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Civil Liability Bill [HL]: Committee Stage Report

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Summary

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 Speaker has certified the Bill under Standing Order No. 83J as relating exclusively to England and Wales on matters within devolved legislative competence.

A Library briefing paper, published for Second Reading of the Bill in the Commons, provides background information, including on debate in the Lords:

Commons Library Analysis: Civil Liability Bill [HL] (Number 08335, 23 August 2018).

The Government also intends to increase the small claims track limit for personal injury claims. This 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 related reforms. Issues relating to the increase in the small claims track limit have been raised in debate on the Bill at all stages in both Houses of Parliament.

Having completed its passage through the Lords, the Bill was introduced in the House of Commons on 28 June 2018 as Bill 240 of 2017-19. Second Reading took place on 4 September 2018. The Bill was considered by a Public Bill Committee in two sittings on 11 September 2018.

In Public Bill Committee, 21 Opposition amendments were defeated on divisions. In addition, there were two divisions on clause stand part debates, both of which were carried. Government amendments were made which would:

- require the Lord Chancellor to consult the Lord Chief Justice before making regulations about the amount of damages for whiplash injuries and minor psychological injuries suffered on the same occasion; and
- provide for affirmative resolution regulations to require insurers of customers domiciled in England and Wales to provide information concerning the impact of the Bill's provisions on insurance premiums in England and Wales, and to require HM Treasury, with the assistance of the Financial Conduct Authority, to lay before Parliament a report concerning the information provided.

The Bill as amended in Public Bill Committee has been published as Bill 264 of 2017-19.

Report stage is scheduled for 23 October 2018.

1. Introduction

1.1 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.

At Second Reading, David Gauke, Lord Chancellor and Secretary of State for Justice, set out the purpose of the Bill:

> The Bill will make important changes to our personal injury compensation system, which it aims to make fairer, more certain and more sustainable for claimants, defendants, the taxpayer and motorists. It builds on our wider reforms to cut the cost of civil justice claims and strengthen the regulation of claims management companies.
>
> The first part of the Bill will deliver a key manifesto pledge to support hard-working families by bringing down the cost of living through a crackdown on exaggerated and fraudulent whiplash claims, which lead to higher insurance costs. The second part will create a fairer and more transparent method for setting the personal injury discount rate. The Bill will provide a compensation system that meets the rightful needs of claimants while saving the public money, in respect of both consumers and taxpayers.[1]

The Speaker has certified the Bill under Standing Order No. 83J as relating exclusively to England and Wales on matters within devolved legislative competence.

A Library briefing paper, published for Second Reading of the Bill in the Commons, provides background information, including on debate in the Lords:

Commons Library Analysis: Civil Liability Bill [HL].[2]

1.2 Increase in small claims track limit

The Government intends to increase the small claims track limit for personal injury claims – to £5,000 for (most) road traffic accident (RTA) related personal injury claims, and to £2,000 for all other types of personal injury claims. This 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).

1 HC Deb 4 September 2018 c77
2 Number 08335, 23 August 2018

Issues relating to the increase in the small claims track limit have been raised in debate on the Bill at all stages in both Houses of Parliament.

1.3 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.[3] The Bill was considered in Committee on two days. On 10 May 2018 the Lords considered Part 1,[4] and on 15 May 2018 they considered Part 2.[5] Report stage was on 12 June 2018,[6] and Third Reading took place on 27 June 2018.[7]

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 took place on 4 September 2018. The Bill was considered by a Public Bill Committee in two sittings on 11 September 2018 when some Government amendments were made. 21 Opposition amendments were defeated on divisions.

The Bill as amended in Public Bill Committee has been published as Bill 264 of 2017-19.

Report stage is scheduled for 23 October 2018.

1.4 Membership of the Public Bill Committee

The Public Bill Committee consisted of the following Members:

Chairs: Sir Henry Bellingham, Graham Stringer

Jack Brereton, (Con)

Bambos Charalambous, (Lab)

Robert Courts, (Con)

Chris Davies, (Con)

Gloria De Piero, (Lab)

Ruth George, (Lab)

Chris Green, (Con)

David Hanson, (Lab)

Peter Heaton-Jones, (Con)

Scott Mann, (Con)

Amanda Milling, (Con)

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

Fiona Onasanya, (Lab)

Ellie Reeves, (Lab)

Lloyd Russell-Moyle, (Lab/Co-op)

Jo Stevens, (Lab)

Rory Stewart, (Minister of State, Ministry of Justice)

Craig Tracey, (Con)

2. Part 1: Whiplash

In short, Part 1 would:

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

2.1 Second Reading debate

At Second Reading, David Gauke, Lord Chancellor and Secretary of State for Justice, spoke of the number of personal injury claims for whiplash related injuries. He said that the Government considered it necessary to deal with abuse in the system, the knock-on effect of which was increased insurance premiums, "particularly for young people and the elderly". He added, "taken together, the whiplash measures proposed by the Government could result in savings of around £1.1 billion a year".[8]

The Lord Chancellor summarised what Part 1 was intended to achieve:

> The purpose of our reforms is to compensate the genuinely injured and to improve the system for all by reducing the number and cost of whiplash claims and deterring fraudulent and unmeritorious claims. The measures in the Bill will do that by introducing a ban on settling whiplash claims without medical evidence. That will discourage fraud and incentivise insurers to investigate claims and provide reassurance to claimants that they are being compensated for the true extent of their injuries.[9]

David Gauke confirmed that implementation of the whiplash reforms would be pushed back to April 2020, adding, "This will enable careful user testing of the IT system to ensure that the system works well for all types of users on full implementation".[10]

Shadow Lord Chancellor and Shadow Secretary of State for Justice, Richard Burgon, set out the Labour Party's opposition to the Bill:

> So Labour Members are clear that this Bill, in its current form, cannot be supported. Unless it is very substantially amended in Committee, we will vote against it on Third Reading. We hope that the Government will take seriously the amendments that we are tabling this week, which build on the points raised by many colleagues in the Lords.[11]

8 HC Deb 4 September 2018 c79
9 HC Deb 4 September 2018 c79
10 HC Deb 4 September 2018 c82
11 HC Deb 4 September 2018 cc85-6

Richard Burgon expressed concern with the tariff system, which would fix the amount of compensation in "so-called minor whiplash claims":

> One key point in our opposition is the slashing of compensation for genuine claimants. Another is that it will be the Lord Chancellor setting tariff levels, which risk becoming a political football or, rather, being reduced ever further by the powerful insurance industry lobby. Tariffs are a rather blunt instrument; people should simply get the correct compensation for the specific injuries they have suffered. As former Lord Chief Justice Lord Woolf says, establishing the correct level of damages is
>
> > "a highly complex process of a judicial nature"—[Official Report, House of Lords, 12 June 2018…]—
>
> and damages might vary from case to case, making the fixed tariff inappropriate. [12]

Richard Burgon queried the scale of the problem:

> The Government give the impression that it is an uncontested point that fraud is at the levels that the insurers claim, but that is contested. That is not to say that there are not fraudulent cases—of course a small minority of cases are fraudulent—but we need to properly understand the problem if we are going to have genuine solutions.[13]

The Shadow Lord Chancellor added, "It is immoral to make the honest vast majority pay—literally—for the fraudulent activities of a tiny minority".[14]

He agreed with the introduction of compulsory medical reports.

At the end of the debate, Shadow Justice Minister, Gloria De Piero, reiterated the Opposition's position:

> Labour will be abstaining today in the hope that the Government will think again before the Committee stage. Without some key changes, we will vote against the Bill's Third Reading. We sincerely hope, for the 99% of injured people even the insurers admit are honest, that they reconsider.[15]

Justice Minister, Rory Stewart, summed up three arguments in favour of the Bill:

> The first is that we need to ensure that the administration of justice is proportionate and sustainable. …the fact that nearly 40% of the costs are currently being absorbed by legal fees is a serious issue. Secondly, we need to ensure that the system is straightforward. … the introduction of the portal will ensure that the administration becomes more straightforward. Thirdly, …the introduction of fixed tariffs, on the French model, will make the administration of justice more predictable.[16]

He spoke of the Government's balancing exercise:

> The fundamental point is that the Government have a responsibility to balance the administration of justice and honesty

12 HC Deb 4 September 2018 cc88-90
13 HC Deb 4 September 2018 cc88-9
14 HC Deb 4 September 2018 c90
15 HC Deb 4 September 2018 c129
16 HC Deb 4 September 2018 c131

> with the broader social costs. … insurance premiums have been rising, and we need to take them into account. … premiums are rising in rural areas in particular. Again, … the cost of over £1 billion to the NHS that will be addressed through this legislation is one that is borne by every taxpayer and is causing increasing concern among medical professionals.[17]

2.2 Public Bill Committee stage

Amendment agreed

Clause 3: Damages for whiplash injuries

A Government amendment (**Amendment 4**) was agreed without division. The amendment would require the Lord Chancellor to consult the Lord Chief Justice before making regulations about the amount of damages for whiplash injuries and minor psychological injuries suffered on the same occasion.[18]

Amendments not agreed

Clause 1: "Whiplash injury" etc

Shadow Justice Minister, Gloria De Piero moved **Amendment 8** which would have left out Clause 1 and required the Chief Medical Officer to define "whiplash injury". It was considered with other Opposition amendments:

- **Amendment 9** which would have exempted from the definition people suffering a whiplash injury during the course of their employment; and
- **New Clause 9** which would have exempted vulnerable road users and people injured in the course of their employment from the provisions of Part 1, except Clauses 6 and 7 (rules against settlement before medical report),

The Shadow Minister considered that there should be a medical definition of "whiplash":

> The Government have chosen not to ban all compensation for whiplash, which indicates that they accept its validity as a medical condition, but they attempt to define it themselves. If they accept that it exists as a medical condition, surely it needs a medical definition.[19]

She agreed with the need to "act against insurance cheats; no one supports fraudsters" but said that the amendment would not affect the pursuit of those claiming fraudulently.

Gloria De Piero said that she had not seen any complaint of fraud levelled by the Government against workers, and that the amendment was "an opportunity for the Government to exempt employers' liability claims from the Bill and at the same time exclude them from the small claims limit".

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17 HC Deb 4 September 2018 c131
18 PBC Deb 11 September 2018 c28
19 PBC Deb 11 September 2018 c5

The Shadow Minister contrasted the position of workers with that of vulnerable road users:

> Given that the Government have exempted vulnerable road users—horse riders, pedestrians and cyclists—from both the Bill and the associated small claims changes, what is their justification for not exempting workers? Are they saying that vulnerable road users are worthy of more protection than workers? Perhaps the justification is that the cyclist, the pedestrian and the horse rider do not take out motor insurance for their road use, but neither does the professional driver. If the justification for the exemption of vulnerable road users is that they are uniquely exposed, surely the professional driver is, too? For instance, there is the police officer in a high-speed chase or the HGV driver who is on the road for eight hours a day. The reality is that the Government have exempted vulnerable road users because including them would be politically untenable.[20]

Rory Stewart confirmed that the definition of whiplash had been added to the Bill following extensive debate in the Lords and the recommendation of the House of Lords Delegated Powers and Regulatory Reform Committee:

> The Committee felt it was not appropriate for any individual, whether a Minister or a chief medical officer, to make this definition on their own. It should be made by Parliament as a whole and it should be made fully explicit.[21]

He said that Clause 2 provided for a review of the definition every three years "to make sure it remains in touch with medical science and medical expertise." He added that the definition was not simply a question for medical specialists; it related to the operation of law and the way in which the law of tort would operate.

On Amendment 9, the Minister argued that "the key point is that the injury has occurred and not why the individual is in the car":

> The question of why they are in the car would be a distinction without a difference…The key is the injury and the fact that the third party who is liable for that injury is held liable.
>
> (…)
>
> It would be difficult to argue that somebody who travels in the course of their employment is necessarily travelling more frequently than somebody who is not. [22]

Rory Stewart said that the likelihood of having an accident should not affect the level of compensation that someone receives:

> That should be relative to one thing only: the nature of the injury and the prognosis. It should not be relative to why someone is in the car, how well or how frequently they drive or why they are driving.[23]

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20 PBC Deb 11 September 2018 c6
21 PBC Deb 11 September 2018 c7
22 PBC Deb 11 September 2018 cc8-9
23 PBC Deb 11 September 2018 c10

On new clause 9, the Minister referred again to his arguments on Amendment 9, and said that vulnerable road users were already exempted from the Bill.[24]

Gloria De Piero did not accept the Government's arguments:

> The Bill's objective is to reduce fraud. I have not heard anybody suggest that workers injured in the course of their employment are scammers. However, I have heard from Labour Back Benchers that workers drive all day and do not have a choice about whether to drive.

She pressed for divisions on Amendments 8 and 9. Both were defeated by 9 votes to 6.

Clause 1 was ordered to stand part of the Bill after a division (9 votes to 7).

Clause 3: Damages for whiplash injuries

Gloria De Piero moved **Amendment 12** which was considered with **Amendments 13 to 16.** The intention was to replace the tariff with the Judicial College Guidelines for the assessment of damages. The Shadow Minister explained:

> The Bill proposes that the Lord Chancellor, rather than judges, should set the tariffs for pain, suffering and loss of amenities. In view of the opposition from those who are judicially qualified and the upholders of the law, can the Minister not see the sense in the point that no politician should be making decisions for which the judiciary is rightly responsible?
>
> (…)
>
> The Bill removes the judicial responsibility for the assessment of damages and reduces the damages that will be received by honest claimants, because of the activities of a tiny proportion of dishonest ones.[25]

Ruth George (Labour) questioned the basis of the tariff:

> It does not make sense that we are considering introducing a one-size-fits-all tariff at a very low rate that takes no account whatever of the amount of pain and suffering, only its duration. It takes no account of the impact on the victim's life, including on their work and home life. If someone is a carer, works in a nursery or has another manual job, the impact on them will be far greater than on someone with a similar injury who does not have to perform such tasks.[26]

Rory Stewart reiterated that the tariff would apply only to general damages, which cover pain and loss of amenity. Loss of earnings, or being unable to perform a particular job because of whiplash, would be covered by special damages and would not be affected by the legislation. He added:

> In other words, we are focusing on what ultimately must be a difficult, subjective judgment about the level of pain that an

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24 PBC Deb 11 September 2018 c10
25 PBC Deb 11 September 2018 cc17-18
26 PBC Deb 11 September 2018 c19

> individual experiences, and not loss of earnings or other forms of treatment.[27]

The Minister outlined the development of the policy and said that the Government had made a lot of concessions since their initial proposals. He acknowledged that a tariff system is relatively unusual in English common law but noted the equivalent for criminal injury compensation cases. However, he said that tariffs are not unusual and that they had been introduced "very successfully" in Italy, France and many other European jurisdictions. He also said that there would be judicial discretion on the tariffs:

> It is in line with what the European Court of Justice believes should be the appropriate degree of judicial flexibility when applied to a tariff system.[28]

Gloria De Piero pressed for divisions on amendments 12 to 16 speaking of strong feelings "led by the independent experts, by the Select Committee on Justice and by some people in the Minister's own party, whom I quoted earlier".[29]

Amendments 12 and 13 were defeated by 9 votes to 7 and Amendments 14, 15 and 16 were defeated by 9 votes to 8.

Clause 5: Uplift in exceptional circumstances

Gloria De Piero moved **Amendment 18** which would have allowed judges to increase the amount of damages payable where they determined the tariff amount to be insufficient compensation, instead of (as in the Bill) capping the amount by which judges could increase compensation awards to a percentage specified by the Lord Chancellor.

The amendment was considered with a discussion on whether Clause 5 should stand part of the Bill.

Gloria De Piero spoke of the "long-standing tradition of trusting judges, rather than having politicians interfere with the discretion of the courts". She said that Amendment 18 "would restore judges' lost autonomy".[30]

Rory Stewart said that Clause 5 provided "a pragmatic compromise between a strict tariff system and judicial discretion by allowing the judges to lift that tariff in exceptional circumstances", adding:

> However, as the European Court of Justice accepted in the arguments made in the Italian case, there needs to be a limit. If there were no limit to judges' discretion, the tariff system would become unworkable.

The Minister reiterated that the introduction of the tariff was "designed precisely to reduce the amount paid out in the specific case of general damages for minor whiplash injuries", and said:

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27 PBC Deb 11 September 2018 c24
28 PBC Deb 11 September 2018 c26
29 PBC Deb 11 September 2018 c26
30 PBC Deb 11 September 2018 c29

> Simply to stick with the judicial college guidelines would obviate the entire purpose of the Bill and undermine the medical, legal, social and political arguments that underlie the legislation.[31]

Gloria De Piero pressed for a division. The amendment was defeated by 9 votes to 7.

Clause 6: Rules against settlement before medical report

Gloria De Piero moved **Amendment 19** which, with **Amendments 20 and 21**, was intended to ensure that, in all cases, any medical evidence of a whiplash injury must be provided by a person registered on the MedCo portal website.

The amendments were considered with **New Clause 3** - "Recoverability of costs in respect of advice on medical report, etc."[32]

Gloria De Piero set out the reasoning behind the amendments:

> We suspect that the vagueness about what qualifies as proper medical advice might be an attempt to allow the use of physiotherapists for the evidence. Insurers have long pushed for that. Physiotherapists are great people doing wonderful work in an extremely important part of post-accident rehabilitation, but they are not doctors and are not able to assess and provide a long-term prognosis.
>
> … Let us trust doctors and specify where a medical report should come from. Any deviation from the gold standard of a medical doctor would negate the good that is done by effectively banning the settlement of whiplash claims without medical evidence, as this part of the Bill attempts to do.[33]

Rory Stewart said he had huge respect for MedCo but set out why they were not named on the face of the Bill:

> The only reason we have not put MedCo on the face of the Bill is to provide for the eventuality that, in 20 or 30 years' time, an entity other than Medico might exist— as hon. Members will see in clause 6(4), we are specifying the form of evidence, the person, the accreditation and the regulations. That was on the advice of counsel, which has had strong experience over the last century, that defining a non-profit on the face of the Bill could cause massive challenges if something unforeseen happens to it. We absolutely agree that MedCo is the appropriate body to use at the moment.[34]

Gloria De Piero pressed for divisions and Amendments 19, 20 and 21 were each defeated by 9 votes to 6.

Clause 8: Regulation by the Financial Conduct Authority (FCA)

Gloria De Piero moved **Amendment 17**, which was intended to oblige the FCA to require insurers to report on the savings they had made as a result of the Bill, and the extent to which such savings had been passed on to insurance consumers.[35] It was considered with **New Clause 6**, in the names of Opposition Members, which was intended to require

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31 PBC Deb 11 September 2018 c31
32 See section 5 of this paper below
33 PBC Deb 11 September 2018 cc33-4
34 PBC Deb 11 September 2018 c35
35 PBC 11 September 2018 c43

insurers to pass on to insurance consumers all savings made as a result of the changes made by the Bill.

Gloria De Piero said that Amendment 17 and New Clause 6 were straightforward "unlike the Government's over-wordy, over-complicated new clause 2" (which was agreed[36]). She spoke of the difference between the two new clauses:

> What is crucially different between the Government's new clause 2 and our new clause 6 is that our new clause is not only simpler but mentions the savings that insurers will make from the small claims changes.
>
> In calculating the £1.3 billion in savings that the insurers will make every year, the Government's impact assessment includes the savings created by the increase in the small claims limit as a result of the so-called wider package of measures. For the Government not to include the savings made from the small claims limit changes in their new clause 2 renders it virtually worthless, and undermines their much-vaunted and fundamental promise that motor insurance premiums will drop by £35 a year. [37]

Amendment 17 and New Clause 6 were each defeated on division by 9 votes to 8.

Matter to be considered further: children's claims

Bambos Charalambous raised a point about the necessity of a hearing to settle children's claims: "They require solicitors, because there has to be a hearing for there to be a settlement". He asked whether children might be exempted from the scope of the Bill.

Rory Stewart replied:

> Perhaps we can return to that very interesting point on Report. It has not been raised in any of the amendments tabled so far, but I would be very interested to see an amendment tabled and to discuss the matter outside this Committee. [38]

Other significant areas of debate

Clause 3: Damages for whiplash injuries

Gloria De Piero moved **Amendment 10** which was intended to limit the tariff to injuries lasting less than one year (rather than two, as in the Bill). It was considered with **Amendment 11** which had the same intent.[39]

Jo Stevens (Labour) spoke of the Bill creating "tiers of victims of personal injury" pointing to different rates for people injured in Scotland, the workplace and road traffic accidents, and as a result of a criminal act.[40]

Bambos Charalambous (Labour) called for a consistent approach:

> The measure makes no sense at all, and we should not be a situation in which tariffs are set arbitrarily by the Lord Chancellor

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36 See section 4 of this paper, below
37 PBC 11 September 2018 c45
38 PBC Deb 11 September 2018 c36
39 PBC Deb 11 September 2018 c12
40 PBC Deb 11 September 2018 c13

> that are inconsistent with other parts of the law and even other schemes within the Ministry of Justice.[41]

Ellie Reeves (Labour) questioned whether an injury that lasts up to two years could be considered minor.

Rory Stewart replied that the word "minor" came from the Judicial College guidelines:

> The idea that injuries under two years rather than under one year should be separated reflects the process within the Judicial College guidelines and its definition of what constitutes a minor injury. Clearly, that is a legal definition; in no way does the Judicial College intend to suggest that somebody suffering two years of injury is not suffering considerable pain, distress and loss of amenity. It is simply used to make a distinction between an injury that passes over time and an injury that is catastrophic and lasts throughout one's life. In no way is it intended to denigrate the experience during the two years.[42]

He said that the Government considered it important for the Bill to remain consistent with the definitions within the Judicial College guidelines:

> Were we to accept the amendments, they would not only take about 11% of cases out, but mean that the provisions on the requirement for a pre-medical offer would then be removed for the one to two-year period. We would suddenly end up with people able to proceed without medical reports for the one to two-year period, which would undermine a lot of the purpose of the Bill.[43]

Gloria De Piero said that she did not intend to press for a division but that "we will raise these issues again on Report and Third Reading".[44] The amendment was withdrawn.

In the context of debate on proposed amendments to Clause 3, there was also a lengthy exchange on how the existence of a whiplash injury might be determined, and how to establish the number of fraudulent claims.[45]

2.3 Amendments tabled for Report stage

As at 19 October, the Opposition have tabled amendments intended to leave out Clauses 3 (Damages for whiplash injuries); 4 (Review of regulations under section 3); and 5 (Uplift in exceptional circumstances). The Member's explanatory statement for each amendment states:

> This amendment would remove the creation of tariffs for whiplash injuries and retain the existing system where judges decide compensation levels with reference to Judicial College Guidelines.

The Government has tabled a minor amendment, described as "a correction" to the wording of Clause 5.

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41 PBC Deb 11 September 2018 c13
42 PBC Deb 11 September 2018 c15
43 PBC Deb 11 September 2018 cc15-16
44 PBC Deb 11 September 2018 c16
45 PBC Deb 11 September 2018 cc20-25

3. Part 2: Personal injury discount rate

Part 2 of the Bill deals with the assumed rate of return on investment of lump sum damages, the so-called 'discount rate'. Compensation for an accident is normally paid as a lump intended to compensate the claimant for 100% of their loss. 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, to avoid overcompensation, the actual lump sum needed now should be reduced by the likely investment returns over the period. This is achieved by applying the discount rate to the compensation award.

Part 2 of the Bill, which comprises a single clause (clause 10), would amend the *Damages Act 1996*, inserting a new section and Schedule. The changes would alter the level of risk an investor is assumed to be willing to take investing their lump sum, from "very low" to "low". It would also introduce a requirement for the Lord Chancellor regularly to review the rate, taking into account the views of an expert panel and the Treasury.

3.1 Second Reading debate

In his Second Reading introduction of the Bill the Lord Chancellor explained the reforms to the discount rate-setting mechanism:

> we continue to support the aim that seriously injured people should receive full compensation to meet their expected needs, including care costs. The problem, however, is that on the evidence we have obtained, our discount rate of minus 0.75%—one of the lowest in the world—is leading to awards in personal injury claims averaging at 120% to 125% of the damages awarded, even after allowances are made for management costs and tax.
>
> Such overcompensation is contributing to escalating costs in the NHS, which spent £2.2 billion on clinical negligence claims alone in 2017-18—a figure that is expected to rise to £3.2 billion in 2020-21. This is almost double the amount spent in 2016-17 and seven times the amount spend in 2006-07. This overcompensation is not sustainable. Money is being diverted that could instead have been spent on frontline public services such as our hospitals, schools and armed forces. As well as adding to the financial pressure on the NHS, the current framework for setting the discount rate is also creating pressure that is driving up insurance premiums, particularly for motorists.
>
> The reforms that we propose to the discount rate will also save consumers money, as the insurance industry has committed to passing on these savings. The changes that we propose to make in the Bill to how the discount rate is set will make it fairer and more realistic for everyone. We intend to reflect the reality that claimants are more likely to invest their compensation in slightly higher risk diversified portfolios, rather than in very low risk investments under the current test.

> …
>
> The Bill contains provisions requiring the Lord Chancellor to review the rate promptly after Royal Assent and then at least once every five years, again providing greater certainty and clarity. Following amendments accepted by the Government in the other place, the first review will continue the current arrangements under which the Lord Chancellor consults the Government Actuary and Her Majesty's Treasury before setting the rate.[46]

Conservative Member Robert Neill MP, the Chair of the Justice Committee, questioned whether the Lord Chancellor would set the rate independently of the Government, in his quasi-judicial capacity.[47] Mr Gauke responded:

> Yes, it is a decision taken by the Lord Chancellor. I was in the Treasury at the time when the most recent change to the discount rate was made by one of my predecessors, and I can certainly assure my hon. Friend that it was very much a decision taken by the Lord Chancellor.[48]

The Shadow Lord Chancellor, Richard Burgon MP, indicated that the Opposition would seek to amend Part 2 of the Bill:

> we will closely scrutinise the Government's proposals to change how the discount rate is set, so it is determined not by the powerful insurance lobby but in the interests of society as a whole. That is why we will table amendments to strengthen the safeguards in the Bill and ensure that all victims get 100% of the compensation they are entitled to.[49]

Chris Philp (Conservative), although supportive of the changes to the discount rate, suggested that Periodic Payment Orders (PPOs)[50] should be the default award to claimants:

> I suggest that the Government consider making periodic payment orders the default option and that a lump sum award should be made only if a judge decides that there is a good reason not to set up a periodic payment order. I think that PPOs provide better protection for the claimant.[51]

The Minister, Rory Stewart, agreed to consider the issue.[52]

Bambos Charalambous, a Labour Member who sits on the Justice Committee, expressed concern about the Lord Chancellor's discretion when setting the rate:

> the Lord Chancellor can take into account other factors than those defined by the Bill when setting the rate. This wide discretion opens up the setting of the rate to potential lobbying that could adversely impact the compensation of those who have suffered severe, catastrophic injuries. It is also worth noting that for the purposes of setting the discounted rate, the Bill changes the level of risk of an investment from "very low" to "low". The

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46 HC Deb 04 September 2018 cc82-83
47 Ibid., c83
48 Ibid., c84
49 Ibid., c91
50 PPOs provide for payments to be made as needs arise, negating the risk inherent in paying a lump sum at the outset a claimant's long-term illness.
51 Ibid., c108
52 Ibid., c131

> lump sum to be invested is there to last for a victim's entire life, so reducing the level of risk of the investment in setting the discounted rate is concerning, and it has not been properly explained.[53]

3.2 Public Bill Committee Stage

Amendments not agreed

Clause 10

Ellie Reeves moved **Amendment 24** which would have replaced Schedule A1 with a new Schedule A1. Schedule A1 is the part of the Bill that provides the detail about how the discount rate is to be set and reviewed. The main feature of the proposed new Schedule was that it would have provided for the rate to be set by an expert panel, rather than the Lord Chancellor. Ms Reeves argued:

> The amendment would replace scheduleA1 as drafted with a far more appropriate means of setting the discount rate—allowing it to be set by an expert panel, rather than it being politicised as a decision by the Lord Chancellor.
>
> …
>
> In setting the discount rate, the Lord Chancellor is given wide-ranging discretion. That opens up potential for other factors to influence the Lord Chancellor, which could adversely impact the compensation received by someone who has suffered catastrophic injuries.[54]

The Minister replied that, ultimately, it should be for a Minister, accountable to Parliament to set the rate:

> because they have to balance some very different issues: our obligation towards vulnerable people who have suffered catastrophic life-changing injuries and our obligation on the costs to the national health service, which run into billions of pounds, and balancing these different public goods.
>
> It simply would not be fair to expect an actuary to make those kinds of political and social decisions.[55]

The Committee considered the Opposition's **New Clause 5** alongside amendment 24. The new clause would have required the Lord Chancellor to arrange for the expert panel to conduct a review of the assumptions on which the discount rate is based, in light of how claimants are in practice investing their compensation.

Ellie Reeves pressed amendment 24 and new clause 5 to a division; both were defeated by 9 votes to 8.

Clause 10 was ordered to stand part, after being supported on division by 9 votes to 8.

New Clause 4

New Clause 4, moved by Ellie Reeves, would have required the Civil Justice Council to consider the impact of the discount rate on the extent

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53 Ibid., c118
54 PBC Deb 11 September 2018 cc58-60
55 Ibid., c61

to which periodic payment orders (PPOs) are made by courts in personal injury actions. The review would have to be conducted within 18 months of the coming into force of the Act.

PPOs are an alternative way of providing compensation, akin to annuity payments in that the claimant 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 claimant; they will never 'run out' of money.

In speaking to the new clause, Ms Reeves described the relationship between the discount rate and New Clause 4:

> The setting of the discount rate is highly relevant to periodical payments. When the rate stood at 2.5%, it was far more attractive for defendants to pay a lump sum that was discounted by 2.5%than to pay index-linked annual payments. That meant that in all but the most serious cases, periodical payments often met huge resistance from defendants. A rate that assumes a much lower level of investment risk by injured people may well result in an increase in the use of periodical payments, particularly in cases not at the most catastrophic level where resistance from defendants has been greatest.
>
> The benefits to the injured person are clear, and the benefits to the state of not having to pick up the bill for care or housing, if and when the money runs out, are obvious.[56]

The Minister expressed support both for the use of PPOs and "the nature of" the argument behind New Clause 4.[57] However, the Government opposed the clause on the technical ground that the 18-month period from Royal Assent was too short a period for the new discount rate to take real effect. Nonetheless, the Minster said:

> Regarding the basic question the hon. Lady has raised—whether the Civil Justice Council should look at the use of PPOs and the impact of discount rates on PPOs—we have written directly to the Master of the Rolls to request that the Civil Justice Council look at the use of PPOs. We remain open to doing that again, once the new review of discount rate is introduced.[58]

The new clause was defeated on division by 9 votes to 8.

Other significant areas of debate

Amendments 22 and 23

As currently drafted, the Bill would require the discount rate to be reviewed by an expert panel after it is initially set under the new investor assumptions. The initial rate would be set relatively quickly by the Lord Chancellor on the advice of the Government Actuary. Amendments 22 and 23 would have required the Lord Chancellor to consult the expert panel before this rate determination. The Minister opposed this, on the basis that the same argument had already been made by the Government and rejected by the House of Lords:

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56 Ibid., cc71-72
57 Ibid., c72
58 Ibid.

> amendments 22 and 23 reflect the original position of the Government on the Bill, so we are slightly going round in circles. We had originally suggested in the version of the Bill that we presented to the House of Lords that the Lord Chancellor should consult the expert panel before setting the rate. Under pressure from Opposition Members in the House of Lords, in particular Lord Sharkey, the Lords pushed us into a position where we agreed that, instead of an expert panel, it should be the Government Actuary, working with the Lord Chancellor, who set the first rate.
>
> The argument made by the Lib Dem peer and backed by others, including Lord Beecham, was that the problems for the NHS caused by the discount rate are so extreme and the costs on the public purse so extreme, that the first change in the discount rate should happen relatively rapidly, on the advice of the Government Actuary. Were we now to reject that amendment, which we accepted after long negotiation in the House of Lords, we would
>
> have to go back to the drawing board and set up the expert panel again, leading to a very significant delay, which would impose costs on the NHS. We are in the ironic position that the Opposition are now proposing as amendments the original Government position, which the Opposition struck down in the House of Lords. We are slightly in danger of going round in circles. We are where we are and, given the problems of time, I suggest that the pragmatic compromise is that the Government Actuary, who is an independent individual with enormous expertise, works with the Lord Chancellor on the first setting or the rate, and that for subsequent settings of the rate, the expert panel comes in, as the House of Lords recommended.[59]

The amendments were withdrawn.

[59] Ibid., c61

4. Part 3: Miscellaneous and general

Part 3 sets out the final provisions and deals with regulations, extent, commencement and short title.

The Government's **New Clause 2**, Report on effect of Parts 1 and 2, was agreed in Public Bill Committee.

New Clause 2, now **Clause 11** in the Bill as amended in Public Bill Committee, would provide for affirmative resolution regulations to require insurers of customers domiciled in England and Wales to supply information (as specified) about the effect of Parts 1 and 2 of the Bill on policy holders. Before the end of a year after 1 April 2024, the Treasury would have to prepare and lay before Parliament a report that summarises the information provided about the effect of Parts 1 and 2, and gives a view on whether, and how, policy holders have benefited from any reductions in costs for insurers. The FCA would be required to assist the Treasury in the preparation of the report.

This new clause was considered with **New clause 6**, in the names of Opposition Members, which was intended to require insurers to pass on to policy holders savings made as a result of the changes.

Gloria De Piero raised a number of complaints about New Clause 2 which she described as being "as full of red tape as it is holes".[60]

Rory Stewart acknowledged that New Clause 2 had been introduced to meet concerns raised by Opposition Members of the House of Lords."[61] He spoke of a fundamental disagreement with Opposition Members about the nature of markets, of the effect of competition, and of how the modifications which had been made to the Government's original proposals had affected the anticipated reduction in insurance premiums.

The Minister said that New Clause 2 would enable insurers to be held to account:

> In the very detailed amendment put forward by the Government, … we have specified all the information we expect insurers to provide, so that we are in a position to work out exactly what savings they derive. That will allow the Treasury, working with the Financial Conduct Authority, to come to a view on whether insurers are passing on the savings to the customers.
>
> The right hon. Member for Delyn asked what the point is of the new clause and why we do not propose a compulsory mechanism to pass savings on. The answer is that it all depends on competition and market law. If at the end of the reporting period there is clear evidence that the companies have significantly increased their revenues without passing on savings to customers, that will raise very considerable questions about the operations of markets and competition. That may indeed imply, as Opposition Members seem to imply, that some form of legal cartel is in

60 PBC 11 September 2018 cc44-5
61 PBC 11 September 2018 c48

> operation. At the moment, there is no evidence that that is happening. [62]

In answer to a question about why reporting would not be done annually, Rory Stewart said:

> …a claim can be brought any time within three years of an accident. The date takes into account that the law is due to come into effect in 2020. We add three years to that for the claim, and then time for the data and evidence gathering in order to report in 2024.[63]

The Minister argued that the Government's New Clause 2 was better than the Opposition's proposals:

> … pushing for one-year rather than three-year reviews and attempting to price fix the result would leave the opposition amendments open to judicial review and create an enormous, unnecessary burden on the market. Our contention is that the market already operates—we have the Competition and Markets Authority to argue that that is the case—and, by introducing our new clause, we will be able to demonstrate that over time. It is a very serious thing.
>
> I remain confident that, if insurance companies are compelled to produce such a degree of detail and information to the Financial Conduct Authority and the Treasury, they will pass on those savings to consumers because, were they not to, they would be taking a considerable legal risk. The industry initially resisted this move, and understands that it is a serious obligation.[64]

Other Government amendments were agreed to provide for New Clause 2 to extend to England and Wales.

62 PBC 11 September 2018 c51
63 PBC 11 September 2018 c52
64 PBC 11 September 2018 cc52-3

5. Small claims

The Government's proposal to increase the small claims track limit for personal injury claims was raised in debates on the Bill, even though it does not form part of the Bill and would be achieved instead by secondary legislation (effecting a change to the Civil Procedure Rules).

5.1 Second reading debate

At Second Reading, David Gauke provided information about the increase:

> The Government's reform programme also includes measures—not included in the scope of this Bill—to increase the small claims track limit for road traffic accident personal injury claims to £5,000, and for all other personal injury claims to £2,000. As these claims are generally not complicated, they are suitable to be managed in the simpler, lower cost small claims track. This route is designed to be accessible to litigants in person without the need for a lawyer, although claimants may still seek legal representation if they wish. To support this, the Government are working with a wide stakeholder group including the insurance industry, claimant solicitor representative groups and consumer groups in order to design and deliver a simple-to-use online service to enable the vast majority of those claiming for low-value road traffic accidents who may well choose not to be represented by legal advisers to receive help and guidance to manage their cases through to conclusion.
>
> The service will be designed for those with no legal advice or training, and will be as simple to use as possible to ensure that the claimant journey is as smooth as it can be. Raising the small claims limit for these RTA cases to £5,000 will work to control their costs, acting as an incentive for insurers to challenge, rather than settle, those cases that they believe to be without merit. This is vital to changing the unhealthy culture that sees whiplash claims as a way to make easy cash. The reality is that, as insurers are forced to offset the cost of the abuse by raising premiums, fraudsters are simply taking money out of the pockets of honest motorists.[65]

David Gauke acknowledged concerns about the effect of the increase on vulnerable road users, for example, cyclists, pedestrians and motorcyclists. He said "we intend to remove these vulnerable road users from the small claims limit changes. They are, of course, already excluded from the Bill".[66]

Richard Burgon expressed concern about what the increase would mean in practice:

> Without legal fees being covered, tens of thousands of working people will simply be priced out of obtaining legal assistance. Many will drop their cases altogether. Others will fight on but do so representing themselves, not only making their pursuit of justice more difficult, but placing serious pressures on the courts. Others will pay their own legal fees out of their compensation,

65 HC Deb 4 September 2018 c81
66 HC Deb 4 September 2018 c82

> which in effect means a cut in their compensation levels. Of course, other workers will conclude that when their route to justice through a court or tribunal is removed, they have no alternative but to resort to industrial action to achieve redress.[67]

The Shadow Lord Chancellor thought there should be a much more modest increase:

> We agree with the Justice Committee and the recommendation of the Jackson review that there should be an increase in the small claims limit only in line with inflation. That would mean a rise to £1,500, not the £2,000 currently proposed. If the Government were to propose a £1,500 limit today or to accept Labour's amendment that we will propose in Committee, that would help to build a much broader consensus around this currently divisive legislation.[68]

Robert Neill (Conservative), the Chair of the Justice Select Committee, spoke of the concerns of the judiciary:

> … it is most important that we take on board the senior judiciary's significant evidence on the potential impact in the courts, to which our report refers, and the dangers that will happen if litigants in person—genuine litigants in person—have difficulty navigating the system, which may have the unintended consequence of placing additional burdens on the Courts Service…
>
> …[The Government] should consider where we should set the appropriate limit in relation to employment liability and public liability, which almost invariably create more complex issues. It is much harder to expect people, on an equality of arms basis, to deal with issues arising collaterally from the main point in such cases. As the Bill proceeds, we need to look again at how we handle that.[69]

Gloria De Piero referred to the small claims changes being "hidden behind the Bill".[70] She called for workplace injuries to be excluded from the reforms:

> There is no suggestion of fraud or of increased numbers of claims by people injured at work. The Government should exclude such claims from this package of measures and from any small claims increase.[71]

5.2 Public Bill Committee debate

At Public Bill Committee stage, Justice Minister, Rory Stewart, reiterated:

> Vulnerable road users will be excluded from the Bill and from secondary measures on the small claims court limit. A vulnerable road user is anybody who is neither driving a motor vehicle nor a passenger in one; in other words, the definition includes pedestrians, horse riders, motorcyclists or anyone else on the road who is not in a motor vehicle.[72]

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67 HC Deb 4 September 2018 c86
68 HC Deb 4 September 2018 c88
69 HC Deb 4 September 2018 c112
70 HC Deb 4 September 2018 c128
71 HC Deb 4 September 2018 c128
72 PBC Deb 11 September 2018 c6

Opposition new clauses

New Clause 1: Restriction on increase in small claims limit for relevant personal injuries

New Clause 1 was intended to "limit increases in the whiplash small claims limit to inflation (CPI), and allow the limit to increase only when inflation had increased the existing rate by £500 since it was last set".[73]

Gloria De Piero criticised the process involved in introducing the increase:

> The Government have been disingenuous in trying to sneak through these changes to the small claims track limit by using delegated legislation, which restricts the proper scrutiny that such significant changes deserve. With the new clause, we ask the Government to do the right thing and to put it on the face of the Bill, enshrining the terms that a plethora of experts agree on: the use of CPI over the retail prices index when it, and using 1999 as a start date for any recalculation of the limit for a small claims track.[74]

Rory Stewart disagreed with the amendment citing a number of objections. One of these was that the Government was "not arguing that the shift to £5,000 is fundamentally a question of inflation".[75] His fundamental reason for opposing the amendment was constitutional:

> This is business for the Civil Procedure Rule Committee, as it always has been, and it is not suitable to put in the Bill.

On division, New Clause 1 was defeated by 9 votes to 8.

New Clause 3: Recoverability of costs in respect of advice on medical report, etc.

New Clause 3 was intended to ensure "that a successful claimant is able to recover costs incurred for legal costs in respect of advice sought in relation to determining the quantum of damages following a medical report or the establishment of liability where it is in dispute".

The Shadow Minister disagreed that all small claims track cases would be "minor, straightforward and simple". She said that New Clause 3 would ensure that,

> at the very least, when the injured person gets a medical report, as the Government in clause 6 rightly say they should, they can get independent legal advice on what the report means in terms of the value of their claim, so that, if they remain fighting on their own, they settle at an appropriate sum. How else would they know what their case is worth?

Gloria De Piero spoke of a societal benefit:

> If people settle at an undervalue or their conditions are not properly recognised, they will fall back on the state - the NHS or the benefits system - and the taxpayer will foot the bill that should properly have been met by the negligent party. The polluter will end up not paying and we will all pay through our taxes.

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73 PBC Deb 11 September 2018 c66
74 PBC Deb 11 September 2018 c66
75 PBC Deb 11 September 2018 c67-8

In cases where insurers did not admit liability, Gloria De Piero considered that the claimant should be able to get fixed-cost legal advice and representation in relation to establishing liability. [76]

The Minister considered that New Clause 3 would go against the fundamental principle of the small claims court, "the idea of which is that an individual should be a litigant in person and not in a position to recover their legal costs". He said that the Government had made some concessions about the online portal and the roll-out, which made it inappropriate to ask for the reclaim of legal costs. The Minister continued:

> In the vast majority of cases, a claimant will get a medical certificate, follow the path of the online portal and the settlement will come without them having to proceed to court. [77]

He commented on how the Bill would affect the number of people bringing cases:

> The Government's contention is that some of the cases currently being brought forward are fraudulent or exaggerated claims motivated by a desire to get a payout when either an injury has not been experienced or the injury experienced was considerably less than claimed in court. We believe that, by reducing the level of tariffs that paid out and by removing the industry of lawyers whose costs can currently be reclaimed through the process, it will be less likely that an individual who has not suffered an injury will go through the inconvenience of seeking a medical report, and less likely that they will proceed to the small claims court or go through the online portal to receive payment for an injury that did not occur. They would not be supported and encouraged by the legal profession or, more likely, claims management companies in proceeding down that path.

On division, New Clause 3 was defeated by 9 votes to 8.

New Clause 7: Small Claims Track: vulnerable road users

New Clause 7 was intended to "limit increases in the small claims track limit in relation to vulnerable road users (cyclists, pedestrians, horse riders, etc) suffering whiplash injuries to inflationary rises only".

It was considered with **New Clause 8** which was intended to "limit increases in the small claims track limit in relation to people who have suffered a whiplash injury during the course of their employment to inflationary rises in increments of £500 only".

Gloria De Piero set out the context for the amendments:

> The Government have refused to allow the small claims changes, which will have a fundamental impact on access to justice for hundreds and thousands of injured people every year, into the Bill. New clause 7 is designed to ensure that vulnerable road users are exempted as the Minister has promised. New clause 8 would do little more than reflect the recommendations of Lord Justice Jackson in his civil justice review. The Minister agreed this morning that there had been a change to the small claims limit in 1999. New clause 8 says that 1999 is the date from which any change to the small claims limit should be calculated and that the increase

[76] PBC Deb 11 September 2018 c34
[77] PBC Deb 11 September 2018 c35

> should be by no more than £500 at any one time. As I have said, that reflects the recommendations of Lord Justice Jackson.
>
> There is a difference between us on the appropriate level of inflation. We say CPI—the consumer prices index. There is absolute logic in that because that is the inflation rate applied by the Government to benefits paid to injured people. It is also, of course, the rate that the Governor of the Bank of England recommends.

Rory Stewart pointed to concessions which had already been made:

> In relation, first, to people injured in the course of employment, personal injury claims that are not as a result of whiplash, we have listened very carefully to right hon. and hon. Members. They will remember that in the initial consultations there were suggestions about raising the limit to £10,000 or £5,000. The agreement has been that for non-whiplash-related injuries, it is kept at £2,000.
>
> There is some discussion about whether it is correct to see that in terms of CPI or RPI—the retail prices index—but broadly speaking, it is not very significantly different from the rates that were set in the 1990s when inflation was applied, although there is some disagreement between the two sides of the House, to the extent of a few hundred pounds, on the extent of headroom put on top of inflation. …
>
> The real concession has been made in relation to vulnerable road users, which I hope hon. Members on both sides of the House will welcome.[78]

On division, New Clauses 7 and 8 were each defeated by 9 votes to 8.

5.3 Opposition amendments tabled for Report stage

The Opposition have tabled two new clauses relevant to the proposed increase in the small claims track limit for personal injury claims:

- New Clause 1, "Restriction on increase in small claims limit for relevant personal injuries". The Member's explanatory statement states:

  > This new clause would limit increases in the whiplash small claims limit to inflation (CPI), and allow the limit to increase only when inflation had increased the existing rate by £500 since it was last set.

- New Clause 2, "Small Claims Track: Children and Protected Parties". The Member's explanatory statement states:

  > This new clause would limit increases in the small claims track limit for those suffering whiplash injuries to inflationary rises only, for people who are either children or people lacking capacity to make decisions for themselves (as defined in the Mental Capacity Act 2005).

78 PBC Deb 11 September 2018 c76

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