot be resolved between the parties the claim will exit the OIC and go to court. The claim may also exit the OIC in other circumstances with the claimant then free to issue proceedings, for example, if the claim exceeds £5,000 for personal injury or £10,000 overall, if there are allegations of fraud or FD, if there is complexity or a dispute on the facts, or if the compensator fails to make an offer. The OIC will generate court forms using the information uploaded.

The new PD 27B sets out different processes depending upon the nature of the claim being brought:

- On a liability dispute there will be an oral hearing attended by both parties or their representatives.
- For a decision on quantum without a claim for 'non-protocol vehicle costs' or an uplift, the claimant may request a determination without a hearing, which the court may direct if the defendant does not disagree.
- Where 'non-protocol vehicle costs' or an uplift are claimed, there will be an oral hearing attended by both parties – an improvement on the current Stage 3 process where credit hire is involved where the defendant is not able to require an oral hearing.
- A specific section of the PD covers claims which go to court because there is a dispute over the costs incurred by the claimant for a medical report or other disbursement. Claim Form O will be generated by the OIC and directions will be given following filing of the Acknowledgment of Service.

The timescale of an OIC claim which exits the process for a court decision will be subject to court resources. Whilst some courts are able to offer a SCT hearing within six weeks, in others

the parties can wait over a year. Where a decision on liability is required, the medical report will not be obtained until the issue has been determined and may be significantly delayed.

The MIB seminar was asked who will pay the court issue fees. The question was not one of those answered. It would seem likely that the usual rules on SCT fees will apply with the issue fees paid by the claimant, subject to the usual rules on remission, and then recovered from the defendant if the claim succeeds. Under the PAP para 10..6(7) "*where the claimant pays court fees, the compensation must pay the court fee incurred at the end of the claim, unless the court has ordered otherwise.*"

All claims will be issued by Salford. Voluntary and consumer organisations are engaged and judicial training is underway.

The interaction between the OIC and the courts, and the options that will arise to exit claims, or to issue proceedings and avoid the OIC, are likely to create gaming opportunities.

### **Further medical reports**

Under para 7.6 of the PAP a further medical report will be justified where:

- It is recommended in the first report.
- The first report recommends that further time is needed before a prognosis can be determined.
- The claimant is receiving continuing treatment.
- The claimant has not recovered as expected.

This raises the possibility that a further report may be sought where a prognosis has been given but the claimant is still receiving treatment.

If a request is made for a further medical report, the compensator must arrange and pay for the further report unless they believe it is not justifiable under the grounds set out above. Any such objection must be reasonable.

It is not clear what will happen if the compensator refuses to obtain a further report and the claimant disagrees with that decision, although the claimant may obtain and pay for the report themselves (para 7.8(4)). However, the new PD 27B, para 1.13, amends CPR r.27.14 on costs which can be ordered under the SCT. Where a compensator has failed to obtain a further medical report, or has refused to do so unreasonably, the court can order it to pay "*any legal costs incurred by the claimant as a result*". Existing provisions are included within Part 27 allowing costs to be ordered where the defendant has behaved unreasonably. Under CPR r.27.14:

*"(g) such further costs as the court may assess by the summary procedure and order to be paid by a party who has behaved unreasonably."*

In the wording added by PD 27B, there is no reference to assessment but the Costs SFT takes the view that as the new provision is "*without prejudice to the generality of r.27.14(2)(g)*", that the failure to obtain a further medical report will be deemed unreasonable behaviour and will trigger a summary assessment of the claimant's costs. . The issue is likely to be dealt with at the end of the substantive hearing.

### **Claiming for an Uplift to the Tariff**

As expected, the whiplash regulations allow for an uplift to the tariff of up to 20% in exceptional circumstances.

Para 5.12 of the PAP states that the claimant will be asked during the process of entering their claim if they consider their whiplash injury was exceptionally severe and "*whether their circumstances have had an impact on their pain, suffering and loss of amenity caused by the whiplash injury and, is so, whether they consider those circumstances were exceptional*". The

wording is rather awkward. It is lifted mainly from the Civil Liability Act although that refers to circumstances increasing pain, suffering or loss of amenity. It remains to be seen how that wording will be distilled down into the questions asked in the OIC process.

Once the claimant has claimed an uplift the matter is referred to the medical expert. Under the section on medical reports, para 7.8 of the PAP indicates that where the claimant is unrepresented the instructions to the medical expert will automatically include the information on whether injury or circumstances are considered exceptional. Under para 7(9) it appears that the same information will be provided to the expert where the claimant is represented.

The PAP, in para 5.12 states that the information provided by the claimant on severity and exceptional circumstances "*will be provided to the medical expert for the purposes of considering any claim for uplift*". There is no indication in the rules that the medical expert will comment expressly on whether an uplift is justified. The expert is required under para 7.13 of the PAP to upload the report and details on prognosis, but it makes no reference to putting forward an opinion on an uplift.

Under para 8.4 of the PAP, where the claimant claims an uplift they are required to confirm if the "*medical report supports the claim as set out*" presumably including the claims of exceptional severity or exceptional circumstances. If the medical report does not provide that support the claimant should set out the evidence relied upon to support the claim for an uplift. The compensator's offer must then set out the percentage uplift offered, if any. It would appear that the expert's role is to consider and report on the details provided by the claimant, with the compensator then making the decision on whether the injury/circumstances are exceptional.

### **Statements of Truth**

A number of documents uploaded by the compensator will need to be supported by a Statement of Truth. These include:

- a defendant's statement of events where submitted – with the Statement of Truth to be signed by the defendant. This should be uploaded with the response within 30 days from the date of the claim.
- The compensator's offer.
- The Response Form for 'non-protocol vehicle costs'.

Under the new system claims handlers will routinely be required to sign SOT for the first time.

### **Interim payments**

In contrast with the current portal, in claims under the OIC interim payments will be limited to special damages, and will not include PSLA damages.

### **Allegations of Fraud**

Under Para 4.59(d) of the PAP, where the compensator through the portal makes an allegation of fraud or fundamental dishonesty against the claimant the claim will no longer continue in the OIC.

The MIB says that in making this "*serious allegation*" someone will be asked to set out the details, which the claimant will see. Under PAP para 4.5(2) the compensator must explain the reasons for the allegation. On the individual putting forward the allegation, the MIB says "*you will have to tell [the claimant] who you are and your job title within the compensator*".

### **Public Awareness of the OIC**

The public will be made aware of the new whiplash process through social media channels which will start w/c 3 May.

The MIB seminar can be viewed on YouTube on <https://youtu.be/O1H0fwBzQyI>

A series of MIB E-shots is expected from 8 March onwards covering 'non-portal vehicle costs', medical instructions, tariffs, exit points and court forms (which have not yet been published).

From 5 April, pre-registered third parties will be able to try out the system. The MIB will be "wide open for feedback".

The MIB has made clear that it has responsibility for the build but not for policy decisions which rest with the MOJ. The MOJ will be running a series of webinars starting w/c 8 March – the first is scheduled for 11 March. The MOJ will cover the PAP, the PD and address legal technical issues.

The MOJ has published a response to the MedCo proposals for additional rules and audit process for DMEs:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/964708/medco-survey-analysis-response.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/964708/medco-survey-analysis-response.pdf)

DMEs undertaking LIP work will now require a DBS basic check, with an enhanced DBS rating recommended as best practice.

If you have issues on the new system or the PAP, PD or SIs you would like to raise with the Motor, Credit Hire or Fraud SFT, please contact Shirley Denyer (at present, due to technical issues with the FOIL info address, via the CEO email [Laurence.besemer@foil.org.uk](mailto:Laurence.besemer@foil.org.uk)) .

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