

The Lord Hodgson of Astley Abbotts CBE
Chairman
Secondary Legislation Scrutiny Committee
House of Lords
London SW1A 0PW

8 March 2021

Sent by email (hlseclegscrutiny@parliament.uk)

Dear Lord Hodgson,

The Whiplash Injury Regulations 2021

The Motor Accident Solicitors Society (MASS) understand that the draft statutory instrument, The Whiplash Injury Regulations 2021 (“the Regulations”), are to be considered by the Secondary Legislation Scrutiny Committee on Tuesday 9 March 2021 and would like to draw several issues to the attention of the Committee.

Whilst acknowledging that the Regulations will form a central element of the Government’s new motor accident claims process from 31 May 2021, given the significant impact these regulations will have on future Road Traffic Accident (RTA) victims from 31 May 2021, we respectfully submit that the Committee should draw the instrument to the attention of the House of Lords to allow a full debate and raise awareness of the issues ahead of implementation. In the absence of any guidance within the parent Civil Liability Act 2018 or the Regulations, we would urge the Committee to suggest that the tariff of damages (Section 2) should be reviewed annually and revised according to inflation and considering any other circumstances.

The Regulations will implement several key elements of the Civil Liability Act 2018, the most significant being the introduction (Section 2) of a new tariff of damages for whiplash injuries. Section 3 introduces an uplift in damages in exceptional circumstances. In short, we believe that the judiciary should not be restricted by the Lord Chancellor in applying a discretionary uplift in the proposed fixed compensation payments, with the maximum imposed by the Bill being insufficient to cater for all circumstances. MASS fully supports the requirement of a medical report (Section 3) as evidence of a whiplash injury and have long campaigned for a ban on pre-medical offers from insurance companies in seeking to limit their costs, believing that they have played a significant role in encouraging greater numbers of claims and potentially aggravating fraudulent behaviour.

Continued ...

We wish, however, to focus on the ramifications of the new tariff of damages (Section 2). Throughout the passage of the Civil Liability Act, MASS and others argued unsuccessfully that the power to determine damages should continue to reside with a judicial body. We argued that the Judicial College's 'Guidelines for the Assessment for General Damages in Personal Injuries' has provided a clear and logical framework for the assessment of damages in personal injury cases since they were first published in 1992, although the courts have been assessing damages since the creation of the law of tort.

As background, it should be noted that a draft tariff of damages was first included in a draft Order (The Whiplash Injury Regulations) in May 2018 to correspond with the Second Reading debate of the Civil Liability Act in the House of Lords. The tariff contained within the 2021 Regulations remain unchanged apart from a small uprating for inflation.

It is a matter of record that we have contended that the new tariff rates are fundamentally flawed in the methodology used in their formulation, leading to a substantially greater reduction in damages payable to injured claimants that will be far more than anticipated or is justified. They are based on a combination of inaccurate insurance industry data, old Judicial College Guidelines (2013) and political judgement.

We continue to contend that the proposed tariff of damages is unfairly low given the possible severity and duration of the injury sustained, are unjustifiably low in comparison with other non-injury awards of financial compensation and produce an inherent unfairness by discriminating between categories of individual suffering the same injury or level of pain.

Lord Woolf, former Lord Chief Justice of England and Wales, described the tariff during the Report Stage of the Bill in the House of Lords (12 June 2018) as follows:

“[Clause 2 – the tariff] results in injustice and it is known to result in injustice. Indeed, no one can deny that it results in injustice. There has never been a case where legislation deliberately introduces injustice into our law. It may be that it is only in regard to small claims, but surely it is important that we pause before we do that.”

Significant reduction from current awards

The proposed damages are significantly lower than those currently awarded to motor accident victims, as set out in the Judicial College Guidelines, which consider the full range of individual circumstances of the injured person along with the impact particular to them, eg. the full range of suffering being both length and severity of symptoms along with impact on ability to work, hobbies and lifestyle.

Capturing claims up to a value of £7,000 – the current value of a claim at the top of the two-year injury tariff, they will reduce the amount awarded to accident victims within a range between 90% to 47%, eg. the Judicial College Guidelines recommended an award of £2,950 for a 4-6 month injury in 2019, reduced to £495 by the Regulations.

Continued ...

Comparison with other non-injury financial awards

The tariff figures should justly reflect pain and suffering, over possibly many months, but the proposed damages will be reduced to a level where an individual who suffers pain for several months will receive less than an airline passenger delayed for a few hours.

For instance, a long-distance flight that lands four hours late attracts a £530 compensation, holiday sickness lasting a few days to a week attracts awards of £1,250-£3,300.

Comparison with categories of individuals suffering the same injury or level of pain

A person who suffers pain for 12 months from whiplash injury sustained in a road accident will receive £1,320 in compensation, but a person who suffers the same injury through a different type of (non-motor) accident might be anticipated to receive an award of £4,000. A neck injury resulting from a criminal action is considerably higher than the proposed damages for RTA claims with a potential award paid by the state of four-times that paid by the responsible insurer.

Reduction in legal advice

A stated aim of the Government's reforms is to reduce costs for the insurance industry by reducing damages and the provision of legal advice. The new levels of the tariff damages will mean that legal advice becomes increasingly unaffordable, particularly when combined with the proposed increase in the Small Claims Limit (introduced under a separate regulation). Claimants will still have the option to seek expert legal advice, but the practical and financial hurdles resulting from the tariff of damages (Section 2) will make it significantly less likely. Insurers will remain supported by defendant solicitors.

We remain very concerned that fundamental principles such as access to justice and equality of arms will increasingly be denied to Litigants in Person (LiPs)/Self-representing claimants following these reforms. LiPs will be forced to navigate a new digital-only process - through a new Portal funded, developed and administered by the insurance sector – with little or no support in understanding complex legal concepts such as liability, resolving disputes of fact, causation, liability evidence, the complexities of the Road Traffic Act, court rules and protocols and evidence of financial loss.

The Motor Accident Solicitors Society (MASS) represents road traffic accident solicitors acting for the victims of motor accidents. We represent around 100 solicitor firm Members throughout the UK, representing approximately 2,000 claims handlers, who handle an estimated 400,000 PI motor accident claims annually on behalf of the victims of those accidents.

We hope that this correspondence is helpful to the Committee in its deliberations and will assist in bringing these matters to the attention of the wider Parliament. We would urge the Committee to refer this draft Instrument for wider debate in the House of Lords.

Yours sincerely,



Paul Nicholls
Chair, MASS



Motor Accident Solicitors Society Submission to the House of Lords Secondary Legislation Scrutiny Committee: Government Response

1. In order to implement the whiplash reform programme, the Government has published and laid the following Statutory Instruments:
 - **SI 2021/195 - The Civil Liability Act 2018 (Commencement No. 1 and Transitional Provision) Regulations 2021:** commences Part 1 of the Civil Liability Act (CLA) 2018 on 31 May 2021 and enables required regulations to be made;
 - **SI 2021/196 - The Civil Procedure (Amendment No. 2) Rules 2021:** makes changes to the Civil Procedure Rules to implement an increase to the small claims track (SCT) limit for road traffic accident (RTA) related personal injury claims from £1,000 to £5,000; and
 - **Draft SI - The Whiplash Injury Regulations 2021:** specifies by way of a tariff the damages payable for whiplash injuries lasting up to 2 years, and by way of a further tariff, the damages payable for whiplash injuries lasting up to 2 years together with any minor psychological injuries suffered on the same occasion. They specify the level of the discretionary uplift the court may apply to the tariff in exceptional circumstances (up to 20%) and specify what constitutes medical evidence for the purposes of settling a whiplash claim and those experts who may provide it.
2. The Government made changes to the draft Whiplash Injury Regulations which were originally published in support of the CLA 2018, following receipt of the views of the Delegated Powers and Regulatory Reform Committee. In particular, the provisions on defining a whiplash injury were removed from the regulations and placed in the primary legislation.
3. MASS have submitted views on the Civil Procedure (Amendment No. 2) Rules 2021 and the draft Whiplash Injury Regulations 2021 to the House of Lords Secondary Legislation Scrutiny Committee (SLSC). The Government response to each of these points is provided below, along with any necessary clarification and context:
 - i. **We believe that the judiciary should not be restricted by the Lord Chancellor in applying a discretionary uplift in the proposed fixed compensation payments, with the maximum imposed by the Bill [Civil Liability Act 2018?] being insufficient to cater for all circumstances.***

Government Response: For clarity, Section 5 of Part 1 of the CLA 2018 allows the court to determine that an uplift to the relevant tariff figure can be made. The Government believes that this uplift should be capped at an appropriate level to protect the policy objectives of the reform programme. A high or unlimited uplift may result in more claimants requesting hearings for an uplift, driving litigation into the courts, and make the tariff system unworkable.

The Whiplash Injury Regulations 2021 will set that cap at an amount specified by the Lord Chancellor. The figure of 20% was included in the public consultation and debated during the passage of the CLA 2018. The 20% cap balances competing needs for an effective tariff and judicial discretion in exceptional circumstances. This figure reflects the need to

acknowledge that there are occasions when an injured claimant should receive a higher payment than that provided for under the tariff.

The principle of the Lord Chancellor setting this cap was debated fully in Parliament during the passage of the CLA 2018 and, following Divisions on this issue in both Houses, Parliament approved this measure. During these debates the Government was firm in its view that it is right that the Lord Chancellor should set tariffs and the level of the uplift. Ministers also reassured Parliament that this is a carefully targeted approach to deal with a specific problem and is not a widespread challenge to judicial discretion under the common law.

However, the Government accepts that it is important for the judiciary to retain a role in this process, which is why the Whiplash Injury Regulations 2021 enable the Court to increase a tariff payment by up to 20% in exceptional circumstances. Prior to the laying of the Regulation, a statutory consultation on this issue was held with the Lord Chief Justice (LCJ) to ensure the views of the senior judiciary were taken account of before the final level was set. However, the LCJ did not advance any new argument in support of this view, nor did he suggest an alternative figure. Having considered the regulations in light of the representations of the LCJ, the Lord Chancellor was not minded to amend the approach taken.

- ii. It is a matter of record that we have contended that the new tariff rates are fundamentally flawed in the methodology used in their formulation, leading to a substantially greater reduction in damages payable to injured claimants that will be far more than anticipated or is justified. They are based on a combination of inaccurate insurance industry data, old Judicial College Guidelines (2013) and political judgement.***

Government Response: This issue was raised and debated in depth during the passage of the CLA 2018. The Government informed both Houses during these debates on the methodology used in setting them. It is incorrect to assert that the data used was inaccurate or that political judgement in setting a tariff is inappropriate.

For clarity, when first consulting on the tariff in 2016, the Government considered numerous factors including the suggested compensation levels included in the edition of the Judicial College Guidelines (JCG) relevant to the claims data set used (12th edition, published October 2013). In addition, a considerable amount of validated data was gathered from insurers on *actual settlements made*, as well as additional corroborating claims data from claimant lawyers and claims volume and accident rate data from other Government Departments. Full details of the data sets used is available in the published impact assessment¹.

This data was balanced against the overall Government objectives to control the societal impacts of the high volumes of claims by reducing compensation paid to a proportionate level to control the costs and benefit consumers through reduced motor insurance premiums. The Government's consultation response provided an uprated tariff, to account for both inflation and the publication of the 13th edition of the JCG in September 2015. Since the tariff was last published in 2018 it has been further up-rated again to reflect inflation and

¹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/778250/Whiplash-impact-assessment.doc

the publication of the 15th edition of the JCG guidelines. The LCJ has also been consulted and his views on the tariff level were considered before the final figures were set.

- iii. We continue to contend that the proposed tariff of damages is unfairly low given the possible severity and duration of the injury sustained, are unjustifiably low in comparison with other non-injury awards of financial compensation and produce an inherent unfairness by discriminating between categories of individual suffering the same injury or level of pain.**

The figures included in the regulations are, in the Government's view, proportionate to the level of pain and suffering endured. It is also important to note that compensation for actual financial losses sustained as a result of an accident remain unchanged. The published tariff figures have been reviewed and updated on three occasions since they were first consulted on to take account of both inflation and the publication of new editions of the JCG. As noted above the views of the senior judiciary have also been considered through a statutory consultation with the LCJ.

It is also not appropriate to compare non-injury compensation awards such as for a travel delay with compensation for a whiplash injury as the circumstances are both different and unrelated. Supporting evidence for a whiplash injury can be anecdotal and difficult to substantiate, whilst there will be strong objective evidence in the case of a transport delay, which is usually paid to compensate for financial loss. Financial losses in relation to whiplash claims are still payable in full as well as the claimant receiving an additional payment for the pain and suffering encountered.

- iv. Lord Woolf, former Lord Chief Justice of England and Wales, described the tariff during the Report Stage of the Bill in the House of Lords (12 June 2018) as follows: "[Clause 2 – the tariff] results in injustice and it is known to result in injustice. Indeed, no one can deny that it results in injustice. There has never been a case where legislation deliberately introduces injustice into our law. It may be that it is only in regard to small claims, but surely it is important that we pause before we do that."**

Government Response: The Government disagrees with Lord Woolf that the CLA 2018 creates an injustice in any way. This argument was put forward by Lord Woolf during debates in the House and counter arguments were made by other Peers during this debate. For example, another former Lord Chief Justice, Lord Judge stated:

"We have to face the reality that there are a huge number of fraudulent claims for damages arising from alleged whiplash injuries sustained in road traffic accidents—far too many of them. We also have to remember that a large number of perfectly honest claims are made as a result of injuries suffered in road traffic accidents. We have to find a pragmatic solution to the problem of fraudulent claims, given that the cost of contesting them in court tends hugely to outweigh the amount of money that is at stake if the claim is not substantial. Whiplash injury cases, in the way that will now be defined in the Bill, are not cases that attract vast sums of money in damages. I particularly welcome the requirement of medical evidence, which provides some level of protection against the fraudulent. I welcome also the prohibition on cold calling, and I think there is something in the provision for uplift."

These regulations implement the Government's whiplash reform programme which does not restrict access to justice. Claimants are not precluded from seeking representation from a lawyer in the SCT, they will however, need to decide whether to represent themselves, pay for a lawyer or seek some other form of help or representation through a legal

expenses insurance policy or third sector advice agency. These necessary measures will ensure that whiplash claimants will continue to receive proportionate compensation for their injuries, along with special damages for any financial losses suffered. Claimants bringing their own claims under the new system will have access to justice ensured through the new easy to use IT Portal and where necessary, will still be able to utilise the low-cost SCT court process which is designed to be both uncomplicated and accessible to unrepresented claimants.

- v. ***The proposed damages are significantly lower than those currently awarded to motor accident victims, as set out in the Judicial College Guidelines (JCG), which consider the full range of individual circumstances of the injured person along with the impact particular to them, e.g. the full range of suffering being both length and severity of symptoms along with impact on ability to work, hobbies and lifestyle.***

Government Response: The damages proposed in the tariff are in line with stated Government policy as confirmed to both Houses of Parliament during the passage of the CLA 2018. It should be noted that the levels suggested in the JCG are generally higher than the amount that most claims settle for. This can be explained in part by the fact that the JCG is developed using outcomes of cases heard by the court. By default, the judiciary only hear more complex claims where there is significant dispute, and this can often result in higher awards for claimants. For example, the average pre-court settlement for a 9-month whiplash injury is currently around £2,500 but could attract an award of £3,710 if the JCG are used.

Damages for lost wages remain unchanged under these reforms and exceptional additional impacts on a claimant's hobbies or lifestyle are catered for under the new proposals through the facility to apply for a 20% uplift to the tariff damages. The figures included in the regulations are in the Governments' view proportionate to the level of pain and suffering endured. They have been reviewed and updated on three occasions since they were first consulted on to take account of both inflation and the publication of new editions of the JCG. As noted above the views of the senior judiciary have also been considered through a statutory consultation with the Lord Chief Justice.

- vi. ***Capturing claims up to a value of £7,000 – the current value of a claim at the top of the two-year injury tariff, they will reduce the amount awarded to accident victims within a range between 90% to 47%, e.g. the Judicial College Guidelines recommended an award of £2,950 for a 4-6 month injury in 2019, reduced to £495 by the Regulations.***

Government Response: As previously made clear, the tariff is intended to reduce the amount of damages paid to victims of minor whiplash injuries to meet public policy concerns over their cost and impact on premiums. The awards in the proposed tariff are intentionally lower than those made typically under the current system but still provide an amount of compensation that we believe is proportionate, fair and non-discriminatory for the level of injury genuinely incurred.

The tariff is based on a rising scale of damages according to the duration of the injury, escalating in bands of 3-month injury duration up to a maximum of 2 years. This period covers the majority of whiplash injuries and provides protection against artificially inflated claims. Damages have been reduced less at the top end of the tariff to recognise more serious injuries. Claims where the prognosis exceeds 2 years are not subject to the tariff

and overall the tariff figures presented in the Whiplash Injury Regulations 2021 are around 11% higher than those previously presented to Parliament in 2018.

For context the JCG use a range of suggested compensation, so it is incorrect to infer that a two-year injury will receive an award of £7,000. The current range for an injury of up to two years is £4,000 to £7,000 and where it falls on this range would be dictated by the individual circumstances of the claim. By way of comparison, compensation of £4,345 is available for an 18 month to two-year injury under the new tariff.

- vii. *The tariff amounts are not comparable with damages for equivalent injuries. For instance, a long-distance flight that lands four hours late attracts a £530 compensation, holiday sickness lasting a few days to a week attracts awards of £1,250-£3,300. ...A person who suffers pain for 12 months from whiplash injury sustained in a road accident will receive £1,320 in compensation, but a person who suffers the same injury through a different type of (non-motor) accident might be anticipated to receive an award of £4,000.***

It is not appropriate to compare compensation for a travel delay with compensation for a whiplash injury as each of these circumstances is different and unrelated. Supporting evidence for a whiplash injury can be anecdotal and difficult to substantiate, whilst there will be strong objective evidence in the case of a transport delay, which is usually paid to compensate for financial loss. Financial losses in relation to whiplash claims are still payable in full as well as the claimant receiving an additional payment for the pain and suffering encountered.

The tariff only applies to whiplash injuries suffered as a result of an RTA where a driver has been negligent, as this is where there is the high number and cost of claims. Whilst whiplash injuries can (rarely) occur in other circumstances to an RTA, the claims the Government is particularly concerned with due to their continuing high number and cost are those arising from RTAs.

- viii. *Unequal representation: The new levels of the tariff damages will mean that legal advice becomes increasingly unaffordable, particularly when combined with the proposed increase in the Small Claims Limit (introduced under a separate regulation). Claimants will still have the option to seek expert legal advice, but the practical and financial hurdles resulting from the tariff of damages (Section 2) will make it significantly less likely. Insurers will remain supported by defendant solicitors.***

Government Response: The whiplash reforms do not restrict access to justice and the new SCT Pre-Action Protocol (SCT PAP) will enable parties to reach a fair settlement without the need for separate legal advice. The new SCT PAP also details the steps the parties should take, and the new service will provide them with a completed application form should they need to start court proceedings.

However, it is also important to note that the new online service has also been carefully designed to mirror the requirements of the SCT PAP. This means that claimants who process their claim through the Official Injury Claim service will automatically meet all the requirements of the new PAP. Additional guidance for claimants will also be published and they will also have access to a telephone helpline.

In addition, the SCT is designed to be uncomplicated and accessible and genuinely injured claimants are not, and will not, be precluded from having legal representation. However,

they will need to decide whether to represent themselves, pay for a lawyer or seek some other form of help or representation through a legal expenses insurance policy or third sector advice agency.

It is also misleading to assert that legal professionals will not be involved in this market following the implementation of the reforms. Legal advice remains available to claimants through legal expenses insurance policies and there is significant interest from legal services providers in the new service, with 369 organisations already registered to use the service as professional users. Additionally, large legal services providers such as NewLaw, Simpson Millar, National Accident Helpline and InjuryLawyers4U have all publicly confirmed they will be providing legal advice services to injured claimants under the new regime.

- ix. We remain very concerned that fundamental principles such as access to justice and equality of arms will increasingly be denied to Litigants in Person (LiPs)/Self-representing claimants following these reforms. LiPs will be forced to navigate a new digital-only process - through a new Portal funded, developed and administered by the insurance sector – with little or no support in understanding complex legal concepts such as liability, resolving disputes of fact, causation, liability evidence, the complexities of the Road Traffic Act, court rules and protocols and evidence of financial loss.***

Government Response: Access to justice will be ensured through the new online Official Injury Claim service. Substantial work has been undertaken with both claimant and defendant lawyers to ensure that this new service provides a fair, accessible and efficient system for all claimants. The service has been carefully designed with the claimant firmly at its heart and provides a modern, user-friendly digital system, supported by guidance. Digitally disadvantaged claimants who are unable to use the system may also seek assistance from the dedicated telephone support centre. The guidance and help centre will provide support with the process of making a personal injury claim and whilst they will not provide legal advice, they will signpost users to alternative sources of help and support.

As mentioned above, the new service has been carefully designed to mirror the requirements of the SCT PAP and a new bespoke Practice Direction (PD27B) has been developed to enable claimants with a liability or quantum dispute to seek a judicial determination on their issue before being returned into the service to continue towards settlement.

It is also incorrect to assert that the new service, rules and regulations have been directed by one part of the personal injury sector. MoJ officials have worked closely with both claimant and defendant representatives to draft the new framework. The new SCT PAP, PD27B and the accompanying rule changes included in SI 2021/196 - The Civil Procedure (Amendment No. 2) Rules 2021, have all been drafted in conjunction with, and approved by the Civil Procedure Rule Committee (CPRC). The CPRC is an independent body responsible for drafting court rules, its members are drawn from a wide range of backgrounds including claimant lawyers, defendant lawyers, barristers, lay members representing consumer interests and the Judiciary.

**MINISTRY OF JUSTICE
11 MARCH 2021**