Association of Personal Injury Lawyers

Briefing: Civil Liability Bill – House of Lords second reading – April 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 3,400 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.

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. Any concept of fairness or compassion or help for genuinely injured people has been sacrificed in what the Government is now openly calling a 'Bill to cut car insurance premiums'.

There has been a whole series of reforms to personal injury over recent years, all with promises from the insurance industry that premiums will fall as a result. Premiums have not fallen before and will not fall this time. Insurers have been happy to take compulsory car insurance premiums for years. Under these measures, they will now be excused from paying full compensation to people who have been injured through no fault of their own.

The Government's decision to include changes to whiplash claims and changes to the personal injury discount rate in the same legislation is misguided. People suffering from a whiplash injury are very different from those requiring lifetime care whose compensation is to be calculated using the discount rate. Part 1 and part 2 of the Bill are about changes to personal injury claims, but this is where their similarity ends. The needs of people who have suffered life-changing catastrophic injuries as a result of someone else's negligence, and the needs of people who have suffered a whiplash injury in a road traffic accident should be the subject of two very different debates.

Part 1 - Whiplash

Whiplash – a misunderstood personal injury

There can be few aspects of personal injury law which are as misrepresented as whiplash, and there is no clearer example of this than in the definition of whiplash. Under the terms of the Bill, a '"whiplash injury" means an injury, or set of injuries, of soft tissue in the neck, back or shoulder that is of a description specified in regulations made by the Lord Chancellor'[1]. According to the NHS, however, '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.

An injury should not be defined just to suit Government policy. It should be defined by experienced and independent medical experts based on medical facts. Any mistake in the definition could have very serious consequences, and risks including people with injuries far more serious than those traditionally classed as whiplash. This can surely never have been the Government's intention.

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 all whiplash related injuries, including injuries to the neck and back are combined, there has been a decrease in the number of claims. According to a response to a freedom of information request to the CRU made by APIL, there were 670,186 claims in 2016/17. This is a decrease of 10 per cent since 2012/13.

Fraud

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 APIL had to 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.

[1] Civil Liability Bill clause 1 subsection 1
[2] https://www.nhs.uk/conditions/whiplash/

Tariffs

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 damage to the person's body and the very purpose of insurance is to provide recompense for that.

One of the Government's proposals is to fix the amount of compensation for pain and suffering for minor claims at levels which (on the basis of the Government's impact assessment[3]) are derisory, offensive and certain to result in under-compensation.

Current compensation payments are set in brackets for different types of injury. This allows judicial discretion to take individual circumstances into consideration, not least the impact of the symptoms on the injured person's ability to function in everyday life and ability to work.

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 the Court of Appeal in 2001, Lady Justice Hale said that "The right to bodily integrity is the first and most important of the interests protected by the law of tort". In the House of Lords in 2007, Lord Hope of Craighead said "…every wrong, however slight, attracts a remedy. Every right, of whatever value, may be enforced." He also pointed out that "damages are given for injuries that cause harm, not for injuries that are harmless."

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 £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.

[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

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 which take into account not only duration of the symptoms, but also the type and intensity of the injuries, as well as individual personal circumstances.

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"[4].

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.

[4] 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

Part 2 – Personal injury discount rate

Part 2 of the Bill deals with a very different class of personal injury. In the kind of catastrophic injuries which trigger the use of the discount rate (often referred to as the 'Ogden rate') injured people can face substantial financial losses: loss of earnings for example, the cost of round-the-clock medical care, and social care and support. They may need professional help with washing, dressing, getting up and about, getting proper exercise. They may need help with social activities or may need to have their meals made. This is in addition to the need for specialist equipment to help them manage their disabilities. It is important to recognise that the people who are affected are those who have sustained catastrophic, life-changing injuries at the hands of other people – and that those responsible have been proven to be negligent.

Very low risk approach to investment

Injured people are not stockbrokers. The first thought of someone who receives compensation following a catastrophic, life-changing injury is not "how can I make the most of this fantastic windfall?". It is instead "how can I eke out my compensation payment to make sure it lasts long enough to look after me and my family for the rest of my life?" or "will my compensation payment keep pace with inflation in the long term?".

Injured people need a fair system which recognises the fact that people with life-changing injuries should not have to gamble with the compensation which is carefully calculated to last for the rest of their lives. The fact that many people are so risk averse that their compensation investments may not even keep up with inflation 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 cannot see a way forward. Damages must, therefore, be calculated on the assumption of very low risk investments and the system should be reviewed on a regular basis. 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.

The basis of the Government's legislation is that claimants should invest in 'low risk' rather than 'very low risk' investments. It relies on analysis from the Government Actuary's Department (GAD) and, in particular, the outcome of an assumed investment strategy based on a portfolio of 'low risk' investments[5].

[5] https://consult.justice.gov.uk/digital-communications/personal-injury-discount-rate/results/gad-analysis.pdf page 12

We understand from the Ministry of Justice that portfolio A (paragraph 4.8, page 12 of the analysis) forms the basis of the Government's thinking. An investment strategy which relies heavily on hedge funds and equities cannot possibly be considered 'low risk'.

In addition, the GAD analysis has identified that a significant number of claimants would not receive 100 per cent compensation under the favoured model[6]:

- They would have a 30 per cent chance of being under-compensated by five per cent or more if the discount rate were set at +1 per cent
- They would have a 19 per cent chance of being under-compensated by five per cent or more if the discount rate were set at +0.5 per cent
- They would have an 11 per cent chance of being under-compensated by five per cent or more if the discount rate were set at 0 per cent.
- Even at the current discount rate of -0.75 per cent, claimants would have a four per cent chance of being under-compensation by five per cent or more, according to this model.

The proposal by the Government to move from 'very low risk' to 'low risk' is inherently unfair for claimants and it is fairness to injured people which has to take precedence here. Nothing has changed since Lord Scarman said in Lim Poh Choo v Islington Area Health Authority[7]: "There is no room here for considering the consequences of a high award upon the wrongdoer or those who finance him. And, if there were room for any consideration, upon what principle, or by what criterion, is the judge to determine the extent to which he is to diminish upon this ground the compensation payable?".

It is, surely, the duty of society to ensure that vulnerable people are treated fairly, according to their needs. In such a society, people whose lives have been shattered by negligence, should never be put into the position of having to take chances with their compensation on a volatile stock market. Someone who has been through probably the worst thing ever to happen to him should be allowed to be a risk-averse, safe investor. The person whose life has been shattered because someone else was negligent should not have to worry about whether his funds will run out before he dies, forcing him to rely on the State for his care.

[6] Setting the Personal Injury Discount Rate https://publications.parliament.uk/pa/bills/lbill/2017-2019/0090/personal-injury-IA.pdf pages 12 and 13

[7] Lim Poh Choo v Islington Area Health Authority [1980] Ac 174

Misleading evidence

In drafting its proposals for how the discount rate should be set, the Government has said it has considered evidence on claimant investment behaviour. Any analysis of claimant investment behaviour carried out under the old 2.5 per cent discount rate is, however, highly misleading.

While the discount rate was artificially high at 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.

In an article for the Journal of Personal Injury Law, financial adviser Edward Tomlinson revealed the scale of the challenges faced by injured people under the previous 2.5 per cent discount rate[8]. Mr Tomlinson states that, under the 2.5 per cent discount rate, taking into account inflation, charges and tax, an injured person would have had to have made a profit on his investment if between 6.9 per cent and 12.5 per cent a year just to ensure his compensation payment reflected what was originally awarded by the court. It is impossible to envisage how anyone could have made that level of profit on investment during the straitened economic circumstances of recent years.

Effect on the NHS

Concerns have been raised about the effect of the change in the discount rate on the NHS. NHS Resolution is only liable to pay compensation when the NHS has injured a patient through negligence. But, a high discount rate means that if the compensation no longer meets the needs of the injured person, that person's money will run out before the end of his life. He will then be forced to fall back on the State – and 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 caused needless catastrophic injury.

For further information please contact:

Sam Ellis
Parliamentary Officer, APIL
Email: sam.ellis@apil.org.uk
Tel: 0115 943 5426

Lorraine Gwinnutt
Head of Public Affairs, APIL
Email: lorraine.gwinnutt@apil.org.uk
Tel: 0115 943 5404

[8] The Discount Rate, What's Next? By Edward Tomlinson, 2017 JPIL Issue 2, page 108