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# The effect of the Civil Liability Act on Higher Value Claims

## *The Act may impact on claims for whiplash brought as part of a more serious claim*

As the Civil Liability Bill proceeded through parliament during 2018, its two separate parts appeared to be aimed at completely different parts of the personal injury claims sector. Lawyers responsible for lower value RTA claims were focused on Part 1, setting out reforms to the whiplash claims regime; whilst catastrophic claims lawyers turned straight to Part 2, on the discount rate.

In practice, there is a cross-over. Part 1 of The Civil Liability Act is not limited to stand-alone whiplash or lower value claims but can also apply to RTA whiplash claims included within serious injury claims. In cases where the Civil Liability Act applies to these mixed claims, the most important implication is the pre-med offer ban – a prohibition on settling the whiplash claim (and any minor psychological injury suffered at the same time) without medical evidence.

**The definition of whiplash**

Under Sec 1(1) of the Act, whiplash is defined as "*an injury of soft tissue in the neck, back or shoulder*" that is:

Sec 1(2*)*

- *A sprain, strain, tear, rupture or lesser damage of a muscle, tendon or ligament in the neck, back or shoulder; or*
- *An injury of soft tissue associated with a muscle, tendon or ligament in the neck, back or shoulder.*

In a exclusion which may take some mixed claims out of the Act, an injury is not defined as a whiplash injury under the Act if:

- *it is an injury of soft tissue which is part of or connected to another injury, and*

- *the other injury is not an injury of soft tissue in the neck, back or shoulder of a description falling outside [Section 1(2)],* set out above.

At present, with the new regime freshly introduced, there is no statutory or judicial guidance on what is meant by "*part of or connected to another injury*". The only guidance available was provided by the then Justice Minister, Rory Stewart, speaking in the Third Reading debate of the Bill in the Commons on 23 October 2018. He stressed that injuries were not connected merely by being incurred in the same accident:

*"……we wish to make it clear, as the Government, that when we refer to the question of something being "connected", we are not referring to it being connected simply by virtue of it taking place within the same accident.*

*I have the following on a formal piece of paper here, so that I can make my Pepper v. Hart statement to make sure that this is clear for the judiciary. In subsection (3), therefore, we have excluded those soft tissue injuries in the neck, back or shoulder which are part of or connected to another injury, so long as the other injury is not covered by subsection (2). The effect of subsection (3) would be to exclude, for example, damage to soft tissue which results only from the fracture of an adjoining bone or the tearing of muscles arising from a penetrating injury, which would otherwise fall within subsection (2)."*

The government's intention in including Section 1(3) was to provide a narrow exception, recognising the risk of gaming if a wide range of whiplash claims accompanied by other injuries were taken outside the new regime. The examples given by the Minister appear to suggest that to be "*part of or connected*" to another injury, the whiplash injury will need to be directly ancillary to a non-whiplash injury. Although he wished to make it clear, Rory Stewart's confirmation leaves plenty of room for uncertainty.

It is not only the nature of the injury that is relevant but also its duration. Under Section 6 of the Act, the ban on pre-med offers only applies to whiplash claims which come within Section 3 (which puts in place the tariff for damages). It covers claims where the duration of any of the whiplash injuries suffered "*does not exceed, or is not likely to exceed, two years".* Therefore, if the whiplash injury has already lasted more than two years, or is likely to do so, it appears a pre-med offer can still be made.

Bearing in mind that pre-med offers in more serious claims are likely to be made within two years of the accident, in practice this provision is unlikely to make a difference in most cases. The risk in making an offer where it is believed that the injury is likely to last two years is that if the injury actually resolves within that period the issue could arise of whether the defendant representative's belief was reasonable. With no medical evidence to refer to, there is potential for it to be argued that there was a breach of the Act, whether or not the offer was accepted.

**The need for medical evidence**

Where the whiplash injury falls within the Act, a regulated person cannot make an offer or payment in settlement of the whiplash claim, or arrange or advise settlement, without first seeing "*appropriate evidence*". Similarly, a regulated person cannot arrange or advise the acceptance of a settlement without medical evidence.

**"Regulated persons".**

The provisions cover a wide range of regulated professionals, including those regulated by the FCA, the Claims Management Regulator, The Bar Council, the Law Society, the Chartered Institute of Legal Executives, and a licensing authority under the Legal Services Act 2007.

**"Appropriate evidence"**

The Act itself does not indicate what will amount to "*appropriate medical evidence*": that detail is set out in secondary legislation – The Whiplash Injury Regulations 2021. Under Para. 4, where the claimant lives or is being examined in England and Wales, "*appropriate evidence of an injury*" means either a MedCo fixed cost medical report or, where a medical report has been obtained for another injury suffered on the same occasion as the whiplash injury, which includes evidence of the whiplash injury, and the other injury is identified in the report as being more serious than the whiplash, a medical report from a doctor listed on the General Medical Council's Specialist Register. The GMC website confirms that the Register is a "*list of doctors who are eligible to take up appointment in any fixed term, honorary or substantive consultant post in the NHS excluding foundation trusts. If a doctor is on the Specialist Register it will say so as part of their status on the medical register.*

Outside England and Wales, evidence will be required from a medical expert "*having the required qualifications for the purposes of diagnosis and prognosis of a whiplash injury*."

**The effect of breaching Section 6**

Under Sections 7(5) and (6) of the Act, a breach of Section 6 is not an offence, does not give rise to an action for breach of statutory duty and does not render the agreement to settle the whiplash claim void or unenforceable. The regulated person who breaches the Act will commit a regulatory offence, to be dealt with by the appropriate regulator.

**The limits of the Act**

The boundaries of the Act and the claims to which it applies were the subject of controversial amendments during the course of the Bill and various changes by government have resulted in a complicated picture of claims which are in or out.

As a starting point, the Act only applies to causes of action which accrue after 31 May 2021. Although lower value claims are already being brought under the Act through the Official Injury Claims portal (OIC), it may be some time before the provisions become relevant in more serious claims.

The Act only applies to claims brought by someone who was injured whilst using a motor vehicle, excluding a motorcycle. Vulnerable road users using a wheelchair, bicycle or other pedal cycle, horse riders and pedestrians are outside the Act.

E-bike riders are not included within the express wording of the Act. 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 Act.

There have been numerous press reports of accidents involving e-scooters over the past year and claims for serious injuries are arising. Although the issue is not expressly dealt with in the Act, as an e-scooter is defined as a motor vehicle claims arising from their use are likely to be within the Act.

The position of mobility scooter users is unclear. Lower value claims brought by mobility scooter users are expressly within the OIC. It would seem logical for these claims to be treated in the same way as other claims brought by vulnerable road users but the Act states that 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 "*a mechanically propelled vehicle intended or adapted for use on roads".* There appears to be an argument that a Class 3 mobility scooter will fall within that definition.

Although lower claims brought by children and protected parties are handled outside the OIC, they are within the Act so Section 6 will still apply.

**Other consequences of the Act**

For whiplash claims within the Act which last for up to 24 months, the tariff will apply as set out in Para 2 of the Whiplash Injury Regulations 2021. Tariff damages for whiplash and any minor psychological injury suffered on the same occasion range from £240 to £4,345, depending upon the duration period. An uplift of up to 20% can be awarded if the whiplash injury is exceptionally severe or if the claimant's circumstances increase the pain, suffering or loss of amenity and those circumstances are exceptional. Judicial clarification of those provisions is also awaited.

**Conclusion**

Whilst it is clear that the Civil Liability Act 2018 will apply to whiplash claims brought as part of a more serious injury claim, the exact circumstances in which medical evidence will be obligatory are still to be confirmed. The wording of the Act is convoluted and detailed, with the wording deliberately designed to keep most whiplash claims within the new regime. Until the issue is clarified by the courts regulated persons are likely to take a very cautious approach to settling any whiplash claim without seeing medical evidence.