

## RTA Post Jackson – The Key Facts You Need to Know

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A summary of the main changes appears at

<http://www.justice.gov.uk/civil-justice-reforms/main-changes>

### Extending the RTA Portal - when, how and why?

#### Summary of the Post April 2013 Changes

- The draft protocols can be found at <http://www.rtapiclaimsprocess.org.uk/>. EL/PL claims are also included, but not dealt with here.
- In 2013 the current MOJ Protocol for Low Value Personal Injury Claims in Road Traffic Accidents up to £10,000 will be extended to Employers' Liability (EL), Public Liability (PL) and motor claims with a value up to £25,000.
- The drafts were due to be approved by the Civil Procedure committee on 8 March 2013.
- The changes apply to all RTA claims submitted by the portal after 30 April 2013.
- **A summary of the main changes for RTA claims are as follows:**
- 1.2 (1) The 'Protocol upper limit' is—
  - (a) £25,000 where the accident occurred on or after 1 April 2013; or
  - (b) £10,000 where the accident occurred on or after 30 April 2010 and before 1 April 2013,on a full liability basis including pecuniary losses but excluding interest.
- 4.1 This Protocol applies where—
  - (1) **a claim for damages arises from a road traffic accident where the CNF is submitted on or after 30th April 2013;**
- The **Pre-Action Protocol** for Low Value Personal Injury Claims in Road Traffic Accidents which commenced on 30th April 2010 will continue to apply (as it stood immediately before 1st April 2013) to all claims where the CNF was submitted before 1st April 2013.

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- 5.1 Subject to paragraph 6.1(2), where the Protocol requires information to be sent to a party it must be sent via [www.claimsportal.org.uk](http://www.claimsportal.org.uk) (or any other Portal address that may be prescribed from time to time). The claimant will give an e-mail address for contact in the Claim Notification Form ('CNF'). **All written communications not required by the Protocol must be sent by e-mail.**
  
- 5.6 **Where this Protocol requires the defendant to pay an amount within a fixed number of days the claimant must receive the cheque or the transfer of the amount from the defendant before the end of the period specified in the relevant provision.**
  
- 5.11 **Claims which no longer continue under this Protocol cannot subsequently re-enter the process.**
  
- 6.3 **All boxes in the CNF that are marked as mandatory must be completed before it is sent.** The claimant must make a reasonable attempt to complete those boxes that are not marked as mandatory.
  
- **A claim for vehicle related damages** will ordinarily be dealt with outside the provisions of this Protocol under industry agreements between relevant organisations and insurers. Where there is a claim for vehicle related damages the claimant must—
  - (1) state in the CNF that the claim is being dealt with by a third party; or
  - (2)
    - (a) explain in the CNF that the legal representative is dealing with the recovery of these additional amounts; and
    - (b) attach any relevant invoices and receipts to the CNF or explain when they are likely to be sent to the defendant.
  
- 7.4
  - (1) **The medical expert should identify within the report—**
    - (a) the medical records that have been reviewed; and**
    - (b) the medical records considered relevant to the claim.**
  - (2) The claimant must disclose with any medical report sent to the defendant any medical records which the expert considers relevant.

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- Specialist legal advice

7.10 In most cases under this Protocol, it is expected that the claimant's legal representative will be able to value the claim. In some cases with a value of more than £10,000 (excluding vehicle related damages), an additional advice from a specialist solicitor or from counsel may be justified where it is reasonably required to value the claim.

- **Witness statements**

7.11 In most cases, witness statements, whether from the claimant or otherwise, will not be required. One or more statements may, however, be provided where reasonably required to value the claim

- **Vehicle related damages – interim payments**

- 7.23 Claims for vehicle related damages will ordinarily be dealt with outside the provisions of this Protocol under industry agreements between relevant organisations and insurers. However, where the claimant has paid for the vehicle related damages, the sum may be included in a request for an interim payment under paragraph 7.16.

- Costs of expert medical and non-medical reports and specialist legal advice obtained

- 7.31 (1) Where the claimant obtains more than one expert report or an advice from a specialist solicitor or counsel—

(a) the defendant at the end of Stage 2 may refuse to pay; or

(b) the court at Stage 3 may refuse to allow,

the costs of any report or advice not reasonably required.

(2) Therefore, where the claimant obtains more than one expert report or obtains an advice from a specialist solicitor or counsel—

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(a) the claimant should explain in the Stage 2 Settlement Pack why they obtained a further report or such advice; and

(b) if relevant, the defendant should in the Stage 2 Settlement Pack identify the report or reports or advice for which they will not pay and explain why they will not pay for that report or reports or advice.

### **Submitting the Stage 2 Settlement Pack to the defendant**

- 7.32 The Stage 2 Settlement Pack must comprise—
  - (1) the Stage 2 Settlement Pack Form;
  - (2) a medical report or reports;
  - (3) evidence of pecuniary losses;
  - (4) evidence of disbursements (for example the cost of any medical report);
  - (5) any non-medical expert report,
  - (6) any medical records/photographs served with medical reports; and
  - (7) any witness statements.
  
- **7.33 The claimant should send the Stage 2 Settlement Pack to the defendant within 15 days of the claimant approving —**
  - (1) the final medical report and agreeing to rely on the prognosis in that report; or**
  - (2) any non-medical expert report,****whichever is later.**
  
- **7.34 Where the defendant alleges contributory negligence because of the claimant's failure to wear a seat belt, the Stage 2 Settlement Pack Form must also suggest a percentage reduction (which may be 0 per cent) in the amount of damages.**
  
- **Consideration of claim**

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- 7.35 There is a 35 day period for consideration of the Stage 2 Settlement Pack by the defendant (“the total consideration period”). This comprises a period of up to 15 days for the defendant to consider the Stage 2 Settlement Pack (“the initial consideration period”) and make an offer. The remainder of the total consideration period (“the negotiation period”) is for any further negotiation between the parties.
  
- 7.36 The total consideration period can be extended by the parties agreeing to extend either the initial consideration period or the negotiation period or both.
  
- 7.37 Where a party makes an offer 5 days or less before the end of the total consideration period (including any extension to this period under paragraph 7.36), there will be a further period of 5 days after the end of the total consideration period for the relevant party to consider that offer. During this period (“the further consideration period”) no further offers can be made by either party.
  
- 7.41 When making a counter-offer the defendant must propose an amount for each head of damage and may, in addition, make an offer that is higher than the total of the amounts proposed for all heads of damage. The defendant must also explain in the counter-offer why a particular head of damage has been reduced. The explanation will assist the claimant when negotiating a settlement and will allow both parties to focus on those areas of the claim that remain in dispute.
  
- **7.44 Any offer to settle made at any stage by either party will automatically include, and cannot exclude—**
  - (1) the Stage 1 and Stage 2 fixed costs in rule 45.18;
  - (2) an agreement in principle to pay the Type C fixed cost of an additional advice on quantum of damages where such advice is justified under paragraph 7.10;
  - (3) an agreement in principle to pay relevant disbursements allowed in accordance with rule 45.19; or
  - (4) where applicable, any success fee in accordance with rule 45.31(1) (as it was in force immediately before 1 April 2013).
  
- 7.47 Except where the claimant is a child or paragraphs 7.49 and 7.50 apply, the defendant must pay—
  - (1) the agreed damages less any—
    - (a) deductible amount which is payable to the CRU; and

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- (b) previous interim payment;
  - (2) any unpaid Stage 1 fixed costs in rule 45.18;
  - (3) the Stage 2 fixed costs in rule 45.18;
  - (4) where an additional advice on quantum of damages is justified under paragraph 7.10, Type C fixed costs to cover the cost of that advice;
  - (5) the relevant disbursements allowed in accordance with rule 45.19; and
  - (6) where applicable, any success fee in accordance with rule 45.31(1) (as it was in force immediately before 1 April 2013),
- within 10 days of the parties agreeing a settlement.

7.48 Except where paragraph 7.51 applies, where the parties agree a settlement for a greater sum than the defendant had offered during the total consideration period or further consideration period and after a Court Proceedings Pack has been issued to the defendant but before proceedings are issued under Stage 3,

- (1) paragraph 7.47 applies; and
- (2) the defendant must also pay the fixed late settlement costs in rule [45.18].

- **Vehicle related damages - additional damages**
- 7.51 Paragraph 7.52 applies where at the end of the relevant period in paragraphs 7.35 to 7.37 the claim (“the original damages”) has not settled and there remain vehicle related damages (“the additional damages”) being dealt with by a third party separate from the claim. The original damages include all elements of the claim in the existing Stage 2 Settlement Pack.
- 7.52 Where paragraph 7.51 applies the claimant must, in relation to the additional damages—
  - notify the defendant that this separate claim is being considered;
  - obtain all relevant information from the third party; and
  - make a separate offer by amending the Stage 2 Settlement Pack Form.

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7.53 Within 15 days of the claimant sending the offer under paragraph 7.52(3), the defendant must either agree the offer made by the claimant or make a counter-offer.

- 7.54 The counter offer must explain why a particular head of damage has been reduced to assist the claimant when negotiating a settlement and to allow both parties to focus on those areas of the claim that remain in dispute.
- **Original damages and additional damages are agreed**
- 7.55 Where the original damages and additional damages are agreed within the period in paragraph 7.53 the defendant must pay the claimant in accordance with paragraph 7.62.
- 7.56 Where the parties agree a settlement for a greater sum than the Defendant had offered during the period in paragraph 7.53 but after a Court Proceedings Pack has been issued to the Defendant and before proceedings are issued under Stage 3, paragraph 7.55 applies; and  
the defendant must also pay the fixed late settlement costs in rule [45.18].
- **Original damages are not agreed, additional damages are agreed**

7.57 Paragraph 7.58 applies where—

the original damages are not agreed; but  
the additional damages are agreed.

- 7.58 Where paragraph 7.57 applies—  
the defendant must pay the agreed amount of the additional damages within 10 days of agreeing those damages, and  
the claimant must continue with the provisions in paragraphs 7.64 to 7.75 of this Protocol.
- **Original damages are agreed, additional damages are not agreed**

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7.59 Paragraph 7.60 applies where—

the original damages are agreed; but

the additional damages are not agreed.

- 7.60 Where paragraph 7.59 applies—

the defendant must, in relation to the original damages, pay the claimant in accordance with paragraph 7.62; and

the claimant may start proceedings under Part 7 of the CPR in relation to the additional damages.

- **Original damages and additional damages are not agreed**

7.61 Paragraphs 7.70 to 7.75 apply where the original and additional damages are not agreed.

Settlement after claim for additional damages

- 7.62 Except where the claimant is a child or paragraph 7.64 applies, the defendant must pay—

the agreed damages less any—

- o deductible amount which is payable to the CRU; and

- o previous interim payment;

any unpaid Stage 1 fixed costs in rule 45.18;

the Stage 2 fixed costs in rule 45.18;

where an additional advice on quantum of damages is justified under paragraph 7.10, Type C fixed costs to cover the costs of that advice;

the relevant disbursements allowed in accordance with rule 45.19; and

where applicable, any success fee in accordance with rule 45.31 (as it was in force immediately before 1 April 2013) for Stage 1 and Stage 2 fixed costs,

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within 10 days of agreeing to pay the damages.

- (Rule 21.10 provides that the approval of the court is required where, before proceedings are started, a claim is made by a child and a settlement is reached. The provisions in paragraph 6.1 of Practice Direction 8B set out what must be filed with the court when an application is made to approve a settlement.)
- **General provisions**
- 7.76 Where the claimant gives notice to the defendant that the claim is unsuitable for this Protocol (for example, because there are complex issues of fact or law) then the claim will no longer continue under this Protocol. However, where the court considers that the claimant acted unreasonably in giving such notice it will award no more than the fixed costs in rule 45.18.

#### **Damages Based Agreements, what are they and how do they work in practice?**

- The lawyer is paid only if his client succeeds and the payment is calculated as a percentage of the damages awarded to the client. **There will be a cap on the contingency fee in personal injury cases of 25 per cent of damages** (excluding damages for future care and loss) and a cap of 50 per cent in all other cases (the 35 per cent cap in employment cases will remain unchanged). **Costs will be recoverable against opposing parties on the conventional basis (hourly rate and disbursements) and not by reference to the contingency fee.** Where the fee agreed under the DBA exceeds what would be chargeable on the conventional basis, the claimant will pay that difference from their damages.
- **Successful claimants using DBAs will recover their costs (the lawyer's hourly rate fee and disbursements) from defendants in the usual way, but the claimant will be responsible for paying from their damages any shortfall between the solicitors' costs paid by the losing defendant and the agreed DBA fee and will also be required to pay any shortfall in respect of disbursements. Lawyers acting under a DBA will be required to comply with the indemnity principle, which means that their fee would be restricted to what is due under the DBA fee: if the DBA fee is less than the solicitors' costs would be in the absence of a DBA, a losing defendant would only be liable to pay the DBA fee.**
- **The Damages-Based Agreements Regulations 2013** –
- <http://www.legislation.gov.uk/ukdsi/2013/9780111533444>
- **Requirements of an agreement in respect of all damages-based agreements**

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3. The requirements prescribed for the purposes of section 58AA(4)(c) of the Act are that the terms and conditions of a damages-based agreement must specify—

(a) the claim or proceedings or parts of them to which the agreement relates;

(b) the circumstances in which the representative's payment, expenses and costs, or part of them, are payable; and

(c) the reason for setting the amount of the payment at the level agreed, which, in an employment matter, shall include having regard to, where appropriate, whether the claim or proceedings is one of several similar claims or proceedings.

**Payment in respect of claims or proceedings other than an employment matter**

4.—(1) In respect of any claim or proceedings, other than an employment matter, to which these Regulations apply, a damages-based agreement must not require an amount to be paid by the client other than—

(a) the payment, net of—

(i) any costs (including fixed costs under Part 45 of the Civil Procedure Rules 1998); and

(ii) where relevant, any sum in respect of disbursements incurred by the representative in respect of counsel's fees,

that have been paid or are payable by another party to the proceedings by agreement or order; and

(b) any expenses incurred by the representative, net of any amount which has been paid or is payable by another party to the proceedings by agreement or order.

**(2) In a claim for personal injuries—**

**(a) the only sums recovered by the client from which the payment shall be met are—**

**(i) general damages for pain, suffering and loss of amenity; and**

**(ii) damages for pecuniary loss other than future pecuniary loss,**

**net of any sums recoverable by the Compensation Recovery Unit of the Department for Work and Pensions; and**

**(b)subject to paragraph (4), a damages-based agreement must not provide for a payment above an amount which, including VAT, is equal to 25% of the combined sums in paragraph (2)(a)(i) and (ii) which are ultimately recovered by the client.**

(3) Subject to paragraph (4), in any other claim or proceedings to which this regulation applies, a damages-based agreement must not provide for a payment above an amount which, including VAT, is equal to 50% of the sums ultimately recovered by the client.

(4) The amounts prescribed in paragraphs (2)(b) and (3) shall only apply to claims or proceedings at first instance.

- In practice DBA's may not be suitable for low value personal injury claims, since it only allows the Solicitor to take a minor percentage of damages. However, for credit hire claims or vehicle damage claims, they may be more effective.

### **Conditional Fee Agreements - what you can and cannot do post April 2013?**

#### **Recoverability of success fees - can they be recovered at all post April 2013?**

- **The Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 abolishes recoverability**, introduces a new form of contingency fee agreement (damages based agreements) and imposes an additional penalty on unsuccessful defendants under Part 36.
- **CFA's still exist post April, but success fees cannot be recovered from the Defendant.**
- **LASPO** <http://www.legislation.gov.uk/ukpga/2012/10/section/44/enacted>

Section 44 (2)After subsection (4) of that section insert—

“(4A)The additional conditions are applicable to a conditional fee agreement which—

**(a)provides for a success fee, and**

(b)relates to proceedings of a description specified by order made by the Lord Chancellor for the purposes of this subsection.

(4B)The additional conditions are that—

**(a)the agreement must provide that the success fee is subject to a maximum limit,**

**(b)the maximum limit must be expressed as a percentage of the descriptions of damages awarded in the proceedings that are specified in the agreement,**

(c) that percentage must not exceed the percentage specified by order made by the Lord Chancellor in relation to the proceedings or calculated in a manner so specified, and

(d) those descriptions of damages may only include descriptions of damages specified by order made by the Lord Chancellor in relation to the proceedings.”

- As such, claimants may become liable for the success fee which could see up to a 25% reduction in damages awarded. <http://www.legislation.gov.uk/ukdsi/2013/9780111533437>

#### **Specified proceedings**

4. A claim for personal injuries shall be proceedings specified for the purpose of section 58(4A)(b) of the Act

#### **Amount of success fee in specified proceedings**

5.—(1) In relation to the proceedings specified in article 4, the percentage prescribed for the purposes of section 58(4B)(c) of the Act is—

(a) in proceedings at first instance, 25%; and

(b) in all other proceedings, 100%.

(2) The descriptions of damages specified for the purposes of section 58(4B)(d) of the Act are—

(a) general damages for pain, suffering, and loss of amenity; and

(b) damages for pecuniary loss, other than future pecuniary loss,

net of any sums recoverable by the Compensation Recovery Unit of the Department for Work and Pensions.

#### **10% increase in general damages - when and how does it apply?**

- **To make up for the fact that an injury claimant will no longer be able to recover a success fee or premium where they enter into the CFA or take out ATE insurance on or after 1 April 2013, there will be a 10 per cent increase in general damages.** The Court of Appeal announced in *Simmons v Castle* that the increase would apply to judgments given from 1 April 2013. Following a successful intervention by the Association of British Insurers, which argued that the 10 per cent increase should not apply where the claimant has entered into a CFA before 1 April 2013, the court handed down a further judgment revising their earlier guidance as follows:

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*“With effect from 1 April 2013, the proper level of general damages in all civil claims for (i) pain and suffering, (ii) loss of amenity, (iii) physical inconvenience and discomfort, (iv) social discredit, (v) mental distress, or (vi) loss of society of relatives, will be 10 per cent higher than previously, unless the claimant falls within section 44(6) of LASPO. It therefore follows that, if the action now under appeal had been the subject of a judgment after 1 April 2013, then (unless the claimant had entered into a CFA before that date) the proper award of general damages would be 10% higher than that agreed in this case, namely £22,000 rather than £20,000”.*”

**LASPO 44 (6)***The amendment made by subsection (4) does not prevent a costs order including provision in relation to a success fee payable by a person (“P”) under a conditional fee agreement entered into before the day on which that subsection comes into force (“the commencement day”) if—*

*(a) the agreement was entered into specifically for the purposes of the provision to P of advocacy or litigation services in connection with the matter that is the subject of the proceedings in which the costs order is made, or*

*(b) advocacy or litigation services were provided to P under the agreement in connection with that matter before the commencement day.*

- **CFA and CCFA claimants - will not receive the 10% increase in general damages, unless they have entered into a CFA or had their case taken onto a CCFA after s. 44(6) LASPO 2012 comes into force on 1 April 2013.**

#### **Enhanced damages for beating a claimant's own Part 36 Offer - when and how will this apply?**

- **LASPO 55 Payment of additional amount to successful claimant**

(1) Rules of court may make provision for a court to order a defendant in civil proceedings to pay an additional amount to a claimant in those proceedings where—

(a) the claim is a claim for (and only for) an amount of money,

(b) judgment is given in favour of the claimant,

(c) the judgment in respect of the claim is at least as advantageous as an offer to settle the claim which the claimant made in accordance with rules of court and has not withdrawn in accordance with those rules, and

(d) any prescribed conditions are satisfied.

- The rules are fully set out at:

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<http://www.legislation.gov.uk/ukpga/2012/10/section/55/enacted>

### **Recoverability of after the event insurance premiums - can they be recovered at all?**

- With the exception of clinical negligence expert reports, ATE insurance premiums are not recoverable if the insurance is taken out after 1 April 2013. ATE insurance remains available, and can be taken out by any litigant, and at that litigant's expense.
- It is highly advisable to get all existing cases onto cover by 1 April 2013 as following 1 April 2013, premiums will no longer be recoverable from the Defendant.
- Some ATE products are emerging post April, but the cost post 1 April 2013, is likely to come from the client's damages.
- <http://www.justice.gov.uk/civil-justice-reforms/main-changes>

### **Qualified one-way cost shifting - what is it and how does it work in practice?**

- In personal injury cases, including clinical negligence, a claimant will in general no longer have to pay the defendant's costs if the claim fails, but the defendant will continue to have to pay the claimant's costs if the claim succeeds.
- A new costs protection regime is being introduced for personal injury claims (including clinical negligence). This will provide protection limiting the costs that a claimant might have to pay to the other side. This regime is called 'qualified one way costs shifting' (QOCS). This affects the costs that a claimant might have to pay to a defendant. A losing defendant remains liable for the claimant's costs in the usual way.
- See <http://www.justice.gov.uk/civil-justice-reforms/personal-injury-claims>
- **Part 44 – General Rules about Costs**
- (a) One way qualified costs shifting
- Introducing rules for a new system of qualified one way costs shifting (QOCS) in personal injury cases, devised as an alternative to after the event (ATE) insurance. The effect of QOCS is that a losing claimant will not pay any costs to the defendant, and **a successful claimant against who a costs order has been made (for example, where the claimant does not accept and then fails to beat the defendant's "part 36 offer" to settle) will not have to pay those costs except to the extent that they can be set off against any damages received.**

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- **QOCS protection will however be lost altogether if the claim is struck out or is found to be fundamentally dishonest.** QOCS protection will be lost in part, and subject to the court's permission, in two instances: first, if an otherwise successful claim includes an unsuccessful non-personal injury element (e.g. housing disrepair or costs of credit hire in arranging an alternative vehicle), and there is an order for costs against the claimant of that unsuccessful element, the claimant is liable for all the defendant's costs of that unsuccessful element to the extent that it is just and fair; **and second, where the claim, or an element of it, is made for the financial benefit of someone other than the claimant (e.g. a credit hire claim in respect of the financing company),** an order for the defendant's costs of the claim, or that element, may be made, and enforced, against that person/organisation.
- The new rules can be found at <http://www.justice.gov.uk/courts/procedure-rules/civil>

### **Small claims limit increase - what could this mean for the future?**

- For all cases issued after 1 April 2013 the "Small Claims Court" limit will rise from £5,000 to £10,000. This does not include claims for personal injury cases, but is likely to capture credit hire cases and vehicle damage only cases.
- A consultation ended on 8 March 2013, to increase the personal injury claims limit, currently £1,000 to £5,000.
- <https://consult.justice.gov.uk/digital-communications/reducing-number-cost-whiplash>

### **Further fixed costs in RTA, EL and PL claims?**

- These will be introduced at the same time as the Road Traffic Accident portal is extended upwards to £25,000.00 and at the same time as the introduction of portals in relation to Employers' Liability matters and Public Liability matters.
- The Ministry of Justice has set out the figures, although at present all matters are technically part of a consultation ending on 4 January 2013.
- The table of fixed costs can be found at <http://www.justice.gov.uk/downloads/publications/policy/moj/rta-pi-scheme.pdf>
- The top fee for an RTA claim is £2655, litigated and out of the portal. Portal claims are now £500, to end of stage 2.

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**Discussion of the consultation paper and the proposed fee structures - what could this mean for the future?**

The Government is consulting on measures to address the number and costs of whiplash claims. The consultation, which closes on 8 March 2013, seeks views on the introduction of independent medical panels and on whether to amend the small claims

[https://consult.justice.gov.uk/digital-communications/reducing-number-cost-whiplashhreshold for damages for personal injury claims](https://consult.justice.gov.uk/digital-communications/reducing-number-cost-whiplashhreshold-for-damages-for-personal-injury-claims)