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BRIEFING PAPER

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Civil Liability Bill [HL]

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Summary

This briefing paper deals with the position in England and Wales.

Civil Liability Bill [HL]

The Civil Liability Bill [HL] (the Bill) has three parts:

- Part 1 deals with whiplash;
- Part 2 deals with the personal injury discount rate;
- Part 3 sets out the final provisions and deals with regulations, extent, commencement and short title.

The Bill has completed its passage through the House of Lords and was introduced in the House of Commons on 28 June 2018. It is due to have its Second Reading in the House of Commons on 4 September 2018.

Whiplash claims

Background

Against a background of rising motor insurance premiums and the perception (not universally accepted) of the existence of a "compensation culture", there has been a focus on the incidence of personal injury claims for whiplash injuries (sometimes referred to as soft tissue injury claims), insurance fraud more generally, and the extent to which this has affected the cost of motor insurance.

Reforms to civil litigation procedure and funding were introduced by the Coalition Government, which also developed a whiplash reform programme.

The Government remains concerned about the number and cost of whiplash claims and has consulted on ways to address the issue. It now intends to proceed with a range of reforms aimed at capping whiplash compensation payments and banning settlement of claims without medical evidence.

The Government considers that the reforms would lead to savings of about £1.1bn and expects this to be passed on to motorists, resulting in an average saving per motor insurance premium of £35. Opponents of the Government's proposals dispute the figures and consider it unfair that the reforms would reduce the compensation payable to genuine claimants, and leave victims to conduct claims without legal advice.

The Bill

The Bill contains part of a package of measures intended to introduce the Government's proposed reforms. Part 1 of the Bill would:

- provide for a tariff of compensation for pain, suffering and loss of amenity for whiplash claims. The tariff figures would be set in supporting regulations; draft whiplash injury regulations have been published;
- introduce a regulatory ban on seeking or offering to settle whiplash claims without medical evidence;
- provide for the Judiciary, in exceptional circumstances, to apply an uplift, of a maximum specified percentage (20% under the published draft regulations), to the amount of damages payable under the tariff.

Small claims track limit for personal injury claims to be increased

As part of its package of reforms, the Government intends to raise the small claims track limit from £1,000 to £5,000 for road traffic accident-related personal injury claims, and to £2,000 for other personal injury claims. This would bring many more claims, including whiplash claims, within a regime where legal costs are not usually awarded to the successful party, meaning that many more claimants would probably conduct their claim without legal representation. This proposal does not form part of the Bill and would be achieved by secondary legislation (effecting a change to the Civil Procedure Rules). Further information is provided in another Library briefing paper: Small claims for personal injuries including whiplash.

Reaction to the Government's proposed reforms

The reaction from interested parties has been mixed. In general, lawyers' groups, including the Law Society and the Association of Personal Injury Lawyers, are among those who have raised concerns about the Government's proposals, while the Association of British Insurers (ABI) has welcomed the proposed reforms.

Personal injury discount rate

Background

The personal injury discount rate is one determinant of the amount of compensation to be paid to a victim by an insurance company.

Compensation for an accident is normally paid as a lump sum at the point at which the award is made. It is subject to an investment test which is particularly important in cases where compensation is for a long period of time such as to cover a lifetime disability condition. The agreed annual compensation, multiplied by the likely period it is needed for, produces a total compensation figure. However, a lump sum paid now, can be invested to produce a stream of income returns over that period, hence, the actual lump sum needed *now* is reduced by the likely investment returns over the period.

The higher is the discount rate, the lower is the initial lump sum awarded because the victim is assumed to be able to earn a lot by investing it (and vice versa). Even small changes to the rate can, over a long period, make substantial differences to the initial payment size.

In February 2016 the Justice Secretary announced a reduction in the discount rate from 2.5% to -0.7% to reflect more accurately market investment conditions and to reflect the observed investment behaviour of recipients. The rate is set currently on the basis that recipients have an almost zero tolerance for risk of their investment. In fact, recipients often invest in a range of securities which have some risk attached and which derive greater returns on the investment. Hence the zero-risk discount rate is non-aligned to the real discount rate that most recipients enjoy.

The Bill

Part 2 of the Bill includes the provision about the discount rate. The main change is that the determination of the rate must now be based upon a "rate of return that, in the opinion of the Lord Chancellor, a recipient of relevant damages could reasonably be expected to achieve". Instead of the zero risk approach the rate will be based upon:

(i) more risk than a very low level of risk, but

(ii) less risk than would ordinarily be accepted by a prudent and properly advised individual investor who has different financial aims.

A fine distinction is being enshrined in the law, between a risk averse recipient (but one who accepts some risk) and a normally risk averse investor. The Bill enshrines a procedure for regular reviews of the discount rate and that there will be an 'expert panel' to assist the Lord Chancellor in determining the rate.

Reaction to the Government's proposed reforms

Broadly, insurance companies are very pleased, but the legal groups representing victims had previously welcomed the fall in the discount rate because it would have increased their clients compensation.

1. The Bill

The Civil Liability Bill [HL] (the Bill) has three parts:

- Part 1 deals with whiplash;
- Part 2 deals with the personal injury discount rate;
- Part 3 sets out the final provisions and deals with regulations, extent, commencement and short title.

1.1 Progress of the Bill

The Bill's progress can be followed on the Bill page on the Parliamentary website.

House of Lords stages

The Bill was introduced in the House of Lords on 20 March 2018 as Bill 90 of 2017-19. Second Reading took place on 24 April 2018.[1]

The Bill was considered in Committee on two days. On 10 May 2018 the Lords considered Part 1,[2] and on 15 May 2018 they considered Part 2.[3] A number of probing amendments were debated in Committee and then withdrawn. The Bill was reported without amendment.

Report stage was on 12 June 2018,[4] and Third Reading took place on 27 June 2018.[5] The Bill was amended at both of these stages.

House of Commons stages

The Bill was introduced in the House of Commons on 28 June 2018 as Bill 240 of 2017-19. Second Reading is due to take place on 4 September 2018.

1.2 Extent

Clause 12 of the Bill sets out the extent of the provisions in the Bill:

- Part 1 (whiplash) extends and applies to England and Wales only;
- Part 2 (discount rate) extends and applies to England and Wales only, with the exception of some very minor consequential amendments to the Damages Act 1996 Act.[6]

1.3 Associated documents

The Ministry of Justice has also published the following associated documents:

- Explanatory Notes;[7]

1 HL Deb 24 April 2018 cc1479-1534
2 HL Deb cc256-279 and cc300-341
3 HL Deb 15 May 2018 cc609-670
4 HL Deb 12 June 2018 cc1589-1654 and cc1679-1700
5 HL Deb 27 June 2018 cc189-201
6 Bill 240-EN p7
7 Bill 240–EN

- Delegated Powers Memorandum;[8]
- Whiplash impact assessment (Civil Liability Bill: reforming the soft Tissue injury ('whiplash') claims process);[9]
- Personal injury discount rate impact assessment (Civil Liability Bill: Setting the personal injury discount rate);[10]
- Civil Liability Bill: Overarching Impact Assessment;[11]
- Civil Liability Bill: Factual Q and A;
- Whiplash Factsheet;
- Personal injury discount rate fact sheet;
- Whiplash Reform Programme Equalities Statement;
- Personal injury discount rate: Equalities statement;
- Draft Whiplash Injury Regulations;
- European Convention on Human Rights Memorandum;
- HM Treasury Draft Regulations and Policy Intention.

8 March 2018
9 MoJ015/2016, March 2018
10 MoJ012/2017, June 2018
11 MoJ012/2017, June 2018

2. Part 1: Whiplash

2.1 Background

Summary

Against a background of rising motor insurance premiums and the perception (not universally accepted) of the existence of a "compensation culture", there has been a focus on the incidence of personal injury claims for whiplash injuries, insurance fraud more generally, and the extent to which this has affected the cost of motor insurance. Whiplash injury claims are also sometimes referred to as soft tissue injury claims.

Reforms to civil litigation procedure and funding were introduced by the Coalition Government, which also developed a whiplash reform programme.

The Government remains concerned about the number and cost of whiplash claims and has consulted on ways to address the issue. It now intends to proceed with a range of reforms aimed at capping whiplash compensation payments and banning settlement of claims without medical evidence.

The Government considers that the reforms would lead to savings of about £1.1bn and expects this to be passed on to motorists, resulting in an average saving per motor insurance premium of £35. Opponents of the Government's proposals consider it unfair that the reforms would reduce the compensation payable to genuine claimants, and leave victims to conduct claims without legal advice.

Manifesto commitment

In June 2017, the Conservative Government had a manifesto commitment to "reduce insurance costs for ordinary motorists by tackling the continuing high number and cost of whiplash claims".[12]

The number and cost of whiplash claims

The Government has concerns about the number and cost of whiplash claims (sometimes called soft tissue injury claims), despite improvements in vehicle safety, and the effect of such claims on motor insurance premiums.

The Government has set out concerns about the number and cost of road traffic accident related personal injury claims

Speaking for the Government at Lords Second Reading of the Civil Liability Bill [HL] (the Bill), Lord Keen of Elie, Advocate-General for Scotland and Spokesperson for Ministry of Justice business in the House of Lords, gave some figures and referred to the rise in the number of claims:

> DWP data shows that around 650,000 RTA-related personal injury claims were made in 2017-18. That is nearly 200,000 more than in 2005-06—a rise of 40%. If we take the 10 years following 2005-06, the rise is around 70%. We estimate that around 85% of these are for whiplash-related injuries—higher than in any other European jurisdiction —yet Department for Transport figures show that in the decade up to 2016-17, reported road traffic accidents went from around 190,000 to around 135,000—

[12] Bill 240-EN paragraph 1

> a fall of 30%. Many claims will, of course, be genuine and the Government would never seek to deny justice to those who suffer injury; it is absolutely right that individuals are compensated for genuine injuries. However, by 2016-17, there were around 670,000 whiplash claims in the United Kingdom. That number is too high and the costs to motorists and consumers too great. It comes despite major improvements in motoring safety, such as the increased use of integrated seat and head restraints.[13]

Lord Keen said that not all claims were genuine, and this reflected the existence of a compensation culture:

> Last year the insurance industry identified 69,000 motor insurance claims that it considered fraudulent. By their very nature, these claims are difficult to detect, so I ask the House to consider that the problem goes much further than this already significant number. That the number is so high is indicative of an ever-pervading compensation culture in this country. The knock-on effect of this has been to drive up insurance premiums. I would go as far as to say that, for some, it has become socially acceptable to make a whiplash claim for little or no injury.

Others dispute both the existence of a compensation culture,[14] and the Government's figures.

Others question the Government's figures

At Lords Second Reading of the Bill, Lord Beecham, Shadow Spokesperson for Justice, countered Lord Keen's figures:

> Road traffic accident claims have fallen by 14% since 2013 and by 10% in the past year, while last year the number of claims relative to the number of vehicles on the road was the lowest since 2008. Interestingly, the latest data published—just today—by the Compensation Recovery Unit[15] records a fall in the number of motor cases registered to the unit from 780,000 in 2016-17 to 650,000 in 2017-18. The numbers between 2010-11 and 2017-18 ranged from 828,000 to 761,000. Settlements recorded by the CRU were, at 683,000, the lowest since 2011. Moreover, the cost of such claims in the UK is in the lower half of the European league table of such costs.[16]

In 2017, claimant lawyers asserted that the number of whiplash claims had fallen by as much as 41% since 2010/11, and that the cost of claims had fallen since reforms introduced in 2013

In written evidence to the House of Commons Justice Committee in February 2017, the Association of Personal Injury Lawyers said that the number of whiplash claims had actually fallen:

> In fact, the number of whiplash claims registered with the Government's Compensation Recovery Unit (CRU) has fallen consistently in the past six years, by a total of 41 per cent since 2010/11. Even when whiplash statistics are combined with the number of injuries registered by insurers with the CRU as 'neck

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13 HL Deb 24 April 2018 cc1479-80

14 Another Library briefing paper, Social Action, Responsibility and Heroism Bill, RP14/38, 8 July 2014, section 1.5 considers the arguments

15 The House of Commons Justice Committee has provided this information about the Unit: "The Compensation Recovery Unit (CRU) is an important source of data on the volume of RTA PI claims, as all such claims must be registered there. This unit works with insurance companies, solicitors and the Department for Work and Pensions to recover from PI awards any social security benefits paid as a result of an accident, injury or disease, and costs incurred by NHS hospitals and Ambulance Trusts for treatment of injuries" House of Commons Justice Committee, Small claims limit for personal injury, HC 659, 17 May 2018, paragraph 16

16 HL Deb 24 April 2018 c1483

> and back' injuries, there has been a significant fall of 11 per cent since 2011/2012.
>
> Furthermore, the cost of personal injury claims to the insurance industry has fallen significantly since reforms were introduced in 2013. Data published by the Association of British Insurers (ABI) shows the cost of personal injury claims to motor insurers has fallen by more than 12 per cent (£500 million) a year since the introduction of the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act – from £4.1 billion in 2013 to £3.6 billion in 2015.[17]

The Government disputes these figures. In its response to a consultation on whiplash it said:

> 31. When soft tissue injury claims labelled as 'neck' and 'back' are considered together with those labelled as 'whiplash' the figure increases significantly. The number of such claims has remained steady over the last three years at around 680,000 claims, which is around 90% of all RTA related personal injury claims made.[18]

In its response to the Justice Committee's report on the small claims track limit for personal injury claims, published on 17 July 2018,[19] the Government acknowledged a fall in the number of motor claims in 2017/18:

> The Compensation Recovery Unit (CRU) data shows that, following a decrease in the two years following 2012/13, claims volumes steadily increased for three years to 2016/17. There has been a welcome drop in the last year, but it is too early to say whether this is a trend or a one-off occurrence. It should also be noted that the PI sector has seen a growth in other types of claim (such as holiday sickness) over the last year, which may be indicative of a claims shift. The table below shows the number of motor claims registered over the last six years.

DWP CRU Data on the Number of Registered Motor Claims	
2017/18	650,019
2016/17	780,324
2015/16	770,791
2014/15	761,878
2013/14	772,843
2012/13	818,334

17 Written evidence from the Association of Personal Injury Lawyers, 7 February 2017, paragraphs 3-4 [accessed 23 August 2018]

18 Part 1 of the Government Response to: Reforming the Soft Tissue Injury ('whiplash') Claims Process, Cm 9422, February 2017

19 Government Response to the Justice Committee's Seventh Report of Session 2017–19: Small Claims Limit for Personal Injury, Cm 9649, July 2018, paragraph 6

The current process for making a whiplash claim

There is currently no legislative provision which regulates damages for pain, suffering and loss of amenity for road traffic accident (RTA) related whiplash injuries.[20]

The Government summarised the current procedure in a factsheet published with the Bill, which includes information about how the amount of compensation is calculated:

> 3. In the majority of cases, liability for an accident is admitted early in the post-accident process. The amount of compensation awarded for pain, suffering and loss of amenity (PSLA) for RTA related soft tissue injury claims is usually negotiated between the insurer of the at fault driver and the solicitor of the injured claimant, often with reference to the suggested compensation ranges included in the Judicial College Guidelines. The payment of PSLA in a small number of claims, where the claimant and defendant cannot agree, is determined by the Court. Detailed data for 2015 shows the average compensation paid out for a whiplash claim with an injury duration of up to six months was around £1,850.
>
> 4. All claims must follow the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents (RTA PAP), before any claim enters the court system. Claims can drop out of the RTA PAP process for a number of reasons, but the majority of the claims which exit the process do so due to disagreements over quantum and liability.
>
> 5. If a medical report is required in support of a RTA related soft tissue injury, then the RTA PAP provides the following definition for such injuries:
>
> RTA PAP - 16(a) "a claim brought by an occupant of a motor vehicle where the significant physical injury caused is a soft tissue injury and includes claims where there is a minor psychological injury secondary in significance to the physical injury".[21]

The Judicial College Guidelines suggest compensation ranges for different types of injury

Definition of whiplash injury in Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents

There is no legislative requirement for medical evidence to be produced before offers to settle an RTA related whiplash claim may be made and accepted.[22]

Reforms already introduced

Civil litigation reforms

Over the past few years a range of reforms to civil litigation procedure and funding have been introduced, many of which have an impact on personal injury claims, including whiplash claims.

In short, the reforms introduced already include:

- changes to conditional fee agreements (also known as "no win, no fee" agreements) which mean that, in most cases, success fees and after-the-event (ATE) insurance premiums are no longer recoverable from the losing party, and there is a cap on success fees in personal injury cases;

20 Bill 240-EN paragraph15
21 Ministry of Justice, Civil Liability Bill Whiplash – Tariff of predictable damages, 21 March 2018
22 Bill 240-EN paragraph 16

- the payment and receipt of referral fees have been banned in personal injury cases;
- in any personal injury claim where the court finds that the claimant is entitled to damages, but is satisfied on the balance of probabilities that the claimant has been fundamentally dishonest in relation to the claim, it must dismiss the entirety of the claim unless it is satisfied that the claimant would suffer substantial injustice as a result;
- legal services providers and claims management companies are prohibited from offering benefits to potential clients as an incentive to make a personal injury claim;
- the fixed recoverable costs regime introduced in 2010 for RTA personal injury claims up to the value of £10,000 has been extended: it now covers RTA claims, employer's liability claims, and public liability claims up to the value of £25,000; [23]
- soft tissue injury claims must be supported by a fixed cost medical report commissioned via the MedCo Portal from one of a randomly generated list of medical experts or medical reporting organisations.

Further information is provided in the following Library briefing papers:

- Small claims for personal injuries including whiplash;[24]
- Referral fees in personal injury cases;[25]
- No win, no fee funding arrangements.[26]

General information about actions taken by the Coalition Government is provided in a Ministry of Justice Policy Paper, available on the Gov.UK website, 2010 to 2015 Government policy: civil justice reform.[27]

Whiplash reform programme

In June 2015, Dominic Raab, who was then a junior Justice Minister, summarised steps taken by the Coalition Government in connection with whiplash claims, including measures related to medical reports and the "MedCo" Portal:[28]

> The last Government worked closely with a wide range of stakeholders to develop an effective whiplash reform programme. New rules were implemented on 6 April 2015 to make sure that medical reports used in whiplash claims are obtained through the new MedCo IT portal. The new system also makes sure that solicitors are not able to obtain a report from an organisation with which they have a direct financial link.

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23 The Civil Procedure (Amendment No.6) Rules 2013, SI 2013/1695. Further information is provided in a Ministry of Justice consultation paper, Extension of the Road Traffic Accident Personal Injury Scheme: proposals on fixed recoverable costs. The associated electronic portal regime is available only to registered users (insurance companies and claimant representatives)

24 Number 04141, 23 August 2018

25 Number 06015, 8 September 2016

26 Number 7607, 31 May 2016

27 Updated 8 May 2015

28 MedCo Registration Solutions (MedCo) is an independent industry led not for profit company, HLWS123, Whiplash Reform Programme: Review and Call for Evidence: Written statement, 16 July 2015

These measures supplement reforms implemented on 1 October 2014 to fix the costs of initial medical reports at £180; to provide an expectation that there will usually only be one report; to prohibit the reporting expert from providing medical treatment to the claimant; to discourage insurers from using pre medical offers to settle; and to allow defendants to submit their version of events to the expert if necessary.

Further reforms to tackle fraudulent claims at source came into effect on 1 June 2015, when it became mandatory for claimant-solicitors to carry out a previous claims check on potential clients. In addition a robust new accreditation scheme for medical experts will be introduced on 1 January 2016 to help improve the quality of medical reports overall.[29]

The small claims track

The small claims track is one of three tracks to which a case may be allocated in the civil court. The track that the case follows is decided by a judge and is based on the value of the claim and how complicated the case is. If a case is complex, the judge may refer it to another track for a full hearing, even if it is below the financial limit of that track. A claim's allocation to a particular track has consequences for its subsequent case management and other matters, such as costs.

Costs

The small claims track is supposed to provide a simple and informal way of resolving disputes at court. Although lawyers are sometimes instructed, in most cases, the court will not order legal costs to be paid by the losing party. This means that the successful party must generally pay their own legal costs, and, for this reason, many claimants deal with a small claim without the help of a solicitor. In contrast, in cases assigned to other tracks, the successful party would normally expect to recover legal and other costs from the losing party (there are rules which determine how much can be recovered).

Costs are not usually awarded to the successful party in the small claims track

Financial limit

The financial limit for the small claims track for many types of claim is currently £10,000. The ceiling for personal injury claims (which includes claims for whiplash injury) and housing disrepair is much lower at only £1,000.

Successive Governments have considered whether or not to raise the small claims track limit, generally, or specifically for certain types of claim. A number of arguments have been made for and against doing so. For example, those in favour of an increase in the limit for personal injury claims have pointed to disproportionately high legal costs in lower value claims, and have argued that these claims are straightforward enough for an unrepresented litigant to understand.

Those against an increase have argued, among other things, that personal injury claims involve complex law and that potential claimants could be deterred from making a claim, or accept too low a settlement figure, because of the difficulties involved. They also point to a potential

[29] PQ 60 [on Personal Injury: Compensation], 4 June 2015

"inequality of arms" as defendant insurers might still instruct lawyers in a small claims track case.

More information about the significance of allocation to the small claims track, and previous consideration of increasing the small claims track limit, is provided in another Library briefing paper: Small claims for personal injuries including whiplash.[30]

Government proposals for reform

In the Autumn Statements in 2015,[31] and 2016,[32] the Government announced that it intended to increase the small claims track limit for personal injury claims, and to bring in legislation.

On 17 November 2016, the Ministry of Justice launched a consultation, Reforming the Soft Tissue Injury ('whiplash') Claims Process. An Impact Assessment was also published.[33] The consultation closed on 6 January 2017.

The consultation was "aimed at disincentivising minor, exaggerated and fraudulent RTA related soft tissue injury claims". It stated that the cost to motorists arising from dealing with these claims was "out of proportion to the level of injury suffered" and contributed to the high cost of motor insurance premiums.[34]

The consultation also "aimed at providing claimants with proportionate compensation and greater certainty as to the value of their claim as well as reducing the number of claims settled without adequate challenge or proper medical evidence".[35]

Proposed package of reforms

The Executive Summary summarised the proposed package of reforms:

> The package includes four measures to:
>
> a) tackle the high numbers of minor RTA related soft tissue injury claims by either:
>
> > i. removing compensation for pain, suffering and loss of amenity (PSLA); or
> >
> > ii. reducing compensation for PSLA by setting a fixed amount payable (£400 or £425 if there is a psychological element) for these types of claim.
>
> b) reduce compensation for PSLA for other RTA related soft tissue injury claims where recovery takes longer than for those covered by measure (a) above through the introduction of a set tariff of compensation;
>
> c) raise the small claims limit for all personal injury claims to £5,000, (by reference to the value of the PSLA element of the claim). This would have the effect that the legal costs of such claims would no longer be recoverable from defendants in the

30 Number 04141, 23 August 2018
31 Cm 9162, November 2015 at p125
32 HC Deb 23 November 2016 c907
33 MoJ015/2016, 17 November 2016
34 Ministry of Justice, Reforming the Soft Tissue Injury ('whiplash') Claims Process, Cm 9299, November 2016, paragraph 1
35 Ministry of Justice, Reforming the Soft Tissue Injury ('whiplash') Claims Process, Cm 9299, November 2016, p5

> majority of soft tissue injury claims, although certain costs arising from litigation (for example the costs of issuing the claim) and a number of disbursements (for example the cost of the medical report) could still be claimed by a successful claimant; and
>
> d) ban pre-medical offers to settle RTA related soft tissue injury claims, so in future claims could not be settled without medical evidence provided by MedCo accredited practitioners.[36]

The Government intends that claimants would still be able to receive compensation for other forms of loss, including medical costs, vehicle damage and loss of earnings.

Measures (a), (b) and (d) would require primary legislation. The increase in the small claims track limit (measure (c) above) would be achieved by a change to the Civil Procedure Rules outside of the Bill. It would also be necessary to amend relevant Pre-Action Protocols including the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents.

The consultation paper also sought views on related issues affecting the personal injury sector,[37] including on whether improvements could be made to provide further help to litigants in person using the small claims track. In addition, the Government asked whether any specific measures should be put in place in relation to claims management companies and paid McKenzie Friends[38] operating in the personal injury sector.[39]

The Government's view

The consultation paper set out a number of reasons why the Government considers that the number of soft tissue injury claims in England and Wales remains too high, including:

- the difficulty in identifying and assessing soft tissue injury claims, meaning that claimants will usually know more about whether there is an injury, and if so how severe it is, compared with defendants:

  > This asymmetry of information, plus the availability of compensation at levels many claimants clearly regard as significant, means there are substantial financial incentives for claimants to bring cases regarding relatively minor injury, or to exaggerate the severity of their injury. By either removing or reducing the availability of PSLA these incentives would be considerably reduced.

- successful claimants do not bear the cost of bringing a claim which, instead, is paid by unsuccessful defendants, with defendants sometimes considering it not worth contesting claims:

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36 Ibid
37 Ibid, Parts 6 and 7
38 The consultation paper includes this information about McKenzie Friends: "A McKenzie friend assists a litigant in person in a court of law in England and Wales. They don't need to be legally qualified and tend to be lay advisors who provide moral support for litigants, take notes, help with case papers and give advice on the conduct of a case. McKenzie friends cannot conduct litigation, address the court or sign court documents, their services are usually free, but paid McKenzie Friends are becoming more common", Ministry of Justice, Reforming the Soft Tissue Injury ('whiplash') Claims Process, Cm 9299, November 2016, p30, footnote 21
39 Ibid p30

> …because it is very hard to disprove RTA related soft tissue injury claims, defendants who contest such claims are likely simply to increase their total costs without substantially increasing their chances of success. Hence, in such circumstances, and especially for lower value claims, it may be more cost effective for defendants to accept liability without contesting the claim and to pass the costs involved on to motor policy insurance holders.

- the current system allows the parties to settle RTA related soft tissue injury claims without the claimant presenting medical evidence to the defendant:

> Costs of investigating the claim (and challenging it in court) can often incentivise defendants to settle without this information, with a settlement being seen as a more commercially viable option. This has led to a situation where medical reports are not always used to support claims, which can in turn incentivise minor, exaggerated or fraudulent claims. Therefore, mandating the need for a medical report to evidence claims would help deter claims of this nature in future.

Government response to consultation

On 23 February 2017, the Ministry of Justice published part one of its response to the consultation which dealt with the Government's whiplash reform programme. [40]

56% of the 625 responses had been from claimant lawyers and around 60% of the responses to each question came from claimant solicitors.

The Government stated that the proposed reforms were targeted in particular at RTA whiplash claims, "where it has become culturally acceptable for claims to be made for very low level injuries". [41]

The Government confirmed that it would proceed as follows - some of its proposals had been modified:

- The reforms would cover RTA related whiplash claims and minor psychological claims:

> A definition will be developed to reduce the scope for affected claims to be displaced into other categories of claim. The Government accepts that the definition should not cover more serious psychological illnesses, for example, depression and post-traumatic stress disorder, which are diagnosable using international standards. The Government therefore proposes to limit the scope of this measure to minor psychological injuries, such as 'travel anxiety' and 'shock.'[42]

- Payment of PSLA for minor RTA related soft tissue injury claims would not be removed, nor would there be a single payment for minor claims.

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40 Part 1 of the Government Response to: Reforming the Soft Tissue Injury ('whiplash') Claims Process, Cm 9422, February 2017

41 Ibid paragraph 33

42 Ibid paragraph 45

- A tariff of fixed compensation for pain, suffering and loss of amenity would be introduced for claims with an injury duration of between 0 and 24 months.[43]
- The use of the "prognosis" approach for assessing injury duration would continue.[44] (The Government had consulted on whether a diagnosis approach should be used instead - meaning that the claimant would have had to wait six months to be able to have a medical report completed to determine whether symptoms remained). The Government set out the rationale for continuing with the prognosis approach:

  > This allows claimants to be able to seek any rehabilitation/treatment in a timely manner so as to be as effective as possible. The Government is also of the view that MedCo will continue to play an important role in this area. MedCo can, and will, continue to identify bad behaviour through analysis of its management information, and take the necessary robust enforcement action.[45]

- A single tariff would cover both whiplash claims and minor psychological claims:

  > This decision takes account of the views of respondents to the consultation and the guidance included in the most recent Judicial College Guidelines.
  >
  > The figures in the tariff have been updated taking into account the uplift provided for in the most recent version of the Judicial College Guidelines. It was suggested in the consultation document that the lowest bracket should be 0–6 months, but this has now been broken down further into two bands, namely 0–3 months and 4–6 months.

- The judiciary would be able to apply a discretionary uplift of up to 20% in exceptional circumstances, the definition of which would not be set out in statute:

  > Instead we believe it is more appropriate to leave consideration of when a claim is exceptional to the discretion of the courts.[46]

  The judiciary would also be able to decrease the amount awarded under the tariff in cases involving contributory negligence.[47]

- The small claims track limit for RTA related personal injury claims would be increased to £5,000. The small claims track limit for all other types of personal injury claims would be increased to £2,000 "in line with inflation" but would be kept under review. The Government would consider whether a further increase to £5,000 for all PI claims was required in the future.[48]
- The Government would give further consideration to suggestions made in connection with supporting litigants in person, and

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43 Ibid paragraphs 51 and 63
44 That is, where the injury duration was based on a prognosis period as considered by an accredited medical expert
45 Ibid paragraph 73
46 Ibid paragraph 81
47 Ibid paragraph 112
48 Ibid paragraph 93

would work with both MedCo and Claims Portal Limited on this issue. The Government would also discuss the potential impact on the courts and judicial resources with the judiciary and other interested parties.[49]

- There would be a regulatory ban, without exemptions, on the making, soliciting, accepting and receiving of offers to settle claims without medical evidence in RTA related whiplash claims only.[50]

Measures requiring primary legislation were originally included in Part 5 of the Prisons and Courts Bill, which was introduced into the House of Commons on 23 February 2017,[51] but this Bill fell when the General Election was called for 8 June 2017.

Motor insurance premiums

There has been some debate about whether the cost of motor insurance premiums will fall as a consequence of the proposed reforms. The Government considers that the reforms could result in a saving for motorists, but others question whether savings will be passed on by insurers. In addition, other factors affecting motor insurance premiums may operate to mask the effect of any particular reform.

Further information about factors influencing the cost of motor insurance premiums, and what Government and the industry have done to try and reduce costs, is provided in a separate Library briefing paper, Motor car insurance.[52]

Insurers' commitment to pass on "cost benefits"

On 20 March 2018, following the announcement of the Bill, the leaders of 26 insurance companies wrote to the Lord Chancellor, David Gauke, setting out their commitment to pass cost benefits on to customers.[53] The signatories represent 86% of the motor and liability market written by ABI members.[54]

The letter is published on the ABI website. It includes the following:

> In the UK's fiercely competitive insurance market, each individual insurer will continue to make their own independent decisions on pricing in order to remain competitive. Indeed, such independent decision-making is a requirement of applicable competition law.
>
> However, the signatories to this letter today publicly commit to passing on to customers cost benefits arising from Government action to tackle the extent of exaggerated low value personal injury claims and reform to the personal injury discount rate.

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49 Ibid paragraph 99
50 Ibid paragraph 104
51 Bill 145 2016-17. Another Library briefing paper provides further information, Commons Library Analysis: The Prisons and Courts Bill (No 7907, 15 March 2017)
52 Number 06061, 1 December 2017
53 ABI, Industry leaders commit to passing on cost benefits from Civil Liability Bill announcement today, 20 March 2018 [accessed 23 August 2018]
54 Ibid

Personal injury market job losses

A petition on the UK Government and Parliament's website, which was started after the Government published its consultation paper, called on the Government to keep the personal injury small claims limit at £1,000 and to keep damages for whiplash injuries. It claimed there would be mass redundancies following implementation, "possibly 60,000".

In January 2017, it was reported that research from Capital Economics, commissioned by the lobby group, Access to Justice, had found that "up to 80% of the 44,200 employees involved in personal injury work, including insurers and claim managers, could lose their jobs due to a crackdown on whiplash claims".[55]

The Government's response is that:

> The personal injury market has long proven itself to be adaptable and innovative, and it is likely that the industry will continue to provide cost effective services following the implementation of these reforms. The potential impact on solicitors will depend on a number of factors, including the volume of claims and their ability to adapt in response to a rapidly changing market. A full impact assessment which explores these issues in more detail was published alongside the consultation.[56]

It reiterated that claimants could still seek legal representation in the small claims track if they so wished.

2.2 Consideration of issues by Committees

Transport Committee inquiries

Since 2010, the House of Commons Transport Committee has published several reports on the cost of motor insurance.

Among other things, the Committee has looked at the extent to which the cost of motor insurance is influenced by the prevalence of road accidents, insurance fraud, legal costs, and the number of uninsured drivers. The Committee has also considered ways of reducing the number and cost of whiplash claims. The Committee's recommendations resulted, at least in part, in some of the reforms to law and procedure already introduced.

Transport Committee reaction to the Government's consultation proposals

Transport Committee letter

On 11 January 2017, the then Chair of the Transport Committee, Louise Ellman, wrote to Lord Keen of Elie, Spokesperson for Ministry of Justice business in the House of Lords.[57] She noted that the Government's consultation proposals could help to depress the number

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55 Louie Bacani, Whiplash reforms threaten 35,000 jobs – study, Insurance Business, 24 January 2017 [accessed 23 August 2018]

56 UK Government and Parliament Petitions, Keep the Personal Injury Small Claims Limit at £1,000/ Keep Damages for whiplash, Government response given on 20 February 2017 [accessed 23 August 2018]

57 Transport Committee, Letter from Louise Ellman to Lord Keen regarding injury claims, 11 January 2017

of claims overall, but also that they were not specifically targeted at fraudulent claims. She called on the Government to show how genuine claims would be protected:

> The Transport Committee's recommendations focused on raising the bar for successful claims and was concerned to ensure that genuine claimants were not penalised. Your current proposals seek to reduce the incentives to claim. The Government should demonstrate how the proposals to reduce levels of compensation will deter fraudulent claims while allowing those with a genuine claim to get appropriate restitution. It is important that, in responding to the consultation, the Government shows how genuine claims will be protected.
>
> (…)
>
> Overall I would prefer to see the Government place more emphasis on measures that make it harder for fraudulent claims to succeed. It would be a poor outcome and represent an injustice for genuine claimants if the overall level of claims fell but the proportion of fraudulent claims rose.

Ms Ellman considered that those seeking to make fraudulent claims were likely to try to exploit any new tariff or rule, and expressed concern that the proposals would simply see fraudulent claims displaced.

The letter also highlighted the potential unintended consequence of creating space for claims management companies (CMCs) to operate: "Even very small awards might allow them to make a profit if they can encourage enough claims". Louise Ellman called on the Government to demonstrate how its reforms would not be open to such abuse.

Louise Ellman also questioned the timing of the reforms:

> I do not consider that there has been enough time for the effect of the reforms that have been made recent years to have been properly evaluated. In particular I would like to see more of the recommendations from the Insurance Fraud Taskforce implemented. There should be a proper evaluation of the reforms to date and further reform only if it can be shown that previous reforms have not delivered.

Ms Ellman said that there was "little direct evidence that tackling fraud has reduced premiums", adding:

> The recent increase in insurance premium tax may well offset any future fall arising from efforts to tackle fraud. At best the Government should probably be claiming that it has stopped claims rising as fast as they otherwise would have rather than raising expectations about lower premiums. In opposing fraud the Government should not put genuine claimants at risk of an injustice.

Government response

Lord Keen of Elie replied on 23 February 2017. His letter set out details of the Government's response to the whiplash consultation rather than addressing the specific points made in Ms Ellman's letter.

Evidence to Justice Committee

On 7 February 2017, the then Justice Committee heard oral evidence from two witnesses, James Dalton, Director of General Insurance Policy,

Association of British Insurers, and Neil Sugarman, then President, Association of Personal Injury Lawyers (APIL).[58] Both organisations also submitted written evidence to the Committee, in connection with their inquiry, Personal injury: whiplash and the small claims limits.[59]

APIL

The Association of Personal Injury Lawyers (APIL) submitted its written evidence on 7 February 2017. This set out APIL's opposition to the Government's proposals:

> We believe the proposals undermine fundamentally the rule of law, a key tenet of our constitution which ensures everyone is treated fairly. Furthermore, the proposals are without foundation in evidence and are profoundly unfair to people who have been injured through no fault of their own, the vast majority of whom are entirely honest. The proposals, if introduced, would result in injured people subsidising the insurance industry which collects premiums precisely for the purpose of paying compensation to people who have been injured.

APIL also took issue with the Government's reference to the measures being intended to deal with "fraudulent" whiplash claims, pointing to the lack of evidence to assess the number of such claims:

> 20. In fact, there is no evidence that a high proportion of personal injury claims are fraudulent, as is claimed in the consultation. Data published by the ABI relates to the level of motor and liability insurance fraud in general. In its public pronouncements about fraud, the ABI routinely includes both 'proven' and 'suspected' fraud (ie, what the ABI thinks is fraud but which cannot be proven as fraud). It has long been the case in our justice system that one is innocent until proved guilty.
>
> 21. When the ABI separated the two figures for the first time in 2014 it became clear that 'proven' (or 'confirmed') fraud was just 0.25 per cent of all claims, and this figure remained the same in 2015.This data relates to all motor insurance claims, including policy-holders over-egging their own claims, or making false declarations in applications for insurance. Personal injury fraud is a fraction of that figure, and fraudulent whiplash claims are a fraction of that. Nobody knows for certain the size of the fraction because independent, reliable figures for personal injury fraud do not exist.

APIL said that people with genuine 'minor' injuries are not 'dishonest':

> The fact that genuinely injured people, with modest but perfectly valid claims, are consistently being vilified in the same breath as fraudsters and people who exaggerate claims is not only disingenuous, it is offensive.[60]

Furthermore, APIL did not consider that moving the majority of claims to the small claims track would stop fraud in whiplash claims. They said that people would turn to CMCs to conduct their claims and that "this

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58 Justice Committee, Oral evidence: Government consultation on soft tissue injury claims, HC 922, 7 February 2017

59 The inquiry was closed before it was completed when the 2017 General Election was called

60 Paragraph 22

will inevitably increase the number of fraudulent claims, rather than help to reduce them".[61]

ABI

Following the oral evidence session, James Dalton wrote to the Justice Committee. He set out additional information on a number of points which had been raised, including:

- Despite an initial decrease, he said that there had been little change to claims frequency following the enactment of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) reforms and the corresponding reduction of the fixed recoverable costs in the Claims Portal. James Dalton added that, while the number of claims registered with the Compensation Recovery Unit (CRU) described as "whiplash" had decreased in recent years, this had been coupled with a corresponding sharp increase in the number of soft tissue injury claims for neck and back injuries.
- Following the implementation of the LASPO reforms in May 2013, James Dalton said that "insurers kept to their word and passed on over £1.2 billion in savings to their customers". He added that "as the market cycle started to harden and insurers started to experience inflationary costs pressures from a number of sources, premiums started to rise again".
- James Dalton said that the insurance industry was fully committed to passing on savings from the then Prison and Courts Bill reforms "and has a strong record of meeting these commitments in the past as demonstrated above". He stated that it was important to understand how premiums are calculated when looking at how savings would be passed on to customers, and set out further information about this. He also spoke of the competitive nature of the insurance market.
- James Dalton spoke of the difficulties faced by insurers in tackling suspected fraudulent claims:

> The fact that there is no objective test for soft tissue, whiplash type claims will often make it almost impossible for insurers to fight a whiplash claim they believe to be dishonest or exaggerated as they have to accuse the claimant of fraud. The effect of this is to shift the burden of proof from a civil standard (i.e. the balance of probabilities) to the criminal standard of proof (i.e. beyond reasonable doubt). As such, insurers will generally only fight claims when there is a compelling case of fraudulent behaviour.[62]

Justice Committee report on small claims for personal injury

Although not in the Bill, the Government's proposal to increase the small claims track limit would affect claims for whiplash injuries (as the proposed tariff sets out levels of compensation of less than £5,000).

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61 Paragraph 23

62 Letter from James Dalton, Director of General Insurance Policy, ABI to the Chair of the Justice Committee, 8 March 2017

On 5 December 2017, the House of Commons Justice Committee launched a short inquiry into the Government's proposals for raising the small claims track limit for personal injury claims by way of secondary legislation.[63] The Committee published its report, Small claims limit for personal injury, on 17 May 2018.[64]

The Committee considered that an inquiry focusing on this issue would assist Parliament's scrutiny of a proposal "that might otherwise receive less attention than it merited, owing to its introduction via secondary legislation effecting a change to the Civil Procedure Rules".[65]

The Government published its response to the Justice Committee's report on 17 July 2018.[66] Among other things, the Government confirmed that implementation of the whiplash measures, including the rise in the small claims limit to £5,000 would be delayed until April 2020, and would follow large scale testing of the new online platform.

Information about Committee's report and the Government's response is provided in another Library briefing paper: Small claims for personal injuries including whiplash.[67]

2.3 The Bill

The provisions in Part 1 of the Bill, as introduced in the House of Lords, were largely similar to those previously included in Part 5 of the Prisons and Courts Bill.[68] They have since been amended.

Whiplash provisions in Part 1 of the Bill

The Ministry of Justice has given this summary:

> The whiplash measures in the Bill will:
> - Provide for a tariff of compensation for pain, suffering and loss of amenity for whiplash claims. The final tariff will be set in supporting regulations via the affirmative procedure following Royal Assent.
> - Enable the court, subject to regulations, to increase the compensation awarded under the tariff.
> - Introduce a ban on seeking or offering to settle, whiplash claims without appropriate medical evidence.[69]

The Overarching Impact Assessment (p14) sets out the Government's summary of the net impact of the package of the Government's

63 Justice Committee, Government plans to raise small claims limit, 5 December 2017 [accessed 23 August 2018]
64 HC 659
65 Ibid paragraph 3
66 Government Response to the Justice Committee's Seventh Report of Session 2017-19: Small Claims Limit for Personal Injury, Cm 9649, July 2018
67 Number 04141, 23 August 2018
68 Bill 145 2016-17
69 Gov.UK, Civil Liability Bill, updated 29 June 2018 [accessed 23 August 2018]

preferred options concerning whiplash related claims, and the process for all personal injury claims.

The Government expects the Bill to deliver these savings:

> The Bill will deliver savings for people who hold insurance policies, with the whiplash measures expected to reduce motorists' insurance premiums by £1.1bn in total or an average of about £35 a year per policy.[70]

2.4 Delegated Powers and Regulatory Reform Committee Report

On 19 April 2018, the House of Lords Delegated Powers and Regulatory Reform Committee published its 22nd Report of Session 2017–19, which considered (among other things) the proposed delegated powers in the Bill.[71]

The Committee referred to the Bill introduced in the Lords as being "skeletal" and agreed with the Motor Accident Solicitors Society which had written saying that the extensive use of delegated powers in this short Bill "will severely limit parliamentary scrutiny as the full impact of the proposed measures cannot be determined without consideration of the proposed regulations/secondary legislation. The devil is very much in the detail".[72]

The Committee drew attention to Clauses 1 and 2 (see below).

2.5 House of Lords Second Reading debate

Lord Keen of Elie introduced the Bill as follows:

> It is about making [the] system fairer, more certain and more sustainable in the future for claimants, defendants, the taxpayer and motorists. This builds on our wider reforms to cut the cost of civil justice claims and strengthen the regulation of claims management companies.[73]

The debate covered a range of issues, including

- Peers generally welcomed the requirement for cases not to be settled without a medical report.[74]
- Lord Beecham, Shadow Spokesperson for Justice, questioned why claimants for damages for whiplash injuries should be treated differently from claimants for any other type of personal injury.[75]
- Lord Sharkey (Liberal Democrat) commented on the potential impact on access to justice.[76]

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70 Civil Liability Bill: Overarching Impact Assessment, MoJ012/2017, March 2018, paragraph 3
71 HL Paper 123
72 Paragraph 4
73 HL Deb 24 April 2018 cc1479
74 For example, Lord Beecham (Labour) at c1484; Lord Sharkey (Liberal Democrat) at c1488; Baroness Berridge (Conservative) at c1508; Lord Faulks (Conservative) at c1513; Baroness Chakrabarti (Labour) at c1527
75 HL Deb 24 April 2018 cc1484
76 HL Deb 24 April 2018 cc1488

- Lord Hunt of Wirral (Conservative) said that the plans for whiplash reform "should be commended as being sensible and uncontroversial".[77] He considered the tariff amounts to be appropriate:

> The sums proposed for the tariff, while low, are more in line with what society can realistically afford to pay for these claims. Let us not forget, it is the wider public who have to fund these claims through higher insurance premiums and the inflated cost of goods delivery.
>
> There are consumers and citizens at both ends of this equation. It is the task of Government to balance the interests of everyone involved.[78]

- Other peers who spoke in favour of the general principle of the Bill included Lord Hope of Craighead (Crossbench, former deputy president of the Supreme Court);[79] Lord McNally (Liberal Democrat);[80] Lord Hodgson of Astley Abbots (Conservative); and the Earl of Kinnoull (Crossbench).[81]
- Lord Thomas of Cwymgiedd (Crossbench, former Lord Chief Justice) expressed his support for Part 1 but considered that "a great deal needs to be done to improve it". He welcomed the principle of a tariff, but questioned how it would be set and also its purpose:

> It is important when setting the tariff to have some clear idea of why and how you are setting it. Are you setting it to stop fraud, or on the basis that people should be more stoic and should not be paid so much for a bit of pain? What is the basis?[82]

- Lord Monks (Labour) worried that blame was being placed on victims and that they would lose out.[83]
- Baroness Berridge (Conservative) agreed that there was abuse in the system but expressed concern about the effect of the Bill on genuine claimants who would not benefit from it.[84]
- Lord Faulks (Conservative) spoke of many whiplash claims containing "a strong element of a racket" and said that Part 1 was "aimed in the right direction" and "a necessary correction to the whiplash claims racket".[85]
- Lord Marks of Henley-on-Thames (Liberal Democrat Spokesperson for Justice) said that "while we must do everything we can to stamp out false claims, in so doing we must take care not to prevent those with genuine claims recovering fair compensation".[86]

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77 HL Deb 24 April 2018 cc1494
78 HL Deb 24 April 2018 cc1495
79 HL Deb 24 April 2018 cc1490
80 HL Deb 24 April 2018 cc1496
81 HL Deb 24 April 2018 cc1497 and 1499
82 HL Deb 24 April 2018 cc1511
83 HL Deb 24 April 2018 cc1505
84 HL Deb 24 April 2018 cc1510
85 HL Deb 24 April 2018 cc1513
86 HL Deb 24 April 2018 cc1523

- Baroness Chakrabarti, Shadow Attorney General, considered that the Bill addressed its purported targets indirectly:

> It is concerned with, at worst, fraud and, at best, inflation of, for example, whiplash claims. I agree with, I believe, the majority of noble Lords, that compulsory medical reports before settlement must be a good idea. … But, essentially, the Bill does not directly deal with fraud.
>
> Another stated target is unscrupulous claims managers and McKenzie friends. Again, there is nothing in the Bill about that public policy problem and social evil. …We know that there is some level of problem here; I do not think anyone doubts that.
>
> Another target is the unfairness of overly high insurance premiums. Again, the Bill does not directly regulate insurance premiums. We are told that industry leaders have made a public pledge to pass on the benefits of limiting claims to insured persons, but there is nothing in the Bill at the moment to give teeth to that promise. (…)
>
> Finally, a target of the Bill is said to be devastating pressures on the NHS, and perhaps on social care, too. Again, this is a very indirect approach towards the devastating pressures on the NHS and on social care in this country at this time.[87]

- Other issues raised in the debate, where peers sought clarification or questioned the Government's policy included:
  - the scale of damages, how the level should be determined and by whom, and why the proposed tariff was so much lower that the Judicial College guidelines;
  - whether the proposed use of delegated legislation was appropriate;
  - how to ensure insurance companies pass on savings to motorists;
  - the associated rise in the small claims track limit for personal injury claims;
  - the effect of the reforms on vulnerable road users – cyclists, motorcyclists, horse-riders and pedestrians;
  - insurance companies settling too quickly and in too many cases;
  - the role of claims management companies;
  - the recoverability of the cost of medical reports.

Lord Keen replied on this last point:

> I understand that where liability is accepted, the cost of the MedCo report will be a relevant recoverable cost, no matter whether this is in the small claims court or otherwise. Another question that has been raised is how the original cost of the MedCo report is funded, and we are looking at that and discussing it with interested parties at present. However, there will be no material issue over the recovery of the MedCo report cost

87 HL Deb 24 April 2018 cc1527

> itself, which the noble Lord identified as in the region of £180 plus VAT.[88]

2.6 Clauses in Part 1

Definition of whiplash injury

The Bill

Clause 1 sets out the definition of "whiplash injury", as an injury of soft tissue in the neck, back or shoulder, as further defined in Clause 1. The provisions would apply if the injury was caused by the negligence of a driver of a motor vehicle on a road or other public place in England and Wales, and the injured person was another driver or passenger in a motor vehicle. This Clause was amended by way of Government amendments at Report stage.

Clause 2 was added to the Bill by way of Government amendment at Report stage. It would enable the Lord Chancellor to amend the definition of "whiplash injury" in Clause 1, by regulations made under the affirmative resolution procedure. Amendments would be limited to soft tissue injuries in the neck, back or shoulder. Before making any regulations, the Lord Chancellor would have to prepare, publish and lay before Parliament a report of a review of the definition, including the decision about whether to amend. The Lord Chancellor would also have to consult various specified parties, including the Lord Chief Justice and the Chief Medical Officers for England and Wales. Clause 2 sets out timeframes for the first and subsequent reviews.

Development and consideration of the definition

In the Bill as first introduced in the Lords, the detail of the definition of "whiplash injury" was to be set out in regulations to be made under the affirmative resolution procedure. Draft whiplash regulations were published on 8 May 2018 – shortly before the first day of Committee stage in the Lords. Regulation 2 would have set out the definition of whiplash.

At Second Reading, Lord Keen said that the intention was to have a degree of flexibility, "so that if the claims industry developed in a particular direction in response to legislation, we were equipped to deal quite rapidly with that".[89]

The House of Lords Delegated Powers and Regulatory Reform Committee disagreed with the Government's approach:

> **We take the view that it would be an inappropriate delegation of power for "whiplash injury", a concept central to a full understanding of the Bill, to be defined in regulations made by Ministers rather than being defined on the face of the Bill.**[90]

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88 HL Deb 24 April 2018 cc1530
89 HL Deb 24 April 2018 cc1531
90 House of Lords Delegated Powers and Regulatory Reform Committee, 22nd Report of Session 2017–19, HL Paper 123, paragraph 9

At Committee stage, the Lords debated a number of proposed amendments and considered, among other things, whether the definition of "whiplash" should appear on the face of the Bill.

At Report stage, the Government laid its own amendments to put the definition in the Bill and to introduce a limited power to amend the definition.[91]

The Government's amendments were agreed without division.

Other issues covered in the context of Committee stage debate on Clause 1 included:

- whether the definition should be confined to neck injuries and whether it should include minor psychological injuries;
- whether the tariff should cover injuries with a duration of 12 months rather than 24;
- how any definition should be amended;
- the protection of the rights of legitimate claimants;
- whether the Bill should apply to people injured while driving in the course of their employment (including, for example ambulance drivers and police officers);
- whether insurance companies investigate claims properly.

Lord Keen said in response that:

- removing the back and shoulder from the definition would significantly reduce the number of claims subject to measures in the Bill, and would encourage claims displacement into other areas;
- reducing the injury duration of affected claims to 12 months would have the negative effect of encouraging claims displacement or claims inflation;
- the removal of the term "psychological" from the clause would result in the reduction of damages for a substantial number of personal injury claims outside the scope of the proposed reforms;
- a person driving in the course of their employment who suffered a whiplash injury because of driver negligence would not have a claim against their employer – the insurer of any third-party driver whose negligence caused the injury would be responsible; and a person cannot make a claim in respect of their own negligence; there was no reason to distinguish between a claimant who was driving in the course of their employment and a claimant who was not.

Damages for whiplash injuries

The Bill

Clause 3 would enable the Lord Chancellor to make regulations, under the affirmative resolution procedure, to set out the amount of damages

[91] HL Deb 12 June 2018 c1589

for pain, suffering and loss of amenity and minor psychological injuries, payable in respect of whiplash injuries of a duration up to two years.

If a person suffered injuries in addition to those dealt with in the regulations, the Court could award damages for pain, suffering and loss of amenity of an amount which reflected the combined effect of the person's injuries – it is specifically provided that this would be subject to the limits imposed by the regulations.

Clause 4 is a new clause added by way of Government amendment at Report stage. It provides for a review of the tariff to be undertaken no later than three years after the date that it first comes into force and then every three years. The Lord Chancellor would be required to publish and lay before Parliament a report of each review.

In its Delegated Powers Memorandum, the Government said that it was appropriate for the content of the tariff to be set out in regulations rather than in primary legislation because it would need to be reviewed from time to time:

> First, a fixed sum of money may require adjustment from time to time to make reasonable allowance for the effect of inflation. Secondly, PSLA is not capable of precise quantification in the way that a financial loss is, and there is an element of flexibility needed to reflect possible changes in society's perception of the value of such a loss over time. Thirdly, there is a possibility of a need to change the parameters of the categories of the tariff to adjust or refine the approach to different severities of injury should this become necessary in future and in the light of experience over time.

Delegated Powers and Regulatory Reform Committee report

The Committee said that it was unconvinced by the Government's reasons for the inclusion of the order making power.

Among other things, the Committee was not persuaded that the matter should be left to the Lord Chancellor:

> We are not convinced that the Lord Chancellor will make a better job of this than the judges, who have had decades of experience dealing with damages for personal injury at the bar and on the bench. …We also agree with the [Motor Accident Solicitors Society] that it is not appropriate for the Lord Chancellor to be granted powers to make provision for damages relating to "minor psychological injuries" occasioned by the whiplash injury. If this is not to be determined by the judges, it would be better determined by independent medical experts rather than by Government.

The Committee considered that the proposed delegation of power was inappropriate:

> **In our view it would be an inappropriate delegation of power for damages for whiplash injury to be set in a tariff made by Ministerial regulations rather than on the face of the Bill. The tariff should be set out on the face of the Bill, albeit amendable by affirmative statutory instrument**.[92]

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92 House of Lords Delegated Powers and Regulatory Reform Committee, 22nd Report of Session 2017–19, HL Paper 123, paragraph 13

Draft Whiplash Regulations

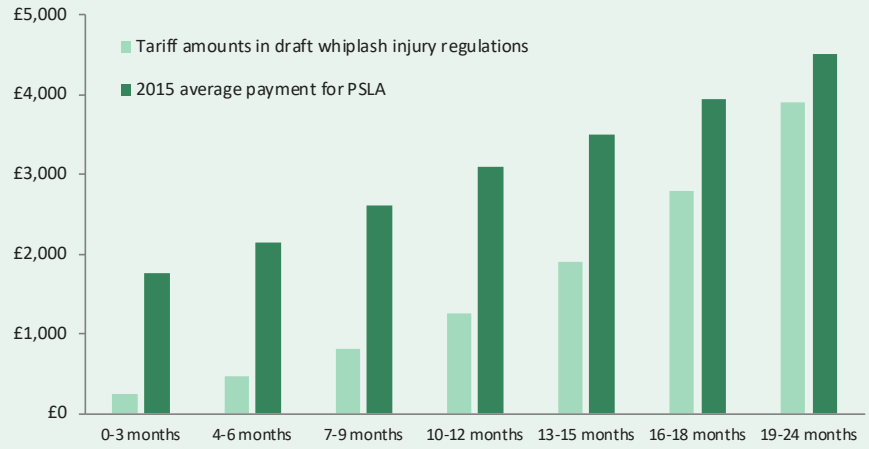
Regulation 3 would provide the tariff. The table and chart below includes the figures in the draft regulations, and also other figures, for the purpose of comparison:

Proposed unified tariff amounts compared to 2015 average payment

Injury Duration	Tariff amounts in draft whiplash injury regulations	2015 average payment for PSLA	Judicial College Guideline (JCG) amounts (13th edition) Published September 2015	Judicial College Guideline (JCG) amounts (14th edition) Published September 2017
0-3 months	£235	£1,750	Up to £2,050	Up to £2,150
4-6 months	£470	£2,150	£2,050 to £3,630	£2,150 to £3,810
7-9 months	£805	£2,600	£2,050 to £3,630	£2,150 to £3,810
10-12 months	£1,250	£3,100	£2,050 to £3,630	£2,150 to £3,810
13-15 months	£1,910	£3,500	£3,630 to £6,600	£3,810 to £6,920
16-18 months	£2,790	£3,950	£3,630 to £6,600	£3,810 to £6,920
19-24 months	£3,910	£4,500	£3,630 to £6,600	£3,810 to £6,920

Source: Part 1 of the Government Response to: Reforming the Soft Tissue Injury ('whiplash') Claims process, Cm 9422, February 2017 and Draft Order laid before Parliament under sections 1(5), 2(11), 3(6) and 4(5) of the Civil Liability Act 201X.

Proposed tariff amounts are less than the average payment in 2015 especially for injuries with a shorter duration



Source: Part 1 of the Government Response to: Reforming the Soft Tissue Injury ('whiplash') Claims process, Cm 9422, February 2017 and Draft Order laid before Parliament under sections 1(5), 2(11), 3(6) and 4(5) of the Civil Liability Act 201X

House of Lords Committee stage debate

At Committee stage, the Lords debated who should be responsible for setting the tariff, the amounts it should include, and whether the original tariff, at least, should be included in the Bill rather than in regulations.

Lord Sharkey questioned whether damages should still be determined by application of the Judicial College Guidelines. He asked how the proposed (much lower) tariff amounts had been decided and whether there had been a target reduction in the cost of total damages awarded. He considered that the proposed tariff looked "arbitrary and a huge transfer of money from claimants to motorists via insurance companies".[93]

Lord Faulks considered that the purpose behind the reforms was to provide certainty and to make the awards "reasonably modest so as to provide less of an incentive for those who would seek to make

93 HL Deb 10 May 2018 c305

fraudulent claims". He accepted that the losers would be genuine claimants who would get a lesser sum than previously, but suggested that "in the round" this was a "sensible policy decision".[94]

The Earl of Kinnoull considered the tariff to be a political matter:

> The problem that we are trying to cope with is a widespread low-level fraud that is afflicting our country. It is easy money offered by the claims industry for people following what are probably genuine motor accidents. …I feel that as it is a political and social problem it must have a political solution, and it cannot really have a judicial solution.[95]

Lord Marks of Henley-on-Thames could not see the justification for prejudicing genuine claimants:

> It is genuine claimants who are made to suffer. I cannot see the justification for that in any of the evidence that the Government have produced. We accept entirely that there is a problem with fraud. We are fully behind attempts to tackle fraud by eliminating, or at least reducing, fraudulent claims. But to remove the right to fair damages for claimants in these particular types of cases does not seem to be an appropriate response to this problem in a civilised society.[96]

Lord Marks raised concerns about the evidence base:

> One of our problems with the present proposals is that there is no evidence base for a recent increase in the number of fraudulent claims. We entirely accept the case that the noble and learned Lord, Lord Keen, made both on Second Reading and today that there is a wide prevalence of fraudulent claims that we have to tackle. However, there is not a wide base of evidence for an increase in such claims, nor is there sufficient evidence of how many claims are fraudulent or genuine. There is certainly no evidence that only the fraudulent claims would be deterred and that the genuine claims would continue. That worries me seriously, because the noble and learned Lord suggested earlier today that a genuine claimant might continue whereas a fraudulent one might be deterred. We simply do not accept that. It is just as likely—and I say this also without an evidence base—that genuine claimants would be deterred because the amount at stake had become so low, even though they had a fair claim.[97]

Lord Keen said that the level of the tariff was a consequence of the steps the Government was taking to address the claims culture:

> We have had regard to the present level of damages awarded in these cases, we have had regard to expert input about how we can deal with the claims culture that has built up, and we have taken the view on the level of tariff required to implement the policy decision that we have made to deal with this emerging problem.[98]

Lord Keen added that the tariff was not based on a mathematical formula or percentage. He spoke of the political nature of the decision:

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94 HL Deb 10 May 2018 c306
95 HL Deb 10 May 2018 c307
96 HL Deb 10 May 2018 c308
97 HL Deb 10 May 2018 c309
98 HL Deb 10 May 2018 c311

> Again, I want to emphasise that this is essentially a matter of policy to deal with a very particular problem. It is a political decision; it is not one that we consider is for the judges; it is one that is ultimately for the Lord Chancellor to deal with in his capacity as a Minister.[99]

Lord Keen also addressed the question about targets:

> I am not aware of there having been any target saving. As I sought to indicate earlier, this was rather an approach from the other direction: what policy is required? Effective policy is required to deal with the problem facing us.[100]

House of Lords Report stage debate

At Report stage, former Lord Chief Justice, Lord Woolf (Crossbench) spoke to an amendment intended to delete what was then Clause 2 (the power for the Lord Chancellor to set the tariff). He said that establishing the right level of damages was "a highly complex process of a judicial nature" and that damages might vary from case to case, making the fixed tariff inappropriate:

> Another well-established legal principle is that if you are wrongfully injured, the wrongdoer has to take the victim as he finds them. The effect of whiplash injuries, with which we are concerned, can vary substantially according to the physical and mental sturdiness of the victim. This means that the appropriate amount of damages for a whiplash injury can vary substantially when applying the rule to which I referred. I suggest that they are not suited to a fixed cap, as proposed by the Government. [101]

Lord Woolf considered it unlikely that the cap on damages would succeed "in its commendable objective of preventing fraud", but would interfere with the small claims court process. He said that the proposal "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".

Lord Woolf considered that the whole of the Judicial College Guidelines would be affected by interference with part, and challenged the Government's assertion that the guidelines are too high. He also said that whiplash claims were not alone in being affected by exaggeration:

> I accept that there is a problem with exaggerated claims being made, particularly for whiplash injuries. However, this can happen in a multitude of different proceedings that come before the courts. Whiplash is far from unique. As examples, I refer to holiday claims, industrial deafness claims, and so on.

Lord Woolf did not think that the proposed reforms would deter a dishonest claimant from making a false claim: "All that he needs to do to achieve that purpose is to make a false claim that is outside the limits of the damages now proposed". He said that the proposals were unjust:

> In any event, matters of legitimate concern cannot justify fixing damages in a manner which departs from that normally adopted in assessing the damages to which a claimant is entitled. Even

99 HL Deb 10 May 2018 c314
100 HL Deb 10 May 2018 c315
101 HL Deb 12 June 2018 c1593

> when the amount involved appears to be modest, claimants are entitled to have the damages to which they would normally be entitled. To deprive them of this involves discrimination against legitimate claimants, irrespective of their means. The consequence is that they do not receive the compensation to which they would be entitled if the same pain or suffering was not caused by whiplash. This is not what a system of justice should do.

Lord Marks of Henley-on-Thames supported Lord Woolf. He agreed with the Government's objective of reducing fraudulent whiplash claims, but did not consider that "the proposed arbitrary reduction in damages for all claimants, fraudulent or genuine, coupled with removing judges from the assessment of damages, is a proper way in which to address it".[102] He said that genuine claimants would lose out as against road accident claimants with other injuries; or as against claimants who sustain whiplash injuries in accidents not covered by the Bill, or as against claimants who suffer injuries of whatever type in other circumstances.

Peers also debated other amendments relating to the tariff including:

- the amount of the tariff and who should determine it;
- whether the proposed uplift in exceptional circumstances was too restrictive;
- whether the Lord Chancellor should be required to consult the Lord Chief Justice before setting the tariff;
- whether the tariff should be set out in the bill, rather than in regulations;
- whether the duration of the injury subject to the tariff should be 12 months rather than two years.

In response, Lord Keen of Elie reiterated that this was a political matter and "a policy that requires deterrents".[103] He thought the tariff was "the only reasonable way forward":

> … the number of whiplash claims remains too high. That is why the Queen's Speech confirmed legislation to meet our manifesto commitment to reduce the cost of insurance for ordinary motorists by cracking down on exaggerated and fraudulent whiplash claims. It is why this Bill now provides for a tariff of predictable damages for pain, suffering and loss of amenity. In my respectful submission, it is the only reasonable way forward. The tariff applies to all whiplash claims with an injury duration of up to 24 months on an ascending scale. We believe that those levels are fair and proportionate to genuine claimants but should work to disincentivise unmeritorious claims and reduce the cost to the consumer. I emphasise that we are dealing with claims where pain and suffering and loss of amenity has a duration of less than 24 months. We are not dealing with major, catastrophic personal injury.

Lord Keen considered that "the enduring scale of the problem justifies giving the role of setting the tariff to the Lord Chancellor". He argued that it was a "carefully targeted approach" and was not "a widespread

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102 HL Deb 12 June 2018 c1596
103 HL Deb 12 June 2018 c1617

challenge to the judicial role under the common law with regard to damages".

Lord Keen said that that the current system, which used the Judicial College guidelines, had "led to compensation levels that are out of step with the level of pain and suffering endured as a result of these injuries".

Lord Keen indicated that he would be moving another amendment at Third Reading to introduce a requirement for the Lord Chancellor to consult the Lord Chief Justice before setting the tariff:

> I want to touch on Amendment 12, spoken to by the noble and learned Lord, Lord Judge. We consider this amendment helpful. It seeks to introduce a requirement for the Lord Chancellor to consult the Lord Chief Justice before setting the tariff. Within the framework of the Lord Chancellor setting the tariff through regulations, the Government agree that introducing this requirement would be helpful to ensure that we can reflect the views of the judiciary and we therefore propose to bring forward at Third Reading an amendment to require the Lord Chancellor to consult the Lord Chief Justice before setting or amending the tariff.[104]

No such amendment was moved at Third Reading. It is understood that this was for procedural reasons and that the Government intend to move the amendment in the Commons.[105]

Lord Keen resisted the other proposed amendments, "particularly those that seek to affect the reasonable and necessary aim of this whole policy".

Lord Woolf pressed for a vote on the amendment seeking to delete what was then Clause 2 (Damages for whiplash injuries):

> I would suggest that the vital feature at the core of my case for deleting Clause 2 is very clear: it results in injustice and it is known to result in injustice. Indeed, no one can deny that it results in injustice. There has never been a case where legislation deliberately introduces injustice into our law. It may be that it is only in regard to small claims, but surely it is important that we pause before we do that.[106]

The amendment was defeated by 218 votes to 205.

Uplift in exceptional circumstances

The Bill

Clause 5 would enable the Lord Chancellor to make regulations to provide for the judiciary to have power, in exceptional circumstances, to apply an uplift, of a maximum specified percentage (up to 20% under draft Regulation 4), to the amount of damages payable under the tariff.

A Government amendment added at Report stage would require the court, before applying the uplift, to be satisfied not only that the degree of pain suffering or loss of amenity makes it appropriate to do so, but also that either one or more of the whiplash injuries is exceptionally

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104 HL Deb 12 June 2018 cc1619-20
105 Ministry of Justice, personal communication, 4 July 2018
106 HL Deb 12 June 2018 c1620

severe, or the injured party's circumstances which increase the pain, suffering or loss of amenity caused by their injuries are exceptional.

The regulations would be made under the affirmative resolution procedure and after consulting the Lord Chief Justice.

House of Lords Committee stage debate

Lord Hodgson of Astley Abbotts (Conservative) considered that there were strong arguments for limiting the amount by which exceptional awards could exceed the basic tariff and for putting the limit in the Bill:

> I wish to see judicial discretion limited because I think this is a political matter, not a matter for judicial discussion and discretion. Therefore the limit should appear in the Bill—as a percentage, not as an absolute amount, because if the tariff goes up, obviously the amount of an exceptional award should also eventually increase.[107]

He said that putting the percentage in the Bill was in the interests of stability and clarity:

> …stability because if the exceptional amount could be increased by the court without limit the temptation for claimants to game the system would be greatly increased, and clarity because such a limit would facilitate the setting of the rates of motor insurance and reduce the volatility in the amount of such rates year by year. That is an important distinction to remove absolute discretion from the courts, to bring it into the political arena and to set that percentage in the Bill so it is clearly a political, parliamentary decision.[108]

Lord Keen of Elie disagreed that this should be put in the Bill.[109]

No settlement of claim without medical evidence

The Bill

Clauses 6 to **9** would deal with the ban on offering, soliciting or accepting offers to settle whiplash claims before seeing medical evidence. Further details about the medical evidence and who might provide it would be set out in regulations made under the affirmative resolution procedure.

Breach of the ban would not make the agreement to settle the whiplash claim void or unenforceable. The breach would be a regulatory matter rather than a criminal offence.

The ban would apply to "regulated persons" (as defined in **Clause 9,** and including, for example, insurers, solicitors and barristers). It would be monitored and enforced by the "relevant regulator" (again, as defined in **Clause 9**, and including, for example, the Law Society and Bar Council) who would have power to make provision in rules for that purpose. When the relevant regulator is the Financial Conduct Authority (FCA), the Treasury would have power to make regulations to enable the FCA to monitor and enforce the ban.

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107 HL Deb 10 May 2018 c328
108 HL Deb 10 May 2018 cc328-9
109 HL Deb 10 May 2018 c329

The Lord Chancellor would have power, by regulations made under the negative resolution procedure, to add to the lists of both regulated persons to whom the ban should apply and relevant regulators.

Draft Whiplash Regulations

Regulation 5 would specify that medical evidence must be provided by way of a fixed cost medical report from an accredited medical expert selected via the Medco Portal.

House of Lords debate

At Committee stage the Lords considered:

- the conduct of claims management companies, and cold calling; and
- how insurers could be required to pass on savings to motorists – the effectiveness of the reforms.

Lord Keen of Elie referred to the insurance sector's commitment to pass on savings and spoke of the highly competitive market. He said that the Government would monitor the reaction of the insurance sector to the reforms.

Lord Keen also spoke of recent measures dealing with cold calling and claims management companies.

At Report stage, Lord Sharkey returned to the issue of cold calling, expressing concern "at the extent to which cold calling will continue to drive fraudulent claims for RTA whiplash injuries".[110] He moved an amendment, and spoke to another, with the intention of "cutting off the revenue stream of cold callers". He proposed extending the ban on settlement of whiplash claims before medical report, in order to cover whiplash claims arising from cold calling.

Replying for the Government, Baroness Vere of Norbiton said that, while she fully understood the motivation behind the amendments, she did not consider them appropriate because they could discriminate against genuinely injured claimants.[111] Baroness Vere set out what had been done to limit cold calling:

> Noble Lords will be aware that not all cold calls are illegal. The Financial Guidance and Claims Act 2018 introduced a ban on cold calling made by any person in which the call relates to claims management services, including personal injury, except where the customer has consented to such calls. This will reduce the number of uninvited nuisance calls received by consumers and will be enforced by the Information Commissioner's Office. As well as government action to curb cold calling in relation to claims management services, lawyers are already banned by the Solicitors Regulation Authority's code of conduct from undertaking cold calling.
>
> The Government are of the view that these measures, taken together with the new rules imposed by the general data protection regulation and the Data Protection Act 2018, mean that consumers will receive far fewer unwanted calls from CMCs

110 HL Deb 12 June 2018 c1626
111 HL Deb 12 June 2018 c1629

> than they currently do. … The 2018 Act also introduces a tougher regime for claims management companies, by transferring responsibility for their regulation to the FCA. The FCA has a wide range of enforcement powers, and I take this opportunity to point noble Lords towards a detailed consultation published just last week by the FCA, which spells out the rigorous steps it proposes to take in future in relation to regulating CMCs.
>
> The Government agree that social nuisances such as cold calling must be curbed, but replicating actions already enshrined in other legislation is not the way to do it.[112]

Lord Marks sought clarification that the cost of obtaining the compulsory medical report would be recoverable by all successful claimants, even in the small claims track.[113] In response, Baroness Vere spoke of recoverability:

> I start by reassuring noble Lords that the cost of medical reports is already recoverable in personal injury claims where the defendant insurer has admitted any part of liability. They will continue to be recoverable following these reforms, including in the small claims track following the proposed increase of the limit to £5,000.[114]

Lord Sharkey also moved an amendment intended to oblige the Treasury to make regulations specifying that the FCA would require all motor insurers to publish a report on the savings made as a consequence of the whiplash reforms in the Bill, and how and to what extent these savings had been applied to reduce motor insurance premiums. The FCA would then have to publish a reasoned assessment of whether the insurers had passed on savings and would have power to compel insurance companies to pass on savings if they had not done so, or done so sufficiently. The amendment included timeframes.[115]

Lord Keen of Elie confirmed that **the Government would develop an amendment to be tabled in the House of Commons**, "that meets these requirements and provides an effective means for reporting on the public commitment made by the insurance sector, showing that it results in savings being passed on to consumers and thereby holds insurers to account".[116] Lord Keen confirmed this commitment at Third Reading.[117]

2.7 Reaction by interested parties

Arguments for and against the Government's proposals

During the process of policy development which followed the announcement in the 2015 Autumn Statement, the reaction from interested parties has been mixed. In general, lawyers' groups, including the Law Society and the Association of Personal Injury Lawyers, are among those who have raised concerns about the Government's proposals, while the Association of British Insurers (ABI) has welcomed the proposed reforms. Some examples are set out below.

112 HL Deb 12 June 2018 c1629
113 HL Deb 12 June 2018 c1628
114 HL Deb 12 June 2018 c1628
115 HL Deb 12 June 2018 cc1630-2
116 HL Deb 12 June 2018 c1632
117 HL Deb 27 June 2017 c199

The Law Society

The Law Society considers that fraudulent claims should be addressed by targeting the fraudsters – "not the vast majority of honest claimants who have been injured and bring genuine claims."[118]

It welcomed the proposal to ban pre-medical settlement of whiplash claims, but called for this to be extended to all claims.

The Law Society has expressed scepticism that any savings will be passed on by insurance companies, adding that "the insurance industry has significant form in falling short when it comes to passing savings to its customers":

> The Association of British Insurers (ABI) conceded to the Commons Justice Select Committee during a session on personal injury reform that the insurance industry saved 'hundreds of millions of pounds' from reforms to personal injury in 2013 and that the number of whiplash claims have come down in the last year.
>
> The findings of an economic study by Compass Lexecon* also show that gains from the government plans will boost insurers' profits. At the same time the plans would curtail the number of people who can claim for soft tissue injury caused through no fault of their own.[119]

The Law Society warned that the Bill would "create the paradox that someone hurt in a road traffic accident will be entitled to less compensation than if they had sustained the injury another way". The then Law Society president Joe Egan said:

> We are concerned about the lack of clarity because fixed levels of compensation are set to be imposed for whiplash injuries. The Law Society is therefore calling for the definition of whiplash to be set by medical experts.[120]

Association of Personal Injury Lawyers (APIL)

APIL has spoken of "an assault on rights" and questioned whether insurers would pass on savings:

> 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

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118 Law Society, Ministry of Justice plans mean victims of negligent drivers won't get legal help, 23 February 2017 [accessed 23 August 2018]

119 Ibid. Note to text "*The study by Compass Lexecon focused on the government's impact assessment of proposed changes to the soft tissue injury claims process and an increase in the small claims court limit. It was commissioned by the Law Society, the Association of Personal Injury Lawyers (APIL), the National Association of Motor Accident Solicitors (MASS) and carried out by economists at Compass Lexecon"

120 Law Society, Lords' collision with new whiplash Bill shows legislation has a long way to go, 26 April 2018 [accessed 23 August 2018]

> 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.[121]

APIL described whiplash as "a misunderstood personal injury" and said that "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.

APIL again questioned the Government's figures and the extent of fraudulent claims:

> 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.

APIL considered the proposed levels of compensation to be "derisory, offensive and certain to result in under-compensation", adding:

> 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.

Access to Justice

The group Access to Justice is campaigning against the proposals. In a news release issued when the Bill was announced, its spokesperson, Andrew Twambley, said that, based on the figures, the Bill was unnecessary. He highlighted the potential inequality of arms:

> The government is seeking to fix a problem that is already being fixed, without the need for legislation. Whiplash claims have fallen sharply in the last twelve months, and the cost of claims has also fallen sharply.
>
> The government's own figures show that the savings accruing from these reforms are likely to be £16-18, [per motor insurance premium] not £35, as the MoJ contends, and only three insurers have said they'll give those savings to their customers. Nearly 80% of the public say the insurers will not hand back any money.
>
> For the sake of £18, 600,000 people injured in road traffic accidents each year will be denied access to legal advice if they want to go to court and claim for their injuries, but if they do go to court, insurers will continue to be able to call on a battery of lawyers to defend their interests.

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[121] Association of Personal Injury Lawyers, Briefing: Civil Liability Bill – House of Lords second reading – April 2018 [accessed 23 August 2018]

> MPs will now have the chance to look at the government's proposals in detail, and they will see that that there is little substantive reason for reform, beyond keeping the insurance industry happy.
>
> We believe there are better ways to regulate the market without the sledgehammer approach of legislation. The government has a golden opportunity to work with all sides of the industry to find a solution that protects ordinary people and ensures they continue to have access to justice."[122]

Previously, Martin Coyne, chairman of Access to Justice, was quoted as drawing attention to the potential loss of jobs:

> "We all agree it's necessary to reduce fraudulent and frivolous claims, and get rid of cold calling, but not at the expense of tens of thousands of jobs and for the sole benefit of insurance companies," said Mr Coyne.
>
> "There are better ways to maintain the historic and important rights of injured people to receive redress yet also tackle fraudsters who try and game the system."[123]

Motor Accident Solicitors Society (MASS)

Simon Stanfield, chair of the Motor Accident Solicitors Society, has argued that "the Government's whiplash reforms discriminate against legitimate claimants, whose rights need to be protected".[124]

MASS considers that it should not be left to the Lord Chancellor to set the damages for whiplash:

> … we do not believe that it is appropriate that the Lord Chancellor set the levels of damages for accident victims under the proposed tariff. The Judicial College's Guidelines have provided a clear and logical framework for the assessment of damages in personal injury cases since they were first published in 1992, and the courts have been assessing damages since the creation of the law of tort. We believe that it is entirely consistent and logical that the judiciary continue to determine damages under the revised regime. Once again, the Delegated Powers Committee agreed, saying: "We are not convinced that the Lord Chancellor will make a better job of this than the judges, who have had decades of experience dealing with damages for personal injury at the bar and on the bench."[125]

Association of British Insurers (ABI)

The ABI welcomed the Bill saying that it would be "great news for motorists". ABI Director General, Huw Evans said:

> People and businesses are paying more for their motor insurance than ever before and we need changes to the law to tackle some

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122 A2J Release: Civil Liability Bill Announced (undated) [accessed 23 August 2018]
123 Marion Dakers, "Whiplash crackdown could cost 35,000 jobs, lawyers claim", Telegraph, 23 January 2017 [accessed 23 August 2018]
124 MASS website, "MASS' Simon Stanfield on how whiplash reform sacrifices legitimate claims" [accessed 23 August 2018] (full article stated to be in Insurance Post, 10th August 2018)
125 MASS website, "Challenging the politicisation of the judicial process" [accessed 23 August 2018] (article stated to have first appeared in Modern Insurance Magazine Issue 31, June 2018)

> of the root causes. Soft tissue injury claims have been rising year on year since 2014 as cold calling claims firms have thrived, driving up the cost of insurance.
>
> This Bill will ensure people in England and Wales receive fair compensation while reducing excess costs in the system. In a competitive market such cost benefits get passed through to customers, as they did after previous reforms in 2012 when average motor premiums fell by £50 over the next two years.[126]

The ABI has published some "mythbusters" including:

> Fiction - These reforms are not needed as whiplash claims have been falling.
>
> FACT:
>
> - Despite a series of reforms and a fall in the number of road traffic accidents there has been no discernable fall in soft-tissue claims.
> - Latest data shows that since 2005 motor personal injury claims are around 40% higher while road accidents have fallen by nearly 30%.
>
> Fiction - Insurers cannot be trusted to pass on any savings to customers.
>
> FACT:
>
> - Yes, they can – insurers have done it before and can do it again. Twenty-six ABI members, representing most of the motor insurance market, have given a written commitment to the Government to pass on cost benefits to customers if the package of measures in the Bill become law.
> - Insurers have a good track record of passing on savings to customers. Following the introduction of the original compensation reforms, between 2012 and 2014 the average private motor premium paid fell by around £50 a year from £437 to £387.
> - Motor insurance remains very competitive, with customers able to shop around for the best deals.
>
> (…)
>
> Fiction - Insurers are only interested in further boosting their profits
>
> FACT:
>
> - This just isn't supported by the facts. Since 1994 the motor insurance market has only made an underwriting profit in one year - 2015.
> - Insurers want honest customers to benefit from a fairer system.[127]

Insurance Fraud Bureau (IFB)

The IFB considers that "reducing the amount of excess cash in the system" will be beneficial in fighting fraud:

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126 ABI, New Civil Liability Bill would be 'great news for motorists' says ABI, 20 March 2018 [accessed 23 August 2018]

127 ABI, Civil Liability Bill Mythbuster [accessed 23 August 2018]

> Ben Fletcher, Director of IFB said, "One of the reasons that organised crime groups have orchestrated 'crash for cash' scams for far too long is that they're perceived as low risk and high reward. The industry has been working hard to deal with this myth and has been successful in fighting back, with over 1190 people arrested and 498 convicted.
>
> "It's due to the amount of money in the system that fraudsters are perceiving this as an easy target and exploiting it, netting upwards of tens of thousands of pounds. By reducing the amount of excess money in the system, we hope to see a positive effect in helping to tackle these scams, as the criminals recognise that the risks are higher and the rewards are lower than they once were.
>
> "The effects and harm caused by these scams is wide reaching from those plagued by nuisance calls. It is also a burden on the innocent policyholder who is asked to cover the cost and the road users whose safety are being put at risk by criminals targeting them to deliberately cause a collision. In taking some of the excess cash out of the system, we hope that it will help to positively influence the level of 'crash for cash' fraud that we see."[128]

Ben Fletcher, Director of the IFB, has said that the Government's whiplash reforms "will undoubtedly help to curb the compensation culture that blights the UK", adding:

> The Bureau therefore welcomes the Government's commitment to progressing with reform, which will help tackle this problem at its root cause.[129]

[128] Insurance Fraud Bureau, IFB responds to Government whiplash reforms, 23 February 2017 [accessed 23 August 2018]

[129] Insurance Fraud Bureau, IFB welcomes confirmation of Government commitment to the whiplash reforms, 21 June 2017 [accessed 23 August 2018]

3. Part 2: Personal injury discount rate

3.1 Background

A fundamental principle of insurance is that insurance only provides compensation for an event – loss, injury, etc. and that the amount paid should not exceed the loss. Perverse disincentives might arise if insured people got more for an incident than they had lost.

In motor insurance this principle often gives rise to the unpopular situation where the insurer 'writes off' a crashed vehicle if the cost of repair exceeds the cost of buying a similar vehicle.

In cases of compensation for long term disability due to an accident, for example, compensation is normally paid as a lump sum up front and is subject to an investment test. The agreed annual compensation, multiplied by the likely period it is needed for, produces a total compensation figure. However, a lump sum paid now, can be invested to produce a stream of income returns over that period, hence, the actual lump sum needed *now* is reduced by the likely investment returns over the period.

This rate of return - the interest rate - assumed in this exercise is called the discount rate. It is currently set by Section 1 of the Damages Act 1996.

The higher is the discount rate, the lower is the initial lump sum awarded because the victim is assumed to be able to earn a lot by investing it. A lower discount rate implies lower investment returns, so the initial lump sum must be higher.

In February 2016 the Justice Secretary announced that the discount rate would be reduced from 2.5% to -0.7%. Since insurers only pay out the discounted compensation figure and premiums are set to meet likely claims, a lower discount rate inevitably means higher pay outs and, one expects, higher premiums to meet them.

3.2 The decision

Because of its market sensitivity the official announcement about the decision was made first to the Stock Exchange. The regulatory notice is shown in full below. It sets out the legal framework within which the decision was taken and the reasons for the change in rates:

> Under the Damages Act 1996, I, as Lord Chancellor, have the power to set a discount rate which courts must consider when awarding compensation for future financial losses in the form of a lump sum in personal injury cases.
>
> The current legal framework makes clear that claimants must be treated as risk averse investors, reflecting the fact that they may be financially dependent on this lump sum, often for long periods or the duration of their life.

> The discount rate was last set in 2001, when the then-Lord Chancellor, Lord Irvine of Lairg, set the rate at 2.5%. This was based on a three year average of real yields on Index Linked Gilts. Since 2001, the real yields on Index Linked Gilts has fallen, so I have decided to take action.
>
> Having completed the process of statutory consultation, I am satisfied that the rate should be based on a three year average of real returns on Index Linked Gilts. Therefore I am setting it at minus 0.75%.[130]

In making the statement the Lord Chancellor was acutely aware of both the private and public-sector implications of the rate change, for example, it would affect the NHS and compensation claims against it. He continued:

> The Government will review the framework under which I have set the rate today to ensure that it remains fit for purpose in the future. I will bring forward a consultation before Easter that will consider options for reform including: whether the rate should in future be set by an independent body; whether more frequent reviews would improve predictability and certainty for all parties; and whether the methodology - which in effect assumes that claimants would invest only in index-linked gilts - is appropriate for the future. Following the consultation, which will consider whether there is a better or fairer framework for claimants and defendants, the Government will bring forward any necessary legislation at an early stage.
>
> I recognise the impacts this decision will have on the insurance industry. My Rt. Hon. Friend the Chancellor will meet with insurance industry representatives to discuss the situation.[131]

The decision was not entirely unexpected in the sense that market conditions – especially market interest rates have altered significantly since the last review and change in 2001. The historically low rates of interest ever since the financial crisis are now out of line with a 2.5% investment return in non-risky assets.

It was also expected because there had been a lengthy consultation exercise which looked at how it should be calculated. The Association of British Insurers (ABI) described this here:

> The process of reviewing the discount rate and the methodology in setting it began of course in August 2012, after a review had first been announced in November 2010. In August 2014 it was revealed that a panel of experts was to be appointed to prepare a report giving expert investment advice to assist with the review but the panel only began its considerations in March 2015. It is known that the experts have reported to the MoJ but the report is yet to be published. In a separate exercise that started in the summer, the analytical services team of the MoJ has been carrying out research to improve the quality of advice to Ministers on the impact of any change in the rate.[132]

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130 Stock Exchange Regulatory Notice 8872X; 27 February 2017
131 Stock Exchange Regulatory Notice 8872X; 27 February 2017
132 ABI website 8 December 2016

3.3 The consultation

The consultation document referred to can be found here: Damages Act 1996: The Discount Rate Review of the Legal Framework. It should be noted that this was a consultation in *how* the rate should be calculated, rather than should the rate be changed under the existing rules.

The consultation looked at whether the underlying assumption of a risk-averse investment approach should be modified, so that the rate can be set by reference to higher risk investments, which could produce a higher discount rate, and thus lower lump sum awards (and premiums) than under the present law.

Secondly, given the potential problems calculating the long-term adequacy of lump sum awards (getting the sums right) the consultation looked at whether there was a case for encouraging the use of periodical payments. The consultation explained how practice had diverged from the legal theory and the consequences arising from this:

> At present the discount rate is set by reference to the expected rates of return on certain types of safe investments. However, there is evidence that recipients of these lump sums do not invest in the cautious way that is envisaged by the guidelines. Instead, the initial evidence indicates, they seem to invest in mixed portfolios, including higher risk investments. This may be the result of a number of factors, but it might suggest that the current legal parameters for setting the rate may produce a rate that is too low. This would result in over-compensation for claimants and extra cost for defendants and those who fund them. These unnecessary costs could unfairly increase the burden on taxpayers and consumers as ultimately they have to fund the payments by state bodies and private insurers. Conversely, if the rate is too high, it is the victims of wrongful personal injury who will suffer.
>
> The inherent uncertainty as to whether a lump sum award will fully compensate the injured person's losses, which is at least partly attributable to the application of a discount rate, can, however, be avoided because compensation can be taken wholly or partly in the form of periodical payments to meet the losses as they arise. These payments clearly have to be funded and come with their own advantages and disadvantages but they do avoid problems attributable to the application of a discount rate.[133]

3.4 The impact of the decision to change the rate

The insurance companies.

The main impact immediately reported was the impact on profits and on the solvency of the companies. Insurers had to make statutory reports to the Stock Exchange from where the following are drawn.

Direct Line

> The Group expects to recognise the New Discount Rate in its financial statements and also within its Solvency 2 ratio calculation for the year ended 31 December 2016. The Group has previously

133 Damages Act 1996: The Discount Rate Review of the Legal Framework

> disclosed in its 2015 Annual Report that its claims liabilities, at that time, were calculated using a discount rate of 1.5%.
>
> The Group currently estimates that the impact of moving to the New Discount Rate of -0.75% on the 2016 reported financials would be to:
>
> **reduce profit before tax by between £215 million and £230** million after reinsurance recoveries (including the impact on both ongoing and run-off business);
>
> increase the Combined Operating Ratio ("COR") for ongoing business by approximately 6ppts; and
>
> **reduce the Group's year end Solvency II capital coverage ratio** before dividends, to towards the higher end of the Group's target range of 140-180%. As at 30 June 2016, the Group's Solvency II coverage ratio was 184% after interim dividends.[134]

Esure Group

> As at 31 December 2016, the Group's reserve margin included an allowance of £2m (net) for a change in the Ogden discount rate to 0%. The discount rate announced today was lower than the Group had allowed for as at 31 December 2016 and subsequently the Group will see **a further net impact of £1m in 2017**. The Group continues to expect its combined operating ratio for 2016 to be within its original guidance of 98-99%.
>
> As at 31 December 2016, the Group's solvency coverage above its solvency capital requirement ("SCR") included an allowance of £3m for a change in the Ogden discount rate to 0%. As a consequence of the discount rate moving to minus 0.75%, **the Group's capital position in 2017 will be impacted by £2m.** The Group's 2016 solvency position will be in the upper half of its stated risk appetite (130-150% coverage of its SCR).

Admiral Group

> In order for the impact of the new rate to be reflected in the Company's 2016 results, Admiral has **decided to postpone the preliminary announcement of the results** for the year ended 31 December 2016 from 1 March 2017 to 8 March 2017.
>
> The reduction in the discount rate will have the effect of increasing the cost of personal injury claims, therefore also increasing the ultimate loss ratio for all business written up to the effective date, part of which will be earned and part unearned. The majority of the financial impact in respect of premiums earned during 2016 and prior years will be reflected as a one-off charge against 2016 second half profits. The balance (along with the impact on business written but unearned at the date of change) will be recognised as lower reserve releases and profit commission mainly over the subsequent three to five financial years as the affected claims settle.
>
> **The estimated total net financial impact of all claims settling at the new rate is £140m to £175m. The estimated net financial impact on 2016 reported profit is £70m to £100m.**

Whilst the ABI described the decision to cut the discount rate as 'crazy', the Association of Personal Injury Lawyers, welcomed the decision and

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[134] Stock Exchange Regulatory Notice ; 27 February 2017

said in a statement that "people already coping with the most severe injuries have been deprived of the help and care they need for years".[135]

Individuals

The strong expectation was that premiums would rise. It was thought that the biggest impact would be on those groups who one might reasonably expect to receive compensation covering the longest period of time. Logic suggest that this group would disproportionally include younger drivers who suffer permanent disabilities and have an award to cover 50 years or more. Comment in the press includes the claim that for young people "annual premiums could rise by up to £1,000" and "Drivers aged over 65 could also face an extra £300 charge, while the average comprehensive motor insurance policy could increase by up to £75 a year"[136] and "Consultants PwC estimated annual motor premiums would rise by £50- £75 on average".[137]

3.5 The Review

The ABI requested a meeting with the Lord Chancellor the day after the announcement was made. They issued a joint statement after:

> "Claimants must get the money they're entitled to following an injury in order to support their future needs. "It is important that going forward, personal injury discount rates are set at a level that is fair to both claimants and consumers. "The government will progress **urgently with a consultation on the framework for setting future rates**, and bring forward any necessary legislation at an early stage. "The industry will contribute fully to the upcoming consultation, and the government will carefully consider all evidence and arguments submitted."[138]

The MoJ consultation referred to was published in March 2017. It looked at:

- What principles should guide how the rate is set?
- How often should the rate be set?
- Who should set the discount rate?

It also considered whether sufficient use is being made of periodical payment orders instead of the single lump sum payment model.

The Response to the Consultation was published in September 2017. The Government's proposals were:

> There is clearly a need for a fairer and better framework for the setting of the discount rate. The Government intends to make the following changes to the law:
>
> > a. The rate is to be set by reference to expected rates of return on a low risk diversified portfolio of investments rather than very low risk investments as at present; and in assessing those rates the actual investment practices of

135 Reuters 27 February 2017
136 Daily Telegraph online 27 February 2017
137 Reuters 27 February 2017
138 ABI press release 28 February 2017

> claimants and the investments available to them should be considered. This will make the rate more realistic.
>
> b. The principles for the setting of the discount rate should be set out in statute.
>
> c. The rate is initially to be reviewed promptly after the legislation comes into force and, thereafter, at least every three years, with that period being re-set when the rate is changed. Reviews will be completed within 180 days of starting. This will avoid overlong delays between reviews, which will make changes in the rate more predictable and manageable.
>
> d. The rate is to be set by the Lord Chancellor with advice from an independent expert panel (other than on the initial review which would be by the Lord Chancellor with advice from the Government Actuary). HM Treasury will, as at present, also be a statutory consultee for all reviews. The panel will be chaired by the Government Actuary and include four other members having experience as an actuary, an investment manager and an economist and, finally, experience in consumer investment affairs.
>
> e. It will continue to be possible to set different rates for different types of cases, including by reference to the length of the award.

The key phrase was that set out in paragraph a) – "The rate is to be set by reference to expected rates of return on **a low risk** diversified portfolio of investments rather than **very low risk** investments". This small change of emphasis, it is calculated returns the rate to 0% - 1%, a range many insurers expected. In an article in Post Magazine[139], accountants Deloitte estimate that the move from minus 0.75% to plus 1% "could be (worth) in the range of £300m to £600m across the market". Estimates of the impact of the rate change on premiums were also reduced. Average reinsurance rates that might have risen by between 30% and 50% were now expected to rise by only 5% - 15%.[140]

3.6 New legislation

Draft clauses to effect the changes were published at the same time and the Justice Select Committee produced its Report which considered the draft clauses on 29 November 2017. It summarised the proposed changes to the system of setting the rate:[141]

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139 Post Magazine, October 2017, p9
140 Post Magazine, October 2017, p10
141 Justice Select Committee; *Pre-legislative scrutiny: draft personal injury discount rate clause;* HC 374 2017-9, November 2017

Status quo	New Proposals
Lord Chancellor sets rate after consulting Government Actuary and Treasury	Lord Chancellor sets rate after consulting expert panel and Treasury
No fixed review of discount rate	Discount rate set at least every 3 years
Assumptions about investment of lump sums derive from case law (Wells v Wells)	Assumptions derive from legislation
Rate should be set on the assumption that lump sums are placed in very low risk investments, by reference to yields on Index Linked Government Securities	Rate should be set on the assumption that the recipient of the relevant damages invests the relevant damages in a diversified portfolio of investments; using an approach that involves (1) more risk than a very low level of risk, but (2) less risk than would ordinarily be accepted by a prudent and properly advised individual investor who has different financial aims

Source: Justice Committee

The following summarises its main conclusions.

Compensation

There was general approval from the Committee and witnesses that the Government is committed to the principle of 100% compensation for loss. However, achieving that is a practical impossibility on a sustained basis, hence the 100% aim might be more usefully defined.

There was a range of views about whether the current negative rate 0.75% left claimants over compensated or not. It was noted that the draft legislation bases the determination of the rate on claimant behaviour rather than on a defined set of 'risk free' investment instruments. Typically, claimants invest in low risk instruments which return much more than zero risk ones. In a typical case, therefore the claimant will get more than the award value. Whether this should be described as 'over compensation' or simply a reward for taking greater risk, was disputed.

Total compensation also depends on longevity too which claimants cannot predict with accuracy. In cases of long term care the rate at which care costs increase and the length of time they increase over will have a significant impact on the balance of over or under compensation.

All parties agreed that any investment adviser who only invested according to the legal basis (i.e. only in index linked gilts) would be "crackers". However, whatever the discount rate is set at (for example past returns) determines the forward investment strategy of claimants, because if they don't achieve a rate of return equal to the discount rate they will struggle to live. The discount rate at the point of the determination of quantum, fixes the sum available to invest. Over the remaining period claimants need to at least match that rate or be 'under' compensated.

Balancing costs and benefits

Much of the debate over the setting of an appropriate level of rate is set in the context of a zero-sum binary game: high rates good (for insurance industry), bad (for complainants) – and vice versa. Into this scenario the committee noted that Government was attempting to introduce a third factor, namely:

> the social benefits which would arise from lower insurance premiums and reduced clinical negligence costs resulting from the higher discount rate. The Command Paper argues that "The unrealistic assumptions currently being used" to set the discount rate:
>
> are having a significant effect on taxpayers through the additional cost of personal injury settlements paid by the National Health Service and other public sector bodies; and businesses and individual consumers through insurance premiums that are higher because awards of damages may be providing more than 100% compensation.[142]

The Report highlights the interrelationship of several of the variables in the calculation of an ideal discount rate. A lower rate, because it causes premiums to rise, raises insurance premium tax receipts, but under-compensation could impose public health costs if claimants could not finance their own treatment throughout their lives. It also notes the social justice aspects of the decision. Under-compensation would affect poorer people more than wealthier ones – they have less other resources to fall back on - with a possible policy imperative that:

> 88.We recommend that instead of targeting 100% compensation, neither "under" or "over" compensation, the Government should consider adopting as a target the median level of compensation to tend towards over-compensation; or should at least ensure that there are adequate safeguards to prevent significant under-compensation of the most vulnerable claimants.[143]

The Committee questioned whether there was sufficient evidence to think that premiums would fall as fast as they had risen, following the rate cut, if the rate was raised. It also focussed on the costs to the NHS in the payment of clinical negligence claims:

> 97.In March 2017, the OBR stated that the reduction in the discount rate to 0.75% would affect their fiscal forecast: "the Government has added around £1.2 billion a year to the … reserve to meet the expected costs to the public sector, in particular to the NHS Litigation Authority".[144]

3.7 The Bill

Part 2 of the Bill (clause 10) includes the provision about the discount rate. It amends the *1996 Damages Act* in the following particular:

> A1 Assumed rate of return on investment of damages: England and Wales
>
> (1) In determining the return to be expected from the investment of a sum awarded as damages for future pecuniary loss in an action for personal injury the court must, subject to and in accordance with rules of court made for the purposes of this section, take into account such rate of return (if any) as may from

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142 Justice Select Committee; *Pre-legislative scrutiny: draft personal injury discount rate clause;* Chapter 4

143 Justice Select Committee; *Pre-legislative scrutiny: draft personal injury discount rate clause;* Chapter 4

144 Justice Select Committee; *Pre-legislative scrutiny: draft personal injury discount rate clause;* Chapter 4

time to time be prescribed by an order made by the Lord Chancellor.

(2) Subsection does not however prevent the court taking a different rate of return into account if any party to the proceedings shows that it is more appropriate in the case in question.

(3) An order under subsection (1) may prescribe different rates of return for different classes of case.

(4) An order under subsection (1) may in particular distinguish between classes of case by reference to—

(a) the description of future pecuniary loss involved;

(b) the length of the period during which future pecuniary loss is
expected to occur;

(c) the time when future pecuniary loss is expected to occur.

(5) Schedule A1 (which makes provision about determining the rate of return to be prescribed by an order under subsection (1)) has effect.

(6) An order under this section is to be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament."

It is the proposed Schedule A1 to the Act which contains the 'meat' of the new proposals. Sub -paragraphs 2 and 3 of Paragraph 4 state (**author emphasis**):

The Lord Chancellor must make the rate determination on the basis that the rate of return should be the rate that, in the opinion of the Lord Chancellor, **a recipient of relevant damages could reasonably be expected to achieve** if the recipient invested the relevant damages for the purpose of securing that—

(a) the relevant damages would meet the losses and costs for which they are awarded;

(b) the relevant damages would meet those losses and costs at the time or times when they fall to be met by the relevant damages; and

(c) the relevant damages would be exhausted at the end of the period for which they are awarded.

(3) In making the rate determination as required by sub-paragraph (2), **the Lord Chancellor must make the following assumptions**—

(a) the assumption that the relevant damages are payable in a lump sum (rather than under an order for periodical payments);

(b) the assumption that **the recipient of the relevant damages is properly advised on the investment** of the relevant damages;

(c) the assumption that **the recipient of the relevant damages invests the relevant damages in a diversified portfolio of investments**;

(d) the assumption that the relevant damages are invested using an approach that involves—

> (i) **more risk than a very low level of risk**, but
>
> (ii) **less risk than would ordinarily be accepted by a prudent and properly advised individual investor** who has different financial aims.

A fine distinction is being enshrined in the law, between a risk averse recipient (but one who accepts some risk) and a normally risk averse investor.

Elsewhere the Schedule states that there will be regular reviews of the discount rate (within a three-year period) (paragraph 1) and that there will be an 'expert panel' to assist the Lord Chancellor in determining the rate (paragraph 5).

3.8 Reaction

Several insurance companies welcomed the decision on the discount rate. The CEO of AXA, described the Government's announcement as striking "the right balance between under and over compensation." Other insurance companies echoed this.[145]

An insurance lawyer said that the changes would be "broadly welcomed across the insurance industry".[146]

3.9 House of Lords debate

Consideration of the Bill in Committee began with a series of amendments that promoted the use of periodic payments instead of a reliance on single lump sums.

Box 1: Periodic Payments

This alternative way of providing compensation is akin to annuity payments in that the victim will receive a series of payments over the course of their life. The amount will never cease or change until the person dies, or the need is otherwise extinguished. It means that there is no investment risk for the victim so they will never 'run out' of money.

Lord Hodgson of Astley Abbotts moved an amendment that would force courts to be more aware of the use of periodic payments:

> I have been seeking ways to redress this imbalance and move towards a position where PPOs might become the default option in cases where compensation for injuries will be paid out over the long term or where the injured party has a low tolerance of risk or is risk averse. Amendment 55 is intended to achieve this by requiring changes to the rules of court which would encourage or require judges to consider wider factors, in particular longevity risk and investment risk.[147]

Several Peers supported a move to encourage periodic payments. Responding for the Government Lord Keen of Elie rejected the specific amendments but offered this assurance on the principle:

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145 Insurance Business UK website.
146 Out- Law.com
147 HL Deb PBC 15 May 2018 c610

> We will, as I have indicated, be taking forward a range of initiatives to encourage the use of PPOs and to ensure that claimants are properly advised when choosing the form of their award. We hope to have the first part of that process completed by the end of 2018 and the wider investigation completed by the summer of 2019. We believe that those practical steps will encourage the use of PPOs where appropriate—we will, of course, monitor that—and create a situation in which a review requirement, such as that envisaged by the amendments, will not be necessary. Indeed, it would be more appropriate to move in this direction rather than find ourselves in the somewhat invidious position of the Executive sending out directions to the judiciary about how it should approach the award and determination of damages in such serious cases.[148]

Lord Faulks moved a further amendment to encourage periodic payment acceptance by giving the court the power to alter the discount rate if a periodic payment offer is refused:

> It is, of course, entirely a matter for the claimant what he or she wants to do with his money, subject only to the unlikely intervention of the courts to order periodical payments. It seems to me, therefore, that it should be open to the court to vary the discount rate to reflect the fact that, by turning down a reasonable offer of periodical payments, a claimant has evinced an intention to be rather more adventurous than the legislation presumes that he will be. This could either have the result of reducing the overall sum, thus making periodical payments more attractive in the light of a different discount rate, or of promoting settlements, factoring in the possibility of a court varying the discount rate in the light of sensible offers of periodical payments. One way or another, it may go some way to redressing the tendency away from periodical payments in favour of lump sums.[149]

Replying for the Government, Baroness Vere rejected the amendment on the grounds of complexity and that the Bill already includes provision to allow it:

> When in the March 2017 consultation we asked whether the court should retain a power to apply a different rate if persuaded by one of the parties that it would be more appropriate to do so, 96 of the responses to the question supported the retention of the existing power, with 23 against. These, in general, were concerned about the problems of uncertainty, inconsistency and delay if the power were to be expanded. These difficulties would only be increased if the amendment were adopted. We believe that it is desirable for the Lord Chancellor to set a rate that is generally applicable and is not constantly called into question in individual cases. This is the core benefit of a prescribed rate and it should not lightly be set aside.[150]

And,

> We do not consider that the amendment is necessary. New Section A1(4) already prescribes that the Lord Chancellor may distinguish between classes of case by reference to, among other things, the description of future pecuniary loss involved and the

148 HL Deb PBC 15 May 2018 c622
149 HL Deb PBC 15 May 2018 c624
150 HL Deb PBC 15 May 2018 c628

> length of the period during which future pecuniary loss is expected to occur. The Explanatory Notes state:
>
> "Subsection (4) makes clear that the power in subsection (3) to prescribe different rates of return for different classes of case includes the power to set separate rates for different sorts of future loss or for different durations of award. For example, under this power one rate might apply to damages for the first ten years and another rate to damages for subsequent years".
>
> I therefore reassure the noble Earl that the Bill already addresses the point he has raised.[151]

Lord Faulks commented on the Minister's response that "I did find that it went two ways: on the one hand, we do not need the amendment because it is already there; on the other hand, the amendment, if agreed to, will cause uncertainty."[152]

Earl of Kinnoul moved an amendment to speed up the timing of the review of the discount rate. Currently the Bill sets the first review to start within a 90 days of the commencement of the Act. He wanted it to start immediately because any delay would in effect cost the NHS significant amounts of 'excess' compensation.

> It is found in the latest annual report of NHS Resolution, which makes it clear that moving the discount rate from plus 2.5% to minus 0.75% has meant that the cost of medical negligence to the NHS, every year, will be an extra £1.2 billion. That means that every day £3.3 million is not being spent on the NHS front line. If the rate does not go all the way back to 2.5%, but is like the rate in France of 1%, that adds up to £2 million a day. So that is somewhere between £2 million and £3 million a day, which is quite a lot of money. That is why am trying to cut the review period from 270 days-plus down to 120 days.[153]

The Government's response was that *preparations* for the review would begin as soon as possible, before the time set out in the Bill, forcing the pace further might result in the Lord Chancellor to "delay commencement or risk the time to conduct the review being eaten into, thereby reducing its effectiveness".[154]

Lord Hodgson of Astley Abbots, moved an amendment that would change the periodic reviews of the rate not to be time-dependent (every three years) to one that was dependent on changes in the investment environment. The review would be undertaken by a new advisory panel. The amendment:

> imposes a new advisory duty on the panel to,
>
> "advise the Lord Chancellor to undertake a review of the rate of return when it considers that the nature of return on investment has changed sufficiently to justify such a review".
>
> The decision to initiate the review remains with the Lord Chancellor, but he or she is given the comfort of a third party advising that a review is advisable. To ensure that paralysis does

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151 HL Deb PBC 15 May 2018 c629
152 HL Deb PBC 15 May 2018 c630
153 HL Deb PBC 15 May 2018 c630
154 HL Deb PBC 15 May 2018 c633

> not overtake the panel, the second part of Amendment 61 requires that,
>
> "where a review under this paragraph has not taken place for a period of 12 months, the expert panel must report to the Lord Chancellor as to why it considers that no review is necessary".[155]

Lord Sharkey introduced an amendment that questioned why the Lord Chancellor (however advised) should be the responsible person deciding the discount rate. The Government's view was:

> The creation of the expert panel to advise the Lord Chancellor is, of course, one of the most important changes introduced by Clause 8. The panel is central to the Government's proposals for the way in which the rate is set, introducing new expertise and transparency. The panel will play a very important role in providing assistance to the Lord Chancellor in setting the rate, but it would not in our view be appropriate for the panel's recommendations to bind the Lord Chancellor in deciding whether the rate should change and what it should be. The setting of the discount rate requires the weighing of different potential outcomes for individuals in relation to a range of possible rates. An element of value judgment will ultimately be required. It is important, therefore, that the decision-maker should be politically and publicly accountable for decisions on the rate. That is why the Lord Chancellor is, in our view, the appropriate person to make that choice[156]

155 HL Deb PBC 15 May 2018 c637
156 HL Deb PBC 15 May 2018 c645

4. Small claims

4.1 Proposed increase of limit for personal injury claims

As set out in its 2017 response to the consultation on the whiplash claims process,[157] the Government intends to increase the small claims track limit for RTA related personal injury claims from £1000 to £5,000. The small claims track limit for all other types of personal injury claims is to be increased from £1,000 to £2,000 "in line with inflation".[158]

Costs are not usually awarded to the successful party in the small claims track

One consequence of a case being allocated to the small claims track is that in most cases, the court will not order solicitors' costs to be paid by the losing party (although some disbursements can still be recovered). This means that the successful party must generally pay their own legal costs in a small claims track case. For this reason, most claimants deal with a small claim without the help of a solicitor.

Further information is provided in the Library briefing paper: Small claims for personal injuries including whiplash.[159]

4.2 Increase to be effected by secondary legislation – not by the Bill

The proposal to increase the small claims track limit does not form part of the Bill and would be achieved instead by secondary legislation (effecting a change to the Civil Procedure Rules). However, the Government has presented Part 1 of the Bill and this secondary legislation as a package of reforms. Both the Bill and the increase in the small claims track limit would affect claims for whiplash injuries (as the proposed tariff sets out levels of compensation of less than £5,000).

4.3 House of Lords debate

Peers raised issues relating to the increase in the small claims track limit in debate at all stages on the Bill.

Committee stage

At Committee stage, among other things, concerns were raised about:

- the amount by which the limit was to be raised;
- the effect of the proposals on access to justice;
- the effect of the increase in non-RTA cases, including on health and safety at work;
- the effect on genuine claimants;
- the effect of the proposals on vulnerable road users, such as cyclists and pedestrians;

157 Part 1 of the Government Response to: Reforming the Soft Tissue Injury ('whiplash') Claims Process, Cm 9422, February 2017
158 Ibid paragraph 93
159 Number 04141, 23 August 2018

- the accessibility of the claims portal;
- the recoverability of the cost of the medical report.

Report stage

At Report stage, Baroness Hayter of Kentish Town, Shadow Deputy Leader of the House of Lords, moved an amendment intended to introduce a new Clause which would restrict the increase in the small claims limit for relevant personal injuries. The amendment proposed that when the 1999 claims limit of £1,000, adjusted for inflation (computed by reference to the CPI) reached £1,500, the limit should be changed to that level.[160] (This would reflect the recommendation of Lord Justice Jackson in his review of the costs of civil litigation. In his Final Report, published in January 2010, Lord Justice Jackson did not make any recommendation for raising the small claims track limit for personal injury claims at that time and proposed, instead, that the limit should stay at £1,000 until such time as inflation warranted an increase to £1,500.)[161]

Baroness Hayter said that "this amendment will bring the issue into primary legislation, where it belongs".

She spoke of the widespread effect of the proposed change, which would go beyond whiplash claims, and questioned the justification for the Government's approach:

> Here we have a Bill to deal with whiplash, but the Government are taking action on the limits which flies in the face of advisers and is unrelated to whiplash or fraud, but will affect tens of thousands of people a year. Furthermore, the Government have offered no justification for increasing the small claims limit in all road traffic accidents, not just whiplash, to £5,000, which could capture perhaps nine in 10 of all RTAs, leaving them effectively without legal representation. The changes will also affect employment injury claims. Again, there is no suggestion of fraud or misuse of the courts, and the amounts are significant to low-paid workers, exactly those least able to pursue a claim without legal advice or representation.[162]

Lord Bassam of Brighton supported Lady Hayter and said that, by raising the limit in the proposed way, the Government would "seriously disadvantage those with an entirely legitimate personal injury small claim and prevent them gaining access to justice and legal advice".[163] He spoke of the potential impact:

> We all know that there are many who cannot use portals and online means of tackling these issues because they do not have the training or expertise and feel uncomfortable in the online world. The Minister may say that insurers will not fight a case which they know they are going to lose but that does not stop

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160 In 1999 the £1,000 limit was restricted to damages for pain, suffering and loss of amenity, rather than to the value of the entire claim. Further information is provided in the Library briefing paper: Small claims for personal injuries including whiplash

161 Review of Civil Litigation Costs: Final Report, December 2009, Chapter 18, paragraph 3.3

162 HL Deb 12 June 2018 cc1633-6

163 HL Deb 12 June 2018 cc1636

> them playing hardball because they choose to. Why would they not, faced with a claimant on their own? Insurers also have a duty to their clients.
>
> (…)
>
> Our amendments seek to ensure that those who do not have a corporate lawyer behind them do not fall prey to another racket—the routine denial of claims by insurers, just because they can.[164]

Other amendments in the group concerned:

- ensuring that claimants could get legal advice on the value of their claim and on the issue of liability, if this is denied by insurers, for a fixed recoverable cost;
- recoverability of the cost of medical reports.

In response, Lord Keen of Elie reiterated that the small claims track was suitable for whiplash claims:

> Whiplash claims are generally straightforward and do not routinely require legal advice. The small claims track is suitable for such claims. It is designed to be accessible to litigants in person, and the Government are working closely with stakeholders to develop a comprehensive package of guidance and support for users.[165]

He set out why the Government had decided to raise the limit:

> This limit, as I said, has been set at £1,000 since 1991 and, as compensation levels have risen, the small claims track no longer covers the same breadth of claims as it once did. Following consultation, the Government believe that increasing the limit for RTA personal injury claims to £5,000 is a careful and proportionate increase, particularly having regard to the fact that the limit for other claims, with the exceptions I mentioned earlier, is now £10,000. A level of £5,000 will facilitate early and expedited settlement under the proposed tariff structure and will encourage insurers to challenge unmeritorious claims, many of which are not now challenged because of the potential legal costs.

Lord Keen considered that it would be inflexible to tie the limits into the primary legislative process. He said that it was appropriate for the Civil Procedure Rule Committee, under the leadership of the Master of the Rolls, to make procedural changes to the civil justice system. He rejected the suggestion that a claimant might recover legal expenses.

Lord Keen indicated that the Government was giving further consideration to whether vulnerable road users might be excluded from the £5,000 limit.[166]

Baroness Hayter pressed for a division and the amendment was defeated by 183 votes to 169.

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164 HL Deb 12 June 2018 cc1637
165 HL Deb 12 June 2018 cc1640
166 HL Deb 12 June 2018 cc1641

Third Reading

At Third Reading Lord Monks again raised the issue of the small claims track, saying, "Those of us who have been concerned with this issue have been hamstrung by the fact that we have not managed to secure the small claims limit to be within scope of the Bill".[167] He gave notice that "we will return to the small claims limit issues in any way that we can".

Lord Beecham said, "we will in future seek to oppose the intended increase of the small claims limit to all RTA cases to under £5,000 and for all other personal injury claims to £2,000, when the relevant regulations are laid".[168]

167 HL Deb 27 June 2018 c197
168 HL Deb 27 June 2018 c201

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