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Shoshana Mitchell

Top Tips - Article

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☎ **0300 0300 218**

✉ **Email Shoshana:**

shoshana.mitchell@

normantonchambers.com or

clerks@normantonchambers.com



CASH SLASHED FOR WHIPLASH: TOP TIPS IN LIGHT OF THE ROAD TRAFFIC ACCIDENT REFORMS

The Civil Procedure (Amendment No. 2) Rules (CPR) 2021 will undoubtedly change the landscape for low value Road Traffic Accidents (RTAs). The changes will bring about the new Pre-Action Protocol for claimants who suffer low value personal injuries, including but not limited to whiplash injuries, as a result of an RTA (The RTA Small Claims Protocol). This article contains my top ten tips in light of these recent reforms.

TOP TIP 1: NO REASON TO RUSH

These reforms are not retrospective. Therefore, all RTAs occurring before 31 May 2021 are not caught within these provisions. This means that there is no reason to rush in bringing a claim for low value RTA injuries before the new rules are implemented.

TOP TIP 2: THE LIMIT WILL INCREASE

This new Pre-Action Protocol for RTAs has increased the value of the small claims track in relation to Pain, Suffering and Loss of Amenity (PSLA). The small claims track limit for PSLA will increase from £1,000 to £5,000 on 31 May 2021. However, the small claims track limit remains at £10,000. Therefore, if the totality of the claim is over £10,000 and/or the PSLA is over £5,000 then the small claims track is not appropriate, and these new provisions do not apply.

TOP TIP 3: MAKE SURE YOU KNOW WHO IS AND WHO IS NOT CAUGHT UNDER THESE PROVISIONS

There are a number of exceptions regarding when the new rules apply (CPR 26.6A). The new Protocol will not apply and the PSLA limit of £1,000 will continue to apply when:

- On the date proceedings are started, the Claimant is a child or protected party;
- The Claimant was a 'vulnerable road user', which is defined as a motorcyclist, pillion/sidecar passenger, cyclist, pedestrian, horse rider and individuals using a mobility scooter.
- On the date that proceedings were started, the Claimant is an undischarged bankrupt;

- On the date that proceedings were started, the Claimant or Defendant acts as a personal representative of a deceased person;
- On the date the accident occurred, the Defendant's vehicle was registered outside the United Kingdom;
- The Defendant is *not* a road user, for example the Council fails to maintain the highway resulting in an injury to a road user.
- There is an untraced driver, and the claim is brought against the Motor Insurers' Bureau (MIB).

TOP TIP 4: THE PORTAL IS YOUR FRIEND, NOT YOUR ENEMY

A key feature of the Protocol is the use of a new online Portal. Whilst this Portal is very similar to the current Portal for low value RTAs, there are a number of key differences:

- A Defendant is referred through as the compensator.
- There is a greater focus on and encouragement of unrepresented claimants in the new Portal.
- The failure of the Defendant to respond under the old rules would trigger the claim to exit the Portal. However, under the new Portal a failure to respond to liability by the compensator within the specified time limits results in liability being automatically admitted. (See Top Tip 6).
- Under the old Portal, once claims left the portal they could not re-enter. However, this is not the case under the new Portal. (See Top Tip 7).
- Unlike the current Protocol, the claim does not simply fall outside the new Protocol simply because liability is denied in full or part. (See Top Tip 5).

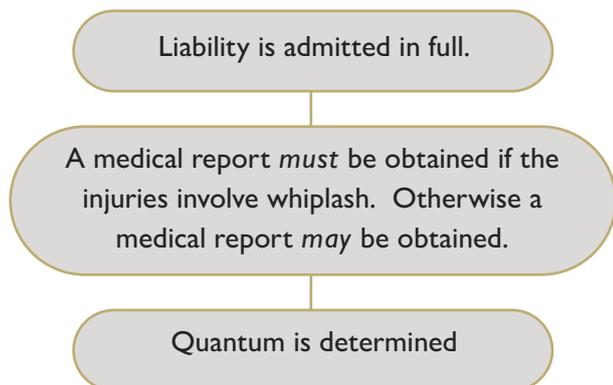
It is important to note that just because the claim enters the Portal this does not count as starting court proceedings. Therefore, it is important to be aware of the limitation period (normally three years from the RTA) and if the claim is approaching that limitation period, then court proceedings must be issued. This will obviously not become a problem until 31 May 2024.

TOP TIP 5: LIABILITY

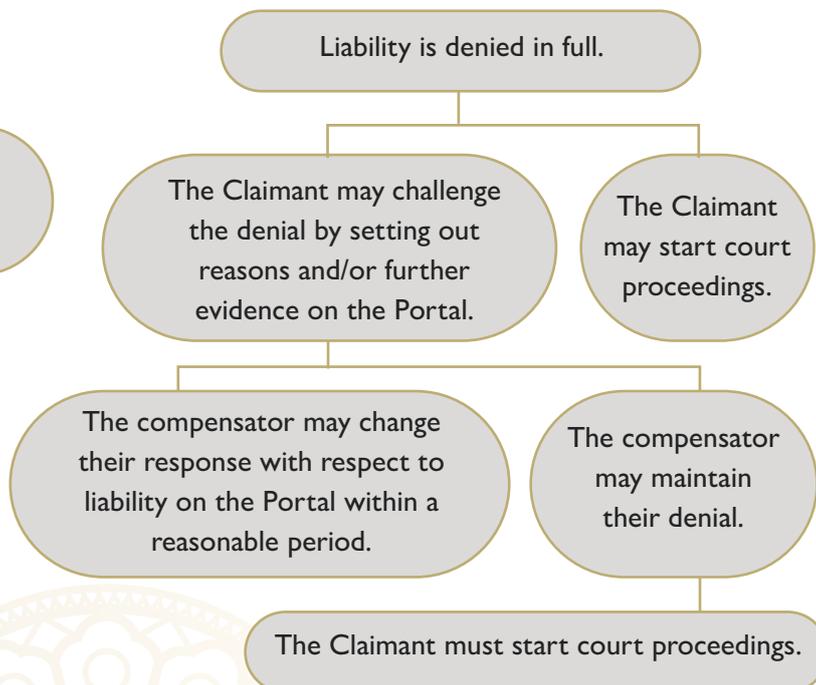
The compensator must respond on the Portal to the Claimant. There are three main options for the compensator: (1) liability

is admitted in full, (2) liability is admitted in part or (3) liability is denied in full. Below are three diagrams for each possible response:

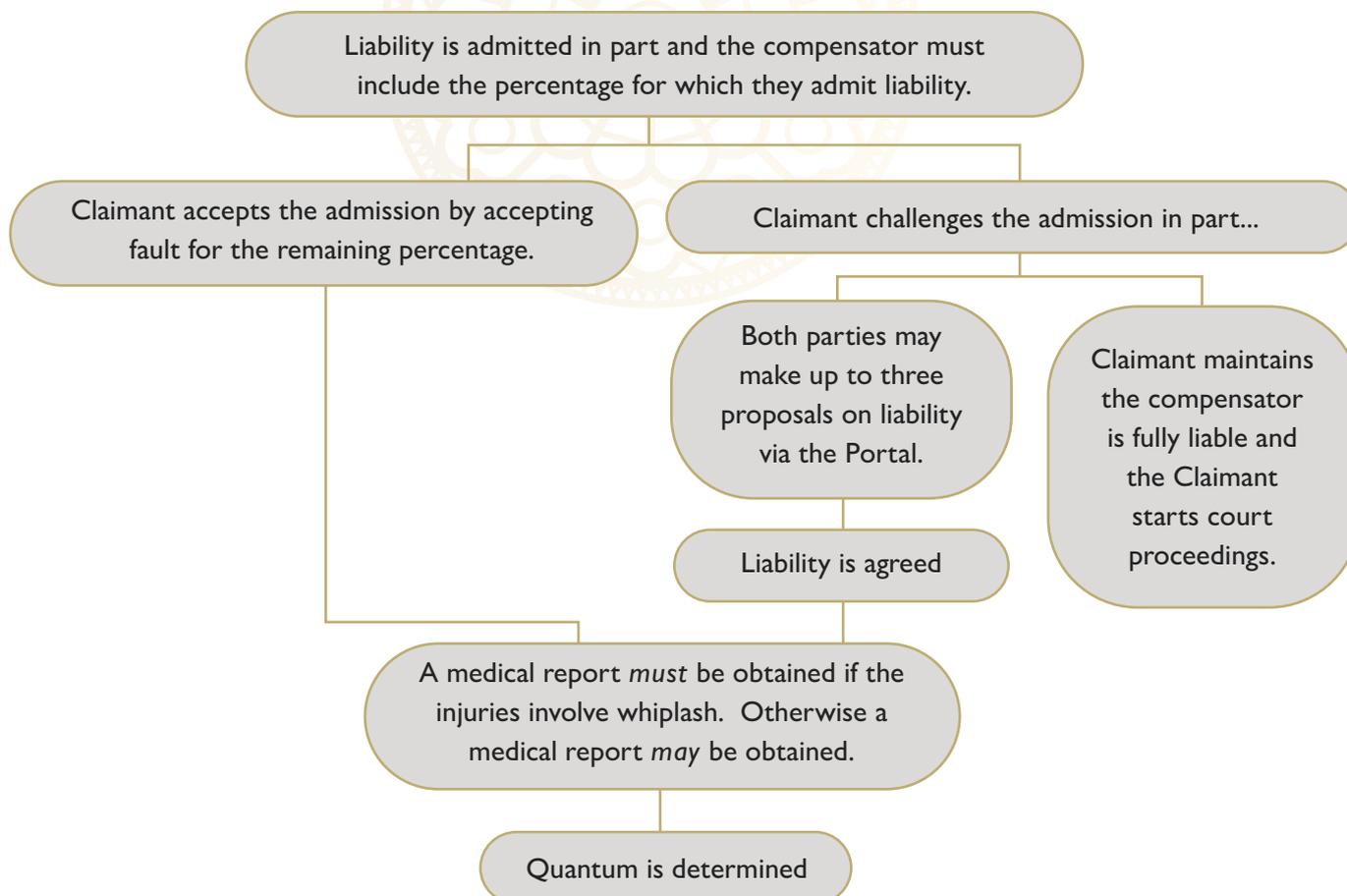
LIABILITY IS ADMITTED IN FULL:



LIABILITY IS DENIED IN FULL:



LIABILITY IS DENIED IN PART:



LIABILITY AND EVIDENCE

It is important to remember that if proceedings are started, then the court may decide not to allow new evidence to be considered. This is to encourage and facilitate settlement in the early stages. Therefore, it is imperative to upload all relevant evidence onto the Portal in a timely manner and at least before starting proceedings.

TOP TIP 6: KNOW YOUR TIME LIMITS

There is a strict time limit for compensators. Compensators must admit or deny liability within 30 days from the claim being accepted onto the Portal. The time limit is increased to 40 days where the Motor Insurance Database does not identify a compensator and the claim is dealt with by the MIB. A failure to respond within this time limit means that the claim is treated as if liability is admitted in full and quantum is then to be determined.

TOP TIP 7: IN, OUT AND BACK AGAIN...

If there is a denial of liability by the compensator, then proceedings must be started by the Claimant and the claim exits the Portal. However, if after proceedings are started, the compensator admits liability and/or the Court finds the compensator liable (in part or full) then proceedings must be stayed, and the claim is returned to the Portal to be disposed of.

TOP TIP 8: CAUSATION

The claim will not fall outside the Protocol if causation is denied. Provided liability is admitted then the issues of causation and/or contributory negligence must be raised and relevant issues must be addressed in a medical expert report.

TOP TIP 9: QUANTUM

Quantum is fixed for whiplash injuries (Whiplash Regulations 2(1)(a)). A whiplash injury is defined as:

- An "injury or injuries of soft tissue in the neck, back or shoulder suffered because of a driver's negligence" *and*
- Recovery "does not exceed, or is not likely to exceed, two years" *or*
- Recovery "would not have exceeded, or would not be likely to exceed, two years but for C's failure to take reasonable steps to mitigate its effect".

Duration of Injury/Injuries	Whiplash Injury/Injuries	Whiplash injuries plus minor psychological injuries
Not more than 3 months	£240	£260
More than 3 months, less than 6 months	£495	£520
More than 6 months, less than 9 months	£840	£895
More than 9 months, less than 12 months	£1320	£1390
More than 12 months, less than 15 months	£2040	£2125
More than 15 months, less than 18 months	£3005	£3100
More than 18 months, less than 24 months	£4215	£4345

In 'exceptional circumstances' the tariff can be uplifted by up to 20% (Whiplash Regulations 4.3). However, the court must be satisfied that:

- The whiplash injury is exceptionally severe; or
- The Claimant's circumstances are exceptional, and those circumstances increase the Claimant's PSLA.

There are several implications of this new tariff. Firstly, it remains to be seen how the courts will interpret 'exceptional circumstances'. The tariff is significantly lower than the JC Guidelines 15 Edition, where the upper bracket (Chapter 7(a)) for whiplash injuries lasting up to two years is up to £7,410. The award for the same injury under the new tariff is now £4,215 or £5,058 with the 20% uplift. Additionally, psychological injuries increase the award by between £20 to £135 which appears to inadequately reflect the significance of such injuries on Claimants. As a result, it is likely that Claimants will try to evade the new provisions.

TOP TIP 10: FLOUT THE NEW PRE-ACTION PROTOCOL AT YOUR OWN PERIL

The new rules make it clear that the court can consider cost sanctions where the new Protocol is not followed. Therefore, defy the new rules at your own risk.

