

# The Civil Liability Act 2018

## Whiplash Reforms

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# The Civil Liability Act 2018

## Whiplash Reforms

The Civil Liability Act 2018 has laid the foundations for significant reform to the way in which whiplash claims from road traffic accidents will be handled in England and Wales. These include fundamental changes to the traditional basis for valuing certain types of personal injury claim and the potential removal of legal representation from the process.

The UK Government has held this out as a means by which to drive a reduction in the cost of personal motor insurance. We will review the known factors and consider the potential outcomes.

- A brief summary of the whiplash journey so far
- An understanding of the actual proposals under development
- Where the prospective challenges lie
- What the outcomes might be

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The UK Government determined that the cost of motor insurance for private individuals in England & Wales was too high & that a contributory factor was the cost associated with frequency & valuation of whiplash claims.

Whilst whiplash is not a phenomenon particular to the UK, it is clear that the frequency & associated cost here is far greater than in other developed countries:

- Vibrant claims & compensation market
- Numerous countries don't make awards or there are restrictions in relation to what can be claimed or when claims can be raised

We have seen a continuous reduction in new RTA claims volumes in the MoJ Portal since 2015 dropping from around 875,000 to circa 680,000 in July 2019 (not all whiplash) but that is still nearly 2,500/day & an annual overall cost running to £bn's.

Regardless of whether we accept the rationale or agree with the approach, a policy decision was made reform the specific area of whiplash claims to address some of the "drivers" & seeking to reduce the overall cost to the country & in particular the cost of motor insurance for private individuals.

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**Received Royal Assent on 20 December 2018 & provides a framework for the whiplash reforms**

### **Lays out scope:**

- Person suffers “whiplash” injury due to “driver negligence”
- Where person is either using a motor vehicle other than a motor cycle, or is being carried in or on a motor vehicle other than a motor cycle. Includes boarding / alighting
- Only applies to accidents occurring in England / Wales

### **Sets out necessary secondary provisions:**

- Regulations & Tariffs
- SCT increase, new CPR rules & Pre-Action Protocol
- Direct Portal access: “Litigant in Person Portal”

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### The Definition in the Act:

#### “Whiplash injury” etc

(1) In this Part “whiplash injury” means an injury of soft tissue in the neck, back or shoulder that is of a description falling within subsection (2), but not including an injury excepted by subsection (3).

(2) An injury falls within this subsection if it is—

- (a) a sprain, strain, tear, rupture or lesser damage of a muscle, tendon or ligament in the neck, back or shoulder, or
- (b) an injury of soft tissue associated with a muscle, tendon or ligament in the neck, back or shoulder.

(3) An injury is excepted by this subsection if—

- (a) it is an injury of soft tissue which is a part of or connected to another injury, and
- (b) the other injury is not an injury of soft tissue in the neck, back or shoulder of a description falling within subsection (1).

### Pre-med offers are banned for whiplash only

#### *Settlement of whiplash claims*

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#### **Rules against settlement before medical report**

- (1) A regulated person is in breach of this section if—
  - (a) the regulated person knows or has reason to suspect that a whiplash claim is being made,
  - (b) the regulated person does, or arranges or advises the doing of, an act mentioned in subsection (2), without first seeing appropriate evidence of the whiplash injury or injuries, and
  - (c) the regulated person is acting as such when the regulated person does, or arranges or advises the doing of, that act.
- (2) The acts referred to in subsection (1) are—
  - (a) inviting a person to offer a payment in settlement of the claim;
  - (b) offering a payment in settlement of the claim;
  - (c) making a payment in settlement of the claim;
  - (d) accepting a payment in settlement of the claim.
- (3) The Lord Chancellor may by regulations make provision about what constitutes appropriate evidence of an injury for the purposes of this section.
- (4) The regulations may in particular—
  - (a) specify the form of any evidence of an injury;
  - (b) specify the descriptions of persons who may provide evidence of an injury;
  - (c) require persons to be accredited for the purpose of providing evidence of an injury;
  - (d) make provision about accrediting persons, including provision for a person to be accredited by a body specified in the regulations.
- (5) A statutory instrument containing regulations under this section is subject to affirmative resolution procedure.
- (6) In this section “whiplash claim” means a claim that consists only of, or so much of a claim as consists of, a claim for damages for pain, suffering and loss of amenity caused by—
  - (a) one or more whiplash injuries suffered by a person on a particular occasion because of driver negligence and in relation to which section 3 applies, or
  - (b) a whiplash injury or injuries within paragraph (a) suffered by a person on a particular occasion and one or more minor psychological injuries suffered by the person on the same occasion as the whiplash injury or injuries.

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### Timetable

**Trigger Date:** Date of Accident is suggested in the draft regulations & confirmed by MOJ (this should mean there is no pre-implementation spike)

### Government target dates are:

- Testing from November 2019 (originally October)
- On-boarding from January 2020
- Target launch date of 6<sup>th</sup> April 2020

### What is still to be done:

Defining Pre-Action Protocol & Rules	MIB & MoJ working with the Civil Procedure Rules Committee - no anticipated date as yet
Soft Tissue Injuries	Minor soft tissue injuries are not included in the whiplash definition so will be valued outside the tariff - guidance is being sought
ADR	Challenges on this only being available to LiP. Still no indication that the provision arrangements have been put out to tender. Will it be single or multiple opportunities?
Statutory Instrument	This will contain the necessary rules etc & needs Parliamentary approval from both Houses

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A new LiP Portal is being built to run alongside the existing MoJ Portal

All RTA claims that are “in scope” & fall within the Small Claims Track

- Personal Injury <£5k and total claim value <£10k
- “vulnerable road users”, children / protected parties / claims against foreign registered vehicles will **NOT** be handled on the new Portal
- Credit based vehicle related damages will **NOT** be dealt with on the new Portal

Claims falling outside the new portal, will proceed as present

There will therefore be two portals running in parallel

Recognition that many claimants may be represented

Separate paths within the process for LiPs & represented parties

It will result in multiple-track claims handling:

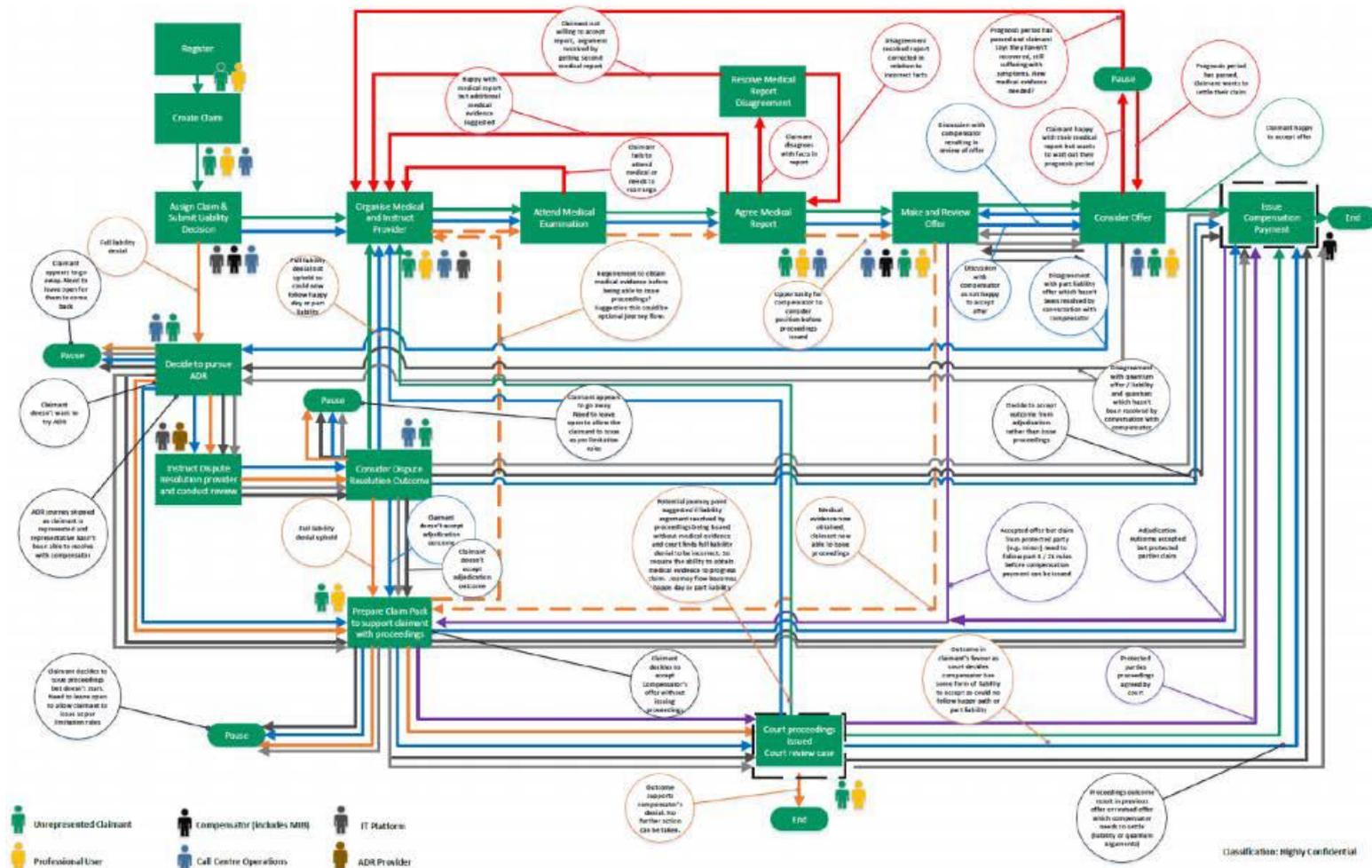
- In scope for LiP Portal
- Out of Scope for LiP Portal but in scope for existing Portal
- Out of scope for either Portal (vulnerable road users/minors with liability disputes) There is a call to revise the SCT limit in respect of minors etc as the existing Portal does not cater for unrepresented claimants

We are going to be faced with an increasing variety of “tracks” through which claims will have to be handled (rules not yet written)

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### What does the customer/claimant journey look like?



Classification: highly confidential

Whiplash reforms

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### Registration

- Identifying the correct portal
- Creating a user account or agreeing User Agreement if a professional user
- IP address validation

### Claim Creation

- Dynamic screen completion with minimum completion level to be attained (menu of injury choices?)
- Integrated MID search to identify relevant insurer (make, model confirmed to avoid mistaken ID)
- MIB assistance if no online capability

### Claim Assigned

- Directed to relevant insurer (redirection capability?)

### Investigation & Response

- Compensator to confirm involvement, reference & status within agreed period (tbc)
- Compensator to confirm position on liability within agreed period (tbc)

### Medical Report arranged & provided to Claimant

- Arranged via MedCo & sent to the Claimant via the Portal

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### Claimant agrees Medical Report

- May identify errors or not agree elements

### Claimant discloses Medical Report to Compensator with full details of claim & supporting evidence

- May withhold/delay report pending prognosis period completion

### Compensator reviews & makes offer

- Settlement payment is outside the portal

### ADR

- Proposals that available to LiP only
- Awaiting clarity on availability of 1 or 2 ADR opportunities

### Litigation

- The system will produce a pack to support the Claimant heading into the litigation process.

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### Challenges

#### Triage Questions & Track Allocation:

- UK or foreign registered vehicle
- Accident in England/Wales
- Was accident on or after 6<sup>th</sup> April 2020?
- Is the Claimant a vehicle driver or passenger?
- Is the Claimant a minor or protected party?

#### Potential Routes:

- LiP Portal
- Original Portal (not designed for LiP or liability disputes)
- Neither Portal (how are these tracked?) (TP Code of Conduct)

### Challenges

#### Minor Injuries:

##### Chapter 13: Minor Injuries (14th Edition)

[\[JC Guidelines Index\]](#) [\[PI Quantum Reports\]](#) [\[PI Index\]](#)

[\[Chapter 13 \(13th Edition\)\]](#)

Minor injuries are injuries which are of short duration, where there is a complete recovery within three months and are not otherwise referred to in other chapters. Cases where there is significant pain or multiple injuries albeit full recovery within three months may fall outside this chapter. Likewise cases involving, for example, travel anxiety (associated with minor physical injuries) or minor scarring where symptoms last for more than three months may appropriately be included in this chapter. The awards within each bracket will be dependent on the severity and duration of symptoms. The extent to which the level of symptoms remains relatively constant will also be a relevant factor. Claims solely in respect of shock or travel anxiety in the absence of physical or recognised psychiatric injury will not attract an award of compensation.

		<u>with 10% uplift</u>
<b>(a)</b> Injuries where there is a complete recovery within seven days.	<b>A few hundred pounds to £550</b>	<b>A few hundred pounds to £600</b>
<b>(b)</b> Injuries where there is a complete recovery within 28 days.	<b>£550 to £1,090</b>	<b>£600 to £1,200</b>
<b>(c)</b> Injuries where there is a complete recovery within three months.	<b>£1,090 to £1,950</b>	<b>£1,200 to £2,150</b>

- minor/soft tissue injuries are not included within the definition of whiplash so tariff values will not apply
- awards historically encompassed within the overall whiplash valuation will now be aggregated on top of the whiplash tariff figure
- Pre-med offers are not banned in respect of minor injury elements

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### Challenges

#### Aggregation of Minor Injury Awards:

Injury Duration (Months)	Tariff	Minor Injuries (lasting 3 month)	Total Damages	Current Average Whiplash	Saving To Compensator
0 – 3	£235.00	£1950.00	£2185.00	£1800.00	-£385.00
3 – 6	£470.00	£1950.00	£2420.00	£2250.00	-£170.00
6 – 9	£805.00	£1950.00	£2755.00	£2700.00	-£55.00
9 – 12	£1250.00	£1950.00	£3200.00	£3250.00	£50.00
12 – 15	£1910.00	£1950.00	£3860.00	£3650.00	-£210.00
15 – 18	£2790.00	£1950.00	£4740.00	£4150.00	-£590.00
18 – 24	£3910.00	£1950.00	£5860.00	£4750.00	-£1110.00

Representations have been made to the MoJ which has apparently written to the Judiciary

There is no clarity but the expectation is that there can be no amendment to the JCG & it may be that if compensators want to challenge then it will be by means of test cases which will take an extended period to reach the necessary appeal stage.

That will not be in the interests of either side – an opportunity for some kind of joint approach that would at least provide a degree of certainty?

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### Challenges

#### Claims Management Companies:

- No longer able to operate in the PPI space
- Highly automated & streamlined processes able to generate profits via small margins
- Attracted by the revenue streams available from associated credit hire & repair claims elements
- Less likely to do robust fraud checks at the front end?
- Attempts to “hide” in the background?
- No cap as yet on CMC fees
- Does the FCA have the resource to adequately monitor & regulate? (without questioning desire or intent)

No guarantee at all of any reduced frequency

No guarantee that any savings whatsoever will be delivered by the Civil Liability Act

Visibility of what is happening will be critical for compensators

### Politics ....

- Brexit
- Elections?

**A degree of certainty (on anything) would be a good starting place**