



Association of Personal Injury Lawyers

Civil Liability Bill House of Commons committee stage – September 2018

The role of the expert panel in setting the personal injury discount rate

Amendment 24 - De-politicising the discount rate

APIL supports complete independence in the assessment of the discount rate in England and Wales. We therefore support amendment 24, which would strengthen independence and transparency in setting the discount rate, and remove politics from the process.

Amendment 24 would remove the Lord Chancellor from the process of setting the discount rate, and leave the decision for what the rate should be to the independent expert panel.

The expert panel will bring transparency¹, independence², and expertise to setting the discount rate. This is acknowledged by the Government in the impact assessment which accompanies the Bill. The expert panel is to be chaired by the Government Actuary. Other members must include someone who has experience as an actuary, one person who has experience of managing investments, one person who has experience as an economist, and finally one person who has experience of consumer matters relating to investments.

Each member of the expert panel will bring their own experience and expertise to the discussions. It is not guaranteed that the Lord Chancellor will be a financial expert, unlike the panel members. The panel is also, therefore, the most technically qualified to determine the appropriate discount rate and the decision must rest with the experts.

The Scottish Government has proposed to remove politics from the assessment of the discount rate in Scotland. Under proposals in the Damages (Investment Returns and Periodical Payments) (Scotland) Bill, the rate would be set by the Government Actuary, without the involvement of ministers.

¹ Setting the Personal Injury Discount Rate <https://publications.parliament.uk/pa/bills/lbill/2017-2019/0090/civil-liability-IA2.pdf> page 15

² Setting the Personal Injury Discount Rate <https://publications.parliament.uk/pa/bills/lbill/2017-2019/0090/civil-liability-IA2.pdf> page 21

As both the assessor of the rate in Scotland, and the chair of the independent expert panel in England and Wales, the Government Actuary would be in an invaluable position. With an involvement in every stage, the Government Actuary would act as an important safeguard against unintended consequences. He would bring parity between the jurisdictions and ensure that a postcode lottery is not created. This would prevent a situation where a catastrophically injured person in one jurisdiction receives far more compensation than someone in another jurisdiction.

Role of the Lord Chancellor

During the second reading debate, justice secretary David Gauke agreed, when questioned, that the rate will be set by him “as Lord Chancellor in his own right, and not on behalf of the Government”³.

The Constitutional Reform Act 2005 changed the role of the Lord Chancellor, and the office holder is no longer head of the judiciary⁴. According to the oath, as set out in the 2005 Act, the Lord Chancellor’s role is to “respect the rule of law and defend the independence of the judiciary...”⁵. This responsibility, however, is also one which is held by every single Government minister⁶. There is no longer any distinction between decisions taken by the office holder as Lord Chancellor or decisions taken by the office holder as a member of the Government.

Last year, the day after the Lord Chancellor announced the change in the rate from 2.5 per cent to minus 0.75 per cent, the insurance industry met with the Chancellor of the Exchequer to discuss the change. A joint statement published by the Association of British Insurers and the Chancellor of the Exchequer revealed the Lord Chancellor did not attend the meeting, despite the fact that the future setting of the rate was discussed⁷. If it is the case that the Lord Chancellor has responsibility for setting the discount rate, as “Lord Chancellor in his own right”, he should be involved in every discussion on how the rate is set.

³ Civil Liability Bill second reading, House of Commons, column 84
[https://hansard.parliament.uk/commons/2018-09-04/debates/C5C185BA-C520-4561-B4A9-069335D3E41F/CivilLiabilityBill\(Lords\)](https://hansard.parliament.uk/commons/2018-09-04/debates/C5C185BA-C520-4561-B4A9-069335D3E41F/CivilLiabilityBill(Lords))

⁴ Constitutional Reform Act 2005, explanatory notes, page 3
<https://www.legislation.gov.uk/ukpga/2005/4/notes/data.pdf>

⁵ Section 17, Constitutional Reform Act 2005 <https://www.legislation.gov.uk/ukpga/2005/4/data.pdf>

⁶ Section 3, Constitutional Reform Act 2005 <https://www.legislation.gov.uk/ukpga/2005/4/data.pdf>

⁷ <https://www.abi.org.uk/news/news-articles/2017/02/chancellor-meets-insurance-sector-leaders-to-discuss-personal-injury-discount-rate/>

Amendments 22 and 23 – The role of the independent expert panel in the first review

If the Government does not accept the need to de-politicise the setting of the discount rate, it should, at the very least, agree to amendments 22 and 23 to restore the role of the independent expert panel in the first review of the discount rate.

These amendments simply revert the Bill to the policy position held by the Government when the Bill was introduced into the House of Lords. The amendments do not go any further than the original approach proposed at that time by the Government.

As part of its pre-legislative scrutiny of the draft discount rate legislation, the Justice Select Committee recommended that the expert panel be involved in the first review⁸. This recommendation was accepted by the Government⁹. It is disappointing that the Government later reneged on this commitment in the House of Lords, and accepted an amendment tabled by Liberal Democrat peers to exclude the expert panel from the first review. As part of the first review, the Lord Chancellor must now consult only the Treasury and the Government Actuary Department when setting the rate.

This contradicts what has been said previously about the importance of the panel. In response to concerns raised by peers that the involvement of the expert panel could cause a delay in the first review, Lord Keen of Elie QC said:

“This was done on the basis that the advantages of having the expertise of the expert panel involved in the first review would outweigh any possible delay that might arise in creating the expert panel for the purposes of that first review”¹⁰.

There can be no justification for replacing a process which requires accuracy, with one which is focussed on speed. The first review after commencement of the Act will, arguably, be the most important, as it will be the first to take place under the new framework.

⁸ House of Commons Justice Committee, Pre-legislative scrutiny: draft personal injury discount rate clause, Third Report of Session 2017-19, page 3,

<https://publications.parliament.uk/pa/cm201719/cmselect/cmjust/374/374.pdf>

⁹ Ministry of Justice, Personal Injury Discount Rate, Response to the Report of the Justice Select Committee, Draft Clause, page 6

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/689413/personal-injury-discount-rate-jsc-govt-response-web.pdf

¹⁰ Civil Liability Bill committee stage, House of Lords, 15 May, column 634

[https://hansard.parliament.uk/lords/2018-05-15/debates/8BD4BC09-D8E9-4887-BFBD-20045411B341/CivilLiabilityBill\(HL\)](https://hansard.parliament.uk/lords/2018-05-15/debates/8BD4BC09-D8E9-4887-BFBD-20045411B341/CivilLiabilityBill(HL))

It is difficult to understand how the Government can now ignore the advantages of the expert panel's involvement in the first review, especially after the minister admitted to peers that those advantages outweighed any possible delay. This, alongside the Government's apparent decision to accept less transparency and less independence in the first review, is a dangerous U-turn which does nothing to benefit catastrophically injured people.

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