

PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT

Seventh Delegated Legislation Committee

DRAFT CIVIL LIABILITY ACT 2018
(FINANCIAL CONDUCT AUTHORITY)
(WHIPLASH) REGULATIONS 2021

DRAFT WHIPLASH INJURY REGULATIONS 2021

Wednesday 28 April 2021

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The Committee consisted of the following Members:

Chair: MR PHILIP HOLLOBONE

Blake, Olivia (*Sheffield, Hallam*) (Lab)

† Caulfield, Maria (*Lewes*) (Con)

† Chalk, Alex (*Parliamentary Under-Secretary of State for Justice*)

Charalambous, Bambos (*Enfield, Southgate*) (Lab)

Clarkson, Chris (*Heywood and Middleton*) (Con)

Evans, Chris (*Islwyn*) (Lab/Co-op)

† Harris, Rebecca (*Lord Commissioner of Her Majesty's Treasury*)

† McFadden, Mr Pat (*Wolverhampton South East*) (Lab)

Mann, Scott (*Lord Commissioner of Her Majesty's Treasury*)

Morris, Grahame (*Easington*) (Lab)

Morris, James (*Lord Commissioner of Her Majesty's Treasury*)

Pursglove, Tom (*Corby*) (Con)

Rutley, David (*Lord Commissioner of Her Majesty's Treasury*)

Sultana, Zarah (*Coventry South*) (Lab)

Throup, Maggie (*Lord Commissioner of Her Majesty's Treasury*)

Timms, Stephen (*East Ham*) (Lab)

† Tomlinson, Michael (*Lord Commissioner of Her Majesty's Treasury*)

Chloe Freeman, *Committee Clerk*

† **attended the Committee**

Seventh Delegated Legislation Committee

Wednesday 28 April 2021

[MR PHILIP HOLLOBONE *in the Chair*]

Draft Civil Liability Act 2018 (Financial Conduct Authority) (Whiplash) Regulations 2021

2.48 pm

The Chair: I remind Members to observe social distancing and to sit only in the places that are clearly marked. I also remind Members that Mr Speaker has stated that masks should be worn in Committee. *Hansard* colleagues would be most grateful if Members sent their speaking notes to hansardnotes@parliament.uk.

The Parliamentary Under-Secretary of State for Justice (Alex Chalk): I beg to move,

That the Committee has considered the draft Civil Liability Act 2018 (Financial Conduct Authority) (Whiplash) Regulations 2021.

The Chair: With this it will be convenient to consider the draft Whiplash Injury Regulations 2021.

Alex Chalk: It is a pleasure to serve under your chairmanship, Mr Hollobone. The draft statutory instruments before us are key components of the Government's whiplash reforms. The measures will not only simplify the process of settling whiplash claims, but provide certainty to claimants as to how much their claim is worth. They will also benefit society more generally by enabling an average reduction in insurance premiums for ordinary motorists of an estimated £35 per year.

This House has already undertaken extensive and useful debates on the merits of the Government's policy during the passage of the Civil Liability Act 2018. Our time today is somewhat limited, so I will focus on the detail of the draft regulations, rather than on the substance of past policy debates.

The measures in part 1 of the 2018 Act alter the process for making whiplash claims. That is done primarily by defining what constitutes a whiplash injury, introducing a fixed tariff of damages for pain, suffering and loss of amenity—referred to by lawyers as PSLA—providing for an uplift to be applied to the tariff in exceptional circumstances, thereby preserving the discretion of the court, and banning the practice of seeking or offering to settle a whiplash claim without first seeking appropriate medical evidence.

In addition to the 2018 Act, we are increasing the small claims track limit in respect of road traffic accident-related personal injury claims from £1,000 to £5,000. The Committee may be aware that the Government have previously committed to increasing the small claims limit for all other types of personal injury, including employers' and public liability claims, to £2,000.

On Monday, however, my noble Friend Lord Wolfson QC confirmed in a written ministerial statement that the Government have listened to the views of Members of this House and others, and decided to limit this increase to £1,500 and to defer its implementation until April 2022. We believe that to be a sensible and pragmatic decision that will provide additional time for affected stakeholders to prepare.

The draft Whiplash Injury Regulations 2021 set out in a tariff the amount of damages payable for PSLA for whiplash injury or injuries of up to two years, and any minor psychological injuries suffered at the same time. The regulations also allow the court to apply an uplift of up to 20% of the tariff amount in exceptional circumstances. With regard to the ban on pre-medical offers to settle, the regulations specify what constitutes appropriate medical evidence and the experts who may provide it. That may differ, depending on whether the injuries include a non-whiplash element.

The purpose of the draft Civil Liability Act 2018 (Financial Conduct Authority) (Whiplash) Regulations 2021 is to give powers to the Financial Conduct Authority to enable it to monitor effectively and to enforce the ban on pre-medical offers to settle.

I will now provide a little additional detail on each of the sets of draft regulations, having summarised them. The tariff in the draft Whiplash Injury Regulations 2021 presents a rising scale of fixed payments determined by injury duration, with the damages reduced less at the top end to recognise more serious injuries. Claims with a prognosis that exceeds two years will fall outside the tariff.

We have reviewed and updated the previously published figures to account for inflation, using the consumer prices index system. We have also added a three-year future-proofing element to ensure that the figures do not move out of alignment with future inflationary pressures before the required statutory review. That leads to an increase of about 11% over the figures previously provided to the House.

The limit by which the court may apply an uplift in exceptional circumstances will be capped at 20%. That is intended to balance the need for an effective and predictable tariff, and to allow for judicial discretion. It takes account of feedback received during consultation and earlier parliamentary debates, and it reflects other similar jurisdictions. For example, Italy also allows for an uplift of up to one fifth.

During the passage of the 2018 Act, we introduced amendments to ensure that the views of the Lord Chief Justice were sought on the tariff and the uplift before regulations were made. Accordingly, we have undertaken that consultation and we are grateful for his consideration of those matters. Following that consultation, we will undertake an analysis of the available data after a year, with a view to considering whether an early review is appropriate. That is a matter that arose from our discussions with him.

The draft Whiplash Injury Regulations 2021 also specify exactly what constitutes appropriate medical evidence to be provided before an offer to settle a whiplash claim may be made or indeed sought. They provide that when claimants live or are examined in England and Wales, they must obtain a fixed-cost medical report from an accredited medical expert selected via the MedCo portal.

Alternatively, if claimants suffer more serious injuries on the same occasion as the whiplash injury, they may rely on a report covering all their injuries, if that report is obtained from an expert listed on the General Medical Council's specialist register. The purpose of that is to ensure that only claims that can be properly substantiated by a medical report are settled, because otherwise that litigation risk could be bought off. That in turn increases the cost of insurance premiums, thereby damaging the wider motoring public.

I would like to speak briefly about the Civil Liability Act 2018 (Financial Conduct Authority) (Whiplash) Regulations 2021. These regulations give the FCA the power to take effective action in monitoring and enforcing compliance with the ban on seeking or making pre-medical offers to settle—precisely the mischief we want to address. This ban applies to various types of regulated persons as specified by the Act, which also identifies the FCA as the appropriate regulator to take account in respect of persons authorised under the Financial Services and Markets Act 2000, or FSMA, as practitioners often refer to it.

The FCA is the regulator for insurers and claims management companies who may be involved in settling whiplash claims. These regulations ensure that the FCA has the powers it needs to regulate section 6 of the Act. In plain English, that means that if individuals were tempted to settle insurance claims without seeking a medical report, the FCA could step in and use its powers as a regulator to prevent them from doing so, or indeed to provide an appropriate sanction, should it feel it necessary to impose one.

I will end by emphasising that the measures contained in these regulations are necessary and important. They provide much-needed certainty to whiplash claimants; they will create savings that will be passed on to consumers; and they enable the FCA to effectively regulate the ban on offering and seeking offers to settle such claims without appropriate medical evidence. The regulations serve the public interest and I commend them to the Committee.

The Chair: I now call the Opposition spokesman, who wins today's prize for the most attractive face mask.

2.56 pm

Mr Pat McFadden (Wolverhampton South East) (Lab): Thank you very much, Mr Hollobone, and thank you for your chairmanship this afternoon. I would also like to thank the Minister for his remarks.

There is a long backstory to these regulations. The Minister mentioned the Civil Liability Act 2018, which in itself was a legislative response from the Government to the growth of claims for whiplash in road traffic accidents. The principle that I believe the Government ought to be aiming for is that there is a legitimate and easy-to-use avenue to claim for those who are genuinely injured, but at the same time it takes into consideration the costs to motorists as a whole.

Figures from the insurance industry suggest that in the decade prior to 2016, which is roughly when all this started—legislation is not always a quick process—there was a doubling of claims for whiplash, with an overall cost of around £2 billion a year. It is suggested that the

rising whiplash claims drove up insurance costs for everybody else. That is what has spurred the Government on to introduce legislation.

There are several elements of reform set out in these two statutory instruments. Probably the most notable is a new tariff of payment depending on the length of the effect of the injury. The important thing about it is that these tariffs are set at considerably lower levels than some of the whiplash payments that people have been receiving in recent years. For example, if the injury does not last for three months, the payment is £260, which is a small amount of money. It then goes up on a scale to over £4,000 if the injury lasts up to two years. That is probably the main financial change here.

There is also the requirement for a medical report through a portal known as MedCo registration, and I have a couple of questions for the Minister about that. There is the increase in the financial limit of claims through the small claims process from £1,000 to £5,000. The important part of that is that it is designed to take lawyers out of the process for claims under £5,000. There is also the FCA ban on settlements without medical reports and, in exceptional circumstances, a power for the courts to uplift the payout on the figures I quoted a moment ago by 20%. I have a few questions for the Minister.

The first thing, which most people will look at, is that central justification for everything, which is that the volume of whiplash claims and payouts was resulting in an increase in insurance premiums for everyone. The Government claim that motorists will see a reduction in their premiums as a result of the overall reduced payouts for whiplash. The explanatory memorandum published alongside the draft regulations predicts a reduction in premiums of about £35. First, how will the Government ensure that the insurance industry will pass on any savings as a result of the changes? What is to stop the industry just pocketing the savings and increasing its profits?

Secondly, given that both sets of draft regulations are all about whiplash, how will mixed claims be treated, where not only whiplash might have been sustained, but other injuries too? That is very possible in a road traffic accident.

Thirdly, the draft regulations specify that the medical report must be provided through an online portal or by a doctor listed in the General Medical Council's specialist register. Will the Minister clarify whether that means that a report from someone's own GP would not be considered as a medical report under the regulations? That is most people's point of contact if they have had an injury—they do go to see their GP. If that is the case, why is the GP's report or letter not sufficient to corroborate the injured party's claim?

Fourthly, how will data be handled by the new portal? How will the data be transferred securely between the insurance companies, solicitors' firms and claimants?

Finally, what is the Government's estimate of the impact of that question of taking lawyers out of claims under £5,000? Does that mean, given that most or all of the tariff is below £5,000, that claimants must in effect represent themselves? What are the implications for access to justice?

Motor insurance is rightly of significant political and public interest, because it is something that people are required to have by law; they have no choice about it if

[Mr Pat McFadden]

they want to drive a vehicle. The whole idea of the system is that claims should be honest and that there should be fair recompense for honest claims. That protects the interests of the claimants, but we also have to protect the interests of all drivers who have to pay their insurance premiums, many of whom—probably most—may never make a claim. The question is whether the draft regulations get that balance right, between those different interests of drivers as a whole and those making a claim, and whether they preserve access to justice properly for people genuinely injured.

The final thing I want to say to the Minister is about the review provision he mentioned. The 2018 Act states that there has to be a review within three years—I think that is in one of the early sections of the Act—but he also mentioned the period of a year. Review is important—to go back to my first question—because if the result of everything is simply to lower payouts to people, with the savings not being passed on to motorists and the insurance companies pocketing the difference, we will have to return to the issue in future. The founding reason for it would obviously be open to huge question in those circumstances. The real test will be whether the savings made are actually passed on to drivers as a whole in future.

The Chair: Lots of interesting questions for the Minister to respond to.

3.4 pm

Alex Chalk: Yes, lots of interesting and fair questions. I am grateful to the right hon. Member for Wolverhampton South East for expressing himself as he has and for setting some of that initial context, which he did very fairly. I just want to develop that point before turning to his questions. As he rightly pointed out, the context of this is a worrying concern about what can only fairly be described as an explosion in whiplash claims, associated with grave concerns about the authenticity of a significant number of them. Only a brief look at some of the data could make one's hair stand on end.

Mr McFadden: I do not have much hair to stand on end.

Alex Chalk: The right hon. Gentleman is very diffident on this matter. The latest ABI fraud data report for 2019 found that fraudulent motor claims are the most common insurance fraud, with more than 58,000 in 2019, valued at £605 million, which was up 6% on the previous year. However, City of London Police's insurance fraud enforcement department achieved 433 convictions in 2019, totalling 239 years in custodial sentences arising out of this matter.

The point that the right hon. Gentleman was making is that this, of course, passes costs on to others, but it is worth taking a moment to dwell on how much we are talking about. The suggestion is that this will lead to savings of around £1.2 billion a year. None the less, his central point is a very fair one, which is to say, "Hang on a second; how can we be sure that these insurance companies will not simply pocket it and then up their profit margins, and the poor old consumer will not be reimbursed?" That is a fair challenge, but there are two limbs to the response to that.

The first part of the response is one that, bluntly, I did not expect to be able to update the House on today, but the impact of the pandemic—so cruel in so many ways—has unexpectedly shone a light on the likely behavioural response in certain regards. The right hon. Gentleman will be aware that during the pandemic people have driven their cars quite a lot less. As a result, there has been a lot of pressure from consumers asking their insurers for a refund on their premiums. It may be that there are people in this room who have done exactly that, so when you actually look at the data to see how the power of the market has had an impact upon premiums—nothing the Government can do, but simply the actions of consumers putting pressure on their insurers—it is quite instructive.

I will give an example of one provider, Confused. In the fourth quarter of 2019, the premium was £630. In the fourth quarter of 2020, it was £575. Similarly, another insurer, ABI, was at £483 in the fourth quarter of 2019, and £468 in 2020. In other words, the power of individuals going back to their insurers and saying, "You are going to have to reduce my premium on account of the fact that I haven't been driving my car" has had a market impact. As such, I think we can take increasing confidence that there will be a consumer power to drive down these premiums, effectively telling the insurers, "The Government have taken these steps to ensure that there is less fraud taking place by way of whiplash, and we know that there are savings of around £1.2 billion, so pass them on to me or I will go elsewhere".

Mr McFadden: The Government cannot just leave it to the consumer to have to take the initiative. The Minister is probably right that some consumers have approached the insurance companies because they have been driving a lot less this past year, but trying to phone any big company like that—I am not referring to any insurance company in particular—and get through the systems is not easy. I suggest that we need more from the Government. Surely there has to be some sort of pressure from the Government, some sort of deal here, so that if the Government are going to pass legislation like this, the very purpose of which is to save the £1.2 billion in payouts, then insurance companies have got to pass it on. Otherwise, what is the point of what we are doing here?

Alex Chalk: The hon. Gentleman should have waited for me to make my second point, because he has asked and he shall receive. Let me just finish off the first point. It is not a case of always having to phone the insurer to say, "I paid X, so now you should give me a refund." The point is simply this: if insurance companies do not offer competitive premiums, people are likely to go elsewhere. The experience of the pandemic is precisely that: unless those insurance companies act in a way that is competitive, they are likely to lose business.

The second point is this. The right hon. Gentleman is absolutely right that we need to be holding insurance companies' feet to the fire. Having made a firm commitment to pass savings on to consumers, insurers should be held to account. That is precisely why the 2018 Act includes a statutory requirement on insurers to provide information to the Financial Conduct Authority on how they have passed on savings.

Insurers must provide that information to the FCA by April 2024, as stated in the draft regulations, which I hope the right hon. Gentleman has had a chance to study. The Government, with the assistance of the FCA, will assess whether the industry has passed on the benefits of the reforms to consumers. A report will be made to Parliament after April 2024. That will be his moment to say, “Do you remember, Minister Chalk, when we were having that conversation in April 2021, you told me that the savings would be passed on?” We have ensured that the mechanism is built into the regulations to hold those companies’ feet to the fire.

With regard to the portal, the right hon. Gentleman asked whether a person’s GP could be considered. It is important to note that under all sorts of legislation, whether on medical negligence or road traffic accidents, we have to have the right medical expert for the particular issue to come before the court—or, in this case, with a bit of luck, not to come before the court. It has to be the right medical expert. Without any discourtesy to GPs, they are not always the right expert. If the GP has ensured accreditation under the system, there is no bar to the GP being that expert, but it is not always automatically the case that a GP would be able to provide the medical report, because that might not be within their realm of expertise. There is nothing unusual about that and certainly nothing unusual in the draft regulations so far as that is concerned.

How will data be handled? Data will be handled in the normal way. There is overarching legislation that covers that.

On the impact of taking lawyers out of the system, we make no bones about the fact that for a small category of case, it is more proportionate and appropriate to do precisely that. Let me quote what the Lord Chief Justice said about this. Characteristically, he put it very clearly and pithily. He noted that the tariff was a

“narrowly defined statutory derogation from the principle of full compensation through an assessment of damages by the courts”.

He was saying that the Government are deliberately carving out an area to do with road traffic accidents to ensure that, where additional costs are created that pass on additional expense to consumers, that is dealt with in a surgical way. I say “surgical” because vulnerable road users such as children, pedestrians and cyclists are not covered. That is an important exclusion.

Mr McFadden: For two reasons, I am grateful to the Minister for stressing that. First, those groups he mentioned—pedestrians, cyclists and so on—are not

covered, and that is important. Secondly, the broader importance—I would be grateful if he can reassure us—is that this is a carve-out just for whiplash in road traffic accidents, and it will not affect injuries at work or other kinds of injuries in which the normal system of claiming through a court and having a judgment on the proportionality of the accident will take place. Some people, responding to the draft regulations, have said, “This is unfair, because you are treating one class of injury unlike another.” There is that argument, and I repeat it, but a lot of our constituents want to be reassured that the draft regulations will not have a broader ripple into their circumstances if, for example, they were injured at work.

Alex Chalk: That is critical. The Government believe in access to justice. That means that if people make their way to work and their employer has created an unsafe environment, so they trip over something and need to make a personal injury claim, they should not be crowded out—not shut out from making a claim. The draft regulations preserve precisely that.

I will address the issue of mixed tariff cases and bring my remarks to a close. Section 3(8) of the 2018 Act provides that, where a claimant suffers injuries in addition to a whiplash injury—the point that the right hon. Gentleman was making—the court is not prevented from awarding damages to reflect the combined effect of the injuries sustained. Ultimately, it is for the courts to determine how mixed injuries are addressed. We are confident, given the excellence of our judiciary, that they are well placed to resolve such cases on a day-by-day basis.

In conclusion, the draft regulations are proportionate, calibrated and targeted measures that serve the public and consumers’ interests, drive down on fraud and act to drive down insurance premiums. They are manifestly good for the public and for road users. I commend them to the Committee.

Question put and agreed to.

DRAFT WHIPLASH INJURY REGULATIONS 2021

Resolved,

That the Committee has considered the draft Whiplash Injury Regulations 2021.—(*Alex Chalk.*)

3.16 pm

Committee rose.

