Association of Personal Injury Lawyers

Briefing: Civil Liability Bill – House of Commons second reading – July 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 around 3,000 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.

Executive summary

1. The Civil Liability Bill is an assault on the rights of injured people and will allow insurers to shirk their responsibility to pay full compensation when negligence has occurred.
2. Independent experts should always be involved when the welfare of vulnerable people is at stake. The Government must reverse its decision to exclude the independent expert panel from the first review of the personal injury discount rate.
3. Damages in cases which trigger the discount rate must be calculated on the assumption that injured people should not have to take financial risks with their compensation.
4. Only medical experts are qualified to define a whiplash injury, and only the judiciary has the authority to decide what is an appropriate level of redress for the pain and suffering caused by someone else's failures.
5. The proposed ban on pre-medical offers should be extended to all personal injury claims, and the Government should introduce an outright ban on cold calling for personal injury claims.

Introduction - An assault on rights

Injured people will take the biggest hit to their rights in recent memory under the terms of the Civil Liability Bill. Injured people will suffer, while insurers who pay their compensation will benefit: they will be excused from paying full compensation to people who have been injured through no fault of their own. The Government has openly called the Civil Liability Bill “a Bill to cut insurance premiums”. Even if that ultimately turns out to be true, which is doubtful, it will come at a huge cost. The Government appears to have abandoned any concept of fairness or compassion or help for people with genuine injuries.

People with life-changing injuries could be forced into a position of having to gamble their much-needed compensation because of reforms to the personal injury discount rate in part 2 of the Bill.

The discount rate is a deduction routinely made to lump sum compensation payments for people with catastrophic injuries. The purpose is to offset interest which will be gained from investing that compensation. The discount rate was too high for many years, until it was finally reduced and the new rate became effective in March 2017. This meant injured people were having too much money deducted from their much-needed compensation. Under the terms of this Bill, catastrophically injured people could once again be at risk of having too much money deducted from their compensation.

These injured people have already been through the worst that could ever happen to them. The compensation is vital to help provide them with as comfortable a life as possible. It will need to pay for round-the-clock medical care, social care and support. It will need to pay for professional support for help with everyday tasks such as washing, dressing, getting up and about, and proper exercise. If the discount rate is too high, these injured people will have too much money taken off them and will live in fear of their money running out. They will be left in a position of having to decide which professional support they will have to sacrifice, leaving them to rely on the charity of family members, or on already over-stretched public sector providers.

Part 1 – Whiplash

Definition of whiplash

The definition of whiplash in clause 1 should be set by medical experts. The Lord Chancellor is not a medical expert, and he should have no role in drafting a medical definition.

In the Government's response to the House of Lords Delegated Powers and Regulatory Reform Committee, Lord Keen said the Government had "consulted with and obtained invaluable guidance from a group of expert stakeholders, including experienced medical practitioners and both claimant and defendant solicitors"[1]. Lord Keen has not said, however, if the whiplash definition proposed has been agreed by this "group of expert stakeholders". There must be transparency and accountability for how the definition was decided, as the definition will decide which injured people will have their right to fair compensation restricted.

The Bill allows the Lord Chancellor to amend the definition at a later date. As part of this process, the Lord Chancellor is required to consult various people and organisations. These include the Lord Chief Justice, the Chief Medical Officer of the Department of Health and Social Care, and the Chief Medical Officer for Wales. Some of these people should be setting the definition in the first place. The process proposed is the wrong way round, as the consultation will only take place after the Lord Chancellor has reviewed the definition and come to a decision as to whether it should be changed. This 'consultation' would be little more than a tick-box exercise.

The wrong definition could have very serious consequences, and risks including people with injuries far more serious than what might be classed as whiplash. This can surely never have been the Government's intention.

For example, under the proposed definition, these injuries could include a tear of the rotator cuff, which is a group of muscles and tendons in the shoulder. This is a serious debilitating injury, and it would generally involve the injured person requiring surgery. This is not a whiplash injury. There will be many more injuries which are not whiplash injuries, but which will be caught by this proposed definition.

According to the NHS 'a whiplash injury is a type of neck injury caused by sudden movement of the head forwards, backwards or sideways'[2]. The Government appears to be at odds with its own health service on what constitutes a whiplash injury.

Hyperbole about whiplash claims and fraud

Government and insurance industry rhetoric would have the public believe that there is a whiplash epidemic in this country. In fact, latest figures from the Government's Compensation Recovery Unit (CRU) reveal that even if whiplash related injuries are included with injuries to the neck and back, there has been a decrease in the number of claims.

[1] https://publications.parliament.uk/pa/ld201719/ldselect/lddelreg/152/15204.htm
[2] https://www.nhs.uk/conditions/whiplash/

According to a response to a freedom of information request to the CRU made by APIL, the number of whiplash related injury claims recorded by the CRU fell from 670,186 in 2016/17 to 552,510 in 2017/18 – a drop of 18 per cent. This is the biggest annual drop in these claims ever recorded. The number of whiplash, neck and back claims have continued to fall since 2011/2012, and are now at their lowest level since 2008/09.

People who claim for whiplash injuries they don't have are fraudsters. They should be caught and punished. The vast majority of people are, however, completely genuine. There is no concrete evidence about the extent of fraudulent whiplash claims, but fraud is still the subject of serious hyperbole and misinformation. According to the Association of British Insurers' own data (which is available for purchase) in 2016, 0.17 per cent of all motor claims were "confirmed" (or "proven") to be fraudulent. Personal injury fraud will be just a fraction of that, while fraudulent whiplash claims will be an even smaller fraction. This is a fall of almost a third from 2015, when 0.25 per cent of all motor claims were confirmed to be fraudulent.

Tariff for compensation

The Government proposes to fix the amount of compensation for pain and suffering for minor whiplash claims. This will be at levels which (on the basis of the Government's impact assessment[3]) are derisory, offensive and certain to result in under-compensation. A tariff will circumvent the courts – and judicial independence. The Lord Chancellor, not the experienced and independent judiciary, will determine compensation amounts under the current proposals.

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"[4].

[3] Reforming the Soft Tissue Injury ('whiplash') Claims Process impact assessment https://publications.parliament.uk/pa/bills/lbill/2017-2019/0090/whiplash-IA.pdf page 10
[4] 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)

We support these comments. Tariffs are appropriate for mobile phone contracts and taxi fares, not injured people.

If the Government is absolutely determined to go ahead with tariffs, it should at least involve the judiciary in setting them at levels which are fair and take into account not only the duration of the symptoms, but also the type and intensity of the injury, as well as individual personal circumstances. Any tariff amounts should reflect the guidelines on compensation amounts already published by the Judicial College. Only the judiciary has the authority to decide what is an appropriate level of redress for the pain and suffering caused by someone else's failures.

The Government is expected to table an amendment which would require the Lord Chancellor to consult the Lord Chief Justice before setting the tariff. We have not yet seen the details of this amendment, but this cannot be allowed to be just a tick-box exercise.

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"[5]. 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. Whiplash compensation is paid for by the insurer of the person who caused the injury, out of premiums collected. The Government does not, and should not, have a duty to protect the profits of private companies, and introduce tariffs which will protect negligent people from paying full and fair compensation. There is no precedent for this.

A package of measures

The Government's proposed changes to whiplash claims should not be looked at in isolation. 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"[6].

[5] https://publications.parliament.uk/pa/ld201719/ldselect/lddelreg/152/15204.htm
[6] 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

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.

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.

Pre-medical offers

Pre-medical offers create an environment of "easy money", allowing fraudulent cases to be settled without the necessary checks and balances that a medical examination provides.

If the Government wants to stop fraudulent claims, it should extend its proposed ban on pre-medical offers to all personal injury claims. Not only will this root out fraudulent claims, but it will protect injured people from being potentially seriously under-compensated.

An insurer may, for example, contact someone who has been injured negligently, offer him £2,000 for the injury, and encourage him to accept it. The acceptance of this offer would prevent the injured person from making a personal injury claim related to the accident. The injured person may, however, have a claim which is worth £25,000 to cover loss of earnings and pay for any medical treatment. An insurance company may offer £2,000 in the hope of saving money from a potential claim. This benefits the insurance company's shareholders at the expense of someone who has been injured through no fault of his own.

Cold calling for personal injury claims

More than two thirds of people are in favour of a ban on cold calling for personal injury claims[7]. It is surprising and disappointing that the Government has failed to listen to public opinion and not introduced an outright ban on cold calling for personal injury claims by claims management companies (CMC). Instead, the Government has proposed reforms to personal injury claims which are the perfect business opportunity for claims management companies who will tout for claims by cold calling and texting just as they do for people who have been mis-sold payment protection insurance.

The Government missed an opportunity to introduce an outright ban in the Financial Guidance and Claims Act 2018, and merely changed the rules to put the onus on someone to consent to being cold called. This will not solve the problem of cold calling. People, especially the most vulnerable, will struggle to understand whether they have consented to being cold called, and may not appreciate to what they are consenting.

In its report following an inquiry into the small claims limit for personal injury, the Justice Committee said the recent restrictions on cold calling by claims management companies "do not go far enough and an outright ban should be introduced"[8].

The Government should agree to amend the long title of the Civil Liability Bill and introduce an outright ban on cold calling for personal injury claims.

Part 2 of the Bill – Personal Injury Discount Rate

Effect of the discount rate on the NHS

There has been much concern raised about the effect of the change in the discount rate on the NHS. After the Lord Chancellor announced the change in the rate in February 2017, the Chancellor of the Exchequer, in the Spring Budget, announced that the Government had set aside £5.9 billion to "protect the NHS"[9]. It has since been revealed in the 2017/2018 NHS Resolution annual report that the discount rate change cost the NHS £406.3 million[10] (which represents just 0.4 per cent of NHS England's annual budget). While this is clearly a cause for concern, it is critical to recognise that this increased cost to the NHS is not because of how the discount rate was set, but because the discount rate had been out of date and incorrect for many years.

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[7] YouGov Reports*: Personal Injury 2017*

[8] House of Commons Justice Committee, small claims for personal injury, Seventh Report of Session 2017-19, paragraph 19 page 57
https://publications.parliament.uk/pa/cm201719/cmselect/cmjust/659/659.pdf

[9] https://www.gov.uk/government/speeches/spring-budget-2017-philip-hammonds-speech

[10] NHS Resolution Annual Report and Accounts 2017/2018 page 16

The long overdue correction of the discount rate was the first change in the rate in 16 years, but it should not have come as a shock to those who are responsible for paying compensation. APIL first began judicial review proceedings against the Lord Chancellor in 2011, after an ongoing failure to review the discount rate. A change should have been anticipated and planned for from that point. The fact that the rate fell so dramatically demonstrates that change was long overdue. 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 have less financial impact on organisations such as the NHS.

When considering what financial effect any compensation payment has on the NHS, it must 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 comes under 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.

So, if the discount rate is set too high the NHS will not only have to pay for its own negligence, but also the negligence of everyone else who causes needless catastrophic injuries.

Getting the discount rate right – the role of the expert panel

APIL welcomes the establishment of an independent expert panel to advise the Lord Chancellor during reviews of the discount rate. The expert panel is to be chaired by the Government Actuary. Other members must include someone who has an 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 consumer matters as relating to investments.

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 review[11], and this recommendation was accepted by the Government[12]. It is disappointing that the Government later reneged on this commitment in the House of Lords.

[11] 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

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

At report stage, the Government accepted an amendment from peers to exclude the expert panel from the first review, which the Government believes can then take place more quickly[13]. Instead, the Lord Chancellor must consult only the Treasury and the Government Actuary Department (GAD) as part of the first review.

The involvement of the independent expert panel at the first review is, however, crucial. The expert panel will ensure the Lord Chancellor has access to up-to-date independent evidence on the investment behaviour of injured people. Without this evidence, the first change in the discount rate after commencement of the discount rate could be skewed in favour of a political decision. The risk of political interference in the decision has been recognised by the Scottish Government, which has removed political decisions from the setting of the discount rate. In the policy memorandum accompanying the Damages (Investment Returns and Periodical Payments) (Scotland) Bill, the Scottish Government says the Bill, "will remove the exercise of determining the rate from the political arena where there is the potential for pressure from external interests to attempt to influence the outcome"[14].

The expert panel will bring transparency and independence to setting the rate, and this is recognised by the Government in the discount rate impact assessment which accompanies the Bill[15] [16]. Each member of the expert panel will bring their own experience and expertise to the discussions on setting the discount rate, which is vital to ensure that the rate which is set is appropriate for injured people.

It is disappointing that the Government now wants less transparency in a process which decides how much money will be taken away from people with catastrophic injuries. Injured people cannot afford for the discount rate to be too high. Every review must, therefore, be independent and transparent. If the rate is unfair, five years is a long time to wait for it to be corrected. The emphasis should be on accuracy, rather than speed, and it should involve independent experts at every stage.

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

[13] Civil Liability Bill report stage, House of Lords, 12 June, column 1682 https://hansard.parliament.uk/Lords/2018-06-12/debates/DDA00B46-4C0E-4ADC-BE18-3038E5FC1361/CivilLiabilityBill(HL)

[14] Damages (Investment Returns and Periodical Payments) (Scotland) Bill policy memorandum page 9 http://www.parliament.scot/Damages%20(Investment%20Returns%20and%20Periodical%20Payments)%20(Scotland)%20Bill/SPBill35PMS052018.pdf

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

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

Effect of the discount rate on injured people

In every review of the discount rate the needs of injured people must always come first, as they have the most to lose if the rate is too high. It is unacceptable that injured people should be left to navigate a volatile stock market just to make sure they have enough compensation to last the rest of their lives.

Injured people should be allowed to make risk-free investments. If they are forced to take risks with their compensation, there is a real danger that the risk will not pay off, and they will lose part of their much-needed compensation.

The fact that many people are so risk averse that their compensation investments may not even keep up with inflation when the rate is too high is often overlooked. They are right to be risk averse. The compensation they are given is all they will ever have. When undercompensated, they survive – rather than live – in fear of what will happen when the money runs out and they cannot see a way forward. Our members have reported that injured people are often so concerned about having to eke out their compensation for the rest of their lives that they have gone without the therapies they need, or relied on the charity of their families.

There was a reason why the judges in *Wells v Wells*[17] (which set the basis for the current approach for calculating the rate) said that injured people should not be forced to take risks when investing their lump sum compensation payments. Damages must, therefore, be calculated on the assumption that injured people should not have to take risks with their compensation. This is an issue of need: the actual concrete needs of people who have been injured through negligence must be met in a fair and just 21st century society.

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[17] Page v. Sheerness Steel Company Ltd [1998] UKHL 27; [1999] 1 AC 345; [1998] 3 All ER 481; [1998] 3 WLR 329 (16th July, 1998)