Ministry of Justice

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House of Commons
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Dear Colleagues,

COMMITTEE STAGE OF CIVIL LIABILITY BILL

I would like to thank all members who contributed to the informed debate on the Civil Liability Bill at Committee Stage on Tuesday 11 September and for the time and effort you have spent scrutinising this important piece of legislation. I intend in this letter to recap some of the key areas of that debate and to respond to a range of points that I could not fully address at the time. I am very willing to meet members further to discuss the content of the Bill in more detail if they wish

Firstly, I will cover Part 1 of the Bill relating to the **whiplash provisions.**

Whiplash reform and the Small Claims Track (SCT)

During the debate of new clause 8 I stated that the Government is increasing the small claims track (SCT) limit to £5,000 for whiplash-related personal injury (PI) claims only and that a separate new limit of £2,000 will apply for all non-whiplash PI claims. I would like to clarify that, as the Ministry of Justice announced in its consultation response, our increase in the SCT limit to £5,000 is for all road traffic accident (RTA) PI claims, predominantly but not exclusively whiplash. I should also like to make it clear to colleagues that vulnerable road users, that is cyclists, pedestrians and horse riders, will not be covered in these reforms, and nor will they be covered by the rise of the SCT to £5,000. The separate increase to £2,000 will be in respect of non-RTA PI claims, including employer liability and public liability claims. These changes are not part of the Bill but will be brought forward by secondary legislation afterwards in time for implementation in April 2020.

The Government is proposing action on whiplash claims for good reason. The number and value of these claims has risen disproportionately to the actual number of road traffic accidents. The economic cost of dealing with these claims is significant and is one of the prime reasons why insurers settle many claims which they might otherwise challenge. The cost of this over-settlement has helped to increase motor insurance premiums for car owners. This affects all of our constituents, as honourable members across the House know, because for many people owning a car is not a luxury, it is a necessity, especially for those in rural communities. Increasing the limit for RTA PI claims to £5,000, so claimant legal costs are not recoverable in the event of a successful claim, will – alongside the new requirement for a medical report and the tariff – mean that insurers have greater incentives to challenge unmeritorious claims.

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This new arrangement will absolutely not mean that claimants will be denied access to justice. It will encourage early and expedited settlement for those who have suffered minor road traffic accident injuries, who will be able to manage their claims through a relatively straightforward process which does not routinely require a lawyer (although they may of course instruct a lawyer if they wish). The vast majority of claims have liability admitted early and settle pre-court and we fully expect this to continue. As the honourable members are aware, the Government is working closely with stakeholders, including representatives of litigants in person, to create an easy-to-use online platform to support people to make and run these claims. We have also discussed this with the judiciary and HMCTS and will continue to do so. We will be testing this IT system rigorously before implementing it in April 2020.

Several honourable members have challenged the need for the RTA PI limit to be raised to £5,000. The Government believes that if the limit is set at a much lower level it will incentivise greater claims inflation to ensure that their value is constantly pushed above that (lower) limit, allowing the recovery of legal costs and undermining expected savings for the consumer.

Whiplash tariff

I have touched upon the new whiplash tariff and wish now to explain in more detail why it is important that the Government, through the Lord Chancellor, has the responsibility for setting damages levels in this tariff. Placing control in the hands of the Lord Chancellor through regulations is a carefully targeted approach to deal with the specific and enduring problem of whiplash claims. The current system, which utilises the Judicial College Guidelines, has in our view led to compensation levels which are out of step with the level of pain and suffering endured. The guidelines only consider the damages paid following a judicial determination, uprated by inflation using the RPI measure. They do not take account of the vast majority of settlements made pre-court, which are often lower. The Judicial College Guidelines are not set solely by the judiciary in any event. They are in fact a product of a panel chaired by a judge, but which also includes both claimant and defendant practitioners.

Our response then to set the tariff damages levels is a proportionate response to a serious problem. It is not a widespread challenge to judicial discretion under the common law. Having a tariff in regulations provides the flexibility to react to both inflationary changes and market adaptations. It will ensure that genuinely injured claimants will continue to receive a reasonable amount of compensation. There is nothing novel or arbitrary about the solution – a number of our European neighbours such as Spain, France and Italy all use variations of a tariff system, with levels set by Government.

I would like to turn to the questions raised by colleagues about the Government's proposal that the tariff should cover claims where the injury prognosis is up to two years in duration, assessed by an accredited and independent medical expert. In our view this duration is essential to ensure it captures the vast majority of whiplash claims. Our position has been informed by extensive stakeholder engagement. It is consistent with the Judicial College Guidelines, in which 'minor' orthopaedic neck injuries, which includes minor soft tissue injuries, include those where full recovery may take up to two years. This Bill and the proposed damages for whiplash injuries creates certainty and predictability for those claimants with injuries up to two years whilst ensuring a proportionate amount of compensation. The proposed tariff recognises the differing severity of injuries within the two years period by arranging tariff payments on an ascending scale in three-month bands, which avoids significant cliff edges between prognosis periods.

The honourable member for Delyn asked about how the Government would propose to meet the requirement in the Bill to consult with the Lord Chief Justice before making regulations in respect of the power of the court to determine an uplift in damages in exceptional circumstances. The Government is currently considering the practicalities of the consultation process.

I can assure you, however, that we will ensure that it will be meaningful and transparent, and that we will take full account of the Lord Chief Justice's response.

Whiplash definition

On the matter of the definition of 'whiplash injuries' in the Bill, during Committee debate several colleagues proposed that it should be set by the Chief Medical Officer for England. The Government has listened both to Peers in the Other Place and the DPRRC and has placed the definition on the face of the Bill. The definition is not just a medical one, it must also be accurate from a legal perspective which is why the Government consulted a group of experienced expert stakeholders when developing its definition including medical experts, claimant and defendant solicitors all experienced in the personal injury sector. The definition in clause 1 is sufficiently wide to address the whiplash claims problem but is also clear and certain for claimants and defendants. Clause 2 holds a limited power of amendment to ensure that the definition can be adjusted promptly to respond to changes in the claims market or future medical developments. The Government has provided in the Bill that the Chief Medical Officers for both England and Wales should, among others, be consulted in relation to any future amendments of the definition.

Colleagues also brought an amendment that sought to place on the face of the Bill the requirement for a medical report in a whiplash claim to be provided by an accredited medical expert selected via the MedCo portal. The Civil Procedure Rules (CPR) currently require any initial medical report in support of a whiplash claim to be sought through the MedCo IT Portal and that these reports must be provided by an accredited medical expert. Using the CPR to set out the requirements for medical reports provides flexibility and allows for responses to changed circumstances. I can assure the honourable members that future claimants will be able to access MedCo reports through the new online portal the Government is developing for RTA PI claims.

Finally, the honourable member for Enfield Southgate raised the issue of legal representation of children at settlement hearings. The Government is currently looking into this matter and will clarify the position in relation to this matter when the House returns.

I turn now to Part 2 of the Bill, which concerns the **Personal Injury Discount Rate.**

Periodical Payment Orders (PPOs)

The Honourable Member for Lewisham West and Penge asked during our debate in Committee about the percentage of personal injury claims in which periodical payment orders ("PPOs") are used. PPOs are available in the vast majority of the highest value NHS clinical negligence claims against hospitals, including those involving brain damage during childbirth and in the large majority of long-term serious injury cases where the defendant is insured by a UK regulated insurer. The Ministry of Justice does not have precise figures, but PPOs are generally only used to pay the care and case management elements of any damages for future financial loss in settlements of the most serious and long-term cases and, even then, are almost always used in conjunction with a lump sum. PPOs are therefore generally only found in settlements worth more than £1 million, and the incidence of their use increases sharply with the overall size of the settlement. To give an indication of scale, the NHS settled 12,478 clinical negligence claims in 2016-2017, but only 234 involved settlements over £1 million and of these 163 resulted in a PPO.

Nonetheless, based on information supplied by the Association of British Insurers (ABI) for the three years to March 2017 and by NHS Resolution for claims settled in 2016-17, the Ministry of Justice estimates that about 44 per cent of the claims worth more than £1 million use a PPO.

The information provided indicates that PPOs were used in about 11 per cent of settlements worth between £1 million and £3 million made by members of the ABI for about 8 per cent of the total value of the settlements, while, for the settlements made by them worth over £3 million, PPOs were used in around 64 per cent of claims for 65 per cent of the settlement value. For clinical negligence claims settled by NHS Resolution in 2016-2017, PPOs were used in around 70 per cent of settlements worth over £1 million. These claims made up approximately 2 per cent of the total of the claims settled by NHS Resolution but accounted for 44 per cent of their total value. The department expects to obtain information about settlements in 2017-2018 shortly. I will write again to update you when this is available.

PPOs are in principle a better way of taking compensation for future loss than a lump sum and provide strong protection for claimants concerned about investment returns and their life expectancy. At the Government's request, the Civil Justice Council will be reviewing the law and practice relating to PPOs to see if their usage can be improved.

Insurers passing on savings

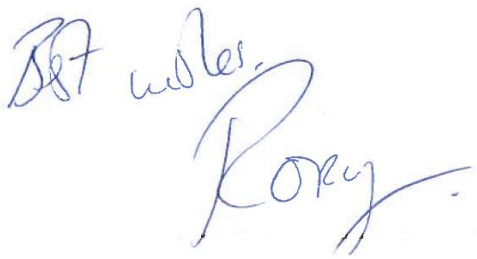
I wanted to address the further comments made during the debate on the issue of the insurance sector passing on to consumers the savings from the reforms in the Bill.

The Government amendment accepted at Committee Stage will hold insurers to account in a way that is rigorous and effective, whilst avoiding placing unnecessary burdens on an industry that is already competitive. As amended, the Bill now places new statutory requirements on insurers to provide certain information to the Financial Conduct Authority to enable HMT ministers, supported by the FCA, to report to Parliament on whether insurers have upheld their public commitments by passing on savings from the Bill and the wider whiplash reform programme.

The timing of requirement on insurers to provide information to the FCA by 2024 has been carefully thought through. This will ensure there is enough time to collect the detailed information needed to fulfil the statutory requirement and that the savings associated with both the Bill and the wider whiplash reform programme are clear. The government is clear that it will hold insurers to account for their public commitment. The FCA may take action against any firm that does not comply with this statutory requirement to provide information

I can reassure colleagues that if the report discloses that a significant portion of the industry had sought to avoid passing on savings, this could signal that the competitive nature of the motor insurance market has changed. In this case, the Treasury will review the findings and will consult with the FCA and Competition Markets Authority, before taking the appropriate action.

I will place a copy of this letter in the House Library.



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