

# **Whiplash Reforms - Third Update**

March 2021

# Introduction

In our recent release we reviewed the new Pre-Action Protocol (PAP) for claims that will be brought in the new Official Injury Claim Portal (OICP).

In this update we look at the Practice Direction (PD) that supplements Part 27, the Small Claims Track (SCT) of the Civil Procedure Rules (CPR) for cases that litigate through the new process.



# Practice Direction

The PD firstly covers the points that will apply to all claims, then sets out separately the extent to which the rules in CPR 27 will apply in each of the 10 different scenarios where a claimant may commence proceedings:

Type of case	Section of Practice Direction which applies
Liability dispute only – liability denied in full	Section 2
Assessing the value of the claim: liability not in dispute, no claim for non-protocol vehicle costs or uplift	Section 3
Assessing the value of the claim: liability admitted in part but remains in dispute (including where non-protocol vehicle costs and/or an uplift are claimed in such cases)	Section 4
Assessing the value of the claim: liability not in dispute and the claim includes non-protocol vehicle costs (and an uplift where claimed in such cases)	Section 5
Assessing the value of the claim: liability not in dispute and the claimant applies for an uplift (no claim for non-protocol vehicle costs)	Section 6
Application for interim payment	Section 7
Non-payment of agreed interim payment	Section 8
Starting proceedings due to limitation	Section 9
Dispute over fees for medical reports or other disbursements	Section 10
Non-payment of agreed settlement sum	Section 11

Whichever section applies, the process is more akin to an MOJ stage 3 Part 8 claim than a Part 7 claim, in that proceedings are started with court pack containing the evidence of both parties (without the traditional Part 7 particulars of claim) and there is no requirement to file a defence after an acknowledgment of service (AOS). The sanction for failing to file an AOS, that the defendant may not take part in the hearing (or rely upon evidence where applicable), also mirrors that in Part 8 claims.

## The defendant may object to the use of the procedure in their AOS.

If claimants seek to rely upon evidence that was not uploaded to the Portal, it should be filed with the court form with an explanation setting out why it was not previously provided. Defendants will need to provide an explanation for non-compliance should they wish to rely upon any additional evidence when filing the AOS. It seems that the court will determine (without a hearing) whether additional evidence will be allowed when providing directions for the hearing. The court can also, of its own motion, order that further evidence on an issue must be filed if the evidence within the court pack is inadequate to determine that issue.



## Issuing Proceedings

There are four different court forms dependent upon the type of dispute which will be generated by the Portal on the basis of information input by the claimant. Where the insurer has stated in their Portal response that they wish to be joined as a defendant, the claimant must include them as second defendant.

We anticipate that there will not be an option to bring the claim directly and solely against an insurer due to the difficulties this would pose to an unrepresented claimant if the insurer was not providing indemnity.



# Exit

## The claim will not proceed under the PD where:

- The claim is valued at more than the £5,000/£10,000 financial limits.
- The claim involves complex issues of fact or law.
- The defendant makes an allegation of fraud or fundamental dishonesty.
- The defendant disputes that the accident caused any injury to the claimant following service of the medical report.
- The parties agree that the procedure is not suitable.
- The court has any other good reason so to direct.

Claims that exit must be allocated to the Fast or Multi Track, save where the court has found “other good reason” for exit. If the court does not reallocate in those circumstances, then the existing SCT PD will apply.

It should be noted that as the claim does not exit the process through a denial of causation until the medical report is served, the liability only procedure (see below) will still apply to those claims.

If there are other proceedings that the claim is joined to, the court will automatically allocate the claim to the same track those proceedings. For example, if proceedings had already been issued for a credit hire claim for £12,000, the injury claim would be joined and allocated to the fast track.



## Admissions

An admission of liability made in the Portal will be binding on all losses claimed by the claimant in this process. The admission is not binding in respect of other claimant's claims or a counterclaim (but the court may take it into account). This qualification resolves the argument raised by some, in the existing low value Portal (MOJP), that an insurer could bind any claim of their customers by admissions made in that Portal.

An application can be made to withdraw an admission, but the court must on receipt of the application allocate the claim to a different track.



## Costs

The claim will be treated as allocated to the SCT when the claim is started. This is a neat piece of drafting. It will defeat the ambush tactic used in the MOJP of putting high value claims through, issuing and seeking a stay at limitation (see Section 9) then seeking reallocation on service of the medical evidence. Whilst that could still be done in theory, the effect of allocation to the SCT is to wipe out all costs save for those recoverable on the SCT. Reallocation to another track only allows costs to be recoverable from the date of re-allocation.

The existing costs rules in the SCT apply with an amendment to allow police report fees to be recovered.

If an insurer fails to arrange a further medical report when justifiably requested by the claimant, (**in time** or at all), or raises an unreasonable objection, there is a presumption of unreasonable behaviour. The court is likely to order payment of costs incurred by the claimant as a result.

The existing fees for fixed costs medical reports are repeated including the costs of obtaining medical records.



## Section 2:

### Liability dispute only

This section only applies where there is a full denial of fault (technically inaccurately referred to as liability in the PD but the process will apply where causation is denied). If there has been a partial admission of liability, then the claimant will proceed to obtain a medical report and liability will be determined with quantum (Section 4).

Following service of the court pack, the defendant must file an AOS and, as above, will not be permitted to rely upon their evidence in the court pack or take part in the hearing should they fail to do so on time.

If there are any other claims identified, then the court will give directions as to the claims being heard together. Given that this section applies where there is a liability dispute it is possible that the “defendant” may be bringing a claim of their own against the “claimant” and may have started their own proceedings as claimant. This provision also applies to claims in Section 4.

The PD provides that the hearing will be an oral hearing that must be attended by both parties or their representatives. If liability is found against the defendant, in full or in part, the proceedings will be stayed (the claimant will then be able to obtain their medical report through the Portal). The stay will automatically be lifted if the claimant issues proceedings to determine quantum.

If the court considers that the value of the claim is likely to exceed the SCT limit, then it may reallocate the claim. This could become apparent to the court during the course of the claimant’s evidence in the hearing.





### **Section 3:**

**Liability admitted, agreed or determined,  
no Non-Protocol Vehicle Costs or tariff  
uplift claimed**

In many cases this will be the most straightforward scenario for a final hearing. Accordingly, there is the option for a decision on paper if both parties agree or the defendant fails to file an AOS.



### **Section 4:**

**Quantum dispute where Liability admitted  
in part but remains in dispute**

### **Section 5:**

**Quantum only dispute and claim includes  
NVC or tariff uplift**

### **Section 6:**

**Quantum only dispute and claim includes  
tariff uplift**

These sections essentially have the same additional provisions, as applicable, save that Section 4 has the additional determination of liability.

The AOS must state whether the defendant disputes the amount of damages and/or any uplift application.

If the claim includes credit hire, and the claimant alleges impecuniosity, the court's directions will include the usual requirements for financial disclosure and Basic Hire Rate evidence.

The hearing must be an oral hearing.

## Section 7:

### Application for interim payment

The claimant may apply to the court for an interim payment where there has been an admission (or finding) of liability in full, in part or deemed.

The section also applies to cases where the defendant disputes that the accident caused any injury but admits fault in full or in part.

The defendant must state in their AOS whether they dispute the entitlement to an interim payment or agree to pay the sum requested. Logically, it should follow that an interim payment for injury related losses will not be ordered where the defendant denies that the accident caused any injury, although that is not clearly stated in the PD.

The claim will normally be determined on paper, unless the court orders otherwise.

The court may make the order for payment of any item of other protocol damages (damages other than injury) provided that it is satisfied

that the claimant will be awarded other protocol damages for at least the sum that is sought and is “not restricted to the sums requested”. This drafting is curious, it would have been simple to state that the court may order payment “of a sum lower or higher than that requested”. As it is, the rule could be interpreted as meaning the court will not order payment for a lower amount.

Any offer made by the defendant before the claim was started will be taken in account for liability of payment of the court fee.

As in the CPR generally, where the defendant has made an interim payment by agreement or by court order the court may order that all or part of the interim payment is repaid, unless the payment is made in satisfaction of specific heads of damage.



## Section 8:

### Non-Payment of Agreed Interim Payment

Oddly, the PD states that the defendant may dispute the entitlement to an interim payment which it seems could be a drafting error. As the agreement will presumably have been made through the Portal, there would not seem to be circumstances in which the agreement could be disputed, see further under Section 11.

## Section 9:

### Starting due to Limitation

As in the current MOJP, proceedings may be started if the PAP cannot be complied with before the expiry of limitation. The court form includes an application to stay the proceedings and the court must order the stay. The defendant may at any time apply to lift the stay, presumably this is provided for having regard to the problems caused by stayed MOJ stage 3 claims where some courts order indefinite stays.

If a claim has already been started for a liability determination or an interim payment, this will count as proceedings limitation purposes so the claimant will not need to use this section. This could become an issue as the stay imposed by Sections 2, 8 and 9 does not have the rule that the defendant may apply to lift it.



## Section 10:

### Dispute over fees (disbursements)

The defendant must state in the AOS why they should not pay the disbursements. The claim will normally be determined without a hearing.

## Section 11:

### Non-Payment of Agreed Settlement Sum

The defendant must state in the AOS why an order for payment should not be made. It seems that this would also be appropriate response to be used in Section 8. It is likely that there would need to be some exceptional circumstances for an order not to be made, although this is our observation and not part of the PD.

## Final Comments

The drafting style of the PD differs from that of the rest of the CPR. Sections 2 to 11 have large amounts of identical content that is repeated verbatim. This is presumably intended to assist unrepresented claimant's by incorporating the relevant information together under each section, to avoid the need to cross reference between different sections.

This has, however, resulted in a 78 page PD which will be difficult to digest for experienced claims professionals and will likely be truly daunting to many unrepresented claimant's. The question posed in our previous release, as to the extent to which claimants will seek to use this process without professional assistance, remains to be answered.



# Key contacts

For further details on the points raised in this document, please do not hesitate to contact us:



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