

The New SCT RTA Protocol & Whiplash Regulations

Details of the new SCT RTA Protocol^[1] ('the Protocol') which sits alongside the new whiplash tariff, as set out in [The Whiplash Injury Regulations 2021](#) ('the Whiplash Regulations') were announced at the end of February. They will come into force, alongside the accompanying changes to the Civil Procedure Rules, on 31 May 2021.

The new Protocol will apply to accidents on or after 31 May 2021 where whiplash, and other injuries valued up to the £5,000, are claimed and where the total value of protocol damages (which do not include credit hire) does not exceed £10,000. It does not apply to accidents before 31 May 2021 so there is no requirement to bring claims precipitously to avoid the Protocol.

Unless one of the exceptions applies, a claim for a whiplash and minor psychological injury, or any injuries valued under £5,000, should be started in the Protocol, even if the claim eventually falls out, such as when fundamental dishonesty is alleged. The new Protocol has important implications for firms which do panel insurance work (note, insurers are referred to as 'compensators' in the Protocol) as there are strict deadlines for compensators to respond to the claim and to make offers and payment.

This article provides an overview of (1) when the Protocol does and does not apply; (2) the key issues regarding liability; (3) quantum and the new whiplash tariff.

When the Protocol will Not apply

The new SCT RTA protocol will not apply when:

- the Defendant is not a road user;
- there was a breach of the Health and Safety at Work etc Act 1974;
- untraced driver claims brought against the MIB;
- the claimant is a child or protected party;
- the Claimant was a "vulnerable road user" (i.e., motor cyclists and pillion / sidecar passengers, cyclists, pedestrians, horse riders and those using mobility scooters);
- the Claimant is bankrupt;
- the Claimant / Defendant acts as a personal representative of a deceased person;
- the defendant's vehicle, at the time of the accident, was registered outside the United Kingdom.

When the Protocol Ceases to apply

The new Protocol will cease to apply if:

- the claim is subsequently revalued above the £5,000 limit for Pain, Suffering and Loss of Amenity ('PSLA') or £10,000 overall limit;
- one of the parties becomes a protected party;
- the compensator notifies the claimant through the Portal that the claim is unsuitable for this Protocol because there are complex issues of fact or law (the reasons for this must be explained);
- fraud or fundamental dishonesty is alleged;
- it continues to be disputed that the accident caused the claimant any injury following disclosure of a medical report.

Credit Hire

Claims for credit hire do not come within the ambit of the new Protocol's online Portal. However, when Court proceedings are started, if the claim cannot be settled in the Portal, the court must be informed of the non-protocol vehicle costs (including credit hire) which have not settled, see 11.1(2). The claim for non-protocol vehicle costs will then be added to the Portal claim when proceedings are started, see 11.5 of the Protocol. However, if adding in the credit hire claim means the overall value of the claim then exceeds £10,000, the Protocol will no longer apply. This means that many claims may be pushed out of the new Protocol by credit hire.

In the Portal, Out the Portal & Back in!

A total denial of liability by the compensator triggers the Claimant's right to bring court proceedings to determine liability, see 6.12, such that the claim leaves the Portal. However, if 'the court decides that the defendant is liable for the accident in full or in part' and the claim does not exceed the Protocol's financial limits the court will stay the proceedings and direct that the parties must follow the steps in sections 7, 8 and 9 of the Protocol'. So a claim can start in the Portal, leave, and then return for the parties to negotiate on quantum.

Liability

Time Limits & Risk of Default Acceptance

It is particularly important for Compensators to note that per 6.15:

'Where no response is provided by the compensator within the relevant response period [30 or 40 days from the claim being accepted on

the Portal], **liability will be taken to have been admitted in full by the compensator.** The claim is then treated under this Protocol as one where liability has been admitted in full and the Protocol will continue to apply.'

This is a key difference as compared with the existing RTA protocol (where procedural default leads to the claim leaving its portal). The compensator must produce a response on liability within 30 days of the claim being accepted on the portal. The time limit is increased to 40 days where the Motor Insurance Database 'MID' search does not identify a compensator and the claim is to be dealt with by the MIB or its agents. If liability is denied, or denied in part, the Compensator's response on liability must also set out the defendant's version of events, accompanied by a statement of truth, and provide any evidence in support.

Negotiating Liability / Causation

Unlike the existing RTA Protocol, the new Protocol is such that a claim will not automatically fall outside its ambit if liability is not admitted in full. If liability is admitted in part, then each party may make up to three proposals on liability. Each proposal must be an improvement on any prior proposal.

The claim will also not fall out of the protocol if the Defendant disputes that the accident caused the Claimant to suffer injury / the extent of injury. When this is the case, provided liability has been admitted, then this issue should be dealt with in the medical expert's report. Similarly, if the Compensator argues that the Claimant contributed to their injuries by not wearing a seatbelt, they must raise this argument in their response and the medical expert will be asked to comment on this in their report. It should be noted that the Protocol discourages the settlement of claims without supporting expert evidence being adduced.

Evidence

The timely disclosure of evidence is encouraged by the Portal as per 5.10(3) of the Protocol 'The court may decide not to allow new evidence to be considered if it is produced after proceedings are started.' This should help facilitate meaningful settlement negotiations.

Quantum

The Whiplash Tariff

"Whiplash injuries" are defined within the Protocol as:

'an injury or injuries of soft tissue in the **neck, back or shoulder** suffered because of driver negligence [...] where the **duration** of the whiplash injury or any of the whiplash injuries— (a) **does not exceed**, or is **not likely to exceed, two years**; or (b) 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.

This mirrors the definition of whiplash injuries under section 1 of the Civil Liability Act 2018.

Minor Psychological Injuries

The tariff also applies where 'minor psychological injuries [were] suffered on the same occasion as the whiplash injury'. It is notable that there is no definition of 'minor psychological injury' within either the new Whiplash Regulations or the Protocol. The introduction to Chapter 7 of the JC Guidelines (15th ed.) anticipated that such a definition would be provided. It is expected the Courts will be influenced by the definition of minor injuries in chapter 13 of the JC Guidelines (15th ed.) which states that whilst this is normally confined to injuries that recover within three months: '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 Amount of Compensation

The amount of compensation that can be awarded for whiplash injuries and minor psychological injuries are fixed by law per regulation 2(1)(a) of the Whiplash Regulations. The amount awarded for one or more whiplash injuries will be taken from the second column, highlighted in blue below and the amount for one or more whiplash injuries and minor psychological injuries will be taken from the third column, highlighted in red below.

<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	£4,715	£4,745

Exceptional Circumstances

Only in 'exceptional circumstances' can the tariff amounts be uplifted by up to 20% per r.4(3) of the Whiplash Regulations. This will no doubt be a high threshold as per r.4(2) of the Whiplash Regulations the Court must be satisfied that the whiplash injury or injuries are exceptionally severe, or the Claimant's circumstances are exceptional, and those circumstances increased the Claimant's PSLA.

Comment

Under the current JC Guidelines, the upper bracket for a whiplash injury lasting two years is £7,410, taking chapter 7(A) for minor neck injuries. Under the new whiplash tariff a Claimant can be awarded up to £4,215 (£5,058 with a 20% uplift) for the same injury. This is arguably unfair as awards for PSLA will now depend on the mechanism of injury (i.e. a whiplash injury sustained in a factory will be assessed by way of the JC Guidelines but whiplash following a road traffic accident will be assessed using the tariff).

This author anticipates that there will be debate as to the meaning of 'minor psychological injuries' given it has not been defined. Claimants will be incentivised to argue that their psychological injuries are not minor, as such injuries only attract an additional award of between £20 – £135, per the column highlighted in red above. Although awards for PSLA were never a question of simply adding up the JG Guideline amounts for physical and psychological injuries, the additional tariff amount for psychological injuries must assume they have not, to any real degree, exacerbated the Claimant's PSLA. It is also anticipated we are likely to see attempts to evade the definition of whiplash by arguing that soft tissue injuries have been sustained to parts of the body that are not the neck, back and shoulders.

Offers & Deadlines to Note

A few final important deadlines to note: once a claimant has provided all the documentation regarding their losses a compensator must make an offer to settle the claim within 20 days (subject to limited exceptions, see 8.7). Even if not all the documentation / evidence in support of a claim for protocol losses are provided an offer must still be made within 20 days on the heads of loss which have been evidenced.

All offers made under the Protocol remain open for acceptance for 10 days after they are made. Thereafter they may be withdrawn by using the "withdraw offer" facility on the Portal, see 8.18(7). It should also be noted, per 8.19(4) that 'An offer which has been rejected may still be accepted at a later date, unless it has been withdrawn in accordance with paragraph 8.18, by using the "accept rejected offer" facility on the Portal'. When a Protocol settlement offer is accepted it must be paid within 10 days (or 30 days if awaiting an updated CRU certificate). Similarly, if an interim payment is requested the compensator must respond to that request within 15 days, see 9.4 of the Protocol.

Concluding Comment

Practically, the new Protocol, coupled with the increase in the small claims track limit and the whiplash tariff will mean that many more claims will now be allocated to the small claims track and started, if not resolved, within the new Portal. Litigation and Claimant legal representation should in many cases be avoided. That said, the new Protocol does not deal with credit hire and this author anticipates attempts by Claimants to evade the whiplash tariff.

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[1] The full title of the new SCT RTA protocol is the 'Pre-Action Protocol for Personal Injury Claims Below the Small Claims Limit in Road Traffic Accidents', available here: [cpr-pap-update-feb-2021.pdf](#) (publishing.service.gov.uk).