

The MoJ's proposals on whiplash injuries

The Civil Liability Bill

- MASS fully recognises the need to tackle fraud and reform in a number of areas is needed, but this **should not be at the expense of legitimate claims for justice**. The rights of the individual to seek justice within the legal system should be preserved and protected. We have serious concerns that widespread injustices will follow implementation of these reforms as currently proposed, with legitimate claimants unable to get the justice that they deserve.
- These measures include:
 - Introduction of a **fixed tariff system at an unfair level**
 - Introduction of a ban on **pre-medical offers**, which we support, regulated by the Financial Conduct Authority, to settle whiplash-related claims resulting from a road traffic accident without an independent medical report
 - Under a measure to be introduced under [Civil Procedure Rules \(via Statutory Instruments\)](#), those with a Road Traffic Accident (RTA) claim valued up to £5,000 will no longer be able to recover any legal fees if they win (raising the **Small Claims Limit**)
 - The Government recently announced that these measures will all be implemented from April 2020, following the development of a new online Litigant-in-Person Portal to process low value road traffic accident personal injury claims.
- As 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):

*“[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.”*
- The MoJ's **last round of reforms** and action by the sector are working, with **claims falling to their lowest levels since 2009** (according to the Govt's Compensation Recovery Unit).
- In addition to making the current round of reforms more **fair and reasonable**, MASS believes that there should be a renewed focus on continued improved data sharing, full implementation of the Insurance Fraud Taskforce's recommendations, ensuring that the ban on cold calling and texting works, tough enforcement action against professional enablers (including a minority of solicitors), better enforcement of data protection legislation, continued action against uninsured drivers, improved driver education and graduated licenses, improved car design and telematics.

How you can help

- In broad terms we would welcome your support in **making representations to Ministers**, particularly Rory Stewart, the MoJ Minister responsible for the Bill, urging that the reforms are implemented in a more reasonable and fair manner that protects genuine claimants that are seeking justice following a motor accident. We also have a range of detailed suggestions (on page 3 of this document) about **how the Bill could be improved**, providing safeguards for particularly vulnerable groups, reasonable amounts of compensation for accident victims and ensuring that any savings from the reforms are passed back to the consumer.

Severely limiting the right to damages

- The Civil Liability Bill seeks to severely limit the level of damages caused by someone else's negligence. This is **unfair and unreasonable**. Damages are awarded on the grounds of pain, suffering and loss of amenity and this requires formal procedures, legal guidance to establish liability and the right level of compensation, as well as providing a mechanism for identifying fraudulent cases. The payment of damages for pain and suffering is an acknowledgement that the injured party was innocent, the negligent driver was wrong and that the injury inflicted was needless.
- The proposed **fixed tariffs are significantly lower** than those set out in the Judicial College Guidelines and instead should **reflect the levels of compensation currently awarded by the courts**. As the Association of District Judges (ADJ) have argued, the proposed tariffs are "*much lower and seemingly arbitrarily as opposed to evidence-based levels than present.*" The **new tariff levels should be closely informed by the current Judicial College Guidelines**, and should incorporate the recommendations of the Lord Chief Justice and other stakeholders. As succinctly expressed by the House of Lords' Delegated Powers and Regulatory Reform Committee: "*We are not convinced that the Lord Chancellor will make a better job of this than the judges, who have had decades of experience dealing with damages for personal injury at the bar and on the bench. Our judgment is shared by the Motor Accident Solicitors Society.*"
- The proposed tariffs are **unfair and unreasonable** for accident victims suffering long periods of pain and discomfort, comparable or below amounts in compensation for flight or train delays.
- The Government is effectively saying that an award for the same injury suffered by the same person, but suffered when driving a car is "disproportionate" and valued significantly less.
- It will cause **disparity and unfairness** between: claimants in the same accident who have different kinds of injury; between claimants with the same injury suffered in different circumstances; and between claimants with the same injuries whose symptoms last for slightly different periods.
- One result of the currently proposed levels of the tariff damages would be that **legal advice would become unaffordable**, particularly when combined with the proposed increase in the Small Claims Limit, which would lead to a clear **inequality of arms**.
- The Government has yet to publish its **Part 2 consultation** on other areas of the claims sector that urgently require reform, such as physiotherapy and rehabilitation, credit hire and repair costs, and this will almost certainly lead to abuse in the future.

"What I cannot accept is a solution which means that a dishonest claim is handled in exactly the same way as an honest one. We cannot have dishonestly informing the way in which those who have suffered genuine injuries are dealt with. That is simply not justice. There should not be any idea that an honest claim for a whiplash injury made by the victim of a car accident should be less well compensated than an identical injury suffered by someone at work."

Lord Judge, former Chief Justice of England and Wales, Report Stage, 12 June 2018

"It is unlikely that the cap will succeed in its commendable objective of preventing fraud, but will interfere with the small claims court process if tackled in the way proposed. It is being introduced before other steps have been taken or had time to demonstrate their worth. It offends an important principle of justice, because it reduces the damages that will be received by an honest litigant because of the activities of dishonest litigants."

Lord Woolf, former Chief Justice of England and Wales, Report Stage, 12 June 2018

"Overall I would prefer to see the Government place more emphasis on measures that make it harder for fraudulent claims to succeed. It would be a poor outcome and represent an injustice for genuine claimants if the overall level of claims fell but the proportion of fraudulent claims rose."

Louise Ellman MP, Chair of Transport Select Committee, in letter to Lord Keen of Elie QC, 11 January 2017

Detailed view on the Bill

The definition of whiplash and review (Clauses 1 and 2)

- The proposed definition in the Bill **goes substantially beyond neck injuries**, impacting a wide range of injuries that could be sustained in a motor accident. A soft-tissue injury to the shoulder is not a whiplash injury unless it is referred pain from a neck injury.
- Any associated ‘minor’ **psychological injury should only be included if it is diagnosed as falling within the medical term “sub-clinical”** (ie. not a diagnosable condition such as PTSD).
- The “exceptions” section and the definition changes from ‘whiplash injury’ to ‘whiplash injury or injuries’ are insufficiently robust enough to prevent the Bill from **either deliberately or inadvertently capturing other minor non-whiplash injuries**.
- The Lord Chancellor **must**, rather than the current **may**, conduct a regular review of the working of the definition (as per the tariff review).

The tariff of damages (Clauses 3 and 4)

- The tariffs should be **fair and reasonable**, and significantly closer to the current Judicial College Guidelines, as proposed by the House of Lords’ Delegated Powers and Regulatory Reform Committee. The tariff should incorporate the recommendations of the Lord Chief Justice.
- The maximum duration of a whiplash injury for the tariff should **be reduced from 2 years to 12 months**, given that the Bill is supposedly to address minor whiplash injuries. We do not believe that it is fair that an injury, with pain and suffering lasting up to two years, should be categorised as minor.
- We are concerned that the **Lord Chancellor would have complete freedom** to increase/decrease or not to review the damages at all at their discretion with only minimal parliamentary scrutiny, and to the potential detriment of accident victims.
- The **review process** of the tariff should be similar in scope of the consultation proposed for the definition of whiplash.
- The **tariff should be updated annually** by inflation (CPI).

Uplift in exceptional circumstances (Clause 5)

- 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**.

Pre-medical offers (Clauses 6-9)

- **MASS has long campaigned for a ban on pre-medical offers**, enforced by the regulators, and we support this measure.

Vulnerable road users (VRUs)

- **All VRUs should be explicitly excluded** from the Bill.

Accountability

- The Bill should enforce a mechanism for insurers to annually report to the Financial Conduct Authority on the **savings passed through to consumers**, distinguishing between new business and automatic renewals.
- The Bill should set out the **consequences for insurers** if they fail to pass on the savings to customers.

The “evidence” base: number of claims and costs

- The number of personal injury motor insurance claims has **fallen to the lowest level since 2009** according to the number of claims recorded with the Department of Work and Pensions (DWP) Compensation Recovery Unit (CRU). From a peak of 828,489 in 2011/12, they have fallen to 650,019 in 2017/18, **a fall of 20% in the last year**. The number of motor insurance claims passing through the Road Traffic Accident (RTA) Portal for low value Personal Injury Claims has fallen for the past two years, **falling by more than 18% over the last two years**, from 857,416 in 2015/2016 to 699,167 in 2017/2018.
- No system is 100% reliable, because of potential over reporting and the inclusion of unsuccessful claims, rather than settled claims, but the trend is clear: previous actions undertaken by the Government and sector are working in **reducing the number of fraudulent claims and under all measurements are falling sharply**.
- The Government focuses on the undisputed fact that the number of serious motor accidents has dramatically fallen since 2006, whilst pointing at the significantly higher number of road traffic accident (RTA) claims. The fact is that not all RTA accidents are reported to the police. MoJ focus on the decrease in the number of road traffic accidents (RTAs) reported to the police since 2006, but have deliberately chosen to ignore Department for Transport estimates that between 2012 and 2016, an average of **around 426,000 “slight” injuries per year and around 57,000 serious injuries from RTAs went unreported to the police**. DfT’s central estimate of reported and unreported total road casualties is **670,000 per annum**, of which only around 187,000 are reported:

Table 1: Estimated total number of reported and unreported casualties, average for 2012-2016, Great Britain

	Number (thousands, estimates rounded to nearest 10 thousand)				
	NTS Central estimate (reported and unreported) ¹	95% confidence limits		Stats19 reported ²	Estimated unreported
Lower		Upper			
Seriously injured	80	50	110	23	57
Slightly injured	590	510	670	164	426
Total casualties	670	590	760	187	483

1. Based on National Travel Survey data collected for 2012-2016

2. Based on police-reported Stats19 casualties for 2012-2016

Source: page 22, Department for Transport, ‘Reported road casualties in GB: 2016 annual report’, published 28 Sept 2017

- The **costs attributed to whiplash are entirely unsubstantiated and vary greatly** and are provided exclusively by the insurance industry, despite their general adoption by both the Government and the media. The true figures, according to ABI data (available from its website for a substantial fee), are that **claims costs have fallen 29% since 2010 with the amount paid annually by motor insurers falling from £8.3 billion in 2010 to £5.89 billion in 2014 – a decrease of £2.41 billion**. Between 1991 and 2010, the value of claims rose 116% but, after allowing for inflation, the ‘real’ increase was only 29%. **Since 2010, the total value of motor claims has fallen**. (Access to Justice/Capital Economics) Meanwhile, the **cost of repair bills has risen by 33% since 2013**.
- **Legal costs have been falling for over ten years**, having been fixed for RTA cases in 2003, reviewed (and negotiated with insurers) in 2010 and the LASPO cost reforms introduced in April 2013 further reduced legal costs by up to 60%.

The “evidence” base: fraud and motor premiums

- We fully acknowledge that **fraud is a problem and must be tackled** in a number of ways. We do however strongly question the view that a high proportion of claims are fraudulent. The ABI’s “fraud” figure used by MoJ actually combines both proven (staged accident claims etc) and what it calls “suspected” fraud, where a claimant withdraws the application having been accused of fraud and/or when a claimant accepts (without a credible explanation) a substantially reduced settlement offer in respect of a claim.
- When the “proven” and “suspected” fraud figures are separated, the **incidence of proven fraud (on the ABI’s own figures) dropped to 0.25% of all motor claims**. It is not known what proportion of these 0.25% of claims are for whiplash or other soft-tissue injuries only. **Technically fraud cannot increase insurance premiums** as to be legally proven fraud it means not only does the insurer not pay out any money, but it also recovers its costs. Suspected fraud and actual fraud are not the same thing. Aviva’s Head of Fraud has said that they only “*identified fraud on less than 1.9% of claims we received.*” Solicitors – both claimants and defendants – report fraud is in the region of 1-3% of claims. Our view is that **the majority should not suffer** from being prevented from seeking justice and compensation for their injuries.
- The insurance sector regularly pays out compensation on 99% of motor accident claims. If they believe that so many road traffic accident claims are fraudulent, **why do they continue to settle so many cases without any medical evidence and without challenging them in court?** Not doing so – but supposedly saving on legal costs – has **greatly fuelled the perception of ‘easy money’ and fraudulent activity**.
- The insurance sector has a **poor history of passing cost savings to consumers**. Promised savings to consumers by cutting motor insurance premiums of £40-50 per premium have now fallen to £35. Whilst **claims and costs have fallen, motor insurance premiums have risen** dramatically to pre-LASPO reform levels. The insurance industry **did not maintain all the promised cost savings** to consumers and as is well documented, are now at near record high levels.
- When insurance companies claim that the cost of motor insurance has reduced, they are usually **only referring to new business only**, ignoring the automatic premium increases applied on renewals (which can account for around 70% of premium policies).
- The ABI has acknowledged that even with the proposed changes to the claims process, premiums will continue to increase because of other factors. Claims that further increases in motor insurance premiums are due to fraud and whiplash claims should be treated with scepticism. There will **always be another and another excuse for increasing motor insurance premiums, at a time when insurers are enjoying their most profitable period since 1994 (sector profits of nearly £3.5bn in the last 3 years):**

“Civil litigation reform is not done in isolation to the wider economy and wider market....Those costs will be passed on to consumers through higher car insurance premiums....What I can say is that premiums will not go up as much if these personal injury reforms are implemented.”

James Dalton, Director of General Insurance Policy, ABI, before Justice Select Committee, 7 February 2017



MASS is a Society of solicitors acting for the victims of motor accidents, including those involving personal injury (PI). MASS has 110 solicitor firm Members, representing approximately 2,000 lawyers and claims handlers throughout the UK. Collectively member firms conduct the vast majority of RTA PI claims each year. We represent claimant solicitors on the boards of MedCo and Claims Portal, both organisations we helped to establish, served on the Personal Injury sub-group of the Insurance Fraud Taskforce and are currently one of the stakeholder representatives on the MoJ’s Whiplash Reform Steering Group and its four sub-groups. Please do contact us at the details below for further information.