Ministry of Justice

The Right Honourable
Lord Keen of Elie QC

House of Lords
London
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24 May 2018

Dear Colleagues,

COMMITTEE STAGE OF CIVIL LIABILITY BILL

Thank you for speaking at the committee stage of the Civil Liability Bill. I am grateful for your contribution to the debates and for the considered questions and amendments posed throughout. I was unable to address all the points raised during the debate so wanted to write with some further responses on several areas of particular interest or concern. I have met with those that requested further discussion during the debates but extend the offer to meet and discuss further to all Peers that would find it helpful.

I shall deal first with points on Part 1 of the Bill, on whiplash injuries and claims.

I noted a number of comments throughout the debate about the issue of whether the insurance sector will pass on the savings from these reforms. We will consider in detail a number of the interesting and helpful proposals put forward by Peers during the Committee debate on this particular issue. **I would like to invite all interested peers to attend a drop-in session on 5th June 12.30-14.00 in Committee Room 2a to discuss this topic in more detail ahead of Report.** As I mentioned in the House, a large number of major insurance companies, covering over 84% of the UK motor and liability insurance market have written to the Lord Chancellor committing to pass on to consumers savings arising from Government reforms to both whiplash and the discount rate. We fully expect that insurers will have little or no choice but to pass on savings or risk being priced out of the market. Although the Government cannot act in a way that would be in breach of competition law, I can assure you that the Government will continue to closely monitor the industry's reaction to these reforms and will consider further action if required.

There was also considerable debate during Committee on the recommendations made by the Delegated Powers and Regulatory Reform Committee in relation to the Civil Liability Bill, in particular on whether it was appropriate for both the whiplash definition and the tariff to be included on the face of the Bill. I outlined the Government's position on these issues during the debate, which differs from that given by the Delegated Powers Committee. I do however, note the opinion of the House in relation the whiplash definition, and the Government will continue to consider its position on this matter before the Report stage of the Bill.

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It is, though, the Government's view that it is wholly appropriate that regulations are used to set and amend the new tariff, and that it is the Lord Chancellor who retains control over the level of damages paid in whiplash claims. The Government continues to be concerned about the high number and cost of whiplash claims and the impact they have on the cost of motor insurance premiums. The tariff will create greater certainty for both claimants and defendants as to the value of a whiplash claim. It is right that the Lord Chancellor should take control of the compensation process, and set tariffs which continue to provide a proportionate amount of compensation, but which also act to disincentivise unmeritorious claims and reduce the costs associated with these claims for all motorists. In the Government's view the Judicial College's guideline amounts are too high. The proposed tariff figures provide a proportionate amount of compensation for the pain and suffering endured,and in developing the tariff amounts the Government has taken account of the suggested compensation included in the Judicial College Guidelines as well as industry data on the actual settlement of claims. It remains important that whilst it is the Lord Chancellor who sets the tariff, the judiciary should also retain a role in this process. This is why the Bill contains the power for the tariff amount to be increased in exceptional circumstances.

The Government is committed to reducing the number and cost of whiplash claims, and the impact they can have on the cost of motor insurance. In relation to this, Lord Sharkey raised a specific question regarding whether there was a target to reduce the amount of compensation set through the new whiplash tariff. I can confirm that no such specific target was set. The Government initially consulted on two options: option one was to remove general damages in minor cases and option two was to develop a tariff of proportionate compensation for the relatively low level of injury suffered. Following consideration of the responses received to the consultation, it was clear that implementing a new tariff of compensation was the fairest way to achieve the Government's objectives from these reforms.

In developing the tariff, consideration was given to a significant amount of data, sourced from the insurance industry, claimant solicitors and the Department for Work and Pensions Compensation Recovery Unit. This included the median amounts of compensation paid to claimants given their prognosis, alongside the suggested amounts in the 12th Edition of the Judicial College Guidelines, which was the relevant edition for the 2015 industry data received.

The new tariff has been developed to increase in an upwards curve so that those with more significant injuries received a lesser reduction from the average current amounts awarded to those with minor claims. Therefore, the amounts for the bands were increased in increments to enable the tariff to move smoothly upwards from minor injuries with a duration of 0 to 6 months up to more serious injuries with a duration of 19 to 24 months.

Consideration was also given to the gap between the bands to ensure they do not encourage attempts to inflate claims in order to receive a higher amount. Following the consultation, the proposed tariff has been uprated twice to take account of the publication of the 13th and 14th editions of the Judicial College Guidelines. The 13th edition also introduced, for the first time, a classification of minor injuries as lasting between 7 days and three months.

As I mentioned during the debate, it was not our intention for the draft tariff values published in the regulations to be different than those provided in the impact assessment, and that a corrected draft regulation has now been published and is available to download, along with all other relevant Bill documents, here: https://www.gov.uk/government/publications/civil-liability-bill.

Several references were also made during the Committee debate to those driving in the course of their employment, including whether there was any evidence of fraud amongst this group. The Government does not centrally collate data on fraud, and such data as is produced by the industry does not break down by occupation of the perpetrator.

As I explained to the Justice Select Committee in January, the very nature of fraud makes it difficult to accurately identify the number of unmeritorious claims taken forward. I can though provide you with what I hope is some helpful information in relation to fraudulent claims. Insurance industry data shows that in 2016 there were around 69,000 detected cases of motor insurance fraud, worth £780 million, although it is also important to note that not all fraud is detected. In addition, the City of London Police Insurance Fraud Enforcement Department has secured over 350 convictions since its inception in 2012, resulting in over 100 years' worth of jail time for insurance fraudsters.

Under the Government's whiplash reforms all claimants are entitled to make a claim regardless of whether the accident occurs in the course of their employment or not, and that it is wrong to differentiate between these groups. An exemption for those driving in the course of their employment would cover far more than just drivers employed by the emergency services, it would also cover the self-employed and many differing types of employees across the country.

It is the Government's view that the tariff figures provide a proportionate level of compensation for the pain and suffering endured and that there is no compelling reason that this particular sub-set of claims should be separated out from others. I should add that, in respect of claims for such injuries arising from the negligence of an employer, breaches of duty imposed by health and safety legislation no longer give rise to civil liability, so would be excluded from the Act's provisions in general, and from the tariff in particular.

I now turn to the question that Baroness Primarolo raised about protection for claimants who are unable to locate treatment for either their physical or psychological injuries. I am happy to clarify that the Bill's provisions merely confirm, for the avoidance of doubt, that a claimant's duty to mitigate their losses, which could include seeking appropriate medical treatment, applies to damages awarded under the tariff. Every case turns on its own facts, but the Bill's provisions only require a claimant to take reasonable steps to mitigate the effect of their whiplash injury, they do not require them to undertake medical treatment it if it is not available for any number of practical reasons.

In addition, minor psychological injuries associated with a primary whiplash injury tend to relate to issues such as loss of sleep and travel anxiety, and as such would not require specialist help from mental health service providers. It is also part of the role of the medical expert who provides the initial medical report to identify if a further psychiatric report is required, and if a significant diagnosable psychiatric injury is identified it will need to be dealt with separately, outside of the terms of this Bill.

A number of Peers also made reference to the personal injury system in Scotland, and I would like to take the opportunity to address this point. Lords will be aware that there are separate legal systems in our different jurisdictions, and one key difference was the introduction in 1997 of the Access to Justice Act which opened up the way conditional fee agreements (CFAs) worked. These changes encouraged claimants to have a go, as there was no comeback if their claim failed, which in turn led to a vastly accelerated increase in 'no win, no fee', whiplash related personal injury claims in England and Wales. This 'claims culture' never developed in Scotland, where a system of only the recovery of a limited success fee from the claimant remained in place. The Government through the Legal Aid and Punishment of Offenders Act 2013, has subsequently amended the way CFAs work in England and Wales in way which mirrors the way such claims are dealt with in Scotland. These reforms are having an impact, but more needs to be done.

I turn now to Part 2 of the Bill, on the Personal Injury Discount Rate.

First, I would like to clarify two points I made during Committee. In replying to amendment 92A I said that the index used for PPOs is a very specific care costs index rather than the RPI. The specific index in question, ASHE 6115, is used in connection with care costs, but other costs in a PPO may be indexed to whichever index the court considers appropriate to the case in question. In replying to amendment 91, I stated that paragraph 8 of the new schedule A1 reproduced the provisions of the Damages Act 1996, whereas the paragraph is intended to reproduce the effect of the statute in allowing the Lord Chancellor not to set a rate.

Several references were made by your Lordships to the desirability of improving the availability and take-up of periodical payment orders (PPOs) as a means of overcoming many of the inherent limitations in the taking an award of personal injury damages for future loss as a lump sum. The Government shares this aim and we agree that PPOs are often the lowest risk way for claimants to receive their settlement. However, defining the circumstances in which a PPO ought to be taken is not necessarily a straightforward exercise. As Lord Hope and Lord Mackay commented PPOs are more appropriate in some cases than others. It is therefore important that measures to increase the use of PPOs are properly considered, not least for unforeseen consequences. It is for this reason that the Government has committed in its reply to the Justice Select Committee to investigate, either directly or with the help of a third party, how within the present law the practice regarding PPOs could be improved to ensure that any avoidable obstacles to their use are removed (CM 9567, paragraph 51). Our intention is that the investigation should be completed by the end of summer 2019.

On Lord Beecham's question of whether the Government would report regularly on the incidence of cases where the court takes into account a different rate from that prescribed by the Lord Chancellor from time to time, Baroness Vere stated that the Government considered that the rate set by the Lord Chancellor should be generally applicable. The Government's initial view is requiring a regular report would be a disproportionate requirement as the power to depart from the prescribed rate, which is being carried forward from the present law, is expected to be exercised sparingly. The Government will, however, consider the Noble Lord's suggestion further.

Lord Beecham, drawing on comments from Lord Mackay at Second Reading, also asked for confirmation that the proposed assumptions in paragraph 3(3) of the new schedule A1 to the Damages Act 1996 were not intended to require the Lord Chancellor to have prophetical vision and that they were not expected to create significant difficulties for the proposed expert panel in reaching agreement on their advice. The Government does not expect that the degree of foresight required will pose particular problems for the Lord Chancellor in his task. The setting of the discount rate will always be an exercise in anticipating the rate of return that it is reasonable to expect a recipient of personal injury damages for future financial loss will receive over the period of their award, which could be many years, so some degree of prediction will be necessary. The Lord Chancellor will under the new law have the benefit of advice from the expert panel to assist him or her. The expert panel will be comprised of diverse specialists, including actuaries and investment experts. They will all bring their individual expertise and skills to the task of advising the Lord Chancellor on the factors relevant to the setting of the rate. This will no doubt require them to consider difficult technical issues and reaching agreement may well not be straightforward, but, ultimately, if there are irreconcilable differences of opinion the advice to the Lord Chancellor will have to reflect them.

Lord McKenzie raised a number of questions regarding the relevance of the interests of defendants in the setting of the rate. He referred, in particular, to the potential influence on the Lord Chancellor of the Government's position as a defendant in high value cases and the comments of Lord Scarman as to the irrelevance of the consequences of a high award on the defendant. He also asked how some claimants being expected to be under-compensated was consistent with the principle in *Wells v Wells*. The Government remains committed to the principle that an award of damages should compensate a claimant

fully for all loses suffered as a result of a wrongful injury. The effect of a change in the discount rate on the size of awards of damages payable by defendants is not a relevant factor in the setting of the rate under the present law and will not be so under the new law. The comments of Lord Scarman quoted by Lord McKenzie will remain applicable. The damages payable should provide 100% compensation, neither more nor less. The purpose of applying a discount rate is to support the achievement of this objective. The proposals in clause 8 of the Bill will ensure that the rate is set on an evidence-based approach that results in a rate that reflects the return reasonably to be expected to be achieved by claimants. This approach will support the delivery of the 100% compensation principle and will be fairer to claimants and defendants. In reality, it cannot be guaranteed that all claimants will achieve 100% compensation. The expert panel in advising the Lord Chancellor and the Lord Chancellor in setting the rate will have to take into account the likelihood that claimants will achieve better or worse rates of return than the rate of return predicted by the discount rate. The Government expects that this will be a significant factor in the setting of the rate at a specific point within the range of possible rates that would be permitted under the proposed law.

Finally, I turn to the point raised by Baroness Bowles regarding the description in the Explanatory Notes of the assumed approach to investment to be taken by the recipient of the award of damages for future financial loss. The relevant extract from the notes states (with emphasis added): The specified assumptions are set out in paragraph 3(3). They include that the recipient of the relevant damages receives proper investment advice; invests in a diversified portfolio of investments; and has a low-risk investment profile (which means the recipient is to be assumed to be willing to take more risk than the very cautious investor envisaged under the present law relating to the setting of the discount rate but less risk than would ordinarily be taken by a prudent and properly advised *individual investor (who is not a claimant) with similar investment objectives*). The intention is that the level of risk assumed in the setting of the discount rate will therefore be higher than is assumed under the present law.

I regret that the italicised words do not accurately reflect the content of the Bill. The notes should have stated *"individual investor, who is not a claimant with similar investment objectives*)". In other words, the individual investor mentioned in this phrase is to be assumed not to have the same financial aims as the recipient of relevant damages, whose investment objectives are described in paragraph 3(2)(a) -(c) of the new schedule A1. The term "investment objectives" in the explanatory notes was not intended to introduce a new concept. I apologise for the confusion that has been caused by this error and I am grateful to Baroness Bowles for bringing it to the attention of the House. The error will be corrected when they are next published. We will also consider whether the overall description can be clarified.

This letter is copied to all Peers who spoke at committee stage and the chair of the DPRRC. I will be placing a copy of this letter in the House Library.

Yours sincerely,

RT HON LORD KEEN OF ELIE QC