# Ministry of Justice:

# Statutory review of the Whiplash Tariff

**Response from the Motor Accident Solicitors Society**

**March 2024**

This response is prepared on behalf of the Motor Accident Solicitors Society (MASS) and submitted by our Chair, Sue Brown.

MASS is a Society of solicitors acting for the victims of motor accidents, including those involving personal injury (PI). MASS has over 70 solicitor firm Members, representing approximately 1,200 claims handlers. We estimate that member firms conduct in the region of 300,000 PI motor accident claims annually on behalf of the victims of those accidents. The Society's membership is spread throughout the United Kingdom.

The objective of the Society is to promote the best interests of the motor accident victim. This is central, and core to our activity. We seek to promote only those policy and other objectives which are consistent with the best interests of the accident victim. We seek to set aside any self interest in promoting these arguments, recognising that we are in a position of trust, and best placed to observe the best interests of motor accident PI victims first hand. We are a not-for-profit organisation, which requires specialism in motor accident claimant work as a pre-requisite for membership. We also have a Code of Conduct which member firms are required to abide by, which is directed to the best interests of the motor accident victim.

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## Questions

### Tariff Structure

Question 1: To what extent do the injury duration ranges in Table 1 reflect the typical duration of whiplash injuries?

Please provide reasons and data, where possible, to support your view.

According to data provided by Official Injury Claim (OIC), since it's implementation to December 2023 there have been a total number of claims (of all injury types) of 674,290. Of these, 19.4% are whiplash only and 11% whiplash plus minor psychological injury.

Considering the relevant timescales involved, the duration of these claims show that over 85% of whiplash only and whiplash plus minor psychological injury have a prognosis of up to 9 months. This is generally in line with what is being experienced.

However, it is important to recognise that on a practical basis, it is commonly experienced that medical reports and injuries do not neatly match duration bands and timescales, with cases often falling between two bands. Consequently, this will inevitably create debate and disagreements between parties, potentially slowing negotiation and increasing settlement times.

What the data does not provide, is a breakdown between Litigants in person (LIPs) and professional users. Naturally professional users have many years of valuable experience in being able to navigate through such issues whereas for the LIP, working through this conundrum and the legal implications may not be so straightforward.

Question 2: In your view, is splitting the tariff into "whiplash only" and "whiplash plus minor psychological injuries" a suitable approach?

Please give reasons to support your view and suggest an alternative if appropriate.

As it is not uncommon for accident victims to suffer a psychological injury following an RTA, it is right and just that there should be recognition of this and additional damages awarded for this element.

However, the definition used within the Civil Liability Act 2018 (CLA) and associated regulations is vague and unclear, creating difficulties in practice. Consequently, we are aware that many GPs are not comfortable in making a psychological diagnosis using the definition within the Act and are therefore referring this element for a second medical report with an appropriate expert. The cost of this second report, can exceed the maximum recoverability fee and may involve a significant psychological injury that requires treatment (ie CBT). In addition, it prolongs the claim and creates further debate and possible disagreement between parties.

It is important to also highlight that the amount of the additional tariff of £25 is extremely poor, considering the level and range of some conditions experienced and is inadequate

compared to the injury suffered, even if that injury is regarded as ‘minor’. We would question whether setting such a low rate for all psychological injuries is fair and just, seeing as in practice it is not just the more minor injuries like travel anxiety that are included.

Question 3: How simple is the tariff to understand, use and explain?

Whilst the tariff and associated bands are relatively easy to use and understand for professional users, explaining the process and level of the tariff to claimants is not necessarily straightforward. Feedback received is that claimants frequently cannot understand why the level of the tariff is so low, especially when they are often in pain and having their normal lifestyle disrupted, through no fault of their own.

MASS would submit that the current fixed level of tariff and associated claims process is not regarded as ‘simple’ by litigants in person (LIPs), clearly shown by the low number of individuals using the process without any assistance.

Such a low level of compensation is disproportionate, unfair and provides a clear inequality when compared to a whiplash injury through an accident not sustained through a motor vehicle.

The low tariff level would only begin to compensate some degree of the injury and would be insufficient to cover any pain, suffering and loss of amenity and disruption to lifestyle.

MASS would also argue that at such a low level, should a litigant in person be unable to pursue their own claim through the OIC and wish to obtain legal advice and assistance, the prospect of such poor compensation could result in legal assistance being unaffordable and therefore severely restricting access to justice.

Question 4: If you have experience engaging with unrepresented claimants, whether advising, providing support, or responding to claims, what is their experience of using the tariff?

With such a low number of LIPs operating the OIC portal (OICP), MASS is extremely concerned about the impact that the process and level of the tariff has.

It should not be underestimated what the overall impact is having on the consumers access to justice. A significant amount of work and understanding is required before the ‘use’ of the tariff is experienced. As the data clearly shows, over 90% of claimants are not able to, or do not wish to pursue their own claim, preferring to obtain professional legal advice, who can assist with their claim and advise them on what they are entitled to.

The introduction of the tariff is only one element and so the whole process must be considered as one. Pursuing a road traffic accident claim is a legal process and, as has been proven, one that LIPs are reluctant or unable to undertake without professional independent legal assistance. The tariff and the level at which it is set, is clearly impacting the choices that LIPs have available, by reducing the affordability of making a claim, which is made even more acute in the current economic climate.

The experience we are gaining from claimants contacting our members or those who contact the society direct, is one of difficulty in obtaining legal advice for claims within the small claims limit, as the complexity of the process means they are not able to pursue the claim themselves. This is then compounded by the fact that there has been a significant reduction in the number of PI firms who are providing legal advice for claims within the OICP and small claims track.

MASS submits that reliance on the data provided by OIC must also be viewed with caution as it does not necessarily provide a full picture of what is occurring day to day. For example, whilst the latest quarterly figures (October – December 2023) show comparable average values settled between LIPs and represented claimants, a clear omission is the value of the claim versus the amount settled.

Our historical experience with insurers is their behaviour through third party capture and being judge and paymaster. Through the experience of our Members, under settling and making woefully poor offers continue. Without legal advice and guidance, the LIP is unlikely to have any idea if what they are being offered is fair and reasonable.

On a similar theme, the data published shows how insurers admit liability in full or part for LIPs in over 90% of cases, much higher than for represented claimants. Again, this should be viewed with caution and questioned how this approach is beneficial for insurers.

Consequently, without having full management information including the value of the claim, prognosis, treatment etc, we are concerned how in their recent response to the Justice Select Committee (Whiplash reform and the Official Injury Claim Service: Government Response to the Committee's Ninth Report of Session 2022–23 – November 2023), the MoJ can indicate that the new reforms are a success and offer no detriment to the LIP.

Question 5: Do you have any other views on the structure or component parts of the tariff which are relevant to this review?

We refer to our answer to questions 1 and 2, which can also be applied to the definition of 'exceptional circumstances' and how this interpreted, understood and subsequently used by parties.

We are aware of increased challenges from insurers generally, but specifically this occurs both with the uplift and exceptional circumstances, unless supported in the medical report and on occasions even challenging it still. As there are times when professional users and medical experts may struggle with interpretation of the definitions, our concern is how a LIP would be able to deal with such challenges from insurers or their legal teams, who would naturally have more knowledge and experience of the process.

**Changes since the introduction of the tariff**

Question 6: Since the introduction of the whiplash tariff, what changes have there been in regard to the following factors that would be relevant to this review?

a) the volume of whiplash settlements;

b) the composition of the claims market;

c) caseloads; and

d) any other relevant factors related to whiplash claims.

a) Volume

There is clear evidence that the volume of motor claims has reduced by around 50%, coupled with a record low of injury claims being submitted. As shown in the following table, according to the Department for Work and Pensions Compensation Recovery Unit, cases registered between 2019/20 to 2022/23 have reduced by 43%. Yet at the same time traffic volumes have returned to pre-pandemic levels.

| Date | Cases Registered | Case Settlements |
|---|---|---|
| 2019/20 | 653,052 | 671,895 |
| 2020/21 | 446,976 | 550,338 |
| 2021/22 | 387,687 | 447,629 |
| 2022/23 | 367,535 | 405,342 |

Whilst the Government may regard this reduction is a positive result of the CLA and reforms, it must be questioned who this actually benefits and why there has been such a dramatic reduction. It is vital that a full assessment is carried out on the impact these reforms have on the accident victim and their access to justice. Questions that need to be considered include;

- What are the reasons for this decrease and what is the impact to the accident victim and their right to fair and just compensation?
- Is the consumer aware of the new law and method in which to claim for a whiplash injury?
- How has the process impacted the digitally excluded and elderly population and others who are not in the position to use a digital process?
- Has the low tariff level dissuaded individuals from pursuing their claim?
- Complexity – According to official data from the MIB, for the period Oct-Dec 2023 (and similar since implementation) – 29% of claims exited the portal for reasons of ‘complexity’ which is an extremely high figure for a process that is supposed to be simple and for only minor whiplash claims. How can a 64-page guidance ‘book’ be regarded as helpful guidance for a ‘simple and straightforward’ process?

The clear answer is that pursuing an RTA claim and the process in which to do so is not necessarily simple and straightforward, especially for injuries suffered over 12 months and accident victims are not happy to handle their own claim. This is backed up by comprehensive data from OIC showing less than 10% of claims have been submitted by LIPs. Furthermore, this percentage also includes those who are assisted by their own insurer, a CMC or ABS, resulting in the true figure of LIPs who have no assistance likely to be far lower and nearer to 3-4%.

Meanwhile motor insurance premiums continue to rise significantly accompanied by continual excuses as to why premiums are not being reduced.

b) Composition of Market

According to the Solicitors Regulation Authority (SRA) data the number of law firms is consistently dropping, going from 10,240 in December 2019 to 9,309 in December 2023. With regard to those undertaking PI, this reduction is even more acute, with a reduction of over 25% over the same period.

With fixed recoverable costs not being reviewed for over 10 years, combined with the implementation of the CLA and increase in the small claims track limit, many firms have found that it is just not financially viable to continue offering legal assistance for claims under £25,000.

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 low level of the tariff damages has contributed to legal advice being increasingly unaffordable, particularly when combined with the increase in the Small Claims Limit. Whilst the MoJ purport that Claimants still have the option to seek expert legal advice, the practical and financial hurdles resulting from the process as a whole and the tariff of damages, have made it significantly less likely, which is supported by the significant reduction in overall claim numbers and those pursued by the LIP themselves.

As a consequence of these combined factors the accident victim has been greatly impacted through the reduction in availability and choice of independent legal advice and consequently access to justice.

c) Case Loads

For those who remain in the sector, due to the continued financial implications, it will inevitably mean increased caseloads for fee-earners. This is also impacted by the lack of viable IT technology for professional users of the OICP, increasing time spent and the potential for errors due to manual inputting.

MASS Members are also reporting an increase in the lifecycle of a claim, some by as much as 50% longer than before the implementation of the OICP.

d) Other relevant factors

*IT Technology*

The efficiency of the whole process been eroded due to the lack of adequate API technology for professional users who undertake at least 90% of the whiplash claims within OICP. The claims process has effectively regressed by over 10 years, going from an efficient and effective claims portal using integrated A2A claims technology to a process whereby manual uploading is required onto a website rather than an efficient and interactive case management system.

For PI claims up to £25,000 there are now two portal platforms (Claims Portal and OICP) in which to submit claims. Valuing a claim at the outset can be challenging even for professional users, so for LIPs this will naturally be extremely difficult. Having two portals is in itself not a problem, but not being integrated in anyway creates even more confusion, challenges and the potential to increase the claim lifecycle still further. Should a claim exit the OICP for valuation reasons or has been selected in error initially, there is no facility for any integration between the two portals.

The Claims Portal has been in operation for 14 years and has proven to be extremely efficient with a fully operational and integration A2A system for professional users.

Unfortunately, the OICP has not followed this efficient platform and the absence of integration by having to manually input claim details potentially twice does not coincide with the principle of efficiency.

*Liability Disputes*
The regulations have no facility in which to resolve liability disputes and so when this occurs for claims within the OICP, a court hearing is required to ascertain liability. Once resolved, the case then returns to the OICP to continue the process. This is neither simple or straightforward and yet another legal challenge that LIPs have to contend with, without sufficient knowledge or support. Not only does it complicate the process, it increases the claim lifecycle and adds further burden to the Court, which is already under extreme pressure.

*Court Delays*
It is well known that Court delays are at a very high level, but as an example, a member firm has reported that it is taking approximately 5 weeks to obtain a 'notice of issue' and out of over 300 cases within the OICP that have been issued since July 2023, only 3 have been listed and only 10 have been transferred to the local courts. This is not an isolated example and is clear evidence that these reforms are not simple, straightforward and efficient.

**Mixed Injuries**

Question 7: How has the introduction of the whiplash tariff changed the process of valuing injuries for the purpose of making offers/counter offers?

We understand from members that disputes over mixed injuries and the lack of set timescales within the OIC for the making and acceptance of offers has caused settlement times to be longer than they were before the introduction of the tariffs and the OIC.

Question 8: How has the introduction of the whiplash tariff changed the process of agreeing settlements for mixed injury claims?

Prior to the publication of the Supreme Court judgment it was causing considerable difficulties in agreeing settlements. We hope that going forward the process will be more straightforward.

Question 9: What do you think should be taken into account in the review regarding mixed injuries?

The Supreme Court have now made this clear.

**Broader Factors: Inflation**

Question 10: What has been the impact of inflation on claimants' damages since 31 May 2021?

The dramatic increases in inflation since the introduction of the tariff of damages has led to a clear and damaging denigration of the compensation awarded to injured motor accident victims.

More generally, this review has been constructed in effect to consider a single issue and outcome – an inflation-only increase to the tariff of damages.

MASS rejects this approach. We believe that the tariff of damages was fundamentally and deeply flawed from its conception to implementation and cannot be extricated from the impacts of the wider reforms (see our answer to Question 15).

We believe that the tariff of damages should be uplifted, beyond a CPI increase, to better reflect equivalent judicial awards for the same injuries suffered outside a motor accident.

Question 11: Does CPI remain an appropriate inflationary measure?

If not, why not?

We do not believe that CPI (Consumer Price Index) has ever been an appropriate inflationary measure to determine the levels of the tariff of damages.

In addition to a so-called "basket" of everyday goods and services, it includes a range of products that amount to the government's own spending – state pensions, public sector pensions, income benefits, statutory sick pay – and so is less representative of real prices for consumers.

The use of CPI – and the construction of this review - suggests that the tariff of damages consists of public expenditure paid from the public purse by HM Government. Of course, no public expenditure is involved in compensation to injured motor accident victims. The compensation is entirely paid through the insurance system, paid for by compulsory motor insurance premiums paid by consumers.

We believe that the RPI (Retail Price Index) is a more representative measurement of the impact of price increases on consumers as it reflects a wider range of real-life price increases, including duties, tariffs, travel costs, student loan interest and mortgage interest rate payments. Given that the compensation paid is, in-effect, a private transaction between insurer and claimant, RPI is clearly more appropriate to reflect consumer pricing than CPI which is more heavily weighted towards government expenditure.

We also note that the Judicial College uses RPI to determine its guidelines for the awards of damages by courts. Given that we have always believed that it is more appropriate to base the tariff of damages on judicial awards, we note that the 17th Edition, due for publication in April 2024, is expected to increase PSLA damages by around 25%.

Question 12: Is the three-year inflationary buffer built into the whiplash tariff effective?

If not, what alternative would you propose and why?

No, the three-year "inflationary buffer" has been proven to be ineffective and highly damaging.

Lord Wolfson of Tredegar, then Parliamentary Under-Secretary of State at the Ministry of Justice, told the House of Lords on 26 April 2021 that:

> "We have reviewed and updated the previously published figures to account for inflation. We have also added a three-year future-proofing element to ensure that they do not move out of alignment with future inflationary pressures before the required statutory review in three years' time. That leads to an increase of about 11% over the figures previously provided to the House."
> (Lord Wolfson, Whiplash Injury Regulations 2021, House of Lords, 26 April 2021)

Predicted to be 11%, since June 2021 and February 2024, **CPI has increased by 18.78%**.

In other words, the predicted increase in inflation was **incorrect by 58.6%**.

Whilst this is acknowledged in para 35 of the consultation ("*The Government acknowledge that these figures do not account for the unexpected inflationary pressures since the initial tariff was set, and that the real value of the figures has fallen*"), it is the view of MASS that this demonstrates that the system is entirely flawed leaving injured motor accident victims progressively under-compensated as a three-year term of the tariff progresses.

With an increasingly unstable world both economically and politically, we believe that a three-year "inflation proofing" exercise is no longer viable as inflation rates can no longer be predicted with any accuracy over such a long period.

Most government benefits have been uprated annually since they were first put on a statutory basis in the 1970s. They are uprated each year following a review carried out to determine whether they have retained their value in relation to either prices or earnings.

Inflationary increases are reflected regularly in the decisions by the Bank of England's Monetary Policy Committee (MPC) to adjust the Bank Rate which regularly impacts the real costs to consumers in terms of loans or mortgages.

In everyday life, manufacturers and sellers adjust prices regularly taking into account a variety of factors.

The regular compounding of regular increases has an important and demonstrable impact upon future levels across benefits, products and services. Ahead of any anticipated inflationary increase for the next three years, it is important that the baseline is recalculated to be based on the actual CPI increase experienced over the least three years (the 7.78% difference between the anticipated and actual CPI increase experienced by consumers).

| Duration of injury | Amount (whiplash only) | Amount (whiplash only): new baseline increased by 7.78% ahead of 3-year review |
|---|---|---|
| Not more than 3 months | £240 | £260 |
| More than 3 months, but not more than 6 months | £495 | £535 |
| More than 6 months, but not more than 9 months | £840 | £905 |
| More than 9 months, but not more than 12 months | £1,320 | £1,425 |
| More than 12 months, but not more than 15 months | £2,040 | £2,200 |
| More than 15 months, but not more than 18 months | £3,005 | £3,240 |
| More than 18 months, but not more than 24 months | £4,215 | £4,545 |

We believe that injured motor accident victims should not be further penalised by having a broken three-year review inflicted upon them.

The CLA should be amended at the earliest opportunity to introduce an annual review to better and more quickly reflect inflationary increases.

Question 13: Are there any other economic factors which should inform the review?

Whilst identifying specific evidence for consumer behaviours in relation to making motor accident claims under OICP and the tariff of damages is extremely difficult, we believe that the wider economic impacts of the cost of living crisis will certainly have had an impact.

The necessity to find more immediate financial relief very likely has led to claimants to settle claims earlier than they might have done so previously and accepting under-compensation for those claims.

Motor insurance premiums have continued to rise dramatically according to a variety of reasons according to the insurance industry, ranging from cost of vehicle repairs, vehicle theft and severe weather. The ABI say that insurance premiums have increased by 34% year-on-year, Pearson Ham have said by 48% in the year to October 2023, Confused/WTW by 58% and the Consumer Intelligence Car Insurance Price Index by 61% in the year to August 2023.

Whatever the precise details of the increases in motor insurance premiums, the key point is that insurers can increase their premiums to account for wider economic and other factors. The injured consumer is unable to do this, unfairly restricted by a tariff of damages that unjustly restricts any flexibility in compensation dependent upon either individual circumstances or wider economic factors.

Due to the dramatic increases in motor insurance premiums experienced over the last year or so, fewer consumers are paying for Legal Expenses Insurance (LEI) in order to save on money. If they are subsequently involved in a motor accident, to their detriment they find that if they wish to make a claim, require professional advice and support from a claimant solicitor, and are able to find a claimant solicitor to support their claim, they face a significant deduction directly from their awarded damages, already dramatically reduced by the tariff of damages.

Due to the complexity and difficulties in navigating the process, and the much reduced compensation at the end because of the tariff of damages, many motor accident victims give up their claim, settle too early or for too little.

**Additional Factors**

Question 14: What other factors are relevant in the context of a tariff review?

Please provide reasons supported by data where possible

The most damaging outcome from the whiplash reforms has been the reduction of damages for motor accident victims to only several hundred pounds.

We fully recognise that the purpose of the reforms and the CLA was to reduce the number and cost of motor accident claims, but believe that a fall in claims of over 50% suggests that genuine accident victims are being dissuaded from proceeding with legitimate claims. Whilst the process was designed to dissuade claimants from making so-called 'frivolous claims', the levels of compensation, also being undermined by steeply rising inflation, mean that many potential claimants are simply unable to seek legal support.

Although the reforms were intended to make whiplash claims less appealing for potential fraudsters and reduce the costs for the insurance industry, reductions in damages of over 70% in some instances, have left motor accident victims feeling deeply aggrieved and a strong sense of injustice."

MASS has consistently argued that the tariff regime is far too low, does not recognise the pain and suffering caused by accident victims and would detrimentally impact the ability of potential claimants to engage legal advice.

A stated aim of the whiplash reforms was to reduce costs for the insurance industry by reducing damages and the provision of legal advice. The levels of the tariff damages have meant that legal advice has become increasingly unaffordable, both for claimants and claimant solicitors. Whilst claimants do still have the option to seek expert legal advice, the practical and financial hurdles resulting from the tariff of damages have increasingly made this significantly less likely with many solicitor firms withdrawing from the market on economic grounds.

The fundamental principles of access to justice and equality of arms – with insurers still represented by defendant solicitors – have been severely impacted by the tariff and the wider reforms.

We believe that our long-standing concerns have been fully justified given the substantial falls in the number of claims and the behaviours exhibited in the OICP.

We strongly suspect that the tariff of damages was deliberately designed to make deductions from client damages difficult or unworkable, ensuring that fewer lawyers are able to support litigants.

MASS believes that a fundamental review of the operation and impacts of the Civil Liability Act is necessary to better balance the declared policy objectives of the legislation whilst preserving access to justice.

Question 15: Are there any other considerations not already discussed that should be taken into account as part of the review?

MASS has always and continues to believe that the tariff of damages is fundamentally and deeply flawed.

Damages should be 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 tariff of damages falls short in addressing these fundamental requirements for justice.

We have always agreed with the views of two former Chief Justices of England and Wales, Lord Woolf and Lord Judge:

> *"[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."*
> (Lord Woolf, Report Stage, Civil Liability Act, 12 June 2018)

> *"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 dishonesty 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, Report Stage, Civil Liability Act, 12 June 2018)

The tariff of damages was formulated using a flawed methodology:

- inaccurate and incomplete insurance industry data, based on two valuation software tools using insurer-only settlements rather than the value of claims at court;
- nominally based on old Judicial College Guidelines from late 2013 (12th Edition), rather than the more recent version published in November 2019 (15th Edition);
- little or no transparency in how the proposed damages were calculated, despite repeated requests for relevant documents and evidence answered with platitudes of having been developed with "real world data" and "indicative figures";
- designed to be unfairly low given the possible severity of the injury or injuries sustained, failing to take account of 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;

- set unjustifiably low compared with other non-injury financial awards such as travel compensation, legal services complaints or holiday sickness;

- configured to unfairly discriminate between categories of individual suffering the same injury or level of pain – an injury resulting from a criminal action or the same injury sustained outside of a motor accident attracts a considerably higher level of compensation, often by several factors;

- conceived and constructed by and to the benefit of defendants and the insurance industry: first proposed by Dominic Claydon as Claims Director of Aviva to the Transport Select Committee in 2013 (Aviva written evidence, 2013) and structurally amended as suggested by the ABI in 2017 to the Justice Committee (ABI oral evidence, 7 February 2017).

The construction of the tariff was not based upon any objective, evidence-based judicial determination of damages or calculations based upon previous damages, but were a subjective judgement based upon the policy and political objectives of the government at the time:

> "*With respect, a judgment had been made having regard to all the information available as to what level should be set for the tariff to address the very problem that we are attempting to deal with. It is not based on some mathematical formula or percentage*." (Lord Keen of Elie, former Advocate-General for Scotland, Committee 1st Day, Civil Liability Bill, 10 May 2018)

MASS has always believed that the tariff of damages should be closely informed by the latest Judicial College Guidelines, and should incorporate the recommendations of the Lord Chief Justice and other stakeholders.

Although the full views of the Lord Chief Justice in 2021 have never been published (despite requests), extracts of his views on the tariff were set out by Lord Wolfson of Tredegar on 26 April 2021:

> *"He was clear that the tariff figures*
>
> > *'demonstrate a material divergence in the levels of damages between those proposed and those which are generally currently awarded'.*
>
> *He also acknowledged that the tariff figures were similar to those previously tabled before Parliament, when the Government's intent that the tariffs would be lower than the figures in the Judicial College Guidelines was made clear.*
>
> *The Lord Chief Justice emphasised that the tariff was a*
>
> > *'narrowly defined statutory derogation from the principle of full compensation through an assessment of damages by the courts',*
>
> *but considered that it was not appropriate for him to suggest a change. He made it clear that he understood the Government's principles underpinning the uplift, but expressed the view that he would prefer the judiciary to have greater discretion."* Whiplash Injury Regulations 2021, House of Lords, 26 April 2021

We agreed at the time with the Lord Chief Justice that the judiciary should have greater discretion in the compensation awarded to motor accident victims.

MASS continue to believe that the tariff of damages is fundamentally flawed and needs significant revision to better reflect judicial awards based upon pain and suffering.

We do not believe that it is fair or reasonable that injured persons should receive up to 90% less for an injury because it occurred in a motor accident than current judicial awards for the identical injury sustained elsewhere.

The maximum duration of a whiplash injury for the tariff should be reduced from 2 years to 12 months, given that the whiplash reforms and the Civil Liability Act was designed 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.

The current tariff of damages is unfair and unreasonable for accident victims suffering long periods of pain and discomfort, comparable or below amounts in compensation for flight or train delays. It is unjust that an award for the same injury suffered by the same person, but suffered when driving a car is “disproportionate” and valued significantly less.

This is causing 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.

It is MASS’s view that fundamental adjustments should be made to the tariff of damages that better reflect judicial awards that are consistent with the detriment suffered, and with other injury claims.

**Fostering Good Relations**

Question 16: Please provide evidence on how the whiplash tariff review may affect people with protected characteristics.

MASS believe that the operation and implementation of the CLA, resulting in the tariff and the OICP, has continued to have a negative impact upon people with protected characteristics and has significantly reduced access to justice.

As a digital only platform, we believe that the OICP, and by implication the tariff of damages, adversely impacts vulnerable groups, particularly the elderly and those with poor or no digital access. Support offered by the OICP call centre is limited to answering questions on the registration of claims and the use of the Portal.

The OICP itself is only available in English and Welsh, presenting significant challenges to anyone with poor English when faced with a complicated process with 11 different scenarios on the OIC for self-litigants.

Access to justice has been damaged with claimants faced by a complicated process 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.

Despite ministerial promises of third/charity sector support for disadvantaged motor accident victims during the passage of the Act, there has been no subsequent support provided. We believe that this is one of several broken promises.

We continue to be concerned at the lack of any external oversight or governance of the OICP. Both Claims Portal Co and MedCo have independent oversight and stakeholder scrutiny overseen by voluntary board members appointed from across the sector. We continue to find it deeply troubling that the Ministry of Justice still has no plans for the established practice of independent governance of OICP, which remains fully and solely operated by the Motor Insurance Bureau and the insurance industry.