

# Civil Liability Act 2018

## Overview of the Whiplash Reforms & Discount Rate

### Impacts and Practical Implications

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Part 1: **Whiplash Reforms**



Part 2: Personal injury  
Discount Rate





Four principle areas:

1. Definition of ‘Whiplash’
2. Damages tariff – injuries up to 24 months
3. Increase in the Small Claims Track limit for motor injury claims to £5,000 – no costs environment
4. Ban on ‘pre-med’ offers

## CLA 2018 S1:

- A soft tissue injury to the neck, back or shoulder due to an RTA
- A sprain, tear, rupture or lesser damage of a muscle, tendon or ligament **OR** an injury of soft tissue associated with a muscle, tendon or ligament in the neck, back or shoulder
- The injury is not exceeding, or not expected to exceed 2 years, OR should not have exceeded 2 years but for the Claimant's failure to take steps to mitigate his/her loss
- To include 'minor' psychological injuries

# Whiplash Reform – What is Whiplash?



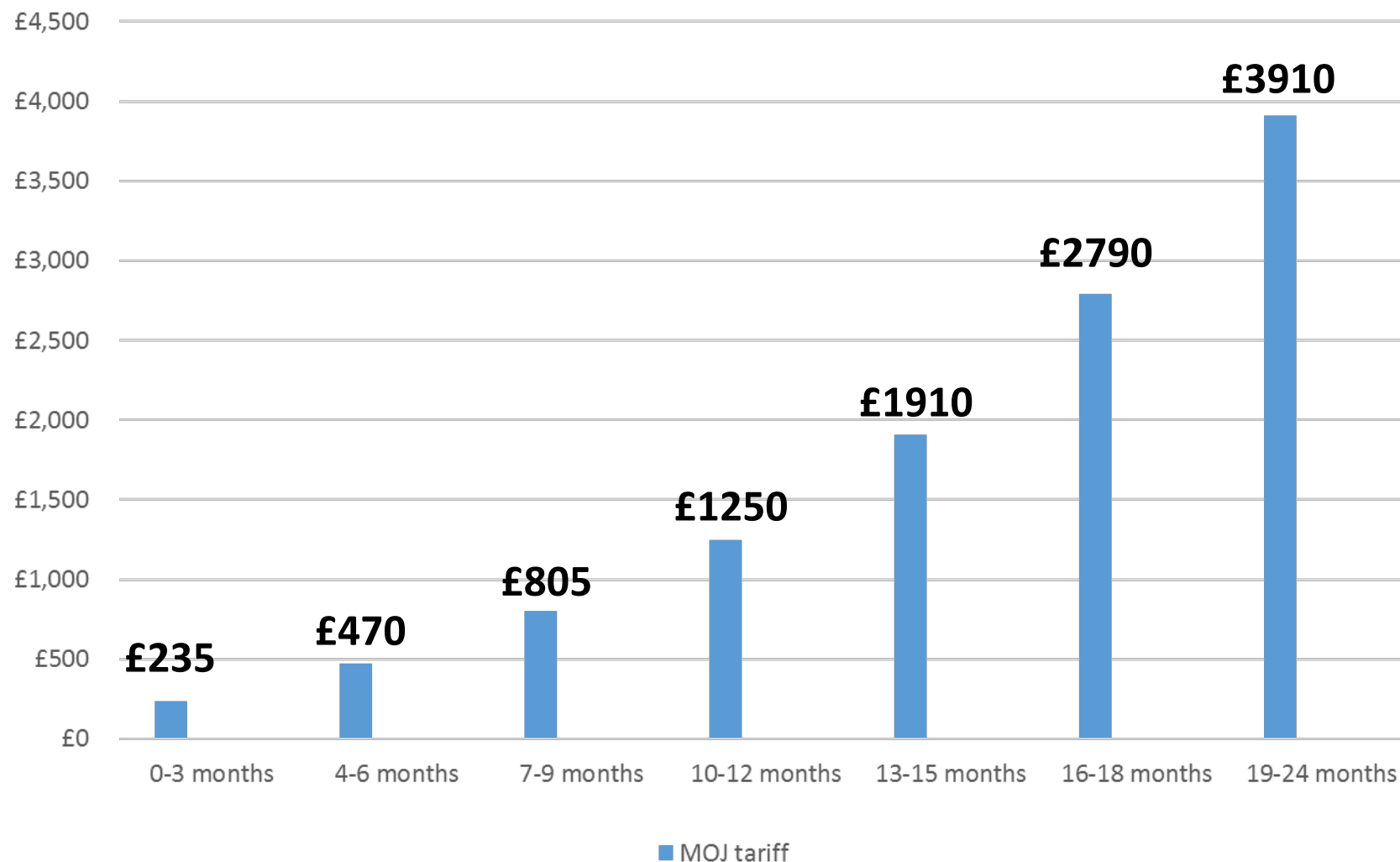
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- Caused by driver negligence in the use of a motor vehicle on a road or public place
- Includes cases of contributory negligence by the Claimant
- While the Claimant is using, being carried in or on, entering or getting into, or alighting from a motor vehicle on a road or public place (RTA 1988 s145 definition)

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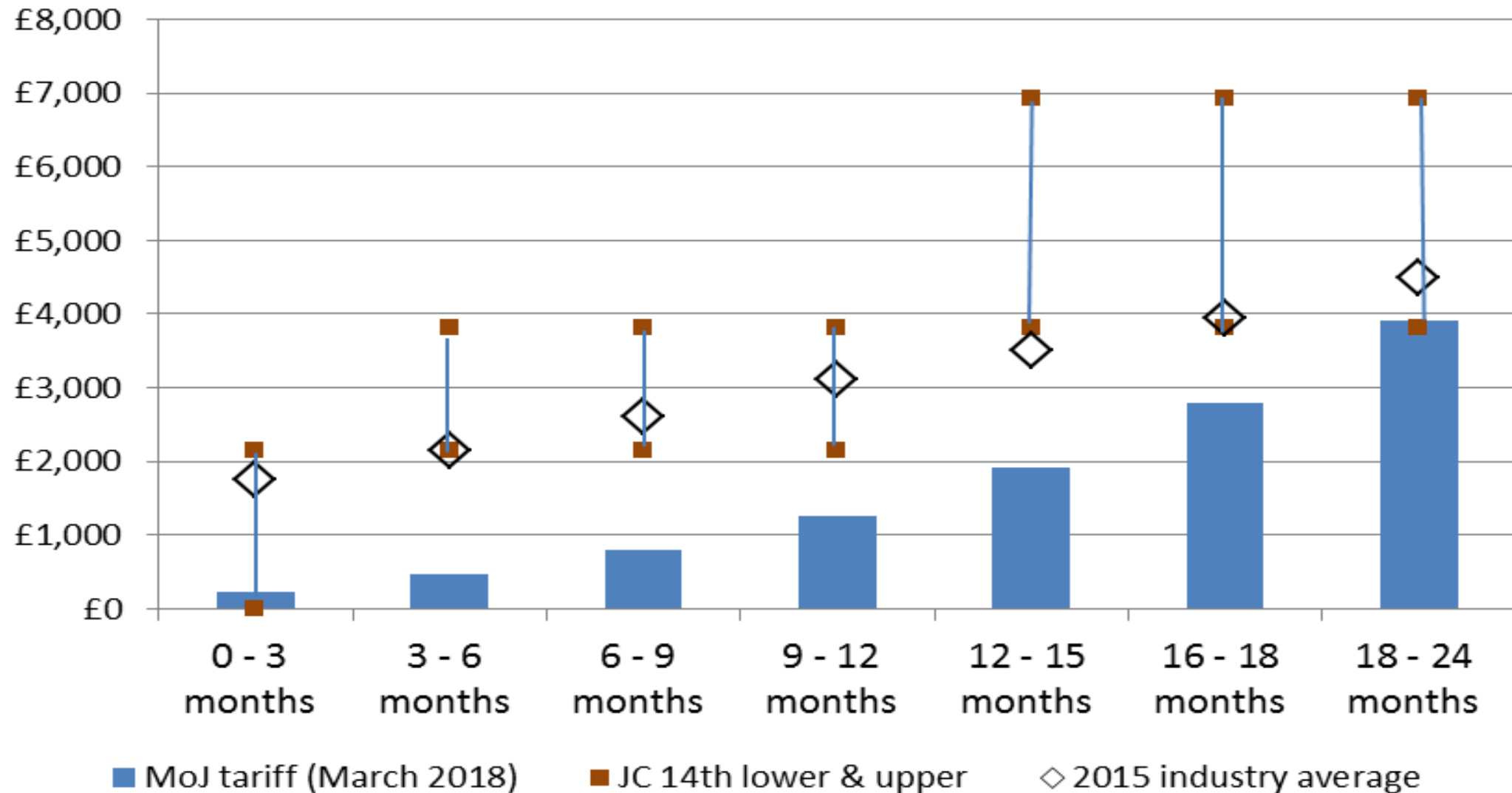
- Any injury other than an injury to the neck, back or shoulder (with 'minor' psychological injury)
- Outside tariff whiplash damages if it is a soft tissue injury which is part of or connected to another injury
- An injury that lasts more than 2 years
- An injury that occurs other than in or on a motor vehicle e.g. involving pedestrians and cyclists
- An injury that occurs on a motorcycle
- Protection of vulnerable road users
- An injury that occurs other than on a road or public place

# Whiplash Reform – What is a Whiplash claim worth?



# Whiplash Reform – What is my claim worth?

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- Lord Chancellor may amend the definition of “Whiplash” injury
- Prior to any amendment the Lord Chancellor must consult the:

Lord Chief Justice

Bar Council

Law Society

Chief Medical Officer

- First amendment - April 2023 (at earliest)
- Exceptional circumstances uplift:
  - Degree of pain, suffering or loss of amenity caused by the whiplash injuries are exceptionally severe or
  - The Claimant’s circumstances are exceptional thereby increasing the pain, suffering or loss of amenity
- Maximum 20% uplift possible
- Unlikely to be used by Courts as if injuries are “exceptionally severe” likely to last over 2 years in any event.

- MIB selecting technology platform and partner to build a new Whiplash Portal
- Commencement date – April 2020
- New Pre-Action Protocol and Procedural rules
- Journey flows for new Whiplash Portal:

Full liability admission and no quantum dispute

Part liability admission and no quantum dispute

Part liability admission and quantum dispute

Liability denied

ADR

Protected parties

- IT Portal platform key to these reforms to allow LIP's to easily navigate the process.
- Access to justice for LIP's
- Prevent influx of new CMC's

- New simplified CNF (Claim Notification Form)
- Integrated MID check (Motor Insurers Database)
- Integrated CUE PI check – fraud and CRU
- Claimant identification and verification checks
- Interaction with MedCo – Skype/remote examinations?
- ADR providers
- ADR decision binding?
- How do credit hire claims fit into this Portal (if at all)?
- Counter claims?
- Fraud
- How will mixed injuries be calculated i.e. whiplash and non whiplash?
- Full liability denial – who funds the medical report?

- Reduction in cost of claims
- Reduction in number of claims
- Reduction in fraud
- Provide transparency, certainty and predictability





- Change in fraud?
- A plague of 'Wristlash'?
- A flood of 'moderate' psychological injury?
- Maximising the claim
- A run to credit hire and repair
- Re-directed investment and new entrants

# Current status of Personal Injury Discount Rate (PIDR)



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## Currently

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- Damages Act 1996 authority to Lord Chancellor to set a rate
- Wells v Wells (HL) 1998 assumption the Claimant is a very risk averse investor entitled to full compensation
- Rate set by reference to yields on Index Linked Gilts (ILGS) since 1998
- Previous rate plus 2.5% until February 2017 when it was reduced to minus 0.75%
- Very unfavourable to Defendants for large future loss claims

## Discount Rate – new process

- Still set by the Lord Chancellor on periodic review at least **every 3 years**
- Lord Chancellor advised by an *'expert panel'* and the Treasury
- Claimant entitled to **full** compensation
- Assume investment approach that involves **low risk** NOT a very low level of risk
- Assume investment approach that involves **less risk** than would ordinarily be accepted by a prudent and properly advised individual investor who has different financial aims



- DR review will commence by 20 March 2019
- Completed by no later than 7 August 2019
- First review – Lord Chancellor only has to consult the Government Actuary
- Panel of experts consulted for subsequent reviews
- In reality, Claimants do not behave as very low risk investors:

Diversified low risk portfolios

Achieve higher returns than current law assumes

Use expert Wealth Managers/IFA's for investments

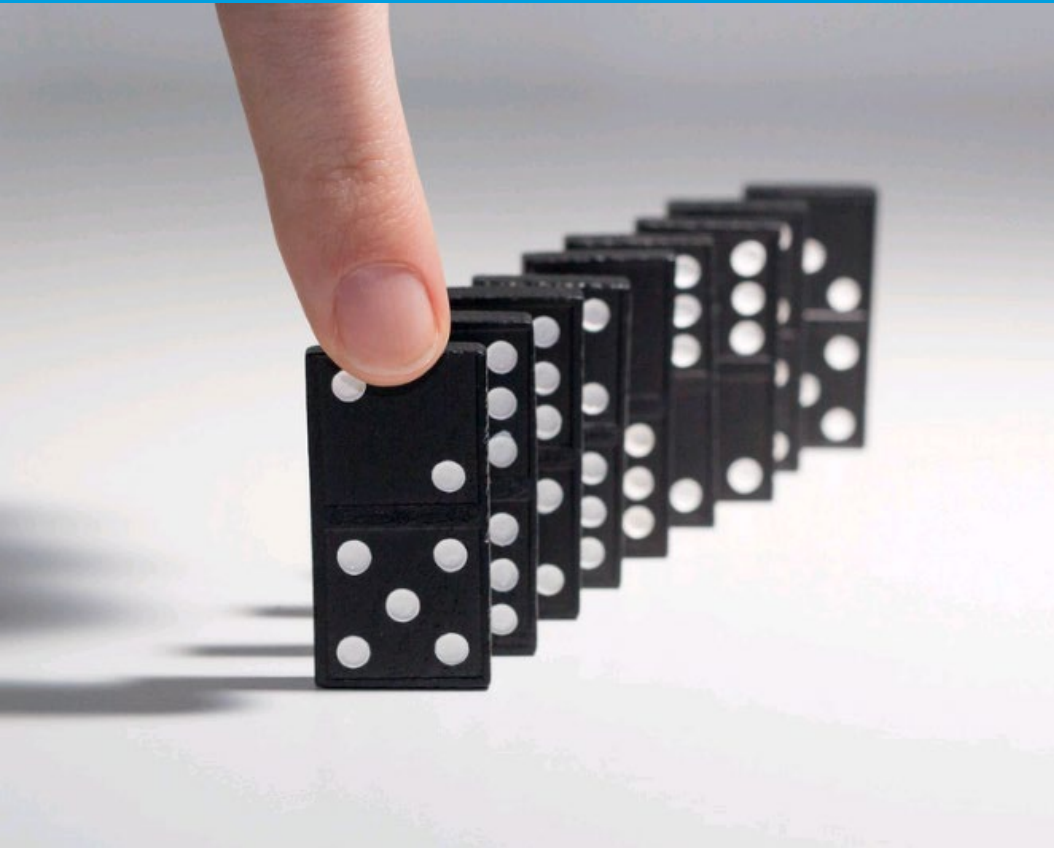


# A Catastrophic Example of the impact of the Discount Rate

Male aged 23, tetraplegic & 24 hour care needed

	2.5% discount rate	-0.75% discount rate	% increase
Claim value	£9m	£21m	122%
Primary layer (£10m)	£9m	£10m	11%
XS/reinsurance (£10m XS £10m)	£0	£10m	-

# The Effects of current Discount Rate



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- **Gearing:** awards at -0.75% eat into higher layers and reinsurance to a greater extent
- **Pricing:** cost of reinsurance protection may well/likely to increase
- **Premium:** increased costs for insurers leading to premium increases
- **Exposures:** increased for both insureds and brokers
- **Significant impact for Public purse:** e.g. claims against NHS and MOD

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- Anecdotal evidence
- Call for evidence ended 30 January 2019 – responses provided to MOJ by FOIL, ABI, APIL etc.
- Market views – Discount Rate between 0.5% and 1%
- Scotland – The Damages (Investment Returns and Periodical Payments) (Scotland) Bill
- Jersey setting the way? – The Draft Damages (Jersey) Law 26 October 2018
  - 0% lid (no minus)
  - Split discount rate (<20>)
  - Use of PPO
- Justice Secretary David Lidington – September 2017:

*“While it is difficult to provide an estimate, based on currently available information, if the new system were to be applied today the rate might be in the region of 0% to 1%”*

## Jersey

- +0.5% up to 20 years
- +1.8% for more than 20 years

## England & Wales

- 0 - 1%?

## Scotland

- 0%

## Northern Ireland

- 2.5%

## Comparators across the world

- ROI 1%
- Germany 4%
- France 1.2%



- Reserves v Reality v Rush to settle
- Settlements over next 6 months?
- Trials?
- Stay/adjourn claims pending completion of the DR review
- Split discount rate
- Forum shopping (where possible)



- Very positive for insurers and the Defendant market
- Most significant legislation for insurers since LASPO 2013
- Whiplash Portal – MIB busy with developments
- Much work to be done by April 2020
- Savings but intended consequences?
- Discount rate amendment – probably July 2019 – 0.5% to 1%?



Any questions?

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