Braced for impact

Andrew Hogan on the potential unintended consequences of whiplash reforms

On 31 May, the long-awaited reforms to low-value road traffic accident claims come into law, with detailed measures for the implementation of the statutory scheme prescribed by the Civil Liability Act 2018. 'W' day has arrived. In this article, I shall consider the content of the reforms, their likely impact upon the courts, and their ramifications for the solicitors' profession; particularly that part that conducts personal injury claims.

THE CIVIL LIABILITY ACT 2018

As with all such reforms, the starting point is the statute. The Civil Liability Act 2018 has been brought into force by the Civil Liability Act 2018 (Commencement No 1 and Transitional Provision) Regulations 2021.

In brief, the Civil Liability Act 2018 is a political measure. It provides for the effective abolition of an award of damages to an injured claimant suffering from whiplash at common law, and substitutes in its place a liability upon a defendant to pay compensation calculated according to a tariff. What, for these purposes, is whiplash? It is defined in the act itself as:

'(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.'

The act was passed on the express premise that damages for whiplash would be substantially decreased by the new statutory scheme; and that it would be coupled with an increase in the small claims limit, so that all such road traffic accident claims would become non-costs bearing small claims, and solicitors would be effectively squeezed out of the process, with the expectation that injured claimants would be able to progress their own whiplash claims without the need for legal assistance.

A new internet portal would be created, to enable interested litigants in person to make their own claims for compensation, without the need for lawyers. Heralded as part of the reforms, the portal is said to have been written to be explicable to those with a reading age of 11. So simple is the process meant to be.

I remember wondering at the time the act was passed, all those years ago, how genuine were the motives behind the implementation of these reforms. The more cynical part of me assumed that rather than suffer a political storm by the outright abolition of the right to claim damages for whiplash, by removing the claims from costs bearing rules and also reducing the damages to a pittance, the government could ensure that people simply would not bother to claim thus ensuring the de facto disappearance of whiplash, rather than its de jure abolition.

Such a move would be cynical indeed, but by no means unprecedented: remember, for example, the introduction of fees in employment tribunals, which had the effect of reducing the 'burden' of employment claims on business, by ensuring people could not afford to bring them. Once fees were introduced, the number of employment claims fell off the proverbial cliff.

THE WHIPLASH INJURY REGULATIONS 2021

In February 2021 more details of the scheme were published. The details of the tariff awards are contained in these regulations. A table is provided of prescribed levels of compensation for whiplash injuries, which is pegged to the number of months of duration of injury that an injured claimant suffers. Thus, for a whiplash injury which lasts up to 12 months, an award of £1,320 will be made.

If the whiplash injury is exacerbated by a minor psychological injury, then that figure will be subject to a modest uplift: in the case of a 12-month injury, a further £70 will be recoverable. An interesting point arises where a person suffers a third injury: such as a sprained foot in a car crash, and how this will be accommodated in an overall damages award for pain and suffering.

The better view of the effect of regulation 3(3) is that the tariff award can be increased by 20% as part of a combined award, and that the award of damages for the foot is unaffected by the tariff provisions. On that basis, a judge will reach a decision as to what is the appropriate global award for pain suffering and loss of amenity.

THE CIVIL PROCEDURE (AMENDMENT NO 2) RULES 2021

This statutory instrument amends the Civil Procedure Rules 1999 so that the small claims limit has now been increased to £5,000 for the value of any claim for personal injuries arising from a road traffic accident. The small claims limit is left untouched at £1,000 for other varieties of personal injury claim, such as occupiers' liability or employers' liability claims.

> These reforms represent a significant experiment in transferring work away from the solicitors' profession

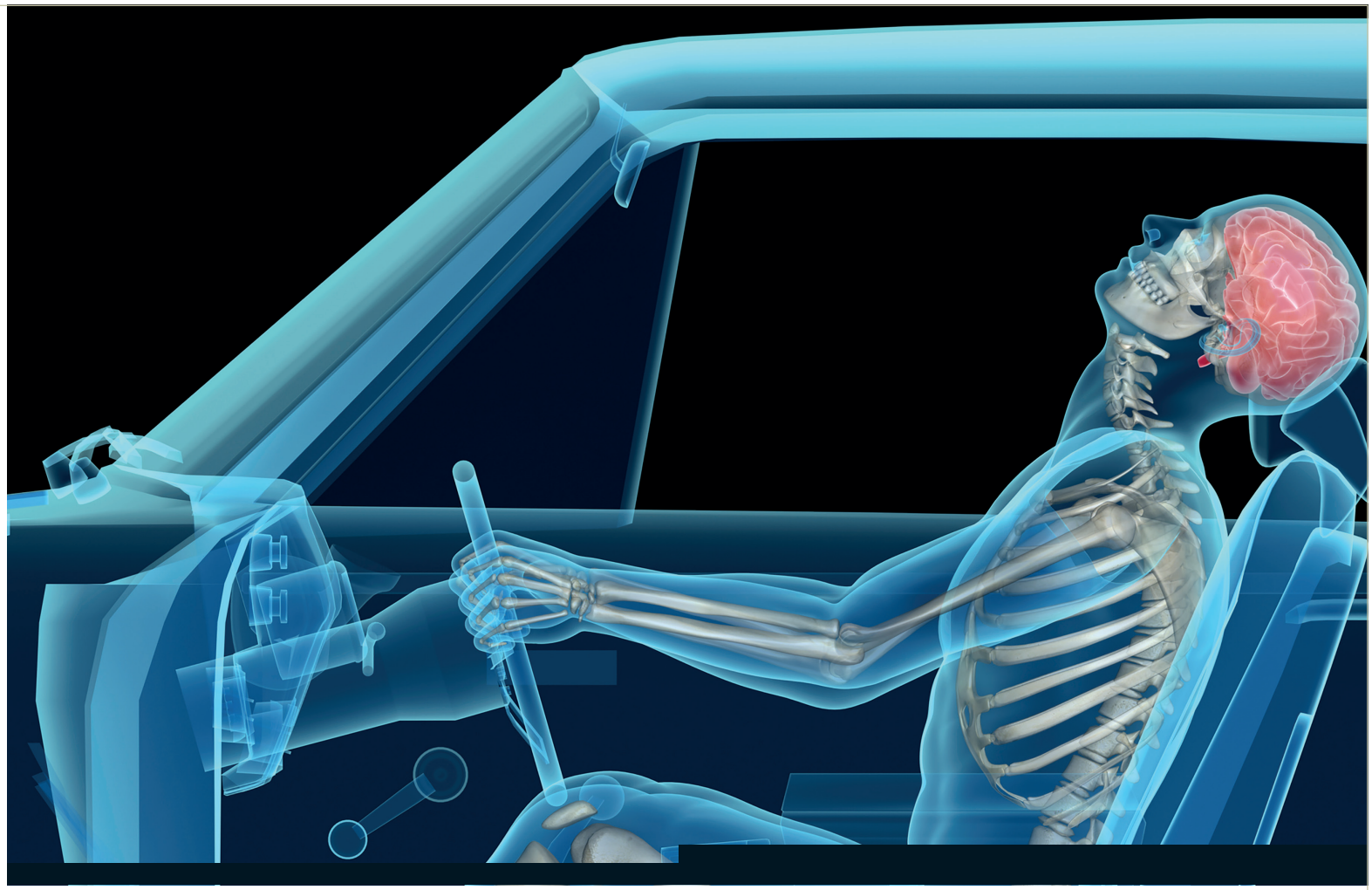
Not all road traffic accident claims will become small claims, by reason of value: there is a list of exceptions where a claim will move to a costs bearing track, where a claimant is a child, or a protected party, or using a motorcycle, a wheelchair or a horse or pedal cycle, or a simple pedestrian.

Part 35 is also amended to deal with medical evidence in such claims, and part 45, to include potential costs penalties for claimants who try to argue that their small claim is reasonably to be valued at a sum more than £5,000 in respect of the damages for personal injuries.

Simultaneously, the practice directions are amended, with a further Practice Direction 27B, the provisions of which can be described as labyrinthine, and which prescribes a complicated set of provisions to be applied depending upon whether liability is disputed, or whether liability is admitted, in whole or in part, and where the dispute is over quantum only. Interestingly, the draft directions annexed to the practice direction contemplate that the (possibly unrepresented) claimant will be fully conversant with the conduct of a credit hire claim:

'The claimant is reminded that credit hire company/credit repairer/AMC/insurer has no standing as a party in this claim and cannot appear itself at the hearing to conduct the claim or present arguments, except via the claimant's representative (if any).'

A somewhat surprising conclusion, given the potential evidential and legal complexities of such claims.



THE PREACTION PROTOCOL

The heart of the new scheme for small PI claims, however, is contained in the new Pre-Action Protocol for RTA claims below the small claims limit, which is meant to be implemented through an online portal. This densely written document, which runs to folio after folio, is going to be unintelligible to any litigant in person: to interpret it, it requires the background knowledge of a lawyer.

It does, however, refer to another document, not yet available at the time of writing, called the *Guide to Making a Claim Under the RTA Small Claims Protocol*, which is going to be available at www.officialinjuryclaim.org.uk and which is produced to help unrepresented claimants.

There will also be a Portal Support Centre, which is meant to provide call centre support to users of the portal, and staff who will enter claims on the system on behalf of unrepresented claimants unable to use the portal themselves. Interestingly, this includes giving a statement of truth on behalf of the claimant. Presumably, such staff will also owe a duty of care to a claimant.

The protocol is meant to provide a cradle-to-grave process for small road traffic accident claims, but the protocol will cease to apply where, for example, the value of the claim increases beyond the small claims limit, or allegations of fraud or fundamental dishonesty are made, or where it is disputed that the claimant suffered an injury.

The claimant is meant to upload photographs, sketch plans, witness statements, dashcam or other video clips or other documents or data in support of their claim that the defendant was at fault for the accident. Interestingly, a case can proceed to court where liability is disputed, but if liability is proved, the case then goes back into the protocol, to deal with quantum. A fixed cost medical report is then obtained with the compensator being liable to pay the fee.

HOW IT WILL WORK

Now, the consequence of this protocol and the portal that implements it represent one of the most intriguing 'unknowns' facing the legal system. It could lead to whiplash claims largely ceasing: why bother to navigate this procedure to bring such a claim for such miniscule rewards? Alternatively, it could lead to a flood of unrepresented claimants, seeking to bring small claims for whiplash: at which point, the question is, how does the insurance industry intend to respond to such claims? Will it just pay them, without investigation? Will it sift them forensically, fighting some and attempting to settle others? And will the legal profession withdraw from this space at all, or will it attempt to represent such

Continued on page 8

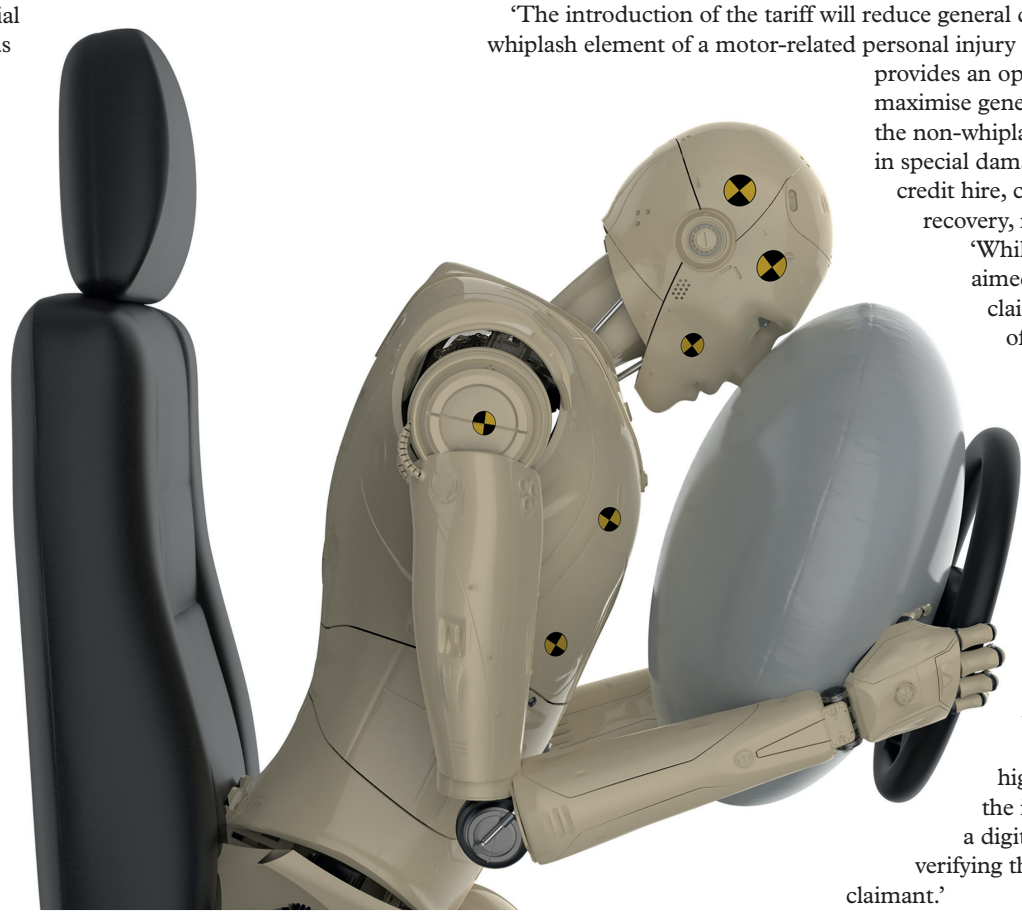
Continued from page 7

claimants, charging very modest fees to be paid out of very modest damages: and if not, will others such as claims management companies enter this space?

THE EFFECT ON THE COURTS

If there is a rush of enthusiasm for making whiplash claims using the new portal, or for claims for other injuries worth less than £5,000 in road traffic accident claims, many thousands of claims being run by litigants in person will be pumped into the court system, at a time when it is likely to still be barely afloat from the effects of the Covid-19 pandemic.

A litigant in person, as well as not recovering costs under the reforms, is not subject to paying costs, or put at any risk of paying them. Their claims will not be subject to Part 36 sanctions, and so these litigants in person will have no financial incentive to settle their case as early as possible.



So, a suspicious individual claimant, confronted with an offer from an insurer, may reasonably take the view that they do not know whether it is a good offer or a bad offer, and decide that the obvious solution is to 'let the judge decide', as that will be the sole source of professional input they trust, as to what their claim is actually worth. A claim may more or less by default go to a hearing.

EFFECT ON THE LEGAL PROFESSION

The effect of the new system on that portion of the profession who undertake personal injury litigation could be profound.

In the first place, there are many firms whose work is largely concerned with road traffic accident litigation and at a stroke will find much of their caseload is now a 'small claim'. The ability of such firms to thrive or even survive without substantial changes to their working practices is called into question.

Secondly, firms that have a mixed practice of claims of differing values depend on low-value claims settling quickly, for useful infusions of costs, which in turn facilitate the cost of financing larger claims, which may take years to reach a conclusion. In effect, the low value claims cross subsidise the larger claims; effectively facilitating access to justice.

If these claims are no longer viable propositions, either new and perhaps more expensive financing must be found, or the viability of the firm's practice may be cast into doubt. But it may be that others move into this space. If claims management companies can make a business out of low value PPI claims, or flight delay claims, why should the conduct of personal injury claims prove to be impracticable? The Civil Justice Council Low Value PI Working Group Report October 2020 notes: 'The Group accepts that it was too early to predict what impact the GDPR and the Data Protection Act 2018 will have on the ability of CMCs to utilise data and to what extent the ICO will investigate / prosecute more cases.

'Although since the introduction of greater regulation, there has been a reduction in the number of CMCs, the Group also accepts that CMCs will remain a part of the claims process.

'Based on previous experience the group anticipates that the reforms to the whiplash regime contained within the Civil Liability Act will lead to some CMCs attempting to exploit the market.

'The introduction of the tariff will reduce general damages for the whiplash element of a motor-related personal injury claim, but still provides an opportunity to maximise general damages in the non-whiplash elements and in special damages areas such as credit hire, credit repairs, storage, recovery, rehabilitation, etc.

'While the OICP is aimed at unrepresented claimants, the Ministry of Justice anticipates that more than two thirds of claimants who use that Portal will be represented, but that still leaves a significant number of LIPs. Based on MedCo figures, this would suggest more than 150,000 claimants will be LiPs.

'The group has highlighted above the importance, under a digitised process, of verifying the true identity of the claimant.'

CONCLUSIONS

In summary, these reforms represent a significant experiment in transferring work away from the solicitors' profession, which may yet produce either profound strain on the court system, or a reduction in access to justice, or the displacement of work to the claims management industry - or all three consequences; instead of the cessation of whiplash claims, or reductions in the costs they impose on the insurance industry. The law of unintended consequences remains very much in force.

Andrew Hogan practises from Kings Chambers in Manchester, Leeds and Birmingham. His blog can be found at www.costsbarrister.co.uk

WHIPLASH REFORMS