



## **Association of Personal Injury Lawyers**

### **Briefing: Civil Liability Bill – House of Commons report stage – October 2018**

#### **About APIL**

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation which has worked for almost 30 years to help injured people gain the access to justice they need, and to which they are entitled. We have more than 3,300 members who are committed to supporting the association's aims, and all are signed up to APIL's code of conduct and consumer charter. Membership comprises mostly solicitors, along with barristers, legal executives, paralegals and some academics.

#### **Amendments to remove clauses 3, 4 and 5**

APIL supports amendments 2, 3 and 4 which will remove clauses 3, 4 and 5 from the Civil Liability Bill. We urge MPs to vote in favour of the amendment.

Upon taking office, the Lord Chancellor has to swear an oath in which he says he will “defend the independence of the judiciary”<sup>1</sup>. These clauses in the Civil Liability Bill seriously undermine that oath. Instead of defending the independence of the judicial process, the Lord Chancellor is sending a clear message to the judiciary that he no longer trusts the ability of the judiciary and the court system to decide fairly what is due in compensation to injured people. Compensation based on years of legal precedent is relegated simply to the award of an amount from an arbitrary tariff.

It is quite a feat for the Government to introduce a Bill which undermines judicial independence and precedent, as well as attacking the rights of injured people. Those who have been injured through no fault of their own will take the biggest hit to their rights in recent memory. Any concept of fairness or compassion or help for genuinely injured people has been sacrificed in what the Government has openly called ‘a Bill to cut insurance premiums’.

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<sup>1</sup> Section 17, Constitutional Reform Act 2005

The payment of fair damages for pain and suffering is an important acknowledgement that the injury inflicted was needless. It can help to atone for the negligence which caused the injury, and it holds the wrongdoer to account. The most devastating aspect of any car crash is not damage to the vehicle, but personal injury and the very purpose of insurance is to provide recompense for that.

A similar injury can produce very different effects on, for example, a young mother nursing a baby, a professional fitness instructor, or someone who suffers a complete loss of confidence as a result of the injury and the incident that caused it. This is more likely to apply to those who are already vulnerable, such as elderly people. To remove judicial discretion from awards will inevitably lead to under-compensation in many circumstances. Tariffs are appropriate for mobile phone contracts and taxi fares, not injured people.

In most cases where the symptoms last up to three months, the Government's proposed compensation of £235 will not be anywhere near an appropriate level of compensation. A train passenger can receive up to £493 if his train from London to Glasgow is delayed by two hours. A train delayed by two hours is an inconvenience, but it is nothing compared to three months of pain, three months of sleepless nights, or three months of not being able to look after a young child properly.

During report stage in the House of Lords, former Lord Chief Justice Lord Woolf said that the proposed tariff "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"<sup>2</sup>. We support these comments.

In the Government's response to the House of Lords Delegated Powers and Regulatory Reform Committee, Lord Keen attempted to defend the Government's decision to introduce a tariff. According to Lord Keen, a tariff is "consistent with other areas where the Government already controls and sets the rates of damages"<sup>3</sup>. Lord Keen cited the Criminal Injuries Compensation Scheme (CICS) as an example. It is an irrelevant comparison. The CICS is administrated by the Criminal Injuries Compensation Authority, an executive agency of the Ministry of Justice, and is funded solely by the taxpayer. The very purpose is to compensate victims of the worst violent crimes, who otherwise would have no one else to pay compensation.

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<sup>2</sup> Civil Liability Bill report stage, House of Lords, 12 June, column 1594, [https://hansard.parliament.uk/lords/2018-06-12/debates/BAD8CBC4-5E52-48F1-93D8-6992453ABFFB/CivilLiabilityBill\(HL\)](https://hansard.parliament.uk/lords/2018-06-12/debates/BAD8CBC4-5E52-48F1-93D8-6992453ABFFB/CivilLiabilityBill(HL))

<sup>3</sup> <https://publications.parliament.uk/pa/ld201719/ldselect/lddelreg/152/15204.htm>

The CICS is funded from public money, and the Government has a duty to the taxpayer. The Government does not, and should not, have a duty to protect the profits of private insurance companies, and introduce tariffs which will protect negligent people from paying full and fair compensation. There is no precedent for this.

These amendments will protect the independence of the judiciary and the court system and defend the rights of injured people. In the long-running debate on this issue, there appears to be little recognition about the needs of injured people. Instead of doing what is right for injured people, ministers continue to see injured people as an easy target.

Members of the House of Commons should support amendments 2, 3 and 4 to remove clauses 3, 4 and 5 from the Bill. Rights for injured people, and an independent judicial system, are hallmarks of a civilised society, and should be protected.

### **Personal injury small claims limit**

At the same time as restricting compensation for whiplash, the Government is proposing to increase the small claims limit to £5,000 for road traffic accident personal injury claims, and £2,000 for all other personal injury claims. Together they form part of what the Government refers to as the “final package of measures” to “reduce the volume and value of minor, exaggerated and fraudulent soft tissue claims”<sup>4</sup>.

Claims under £5,000 are not minor, and an increase in the small claims limit will cover far more than soft tissue injuries. These claims could include a brain or head injury, injuries to the eyes, a collapsed lung, or fractured cheekbones. This is a disproportionate response to a stated aim of dealing with whiplash claims.

Outside the small claims court a ‘polluter pays’ system operates in personal injury cases, which means that if the defendant who has caused the injury loses his case he pays the claimant’s legal fees in the main (some of the cost is borne by the claimant). But in the small claims court the injured claimant cannot recover his costs from the wrongdoer, even if the claimant wins the case.

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<sup>4</sup> Reforming the Soft Tissue Injury (‘whiplash’) Claims Process impact assessment  
<https://publications.parliament.uk/pa/bills/lbill/2017-2019/0090/whiplash-IA.pdf> page 5

Under the small claims proposals injured people will face a very difficult choice. They will either have to represent themselves without any legal help, leaving them vulnerable against defendants who are almost always represented by lawyers; seek legal advice from a solicitor, meaning they will have to sacrifice part of their compensation to pay for legal advice; or abandon the claim altogether, meaning they will receive no justice, and the person whose negligence caused the injury will get away scot-free.

APIL recognises that the small claims limit for personal injury has not been increased for many years and therefore we accept the argument that an increase to reflect the rate of inflation could be justified. This is also the opinion of the House of Commons Justice Select Committee. In May this year the committee concluded that “small claims limit for PI should be increased to reflect inflation”, and recommended a limit of £1,500<sup>5</sup>.

APIL support’s a proposed limit of £1,500, and we ask MPs to support attempts to restrict any increase in the small claims limit.

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<sup>5</sup> House of Commons Justice Select Committee, Small claims for personal injury, Seventh Report of Session 2017-2019, page 54



## CIVIL LIABILITY BILL

Fact checker from the Association of Personal Injury Lawyers – October 2018

**CLAIM** - The number of reported road traffic accidents are going down, but whiplash claims are going up.

**FACT** – Not all road traffic accidents are reported to the police. This was even recognised by the Association of British Insurers (ABI) as far back as ten years ago, which acknowledged that most road traffic collisions leading to whiplash are not reported<sup>1</sup>.

The number of whiplash-related personal injury claims are now at their lowest level in almost ten years, according to the Government's own Compensation Recovery Unit. These claims have continued to fall each year since 2011/2012.

**CLAIM** - Personal injury claims are the reason why insurance premiums are rising

**FACT** – In 2017, half the amount spent by motor insurers on settled claims went on vehicle damage claims. The cost of vehicle damage in settled claims has increased by £668.4 million since 2013, according to the ABI. Money spent on bodily injury claims has actually fallen by £855.4 million in the same period.

**CLAIM** - Most whiplash claims are fraudulent

**FACT** – In 2017, just 0.22 per cent of all motor claims were proven to be fraudulent, according to the ABI. This includes all motor claims, such as vehicle damage claims, or people caught lying on their policy documents. Fraudulent bodily injury claims will only be a small fraction of that 0.22 per cent, and fraudulent whiplash claims will be an even smaller fraction of that. There is absolutely no evidence that most whiplash claims are fraudulent.

**CLAIM** - For every £1 paid out in compensation, an additional 50p is paid out in legal costs

**FACT** – The Government’s own figures in an impact assessment published alongside the Bill show that for every £1 spent in compensation on road traffic accident (RTA) personal injury claims, only 22p is paid out in legal fees. This reflects the fixed fees imposed by the Government in 2013.

This is based on the Government’s assumption that the average amount recovered in legal fees for each RTA claim covered by the proposed reforms is £547<sup>2</sup>, and the average general damages for a whiplash related claim with a medical report is £2,500<sup>3</sup>.

The ABI has not supplied any evidence for its claim that an additional 50p is paid out in legal costs.

**CLAIM** - The -0.75 per cent discount rate means the NHS is paying far too much in compensation

**FACT** – The burden on the NHS was caused by a failure to change the rate for 16 years. The only way to mitigate the financial effect of a change in the discount rate is to have regular reviews of the rate, and the Bill provides for this. Regular reviews will ensure any changes should be more predictable for the NHS.

The cost to the NHS of the change in the rate represents just 0.4 per cent of NHS England’s annual budget, at a cost of £406.3 million<sup>4</sup>. By contrast, missed appointments cost the NHS £1 billion every year and medication errors waste £1.6 billion<sup>5</sup>.

It should be remembered that NHS Resolution is only liable to pay compensation when the NHS has injured a patient through negligence. That is exactly what the patient is entitled to expect. The NHS faces a really serious additional burden, though, when the discount rate is too high and it fails to meet the needs of injured people. The money will run out before the end of their lives, and they will then be forced to rely on the State – ie the NHS.

**CLAIM** - Nobody invests in Index Linked Government Stock (ILGS) – they make riskier investments than that and are over-compensated as a result. So why should the discount rate calculation be based on ILGS?

**FACT** - People with catastrophic, life-changing injuries are naturally risk-averse. But under the old 2.5 per cent discount rate regime, injured people could not afford to invest in ILGS (one of the safest investment options) because they would not have been able to generate enough income to last for the rest of their lives. Their funds would have run out and they would have had to fall back on the State to meet their needs. In any event, claimants would never be advised to invest solely in ILGS because putting all their eggs into one investment basket makes no financial sense.

The reason why the discount rate calculation should be based on ILGS is related to the principle of 100 per cent compensation. If you accept the principle of 100 per cent compensation (and the Government insists that it does) you have to accept that injured people should not have to expose their lump sum award to all the risks of market forces.

If you accept that, then it becomes clear that the only way to avoid such exposure is for the discount rate to be set to reflect the safest kind of investment, of which ILGS are the best example. But this is just the benchmark – it is then for the injured person (with the help of his financial adviser) to develop a portfolio of very low risk investments which reflects that benchmark.

**CLAIM** - People are overcompensated under the current -0.75 per cent discount rate.

**FACT** – The Government's claim is based on evidence which was gathered while the discount rate was 2.5 per cent, which is the only evidence available. The Government Actuary Department was asked to analyse levels of under and over-compensation based on evidence of claimant investment behaviour. Under the artificially high rate of 2.5 per cent, claimants were often forced into the invidious position of having either to take chances with their compensation by putting it into higher risk investments, or struggling to make ends meet. This analysis is, therefore, highly misleading.

**CLAIM** - A Periodical Payment Order (PPO) is an acceptable alternative to a lump sum compensation amount

**FACT** - When a PPO is considered appropriate for an injured person, a lump sum will almost always still be needed to pay for immediate, often high-cost needs. This includes accommodation or transport needs, and equipment such as hoists, wheelchairs and prosthetic limbs. A PPO could never, therefore, replace a lump sum payment: rather, the two forms of payment complement each other.

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**References**

<sup>1</sup> Tackling whiplash – prevention, care, compensation. Association of British Insurers November 2008

<sup>2</sup> Civil Liability Bill – Reforming the Soft Tissue Injury ('whiplash') Claims Process impact assessment – March 2018. Page 15

<sup>3</sup> Civil Liability Bill – Reforming the Soft Tissue Injury ('whiplash') Claims Process impact assessment – March 2018. Page 16

<sup>4</sup> NHS Resolution Annual Report and Accounts 2017/2018 page 16

<sup>5</sup> <https://www.theguardian.com/society/2018/jan/02/patients-missing-their-appointments-cost-the-nhs-1bn-last-year>