



UNCOMMONLY INDEPENDENT

The Official Injury Claim Portal

Five Months On
November 2021

The Official Injury Claim (OIC) portal came into operation on 31st May 2021 promising, along with new low value tariffs for whiplash injuries, a simplified, streamlined motor claims process, a vast increase in the numbers of Litigants in Person and significant reductions to the cost of personal injury claims.

So, five months on, and following the official release of the first data on OIC portal claims, how is it going?



Litigants in Person



One of the much vaulted purposes of the whiplash reforms and the accompanying OIC portal was to make the whiplash claim process simpler for unrepresented Claimants to use. As per the statement of Robert Buckland, Lord Chancellor and Secretary of State for Justice on 27 February 2020, the OIC portal was supposed to:

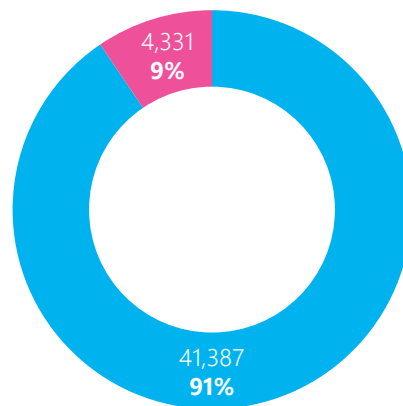
'provide those affected by road traffic accidents with an opportunity to settle small claims for personal injury without the need for legal representation or to go to court.'

The legal process included no possibility for the recovery of legal fees and so it was anticipated that most individuals would pursue whiplash claims directly against the at-fault insurer using the new online portal.

However, prior to the 'go-live' date at the end of May 2021, when the MIB released a user guide on the new system, it was immediately clear to most observers that many would find the process very difficult to navigate. At 64 pages, the guide was highly detailed and generally thought to be far too complicated for use by the legally untrained and potentially technology phobic. It clearly failed the government's stated aim of being 'designed with all users in mind... simple and easy to operate'.

Unsurprisingly, the MIB's recent release of data from the first three months of the OIC's operation has only served to re-enforce that message, with 9 out of 10 Claimants opting to pursue their claim using a legal representative of one type or another.

Total Claims Made in OIC Portal - 31/05 - 31/08



■ Represented Claimant's ■ Unrepresented Claimants

Without major alterations to the process, which are unlikely to come any time soon, it would appear highly improbable that there will be a significant increase the number of Litigants in Person who engage with the OIC portal going forwards. Unable to pursue claims directly themselves, the lower value whiplash settlements paid to injured parties will be further eroded by the requirement to pay an instructed representative a share of the damages.

Certainly on this measure in isolation, the process has clearly failed to meet the brief.





For as long as the implementation of a low value whiplash tariff has been discussed there have been those that have taken the view that Claimants and their representatives will simply circumnavigate the new rules and low value damages awards by alleging they have sustained more than mere whiplash.

The first data revealed by the MIB has done nothing to dampen those concerns.

As can be seen below, in the first three months of OIC portal activity, only 1 in 4 claims relates to solely whiplash injuries (to the neck or back). Conversely 7 out of every 10 Claimants allege they have sustained psychological or other physical injuries in addition to whiplash. 15,154 (33%) of all claims pursued are covered solely by the new whiplash tariff whereas 27,954 (61%) are mixed claims including both tariff and other injuries.

The diversification of allegations of injury could be seen as an attempt in some instances to lift the potential value of the claim to a value in excess of £5,000 (the limit for the new OIC process). Industry commentators, particularly insurers and Defendant law firms, suggest that since the implementation of the new regime there has been a significant uplift on the number of such allegations, some without merit.

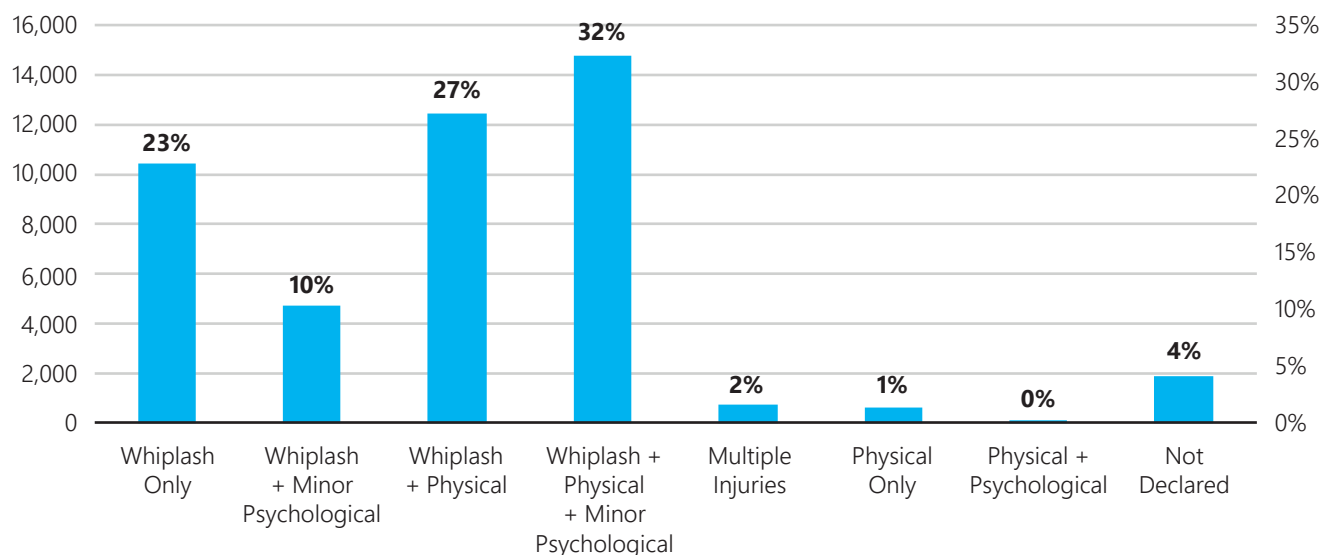
Conversely, Claimant representatives have suggested that the reforms reduce access to justice and are inherently unfair, valuing soft tissue injuries caused by road traffic accidents at considerably less than identical injuries sustained in the workplace or whilst in public. In that respect it was inherently likely that Claimant legal representatives would seek to redress the balance on behalf of their clients.

Unreasonable or unjustified attempts to diversify injury claims are however likely to be met with short shrift by the Courts who were relatively quick to stamp out perceived sharp practices by Claimant representatives when the original MOJ portal was implemented in 2010. To what extent the same can be said for claims through the OIC portal is uncertain. In particular, the will of insurers to pay their legal representatives to dispute low value (often sub-£1,000) claims, when there is no realistic prospect of costs recovery from the Claimant, is likely to be tested. If less claims are disputed and more claims are paid without challenge, the body of useful precedent is likely to be considerably smaller this time around.

Taking this into account, and in order to obtain clarity on how allegations of additional non-whiplash injuries are to be treated and valued under the new rules, the ABI has agreed a framework through which it intends to pursue a number of test cases. These test cases may be subject to determination by the Court of Appeal although first instance decisions are expected as soon as early 2022. How these cases are determined by the Court will have an undoubted effect on how OIC claims are approached by insurers, Claimants and their representatives. It is hoped that at least with the certainty that such test case litigation will bring, there will be a resulting increase in the number of claims brought to a successful conclusion through the OIC portal process in the months and years to come.

Frankly however, the failure to recognise that injury diversification would become a contentious issue is suggestive of a severe lack of foresight from those responsible for designing the OIC process. Again, the evidence thus far is unfortunately that the portal falls short of expectations and stated aims in this regard.

Injury Classification of Claims Pursued Through OIC Portal - 31/05/ - 31/08



Exceptional Circumstances



The Whiplash Injury Regulations 2021 make an allowance for Claimants to allege that the injuries they sustained in a road traffic accident are exceptionally severe or that the injuries have caused an exceptional impact to their lives. Should this be successfully evidenced, the Claimant's injury valuation can be subject to an uplift by as much as 20%.

The MIB data shows that of the claims received in the first three months of OIC portal implementation, somewhat unsurprisingly, 40% of unrepresented Claimant have suggested their circumstances are 'exceptional'; this number dropping to 24% for represented Claimants.

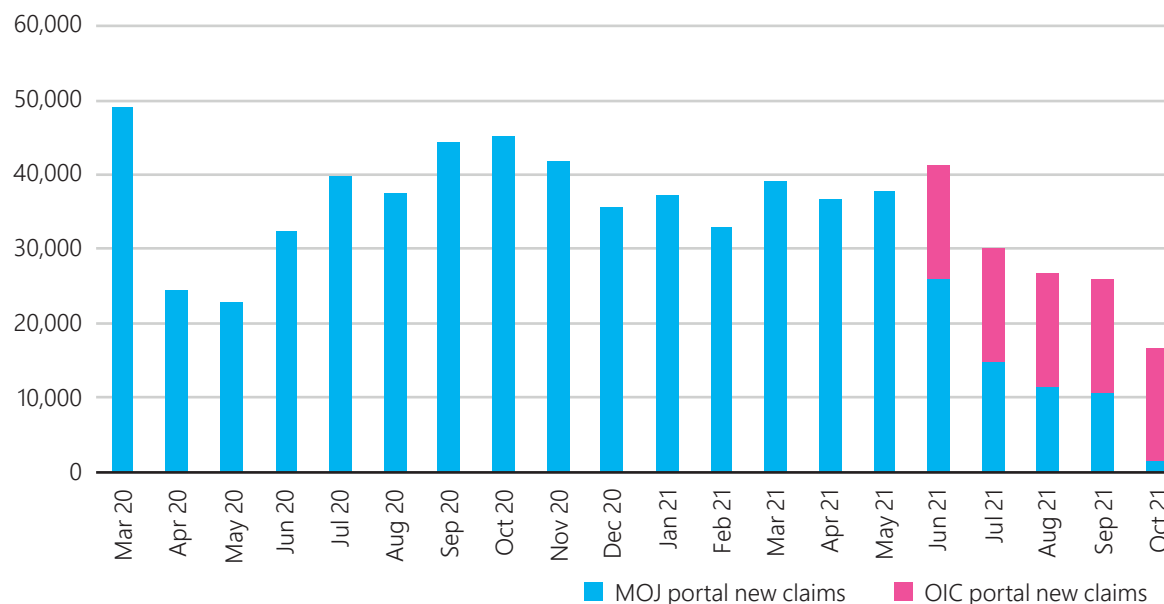
The present lack of judicial comment on the statutory definition of 'exceptional circumstances' means that for now insurers are left to take their own views as to what meets the criteria. Again, this was an area of dispute between Claimants and Defendants that was keenly anticipated and arguably could have been dealt with through better design of the new regime, without the need for satellite litigation.

Frequency



Insurers have thus far suggested that they have seen a significant reduction in frequency as a result of the implementation of the OIC portal and whiplash tariff. Whilst the OIC portal data released by the MIB does not provide a breakdown of new claim volume by month, it does confirm that 45,718 new claims were received in the first three months of operation. Taking from this an average of 15,239 new claims per month and combining with the data from the MOJ portal (that continues to operate around the OIC scheme) appears to support this view.

New Claims - MOJ Portal & OIC Portal



Whilst there has clearly been significant impacts on the volume of motor incidents since the beginning of the COVID-19 pandemic, the data available at present is suggestive of a conservative reduction in the volume of new claims of at least 30%.

In this respect these reforms have, for now, clearly had the desired effect – a reduction in the volume and value of whiplash claims. To what extent insurers are prepared to pass these savings, estimated by the government as being c£1.1bn, on to policyholders is yet to be seen.

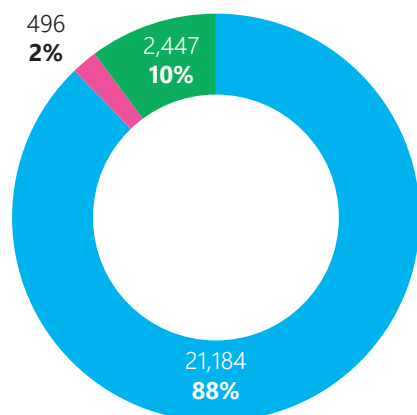
Admissions and Settlements



The MIB data suggests only 436 claims were settled within the OIC portal between May and August 2021. This is unsurprising considering the relatively short period the data covers, not to mention the fact that it is the very first three months of OIC portal activity.

Of more interest however, particularly when considering trends, is the data's revelation that 90% of all liability responses in the OIC portal were either a full or partial admission.

Liability Responses in OIC Portal - 31/05 - 31/08



■ Admitted in Full ■ Partially Admitted ■ Liability Denied

Comparatively, between May 2019 and October 2020, an average of 20% of claims left the MOJ portal at Stage 1 (indicating a liability dispute or a lack of response within the proscribed timescales).

Whilst there are a number of reasons for the claim to leave either portal process, it appears that the implementation of the whiplash tariff has led Defendants and their insurers to admit liability more frequently. This is likely to be due to a number of factors. The irrecoverable costs associated with investigating and defending liability investigations when compared with the new tariffs which, for injuries with a prognosis of less than 12 months only allow for a claim value of less than £1,400, will undoubtedly be a major factor. Difficulties in obtaining a witness statement from their insured with which to dispute the Claimant's allegations within the requisite 30 days is also likely to have brought further challenges for insurers.



Summary

It is reasonable to assess that the implementation of the OIC portal and associated whiplash tariff has not been without its problems. It clearly has, at least for the time being, failed to meet the design brief on simplicity, ease of use and efficiency. Clearly most Claimants require a legal representative of sorts and this will lead to a reduction in the value of their settlement and pressure to tactically increase the value of the claim so as to force it from the process and into an arena that allows legal costs recovery. To what extent such tactics will bear fruit is yet to be seen but some clarity is likely over the next 12 months as test cases and first instance decisions are reported.

Whilst the Ministry of Justice and the MIB may take the view that no plan, however detailed, survives its first battle, it would appear to be a reasonable finding that the roll out of the process, and the process itself, could have been better designed. The inevitable tactical response of the Claimant legal sector to the whiplash reforms was easy to predict, even before the initial government consultation was launched in November 2016. Any reasonable observer would recognise that many Claimants would not be able to engage with the technical aspects of the process as it sits. Without significant change this will remain the case. Despite repeated government pushbacks of the implementation timeline there remains a broad spectrum of uncertainty regarding process and valuation.

The ABI test case framework should assist here, but ultimately it is unlikely to operate smoothly until there is a body of precedent that informs insurers and Claimant representatives as to how far they are able to push the letter of the regulations.

However, the news is not all bad. Whether by design or happenstance, the process does appear to be meeting its primary aim of volume and cost reduction. The complexity of the process and the low rewards for successfully navigating it appears to be driving (along with the COVID-19 pandemic) a lower frequency of claims which ultimately will ensure reasonable savings are made by Defendant's and their insurers. The veracity of the government's suggestion that new process 'put the needs of the claimant at its heart' has however, been severely tested.



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