HOUSE OF LORDS Library Briefing

Civil Liability Bill [HL]
HL Bill 90 of 2017–19

Summary

The Civil Liability Bill [HL] is a government bill, which had its first reading in the House of Lords on 20 March 2018, and is due to have its second reading on 24 April 2018. The Bill has two main purposes. The first is to introduce measures designed to disincentivise the number of minor, exaggerated and fraudulent claims for compensation resulting from whiplash injuries sustained in road traffic accidents. The second is make provision with regard to the personal injury discount rate, according to which claims for the loss of past and future earnings resulting from personal injuries are determined.

Amongst the measures included in the Bill are proposals to give the Lord Chancellor the power to specify a tariff according to which damages for whiplash injuries would be determined (when the duration of those injuries is not longer than two years); to allow a departure from this tariff in exceptional circumstances; to ban the settlement of claims without appropriate medical evidence; and for the Lord Chancellor to set the personal injury discount rate following advice from an expert panel, and according to a calculation based on a 'low-risk' investment profile intended to provide not less or more than 100 percent compensation for the injury sustained.

The Bill is part of a package of primary and secondary legislative measures on personal injury claims. The most significant of the latter are the Government's plans to raise the limit for claims on the small claims track in civil courts from £1,000 to £5,000 for road traffic accident-related personal injury claims, and from £1,000 to £2,000 for other personal injury claims. Both primary and secondary legislative measures are intended to come into force at the same time in April 2019.

Reaction to the proposals has been mixed. Organisations such as the Association of British Insurers and the Forum of Insurance Lawyers have been supportive of the plans, suggesting they are long overdue. In contrast, the Law Society, the Association of Personal Injury Lawyers and campaigning groups such as Access to Justice, have raised concerns such as the access of claimants to legal advice, and queried whether any savings generated by the proposals will be passed onto customers by the insurance industry.

Table of Contents

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Table of Contents

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1. Introduction

The Civil Liability Bill [HL] is a government bill, which had its first reading in the House of Lords on 20 March 2018, and is due to have its second reading on 24 April 2018. The Bill has two main purposes. The first is to introduce measures designed to "disincentivise" the number of minor, exaggerated and fraudulent claims for compensation resulting from whiplash injuries sustained in road traffic accidents.[1] The second is make provision with regard to the personal injury discount rate, according to which claims for the loss of past and future earnings resulting from such an injury are determined. With the exception of minor consequential amendments, the Bill would only apply to England and Wales.

The Bill is part of a package of primary and secondary legislative measures on personal injury claims, the most significant of the latter are the Government's plans to raise the limit for claims on the small claims track in civil courts from £1,000 to £5,000 for road traffic accident-related personal injury claims, and in line with inflation from £1,000 to £2,000 for other personal injury claims.

This Briefing examines the background to the measures, including recent government consultations and previous attempts to legislate, and pre-legislative scrutiny of the current proposals. It then provides a brief clause-by-clause explanation of the measures in the Bill, before exploring the reaction to the proposals, including on raising the limits for personal injury claims on the small claims track in civil court.

2. Background

2.1 Whiplash Claims

According to the Government, the volume of road traffic accident-related personal injury claims has grown by almost 50 percent over the past ten years, from 520,000 registered claims in 2006/07 compared with 780,000 in 2016/17.[2] (These figures have been disputed by organisations such as the Association of Personal Injury Lawyers, however, as discussed below.) The Government maintain this rise comes despite a reduction in the number of road traffic accidents reported to the police and improvements in vehicle safety. It also contends the continuing high number of whiplash claims has increased the cost of motor insurance premiums, and further that the compensation paid in response to these claims is often "out of proportion" to the level of injury suffered.[3]

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[1] Explanatory Notes, p 3.
[2] ibid, p 2.
[3] ibid.

At present, there is no legislative provision which regulates damages for pain, suffering and loss of amenity for road traffic-related (RTA) whiplash injuries.[4] The assessment and award of such damages is a matter for a court, with reference to the facts of the case, including the severity of injuries and previous awards for similar injuries. Current arrangements for how this compensation is calculated is set out in a 2015 government factsheet:

> In the vast 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. In 2015, the average compensation paid out for a whiplash claim with an injury duration of around six months was £1,850.
>
> 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.
>
> 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:
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> > 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".[5]

From November 2016 to January 2017, the Government consulted on a package of measures designed to address the volume and cost of personal injury claims, and in particular those involving RTA-related soft tissue injury, the majority of which are whiplash claims.[6] The package included four measures, designed to:

> a) tackle the high numbers of minor RTA-related soft tissue injury claims by either:
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> > i. removing compensation for pain, suffering and loss of amenity

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[4] Explanatory Notes, p 4.

[5] HM Government, *Whiplash—Tariff of Predictable Damages*, 2015.

[6] Ministry of Justice, *Reforming the Soft Tissue Injury ('Whiplash') Claims Process: A Consultation on Arrangements Concerning Personal Injury Claims in England and Wales*, November 2016. p 5.

(PSLA[7]); 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 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 MedCo2 accredited practitioners.[8]

The consultation document noted that the measures to remove PSLA for minor RTA-related soft tissue injury claims and to raise the small claims limit for personal injury claims were announced by the then Chancellor of the Exchequer, George Osborne, in his Autumn Statement in November 2015.[9] The consultation document suggested the further measures proposed would supplement these reforms, and would require primary legislation. In contrast, raising the small claims limit for personal injury claims would be achieved through amendments to the Civil Procedure Rules by secondary legislation. The paper noted that, for the purposes of the above, it would also have to be determined what constituted a 'minor' claim (as referenced in point a)).[10]

On 11 January 2017, (prior to the Government issuing its response to the consultation) the chair of the House of Commons Transport Committee,

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[7] PSLA is a term used to cover specific elements of compensation following an accident. The pain and suffering element compensates for all past, present and future physical and psychiatric symptoms. The loss of amenity element compensates for loss of enjoyment of life or a reduction in ability to perform everyday tasks (Source: Ministry of Justice, *Reforming the Soft Tissue Injury ('Whiplash') Claims Process: A Consultation on Arrangements Concerning Personal Injury Claims in England and Wales*, November 2016, p 5).

[8] Ministry of Justice, *Reforming the Soft Tissue Injury ('Whiplash') Claims Process: A Consultation on Arrangements Concerning Personal Injury Claims in England and Wales*, November 2016, p 5.

[9] HM Government, *Spending Review and Autumn Statement*, November 2015; and Ministry of Justice, *Reforming the Soft Tissue Injury ('Whiplash') Claims Process: A Consultation on Arrangements Concerning Personal Injury Claims in England and Wales*, November 2016, p 5.

[10] ibid.

Louise Ellman, wrote to Lord Keen of Elie, Advocate General for Scotland and Ministry of Justice Spokesperson in the Lords, to outline a number of concerns about the plans. In particular, the letter noted that the Government's proposals were not specifically targeted at fraudulent claims, and called for the Government to demonstrate how the proposals to reduce levels of compensation will deter fraudulent claims whilst allowing those with a genuine claim to get appropriate restitution.[11] Ms Ellman also voiced concerns that the measures might create the potential unintended consequence of creating space for unscrupulous claim management companies to operate, suggesting even small awards might allow such companies to make a profit if they could encourage sufficient volumes of claims.[12]

In its response to the consultation, published in February 2017, the Government said it remained committed to bringing forward measures to address the "substantial financial incentives for claimants to bring cases regarding relatively minor injury, or exaggerate the severity of their injury" with regard to whiplash claims.[13] It further stated its proposals would be taken forward through a mix of primary and secondary legislation, to be targeted at RTA-related whiplash claims and minor psychological claims, which would be defined as part of the legislative process.

However, the document stated that the Government had decided not to remove payment of PSLA for minor RTA-related soft injury claims, nor to have a single payment for minor claims—thus removing the need to define 'minor' claims as required in point a) above. Instead, a tariff of fixed compensation for PSLA would be introduced for claims with an injury duration of between 0 and 24 months. This fixed tariff, which the Government said had been uplifted to take into account the latest version of the Judicial College Guidelines, was determined as follows:

Injury Duration	2015 average payment for PSLA—uplifted to take account of JCG uplift (industry data)	Judicial College Guideline (JCG) amounts (13th edition) Published September 2015	New Tariff Amounts
0–3 Months	£1,750	A few hundred pounds to £2,050	£225
4–6 Months	£2,150	£2,050 to £3,630	£450
7–9 Months	£2,600	£2,050 to £3,630	£765
10–12 Months	£3,100	£2,050 to £3,630	£1,190
13–15 Months	£3,500	£3,630 to £6,600	£1,820

[11] House of Commons Transport Committee, 'Letter from Louise Ellman to Lord Keen regarding Injury Claims', 11 January 2017.
[12] ibid.
[13] Ministry of Justice, *Part 1 of the Government Response to: Reforming the Soft Tissue Injury ('whiplash') Claims Process, A Consultation on Arrangements Concerning Personal Injury Claims in England and Wales*, February 2017, p 11.

Injury Duration	2015 average payment for PSLA—uplifted to take account of JCG uplift (industry data)	Judicial College Guideline (JCG) amounts (13th edition) Published September 2015	New Tariff Amounts
16–18 Months	£3,950	£3,630 to £6,600	£2,660
19–24 Months	£4,500	£3,630 to £6,600	£3,725

(Source: Ministry of Justice, *Part 1 of the Government Response to: Reforming the Soft Tissue Injury ('Whiplash') Claims Process, A Consultation on Arrangements Concerning Personal Injury Claims in England and Wales*, February 2017, p 22)

The consultation response also said the judiciary would be provided with the facility to both decrease the amount awarded under the tariff in cases where there may be contributory negligence, or to increase it in exceptional circumstances (though such increases capped at no more than 20 percent).[14]

The document also reaffirmed the Government's intention to raise the limit for claims on small claims track from £1,000 to £5,000 for RTA-related personal injury claims, and in line with inflation from £1,000 to £2,000 for other personal injury claims.[15]

The Small Claims Track

Defended cases in the civil courts are assigned to one of three tracks:

Small-claims track: Generally for lower value and less complicated claims with a value of up to £10,000 (although there are some exceptions).
Fast track: For claims with a value of between £10,000 and £25,000.
Multi-track: For complicated claims with a value of £25,000 or more.

The small claims track is intended to provide a simple and informal way of resolving disputes. Although lawyers may be 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 costs and for this reason, many claimants deal with a small claim without the help of a solicitor. In contrast, in multi-track or fast track cases, the successful party would normally expect to recover costs from the losing party.

The financial limit for the small claims track for many types of claim is currently £10,000. A lower limit of £1,000 applies to claims for personal injury and housing disrepair.

(Source: HM Tribunal and Courts Service, *The Small Claims Track in the Civil Courts*, accessed 9 April 2018; and House of Commons Library, *Small Claims for Personal Injury Including Whiplash*, 13 December 2017)

[14] Ministry of Justice, *Part 1 of the Government Response to: Reforming the Soft Tissue Injury ('Whiplash') Claims Process, A Consultation on Arrangements Concerning Personal Injury Claims in England and Wales*, February 2017, p 33.
[15] ibid.

Finally, as per point d), the Government said it would seek to ban offers to settle RTA-related whiplash claims without evidence. Such a ban would cover both the offering and requesting of such settlements, and there would be no exemptions to this provision.

The Prisons and Courts Bill, introduced in the 2016–17 session having been published on 23 February 2017, was intended to take forward many of these provisions which required primary legislation. Specifically, part 5 (clauses 61 to 67) included provision to define whiplash; to specify a tariff of damages for whiplash injuries; provide for an uplift in exceptional circumstances; to set rules prohibiting the agreement of a settlement before a medical report; and to provide for how this ban would be regulated.[16]

However, due to the 2017 general election, the Prisons and Courts Bill fell at the end of the curtailed parliamentary session. Following the election, the new Government led by Theresa May signalled its intention to introduce the Civil Liability Bill in the June 2017 Queen's Speech, with a government policy paper stating:

> **Civil Liability Bill**
> This Bill will crack down on fraudulent whiplash claims and is expected to reduce motor insurance premiums by about £35 per year. The Bill will ban offers to settle claims without the support of medical evidence and introduce a new fixed tariff of compensation for whiplash injuries with a duration of up to 2 years.[17]

The provisions in the current Bill are explored in detail below. In evidence to the House of Commons Justice Committee on 7 March 2018, Advocate General for Scotland and Ministry of Justice Spokesperson for the Lords, Lord Keen of Elie, said the Government intended to implement both the primary and secondary legislative elements of the reforms it proposed, including with regard to changes to the small claims track limits, by April 2019.[18] Reaction to those proposals is provided in the latter sections of this Briefing.

2.2 Personal Injury Discount Rate

Awards of personal injury damages are intended to compensate the claimant for all losses, both past and future, caused by the injury (the '100 percent rule').[19] With regard to future financial loss, damages can be paid by a lump sum or a schedule of future payments under a Periodical Payments Order

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[16] Explanatory Notes to the Prisons and Courts Bill 2016–17, 23 February 2017, pp 58–60.
[17] HM Government, 'Queen's Speech 2017: What It Means For You', 21 June 2017.
[18] House of Commons Justice Committee, *Written Evidence from Rt Hon the Lord Keen of Elie, QC*, 7 March 2018.
[19] Explanatory Notes, p 3.

(PPO), or a combination of both.[20] In order to calculate a lump sum, a discount rate is applied in order to represent the rate of return claimants would be expected to earn when investing it, which has been historically been set with reference to Index Linked Gilts (ILGS), as set out in the Explanatory Notes to the Bill:

> The calculation of a lump sum for future financial loss includes applying a discount rate which represents the rate of return that claimants are expected to earn when investing it. The discount rate is intended to ensure that the opportunity to invest does not result in either over or under compensation. At present, following the leading House of Lords case of *Wells* v *Wells*, the rate is calculated on the basis that the claimant is a very risk averse investor. The rate has, in accordance with this principle, been set by reference to yields on Index Linked Gilts since 1998.[21]

Though it is theoretically possible to set a different rate in individual cases, since 2001 it is thought that no court has departed from the standard discount rate.[22] The Damages Act 1996 provided the Lord Chancellor with the power to set such a rate, to apply unless the court is persuaded another rate is more appropriate, a power which can be exercised from time to time, with no provision for specific intervals between reviews. However, before setting the rate, the Lord Chancellor must consult the Government Actuary and HM Treasury.[23]

The Damages Act 1996 does not specify the methodology to be applied in the setting of the rate—this is largely governed by principles set down in case law by the courts (in particular, the decision of the House of Lords in *Wells* v *Wells*). However, as detailed in the Explanatory Notes, even small changes in the rate can make a significant difference to the size of an individual award.[24]

The power of the Lord Chancellor to set the discount rate has only been exercised twice since the Damages Act 1996 received royal assent, the first was when the rate was set at 2.5 percent in June 2001. In February 2017, the then Lord Chancellor, Liz Truss, announced that the discount rate had been reviewed again, and from March 2017 would be set at -0.75 percent.[25]

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[20] Explanatory Notes, p 3.
[21] ibid.
[22] ibid.
[23] ibid.
[24] ibid.
[25] House of Commons, 'Written Statement: Change to Personal Injury Discount Rate', 27 February 2017, HCWS503.

In a statement accompanying the announcement, the Lord Chancellor acknowledged the change would have a significant impact:

> There will clearly be significant implications across the public and private sector. The Government has committed to ensuring that the NHS Litigation Authority has appropriate funding to cover changes to hospitals' clinical negligence costs. The Department of Health will also work closely with General Practitioners (GPs) and Medical Defence Organisations to ensure that appropriate funding is available to meet additional costs to GPs, recognising the crucial role they play in the delivery of NHS care.[26]

She added that the Government would be seeking to review the framework under which the rate is set to ensure it remains fit for purpose:

> 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.[27]

The resulting consultation paper was published on 30 March 2017, and considered options on by whom, when and by what mechanism the discount rate should be set.[28] In its response to the consultation, published on 7 September 2017, the Government said it intended to fulfil its commitment to create a "fairer and better framework" for the setting of the discount rate.[29] On how the rate should be set, the Government said consultation responses were divided as to the risk appetite which should be assumed, but there was general agreement claimants should be treated as more risk adverse than ordinary investors, and support for the principles proposed for setting the rate.[30] Further, the response stated that, based on the evidence

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[26] House of Commons, 'Written Statement: Change to Personal Injury Discount Rate', 27 February 2017, HCWS503.
[27] ibid.
[28] All the consultation documents are available on the following page: Ministry of Justice, 'Consultation Outcome: Personal Injury Discount Rate: How It Should Be Set In Future', accessed 9 April 2018. The consultation was undertaken jointly by the UK and Scottish Governments, though separate responses were issued as this area of law is devolved in Scotland.
[29] Ministry of Justice, *The Personal Injury Discount Rate: How It Should Be Set In Future*, 7 September 2017, p 44.
[30] ibid.

and analysis examined as part of the accompanying Impact Assessment,[31] the Government believed the present principles governing how the rate is set were "unrealistic" and "may produce significantly larger awards than provide 100 percent compensation", with significant implications for the taxpayer.[32] As a result, the Government proposed:

> 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 [thus removing the explicit link with ILGS]; and in assessing those rates the actual investment practices of claimants and the investments available to them should be considered. This will make the rate more realistic.[33]

The Government also committed that the principles for the setting of the discount rate should be set out in statute. On when the rate should be reviewed, based on the responses received, the Government acknowledged the need for a more structured system, and suggested a review of the rate every three years was appropriate.[34] Finally, on who should set the rate, the Government proposed that the rate should be set by the Lord Chancellor with the advice from an independent expert panel (other than the initial review which would be by the Lord Chancellor with advice from the Government Actuary). That panel would be chaired by the Government Actuary.[35]

Alongside its response to the consultation, the Government published draft legislation on the personal injury discount rate to carry forward the above proposals and invited the House of Commons Justice Committee to undertake pre-legislative scrutiny.[36]

In its subsequent report, published in November 2017, the Justice Committee said it welcomed the Government's commitment to 100 percent compensation in setting the discount rate, but contended the meaning of this should be clarified given this will "nearly always" either under- or over-compensate claimants.[37]

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[31] Ministry of Justice, *Impact Assessment: Setting the Personal Injury Discount Rate*, July 2017.
[32] Ministry of Justice, *The Personal Injury Discount Rate: How It Should Be Set In Future*, 7 September 2017, p 44.
[33] ibid.
[34] ibid, p 46.
[35] ibid.
[36] Ministry of Justice, *The Personal Injury Discount Rate: How It Should Be Set In Future, Draft Legislation*, September 2017, Cm 9500.
[37] House of Commons Justice Committee, *Pre-Legislative Scrutiny: Draft Personal Injury Rate Clause, Third Report of Session 2017–19*, November 2017, HC 374 of session 2017–19.

Further, with regard to the assumptions upon which the rate is calculated, the Committee said the evidence presented on claimant investment behaviour was "thin",[38] stating:

> [I]t may be reasonable to change the assumptions on which the discount rate is calculated if they are no longer representative of "real world" behaviour, but we recommend that clear and unambiguous evidence should be gathered about the way claimants invest their lump sum damages before legislation changes the basis on which the discount rate is calculated; and that if the rate is to take account of investment behaviour, a mechanism must be established to keep those responsible for setting the rate informed about that behaviour.[39]

However, whilst calling for adequate safeguards to prevent significant under-compensation of the most vulnerable claimants, the Committee said there was "ample evidence" the rate ought to be reviewed and set regularly.[40] The Committee added it was convinced of the merit of an expert panel assisting the Government in setting the rate, though it called for that panel to be involved in the first review (not provided for in the draft legislation). Further, the Committee argued the Lord Chancellor should be required to publish their reasons for changing the discount rate or leaving it unaltered, and to publish the advice provided by the expert panel, and the reasons for not accepting that advice whenever that situation occurs. The Committee also made recommendations as to when that panel should be considered quorate.[41]

In its response to the Committee, published in March 2018, the Government said it would undertake a range of actions in response to the Committee's findings, including:

- Involving the expert panel in the first review of the rate under the new framework;
- Working to develop further the existing evidence base ahead of setting the rate in the first review by:
  - Issuing a further call for evidence on the details of investment behaviour, including evidence about investments by or on behalf of persons with protected characteristics;
  - Commissioning the Government Actuary's Department to carry out further research and analysis of the assumptions to be made about inflation, tax and management costs; and further analysis considering the effect of a range of rates

[38] House of Commons Justice Committee, *Pre-Legislative Scrutiny: Draft Personal Injury Rate Clause, Third Report of Session 2017–19*, November 2017, HC 374 of session 2017–19, p 37.
[39] ibid, p 3.
[40] ibid, p 37.
[41] ibid, pp 37–8.

under a wider range of assumptions—for example, as to the length of awards;

- Requiring the Lord Chancellor give reasons for the rate chosen on a review, and that they consult the panel about the allowances to be made for taxation, investment management charges and inflation in the setting of the rate. The Lord Chancellor and the panel will also be able to consider the possibility of setting different rates for different cases on each review;
- Requiring publication of the panel's report to the Lord Chancellor at each review and the impact assessment of the effect in rate every time the Lord Chancellor changes it;
- Amending the legislation to make clear that it is possible on any review for the Lord Chancellor to set differential rates on the basis of duration or heads of loss;
- Explaining more clearly the meaning of the 100 percent compensation principle, and on why the setting of the rate is not dependent on balancing social costs with the level of compensation;
- Providing or endorse guidance on standard practice to help ensure claimants properly understand the choice between a lump sum and a periodical payment order, and investigate the quality and effectiveness of current advice on the choice between a lump sum and a periodical payment order; and:
- Investigating whether there are ways in which the use of PPOs could be increased, whether a mechanism could be created to keep those responsible for setting the rate informed about investment behaviour, and consider whether the Government or a third party should review whether investment management costs should be recoverable as a head of damages. [42]

3. Bill: Clause by Clause

As introduced in the House of Lords, the Civil Liability Bill [HL] has three parts, and would make significant provision for the Lord Chancellor to be given regulation-making powers in a number of areas. Part 1 (clauses 1 to 7) would provide for whiplash injuries, as per the following:

- **Clause 1: 'Whiplash Injuries'**
  Would specify those RTA-related whiplash injuries, and the circumstances in which such injuries are incurred, and provide the power for the Lord Chancellor to specify the details of these definitions in regulation. Such statutory instruments would be subject to the affirmative resolution procedure.

[42] Ministry of Justice, *Personal Injury Discount Rate: Response to the Report of the Justice Select Committee, Draft Clause*, March 2018, Cm 9567.

- **Clause 2: Damages for Whiplash Injuries**
  Would enable the Lord Chancellor to specify in regulations, in the form of a tariff, the damages a court may award for PSLA for relevant whiplash injuries, in cases where the duration of those injuries is not expected to exceed two years. The tariff would provide for an ascending scale of fixed sum payments, and regulations may specify different sums for different injuries, allowing the Lord Chancellor to set and change each category and payment award. Regulations made under this section would be subject to the affirmative resolution procedure.
- **Clause 3: Uplift in Exceptional Circumstances**
  Would enable the Lord Chancellor to provide in regulations that the court may increase the prescribed sum in exceptional circumstances. Such regulations would be subject to the affirmative resolution procedure.
- **Clause 4: Rules Against the Settlement of Claims Before Medical Report**
  These provisions would ban the settlement of a whiplash claim without appropriate medical evidence, and would enable the Lord Chancellor to specify what constitutes appropriate evidence and who can provide it in regulations. Such regulations would be subject to the affirmative resolution procedure.
- **Clause 5: Effect of Rules Against Settlement Before Medical Report**
  Would require relevant regulators (as defined in clause 7) to monitor and enforce the ban on settling whiplash claims without medical evidence.
- **Clause 6: Regulation by the Financial Conduct Authority (FCA)**
  Where the appropriate regulator is the FCA, this clause would allow HM Treasury to make regulations allowing the FCA to monitor and enforce the ban on settling claims without medical evidence.
- **Clause 7: Interpretation**
  Would specify the regulators responsible for monitoring and enforcing the ban on settling claims without medical evidence, and those to whom the ban would apply. Would also provide the power for the Lord Chancellor to extend this list to other regulators or persons. Such regulations would be subject to the negative procedure for statutory instruments.[43]

[43] Explanatory Notes, pp 6–10.

Part 2 of the Bill (clause 8 and schedule 1A) would make provision for changing the law on the personal injury discount rate, as follows:

- **Clause 8: Assumed Rate of Return on Investment of Damages, and Schedule 1A**

  This clause would revoke section 1 of the Damages Act 1996, and replace it with a new provision: section 1A. It would also insert a new schedule 1A into the Damages Act, providing the detail on how the Lord Chancellor is to approach the review and setting of the discount rate. The new schedule makes changes to the methodology through which the rate is set; provides for an initial review of it to take place 180 days of clause 8 coming into force, and thereafter for reviews to occur every three years; and makes provision for the establishment of an independent expert panel that the Lord Chancellor must consult in setting the rate.

  Section 1A

  Would specify that it is for the Lord Chancellor to set the discount rate, including the power to set separate rates for different forms of award. As summarised in the explanatory notes to the Bill:

  > The only substantive differences between section 1(1)–(4) of the Damages Act 1996 and the new section A1(1)–(6) are clarification as to the provision for prescribing different rates of return for different classes of case; the introduction of the new Schedule; and the omission of the requirement to consult the Government Actuary and the Treasury before setting the rate. The new consultation requirements are set out in the new Schedule A1. Regulations made under this section would be subject to the negative procedure.[44]

  Schedule 1A would provide: that the damages calculated according to the discount rate is intended to cover all expected cost and losses caused by the injury; that the rate will be calculated according to a low-risk investment profile; outlines what the Lord Chancellor must have regard to in setting the rate; for an expert panel, to be chaired by the Government Actuary and have four other members, to advise on setting the rate; that the Lord Chancellor must publish such information about the response from the expert panel they consider appropriate; that the cost of the panel will be met by the Lord Chancellor; for rules on when the panel is quorate; and for arrangements should two or more discount rates be prescribed as a result of a review.

[44] Explanatory Notes, p 8.

> Clause 8(3) would also provide that the current discount rate of minus 0.75 percent would continue to apply, and thus this rate will therefore be reviewed in the initial review.

Part 3 of the Bill (clause 9: regulations) provides that regulations made under the Bill are to be made by statutory instrument and specifies the arrangements for regulations made under the negative and affirmative procedures. Clauses 10 to 12 make general provisions including regarding territorial extent and commencement.[45]

4. Reaction to the Government's Proposals

According to impact assessments published alongside the Bill, the Government contends it will deliver savings for people who hold insurance policies, with the whiplash measures expected to reduce motorists' insurance premiums by £1.1 billion in total, or an average of around £35 a year per policy.[46] The Government further contends that the changes to the framework for setting the personal injury discount rate will ensure the process is fairer for both defendants and claimants, and will further reduce motor insurance premiums and deliver other savings to the taxpayer.[47] The Government also claims the reforms to RTA-related whiplash claims and raising the small claims track limit for such claims to £5,000, and raising the limit to £2,000 for all other personal injury claims, will make a "substantial contribution" to its target of reducing regulatory burden on business.[48]

However, reaction to the Government's proposals from across the legal and insurance sectors has been mixed. The Association of British Insurers (ABI) is one of the organisations which have been supportive of the plans.

Commenting with regard to the proposals on whiplash which were included in the Prison and Courts Bill, James Dalton, the ABI's Director of General Insurance Policy, said:

> The reforms to whiplash claims set out in the [Prisons and Courts] Bill cannot come soon enough. For far too long claimant lawyers have been defending a system riddled with exaggerated and fraudulent claims because they have been profiting handsomely from it.[49]

Further, in a joint authored letter coordinated by the ABI, 26 motor and liability insurance companies—who between them reportedly account for approximately 86 percent of the motor insurance market—committed to

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[45] Explanatory Notes, pp 9–10.

[46] Ministry of Justice, *Overarching Impact Assessment: Civil Liability Bill*, March 2018, p 5.

[47] ibid.

[48] ibid.

[49] Association of British Insurers, 'Reforms to Whiplash Claims Cannot Come Soon Enough', 23 February 2017.

passing on savings resulting from the proposals in the Civil Liability Bill:

> 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.[50]

Don Clarke, a member of the Forum of Insurance Lawyers' (FOIL) national committee, also welcomed the reforms though cautioned there was considerable progress to be made for the reforms to be introduced on time, stating:

> FOIL has always been supportive of the Government's desire to tackle the number and cost of whiplash claims […] We acknowledge that there is a great deal to do if the Government is to hit the planned implementation date for whiplash reform of April 2019 whilst at the same time preserving access to justice.[51]

In contrast, the Association of Personal Injury Lawyers (APIL) has been highly critical of the proposals. In written evidence to the House of Commons Justice Committee in February 2017, APIL suggested that the Government's assertion that the number of whiplash claims had risen over recent years was incorrect, stating:

> [T]he 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 percent since 2010/11. Even when whiplash statistics are combined with the number of injuries registered by insurers with the CRU as 'neck and back' injuries, there has been a significant fall of 11 percent since 2011/12.
>
> 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 percent (£500 million) a year since the introduction of the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act—

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[50] Legal Futures website, 'Insurers and Claimant Lawyers Clash over Impact of Civil Liability Bill on Motor Premiums', 21 March 2018.
[51] ibid.

> from £4.1 billion in 2013 to £3.6 billion in 2015.[52]

However, the Government has disputed these figures, stating:

> Many respondents from the claimant lawyer community have indicated their belief that the numbers of whiplash claims registered with the CRU are decreasing. However, further study of the CRU statistics suggests this is not the case and that differences in claims labelling may be behind this belief.
>
> 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 percent of all RTA-related personal injury claims made.[53]

With regard to the proposals in the Civil Liability Bill, APIL has accused the Government of "washing its hands of injured people", with the organisation's President, Brett Dixon, stating:

> 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' […] People with genuine and painful whiplash injuries will have their compensation restricted just because they have had the temerity to have a 'whiplash' claim. All this is for a promise of reduced car insurance premiums, which we know will never stick in the long term.[54]

The Law Society has also been critical of the proposals. On the issue of whiplash claims, the President of the Law Society, Joe Egan, said the measures on whiplash could severely restrict the availability of legal advice and guidance to motorists who may have been the victim of another individual drink driving, for example, and stated "there is a risk these new proposals will mean victims will receive far less than under current levels of compensation".[55]

The Law Society has also been a vocal critic of the Government's plans to adjust the small claims track financial limit for RTA-related injuries, stating:

> The Government is treating injuries that would be regarded as

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[52] House of Commons Justice Committee, *Written evidence to the House of Commons Justice Committee from the Association of Personal Injury Lawyers*, 7 February 2017, paras 3–4.
[53] Ministry of Justice, *Part 1 of the Government Response to: Reforming the Soft Tissue Injury ('Whiplash') Claims Process*, February 2017, Cm 9422.
[54] Legal Futures website, 'Insurers and Claimant Lawyers Clash over Impact of Civil Liability Bill on Motor Premiums', 21 March 2018.
[55] ibid.

> grievous bodily harm in the criminal courts as small claims. A limit of £5,000 will mean injuries including facial scarring, fractured ribs, a bruised chest and whiplash to the neck would be considered as 'small claims'. This means people will be forced to bring claims themselves without expert legal advice.[56]

The Law Society also warned that the proposals could result in an "inequality of arms" in the court system:

> The MoJ does not appear to have properly considered the fact that this will clog up the court system creating a David and Goliath situation where people recovering from their injuries, deprived of legal advice, have no choice but to act for themselves.
>
> Those defending claims meanwhile are likely to be able to pay for legal advice. The increase in the number of litigants in person that will result from these changes will have serious consequences for the courts.[57]

The Law Society has welcomed the proposals to ban the settlement of whiplash claims before medical evidence is considered. However, it has also expressed scepticism that any savings generated by the proposals will be passed onto the customers of the insurance industry.[58]

The campaigning group Access to Justice has also contended that the reforms will restrict claimants' access to justice, result in less genuine claims being pursued, and could arguably lead to job losses in the insurance and claim handling, and legal sectors.[59]

Evidence to the House of Commons Justice Committee: January 2018[60]

In evidence to a one-off session of the House of Commons Justice Committee specifically on the issue of raising the limit for claims on the small claims track, Jason Tripp, Operations Director of the claims handling provider Coplus, also raised concerns about a 'one-size fits all' approach to reform and that those seeking to make a claim could be left without access to representation and legal advice.[61] Similarly, Steve Mitchell, Deputy Head of Legal Services as USDAW, said the reforms were "unfair and unjustified",

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[56] Law Society, 'Ministry of Justice Plans Mean Victims of Negligent Drivers Won't Get Legal Help', 23 February 2017.
[57] ibid.
[58] ibid.
[59] Access to Justice, 'Why the Government Needs to Rethink', accessed 11 April 2018.
[60] The House of Commons Justice Committee has announced a short inquiry into the proposal to change the small claim track limits, the results of which are unpublished at the time of writing.
[61] House of Commons Justice Committee, *Oral evidence: Small Claims Limit for Personal Injury*, 16 January 2018, HC 659 of session 2017–19, Q11–14.

and would restrict access to justice for large numbers of people.[62] Giving evidence in the same session, however, Nigel Teasdale, former President of the Forum of Insurance Lawyers, said as the reforms were aimed at low-value and simple motor claims, such legal representation was not required.[63]

Giving evidence from the judicial perspective, Mrs Justice Simler also voiced concerns about litigants' access to legal advice, and suggested that the reforms would be likely to significantly increase the per case burden of cases on the small claims track. However, she did add that if these claims could be dealt with via a redesigned claims portal, rather than displacing them to the courts system via the small claims track, then this would "go a long way to dealing with our concerns".[64]

Giving evidence for the Government, Lord Keen of Elie, Advocate General for Scotland and Ministry of Justice Spokesperson in the Lords, reiterated the Government's rationale regarding why claims covered under the expanded small claims track limit were straightforward and did not require legal representation:

> Most of [the whiplash claims under discussion] are relatively straightforward in the context of causation, for example. In other words, liability is not normally a significant issue; the issue is the extent of injury and any consequent loss in the context of wage loss and other things. Those can, we believe, be adequately dealt with under the small claims procedure, particularly as it is being further developed. That is why we consider it appropriate to increase the limit to £5,000, which would cover about 95 percent of all claims.
>
> With regard to employers' liability claims and public liability claims, rather different issues arise, because we are dealing with issues of health and safety, and that can lead to complexity. That is why we have retained a lower limit of £2,000 for that type of claim. Let's be clear: for many years, since 1991, such claims, up to the value of £1,000, have been dealt with under this procedure without any real difficulty. In the event that even a minor claim raises complex issues of causation or statutory liability, which can happen, it can be removed to the fast track, which is a different process altogether. Either the judge or the party can suggest that there has to be a move.[65]

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[62] House of Commons Justice Committee, *Oral evidence: Small Claims Limit for Personal Injury*, 16 January 2018, HC 659 of session 2017–19, Q11–14.
[63] ibid, Q33.
[64] ibid, Q47.
[65] ibid, Q55.