



WHIPLASH REFORMS - 10 MONTHS ON

An Insight into Developing Practice Practices and Experiences from Claimant Representatives and Compensators



Apr 2022

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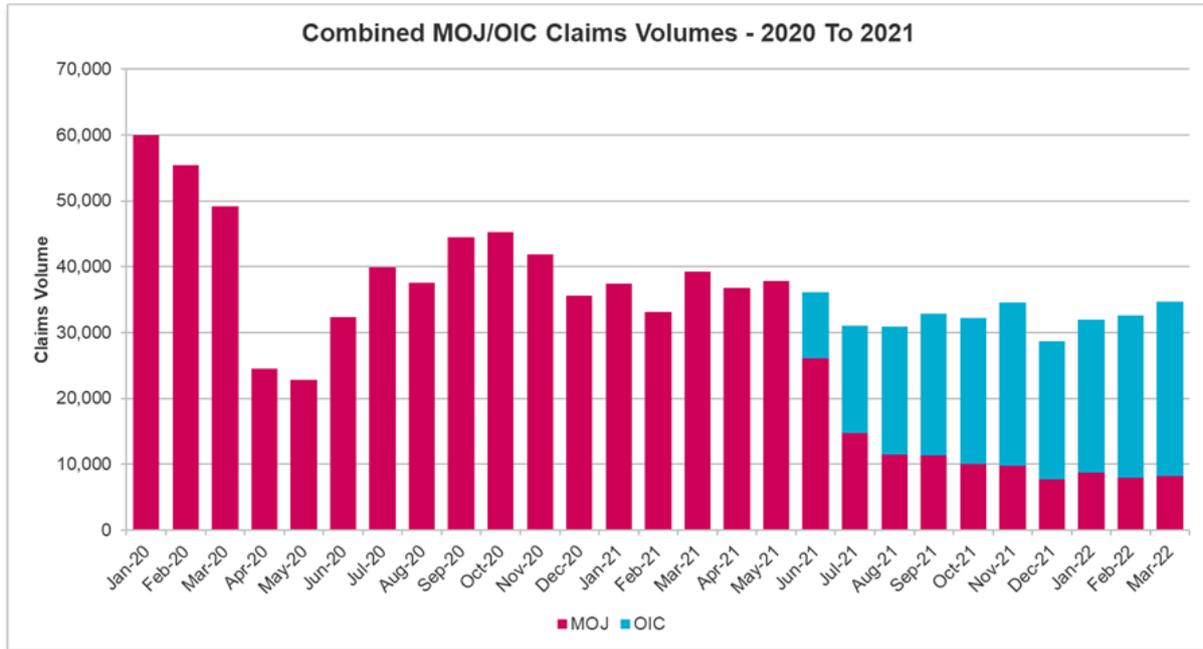
Whiplash Reforms – Survey of Developing Practices Apr 2022

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FOREWORD



(Source – DWF April 2022)

Ten months after the Whiplash Reforms went live, we have seen three sets of data issued by the MoJ but still little insight into how practices are developing within the organisations representing claimants and providing compensation.

With over 200,000 claims already submitted through the Portal, test cases planned for how to assess General Damages for hybrid injuries, and market commentators still raising concerns on the effectiveness of the reforms, SX3 and Glenesk decided to interview representatives from both sides of the claims process, to provide insight on how practices are actually bedding in on the ground.

We hope you find this report informative and balanced. It is recognised that we are still in the early days of this revised claims process, and practices will continue to develop and further challenge emerge. Our sincere thanks to all the firms who gave of their time to participate in the survey and also to colleagues at ACSO and the ABI for their commentary.

We will continue working with all stakeholders involved in the process to identify solutions and call out issues where needed. Be part of that conversation and let us know what you think.

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METHODOLOGY

The objective was to understand the common themes on where the reforms are working effectively, where there are areas for improvement and where the sector might collaborate further to improve claims outcomes and instil improved market interactions.

26 firms were approached to participate in the survey, 19 agreed – 9 claimant representatives and 10 compensators – providing a broad and balanced representation of views from across the motor claims market. All participants were offered the option to provide their views anonymously, and the majority of firms participated on this basis to facilitate a full and frank discussion. Those firms that contributed on the record were:

- Lyons Davidson and File Dynamics
- DLG Legal Services
- Admiral Law
- AA Insurance
- NFU Mutual
- Esure

The survey was conducted by experienced claims professionals from SX3 and Glenesk between 3 March and 9 April 2022, in a series of one-to-one interviews with representatives from each participating organisation, discussing their experience of the following areas:

Claim Volumes	Claim Notification Process	Liability Assessments	Fraud Indicators	Rehabilitation
Credit Hire / Repair	Medical Legal Reporting	General Damages Valuations	Use of BTE Legal Expenses	Dispute Resolution

Interview notes were then provided back to the respondent for review and agreement.

The first section (Survey Results) of this report summarises what market participants fed back on the topics. The second section (Conclusions) of the report focuses on core questions of interest, namely:

- What is working well?
- What common ground is being developed between claimant representatives and compensators?
- Where are there still areas of uncertainty?
- What isn't working well and where are there common areas of concern?
- Where are there further opportunities to improve process, interactions and outcomes?

EXECUTIVE SUMMARY

Claim Volumes

- Overall, volumes were reported as down c. 15% - 30% compared to pre reform volumes. Volumes from claimant representatives working with regular sources of new customers via Motor insurer / broker and LEI BTE arrangements have sustained better than claims from other sources

Claim Notification Process

- A2A solutions have coped well, although some claimant representatives commented that their A2A solutions have been hampered by regular code changes in the OIC Portal
- Claimant representatives report an increase in processing effort and increased input required from claimants, leading to increased timescales to submit new claims through the Portal
- Injury descriptions on SCNFs are frequently not subsequently supported on the medical reports (up to 50% of the time being reported by some compensators)
- Processing difficulties are experienced in cases where SCNF issued to incorrectly identified compensator

Liability Assessments

- Broadly a positive response from both sides with compensators reporting cleaner liability cases now being received
- Claimant representatives are not seeing compensators argue weak liability points
- Causation arguments: primarily related to low velocity impacts and increased claims for non-whiplash symptoms, are still being raised by compensators
- Multi vehicle collisions have been harder to process though the OIC Portal

Fraud Indicators

- No major changes noted

Rehabilitation

- No major changes noted from both sides in practices or delivery
- Increased appetite to seek pre-agreement on rehab rates – there is a possible market opportunity here, particularly now no major changes are expected from the MoJ following their recent response to Part 2 of the Whiplash Consultation

Credit Hire / Repair

- Increased hire periods noted by compensators but acknowledging this could well be due to the current challenges in repairer capacity and parts supply rather than any shift in Credit Hire business practices

Medico Legal Reporting

- Compensators have noted it is taking longer now to receive medical reports post reforms compared to pre reforms and are unsighted on the causes of this. This was a major talking point during the survey
- Claimant representatives offered a number of operational reasons causing delays to submitting medical reports to compensators.
- Compensators are also noting a disparity of injuries reported on the medical report compared to the SCNF. What is causing this?
- In liability / causation disputes, it is not always clear from the medical report if the medical expert had been supplied with the defendant's Version of Events

General Damages Valuations

- Volumes of settlements are still low (see medical reporting delays mentioned above) and it is also likely that it is the simpler injuries settling at the moment
- Tariff injuries are easier to settle, although claimants often express disappointment at the low value
- Whilst no clear guidance yet exists for hybrid injury cases (whiplash tariff defined injuries plus other injuries that fall outside the tariff), parties are reaching agreeable settlements on most cases
- Discussion facilities between parties are proving a fruitful method for resolving disagreements on valuations

Use of BTE Legal Expenses

- Increased utility of LEI BTE products reported, with no issues noted in terms of coverage or customer servicing
- The importance of LEI has unsurprisingly increased since the reforms

Dispute Resolution

- As yet, very few examples of litigation reported
- Parties potentially deterred by long waits for court hearing dates
- The majority of the few litigated cases relate to valuation disputes for non-tariff general damages.

SURVEY RESULTS

Claims Volumes

Most firms reported decreased volumes of activity in line with national reporting, reflecting both a COVID impact and an impact from the reforms. The decrease in volumes estimated between 15% - 30%. Volumes from claimant representatives working with regular sources of new customers via Motor insurer / broker and LEI BTE arrangements have sustained better than claims from other sources,

One claimant representative highlighted the variation by vehicle type, noting that bike claims had remained more consistent. Frequency of claims was stated by multiple firms to be relatively consistent over time. Case attrition was attributed to more rigorous triage of cases, with firms disagreeing about the level of attrition caused once the value of the claim is known which may reflect differences in whether LEI is in place to fund disbursements.

Some claimant representatives noted that a lack of investment from the claimant in a more protracted early part of the process made attrition more likely although others noted that, whilst claimants were surprised / disappointed when they learned of the likely level of settlement allowable in the tariff, they were still pressing ahead with their claims.

Claims Notification Process

Themes from claimant representatives

Most firms interviewed considered that the reforms had helped place a focus on the customer journey and making the claims process simpler and in some cases, it was now possible to go from initial call to submission in one session. It was also clear that claimants still value professional support to help them through the process both for their expertise and also to help those who are less confident interacting digitally.

The requirement for the claimant to sign the SCNF was mentioned by several participants as a change which has created work and caused delays in the submission of claims. As a measure designed principally for the management of CMC claims, which have not been a significant element of OIC Portal volume, it was questioned whether this requirement was really needed if verbal consent was considered sufficient prior to the reforms.

Whilst their A2A solutions are working well, firms also referenced the eleven sets of technical changes to the OIC Portal released since its launch and claimant representatives have employed one of two strategies to respond, either investing in manual data entry until the platform was considered to be in a more stable form which most participants now recognise although a minority disagree. Otherwise, firms have invested in reworking the automated links between key applications.

Getting claims submitted successfully is a common challenge caused by the MIB database directing the claim to the wrong insurer, which one firm stated was occurring in around 5% of cases. Firms describe incorrect data in the database, dual insurance and driving other cars policy extensions as edge cases that are not always accurately triaged. Although the intention was for insurers to forward these cases on when received in error, in practice, claimant representatives state that they frequently have the cases returned to them for resubmission, which in turn often replicates the same error.

Other submission challenges relate to clients who can experience difficulty finding third party details and one firm suggested that alternative identifiers such as a vehicle registration number could be proposed as an alternative to make the process more manageable. It was also suggested that a more flexible approach to data entry that allowed for fields to be updated once available could help to speed up the submission process.

The MIB have ownership of some case steps and these lack time-outs which can lead to cases stalling in a limited number of cases, causing frustration for all concerned.

Themes from compensators

Compensators recognised and appreciated the operational challenges claimant representatives had faced in adapting their systems and processes to the OIC Portal. Broadly, compensators described the claims notification process to be working well after some initial compliance teething issues and fluctuations in the time from accident to notification. Their A2A solutions have worked well.

A number of compensators noted a variance between the injuries stated on the SCNF and those then included on the medical report. Some compensators noted this occurring on up to 50% of cases particularly additional injuries to whiplash being claimed on the SCNF, yet not then featuring on the subsequent medical report. Multiple causes for this anomaly were proposed, relating to the ways in which information is captured through the SCNF and also reported back through the medical reporting process.

Liability Assessments

Themes from claimant representatives:

Two firms questioned why the limit for admission of liability had changed from 15 to 30 days, citing that most insurers were able to respond in much shorter timescales. This change was reported as a source of frustration for clients by 3 firms, and the cause of a delay in requesting medical examinations which has had downstream impacts on the duration of rehabilitation and the associated cost.

Overall, however, firms were encouraged by the speed and clarity of the responses they received and were complimentary of compensators' approach to this topic.

All the firms interviewed are observing a greater proportion of admissions in OIC claims than in those they submitted before the reforms. There were fewer cases of partial admission of liability than was expected, which is attributed to a combination of the change in how compensators are required to respond to SCNF's regarding liability denials, the reduced average value of the claims, and the detail on the injuries that is now provided. There were mixed responses from firms on whether defences of causation had increased or decreased since the reforms.

More complex cases involving passengers and multiple insurers were described as being more challenging. Collaboration with compensators to build protocols for these cases is regarded as the key to addressing them.

Themes from compensators:

No major change in fault / non-fault profile noted in claims received, in fact, several firms were complementary of claimant representatives for submitting claims where liability was more often clear, which may be caused by more rigorous triage by claimant representatives. This would go some way perhaps to explain why claimant representatives had noted an increase in liability admissions from compensators.

Whilst the requirement for a Statement of Truth adds additional work onto the compensators, they welcomed the move to a 30-day response on liability, citing this timescale provides a realistic opportunity to investigate accident circumstances and reach consensus with their customers on each case.

Liability disputes through the Portal is still a difficult process, although this has encouraged discussion to occur between parties to reach an agreeable solution – particularly given the long wait for a court hearing at the moment. Most compensators stated they are raising contributory negligence points sparingly, and only where the evidence is strong, and their customer has signed a Statement of Truth. There was no appetite for arguing weak points.

Low velocity impact (LVI) cases are still being identified and where the compensator is satisfied this causation issue is genuine and their driver is prepared to sign a Statement of Truth (SoT), they are raising LVI arguments.

Fraud Indicators

Whilst some concerns were raised, prior to the reforms going live, of the risk of increased attempts at submitting fictitious injury claims, no significant changes to fraud indicators or defences of fraud have been noted so far by any of the claimant representative or compensator firms interviewed.

Rehabilitation

No major changes in practices reported by either claimant representatives or compensators.

Some claimants are starting rehabilitation straight away but many of the firms interviewed only commissioned rehabilitation once liability was admitted. This practice can lead more frequently to the situation where rehabilitation is ongoing at the point of medical examination and prognosis, making a decision on whether to seek settlement more difficult. It can also increase the duration and cost of rehabilitation.

Some firms highlighted the lack of a rehab tariff as a point of friction that might usefully be resolved in the interest of all parties.

Credit Hire / Repair

Pre-reforms, there was a concern from compensators that pressure on profit margins for claimant representatives would lead to attempts to increase profits on credit repair and credit hire.

Whilst extended periods for hire and repair were noted by most compensators, they recognise the reasons for this may be related to supply chain and repairer capacity issues rather than a change in claimant models in response to the whiplash reforms. Two compensators indicated they had seen claims being exited from the OIC process by claimant representatives arguing the NVC had exceeded the Portal limit.

Other compensators noted CHO's issuing Part 7 proceedings for the hire element, leaving the PI claim in the Portal.

Medico Legal Reporting

Themes from claimant representatives:

Claimant representatives provided clear insight into some of the causes of the delays they are experiencing in the medical reporting process:

- The variety of report formats were described here as a barrier to automation and efficiency. Pandemic related delays have reduced but at least one firm noted that submission of medical reports is taking 7 months now compared to 5 months pre-reforms, which may be a knock-on effect from delays to submission earlier in the process.
- Customers were getting frustrated because of the delay waiting for a decision on liability, which in turn can delay rehab and increase its duration.
- Second reports were stated by one claimant representative to take twice as long now as pre-pandemic. One of the consequences of this is claimant representatives seeing a greater level of challenge from compensators to the medical reports that result.

- One claimant representative was of the view that the training of providers had not been sufficient and that there remained a lack of understanding on how to capture exceptionality and whiplash specific injury, which was not as clearly defined as it could be, and this was causing delays in agreeing / submitting medical reports.
- Other claimant representatives noted delays in submission on occasion because they are waiting to see which Portal should be used for edge cases.

On the disparity between injuries noted on SCNF and what is reported on the medical report, one claimant representative suggested this may be because soft tissue injuries are typically more severe at the point of submission which might explain the difference observed between claim at point of submission versus medical.

Themes from compensators:

Compensators all noted the discrepancy between the additional injuries listed on the SCNF and those cited on the medical report. Whilst the percentage of cases where this discrepancy was found varied by responder, several noted this discrepancy occurring on up to 50% of cases. One responder however, commented that they had seen the volume of those discrepancies reduce in 2022 compared to cases in 2021.

Experience on the extent and nature of claimants claiming exceptional circumstances varied between the compensators. It is unclear to some in the medical report what justifies an exceptional uplift. One responder noted a decrease in the frequency of exceptional circumstances being claimed.

All compensators were particularly concerned with delays in receiving the medical reports, with compensators unclear why the delays are occurring. Medco and the MROs weren't reporting any delays setting up medical examination appointments, so the delays seem to be occurring after the examination.

Some compensators noted increased average prognosis periods for whiplash injuries. However, with volumes of medical reports received so far being quite small (one compensator noting only 16% of claims notified so far also had a medical report submitted), it was acknowledged that views on injury trends were, at this stage, still quite anecdotal.

One compensator noted cases where they had raised causation issues, but the medical expert hadn't commented on those. It wasn't clear if the medical experts were being supplied with the defendant's version of events.

General Damages Valuations

With so few medical reports so far submitted, views from across both claimant representatives and compensators on this topic were recognised as anecdotal, and possibly influenced by the fact that most claims that have settled are likely to be the least complex.

Tariff injury settlements were being agreed with minimum effort.

For hybrid injuries, a range of approaches have been tried by claimant representatives and insurers to overcome the lack of clarity on how hybrid injuries should be valued. Some firms have agreed protocols based on advice from Counsel, others have employed their own tariff-plus models of valuation as a basis on which to advise clients and make offers.

Almost all claimant representatives reported that claimants were often disappointed once the potential value of the claim was communicated. The course of action chosen in relation to settlement tended to depend on the nature of the injury sustained, those with more significant non-tariff injuries more likely to delay settlement until they are fully recovered. Most firms reported this to be a small but growing problem and one that causes confusion for claimants.

All compensators reported being able to reach mutually agreeable settlements with the claimant representatives with very few cases leading to litigation, suggesting the new process is working,

Use of BTE LEI

Increased utility of LEI BTE products was noted with no issues noted in terms of coverage or customer servicing.

The importance of LEI has unsurprisingly increased since the reforms, compensators noting that law firms with a BTE connection were sustaining new claim volumes better than those without. Claimant representatives noted less non-LEI case attrition than expected.

Overall, the application of BTE LEI is reported to continue to function well though one claimant representative did comment that they thought LEI providers were not yet realistic about the level of reasonable fees post-reform for handling claims.

Dispute Resolution

Very few examples seen of litigation as yet – no surprise at only 10 months into the new process. Of the few cases that have litigated, these mainly related to quantum (additional injuries). Most were able to settle before a hearing was required.

Discussion facilities between claimant representatives and compensators were paying dividends as a method for resolving quantum cases in dispute.

No firms reported any court rulings, but a limited number of claimant representatives were awaiting note of issue. One firm noted that the court had returned paperwork and did not recognise the format of claims under the new system. All participants recognised the need for ADR as an essential element of the new process with many actively engaged in voluntary mediation.

CONCLUSIONS

Whilst it is clear there were teething problems when the process first went live – as would be expected of any major process or IT change – it would be fair to say that both claimant representatives and compensators have been able to make the new process work. Yes, there are still some processing challenges being reported by the claimant representatives (less so by the compensators), and it is likely that only the simpler claims that are reaching conclusion at the moment, but the early signs are encouraging.

What is working well?

- The reforms have forced organisations to refocus on the customer journey, process efficiency and the adoption of technology
- It is acknowledged that the OIC Portal is more instinctive to use than the MoJ Portal
- Claimant representatives can go from initial conversation to submission in one session in some cases
- Compensators noted there are fewer weak liability cases being submitted and, in return, claimant representatives have noted liability admission rates going up
- The revised deadline on liability acceptance works well in ensuring defendants have sufficient time to investigate circumstances, although the increased time allowed for the compensator response can be a source of frustration for the claimant
- Simple claim settlements are streamlined because tariff claims don't need to be negotiated
- Increased adoption of collaboration processes between claimant representatives and compensators is helping remove unnecessary acrimony between parties

Where are there still areas of uncertainty?

- A2A interfaces require regular changes to meet the code changes within the Portal
- Clarity required on why there is often a difference between the injuries described on SCNF and those evidenced within the medical report
- Inconsistent medical reporting formats are hampering efficiency and consistency of process
- Clarity required on costs recovery where small claims exiting the Portal
- Claimant representatives question why is there a need for a signed SoT at SCNF stage when this wasn't required for represented cases submitted in the MoJ Portal?
- Clarity needed on reasons for Portal exit in causation arguments
- In liability / causation disputes, it is not always clear from the medical report if the medical expert had been supplied with the defendant's Version of Events

Where are there common areas of concern?

- Valuing of hybrid claims, whilst settlements are being achieved between the parties, the method still is not clear and will likely lead to more disputes.
- Potential for some cases to end in a process cul-de-sac with no time-out in place
- Clunky process for transferring cases from one compensator to another
- Managing issues in dispute between parties when there are long waits for court hearings and a lack of practical and cost-effective ADR solutions

Where are there further opportunities to improve?

- Could a market stakeholder user group be established, with the objective to collect data and analyse new or ongoing small claims related issues and provide regular feedback to the MoJ and MIB to assist with their ongoing improvement actions?
- Increase dialogue between claimant representatives and compensators on what is causing a) the current delays in medical report submissions and b) the reported increase in disparity between the injuries described within the SCNF and subsequently disclosed medical reports
- Establish a consistent process and output by medical experts and agencies through data collection, analysis, regulation and education
- Establish mutually acceptable market rates / limits for the most common rehabilitation services
- Market stakeholders who have such litigated cases to actively engage and share information with the MIB cross-sector working group focused on hybrid injury claims

With the response now received from the MoJ to Part 2 of the Whiplash Consultation indicating little further action, there is a real opportunity here for the industry to address the issues reported above themselves. There is clearly an opportunity for parties to work together to reduce friction around rehabilitation rates via the FOIL cross industry working group on rehab – while of course taking proper account of competition law.

It is encouraging to see both sides make use of discussion facilities to resolve disputes, particularly in the absence of a practical, cost-effective ADR service. Even more so when putting a case into the Civil Courts currently faces potential delays, and the Damages Claims Portal is just around the corner.

Communication between the parties is key, especially on the major debating point raised in many of our interviews around the longer time it is taking for medical reports to be submitted by the claimant representatives to the compensators. Further work could be undertaken by all stakeholders to explore the reasons for this and to address any undue concerns. The outputs of that activity could assist in refining the processes and procedures and, ultimately, in enhancing the customer journey.

ACSO AND ABI COMMENTS TO SURVEY RESULTS

We engaged with ACSO and ABI with the developing of the survey scope and on its outputs. Thank you for your time, input and support through this project.

Matthew Maxwell Scott, Executive Director of ACSO, said:

"The OIC Portal has fundamentally changed a significant part of the civil justice system, and while its wider, longer-term impact is unclear, what we can say is there will be no going back.

"A system in its infancy will inevitably have teething troubles, and while some of these were foreseen, the critical thing is that the wider industry works together to address them and ensure that consumers don't lose out. We are less than 12 months into the initial three-year period of the OIC's existence, after which the FCA will begin the process of establishing the extent of savings made and passed on to premium holders. In the meantime, the focus must be on quality of service and revolving the biggest-single issue, which is how to value so-called 'hybrid' claims.

"What is particularly welcome about this very balanced and useful report is that it evidences the increasingly collaborative attitudes which are growing across the sector. While overdue, it represents a considerable shift from the mistrust which tended to typify some relationships in the past. A future where people work together is likely to be one from which consumers benefit."

Mark Shepherd, Head of General Insurance Policy at the ABI said:

"This is a welcome report that shows many areas where the new system is working well. The implementation of the reforms is still taking time to bed in, and where there are areas that could be improved, we are committed to working with the OIC Portal, the MoJ and others to help ensure that those who suffer injuries as a result of road traffic collisions receive fair and appropriate compensation."