



PROGRESS AT LAST: CIVIL LIABILITY BILL BRINGS PROMISE OF CERTAINTY ON DISCOUNT RATE AND WHIPLASH REFORM

March 2018

Following the government's announcement of their intention to bring forward reforms to the framework for setting the personal injury discount rate within the Civil Liability Bill, the government has published both the Bill and a response to the Justice Select Committee's report on their inquiry into the draft discount rate legislation.

The Bill also contains the expected measures to further reform whiplash claims, which includes seeking to impose a tariff-based damages system and bans pre-medical offers.

Whilst the Bill is a big stride in the right direction towards driving further efficiencies and fairness into the space of whiplash claims, there remains a lot to play for on the detail to ensure it achieves its aim.

With regard to the discount rate, the Ministry of Justice has thankfully explicitly rejected the Justice Committee's suggestion that the existing evidence of overcompensation was insufficient for an immediate review and is rightly pressing on with its reforms.

In particular, it was a concern at the Justice Committee stage that mandating full expert panel involvement in the first review of the rate might slow the process. Overall, compensators in both the private and public sectors should take comfort that the profound difficulties that the current rate has caused is being addressed.

The government has published the awaited Civil Liability Bill, which aims to deal with two important aspects: first, to curb the excesses of low-value personal injury claims and second, to set a new framework for calculating the discount rate.

The publication follows the government's announcement on 20 March 2018 of their intention to bring forward reforms to the framework for setting the personal injury discount rate within the Bill, and a response to the Justice Select Committee's report on their inquiry into the draft discount rate legislation.

DISCOUNT RATE REVIEW: PRUDENT CLAIMANT PREVAILS

The discount rate measures in the Bill will:

- Amend Section 1 of the Damages Act 1996 to put the process of setting the rate on a clearer statutory footing, with a requirement for the Lord Chancellor to review it at least every three years and confirm his or her determination within the 180 day review period.
- Require the first review of the rate of return to start within 90 days of the Bill being enacted and to be completed within a further 180 days.
- Ensure the rate determination is made on the assumption that the claimant is a prudent and properly advised individual - namely that he or she invests in a diversified portfolio of investments that involves more risk than a very low level of risk.
- Require the Lord Chancellor to consider the actual returns available to investors.
- Require the Lord Chancellor consult an expert panel of four members and the Government Actuary.

The Bill reflects the government's response to the Justice Committee, which rejected the Committee's suggestion that there was insufficient evidence to change the rate now.

Other key conclusions the government drew include:

- Work to develop further the existing evidence base ahead of setting the rate in the first review - to include issuing a further call for evidence on the details of investment behaviour and commissioning the Government Actuary's Department to carry out further analysis.
- Investigate whether a mechanism could be created to keep those responsible for setting the rate informed about investment behaviour.
- Investigate whether there are ways in which the use of PPOs could be increased.
- Require the Lord Chancellor and the panel to consider the possibility of setting different rates for different cases on each review.
- Amend 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.
- Consider whether the government or a third party should review whether investment management costs should be recoverable as a head of damages.

TAKING COMFORT

The Ministry of Justice (MoJ) has thankfully explicitly rejected the Justice Committee's suggestion that the existing evidence of overcompensation was insufficient for an immediate review and is rightly pressing on with its reforms.

In particular, it was a concern at the Justice Committee stage that mandating full expert panel involvement in the first review of the rate might slow the process. However, the Bill fortunately keeps the same 90/180 day timescales, regardless of any extra panel consultation by the Lord Chancellor.



Also on timing, it is of some comfort that the fresh research about actual investment behaviours will happen during the passage of the Bill, which means a review can hopefully commence as soon as the Bill is enacted.

Interestingly, the MoJ acknowledges that such research may be limited because holders of data showing favourable returns may not readily share it if it would contribute to a higher discount rate and lower awards.

In terms of wider process reform, the MoJ reiterates its political support for increasing PPO use and intends exploring whether investment management fees should be recoverable as damages - both of which could potentially be inflationary factors for compensators.

THE MILLION DOLLAR QUESTION - WHEN?

To help prepare for the first review of the discount rate under the new law, which will follow shortly after the relevant legislation comes into force, the government will call for evidence on the details of investment behaviour and arrange for further analysis of the returns likely to be obtained, during the passage of the Bill.

In terms of the legislation, a few months ago we would have said the challenge to passing the Bill will be finding time in the parliamentary calendar. However, that may now be less of an issue as Brexit legislation is held back while UK/EU discussions continue.

The MoJ will ideally want to see the Bill pass into law in the autumn, if not before. The Lord Chancellor will then be subject to the new statutory review periods, which could produce a change of discount rate in the first half of 2019.

WHIPLASH MEASURES

The Whiplash measures in the Bill will:

- Provide for a tariff of damages for pain, suffering and loss of amenity (PSLA) for a whiplash injury as defined in the Bill, which includes the duration of the injury not exceeding two years.
- Allow for the final tariff figures in supporting regulations to be debated via the affirmative procedure by parliament following Royal Assent.

- Ensure the amount of damages for PSLA as specified will include one or more minor psychological injuries (as sustained on the same occasion as the whiplash injury).
- Introduce a regulatory ban on seeking, or offering, to settle whiplash claims without medical evidence (pre-medical offers).
- Provide the court with a discretion to apply an uplift of damages in exceptional circumstances. The cap for exceptional payments would be set in supporting regulations.

Whilst the Bill is a significant stride in the right direction towards driving further efficiencies and fairness into the space of whiplash claims, there remains a lot to play for on the detail to ensure it achieves its aim.

The objectives underlying the Bill are correct but, to achieve them, the MoJ will need to make sure the detail gives as little 'wiggle room' for challenge as possible. For example, the definition of whiplash includes "neck, back or shoulder" injuries that will be subject to the proposed tariff of claims for injuries of less than two years duration.

However, does this mean that a minor thumb or wrist injury caused by a driver with advance warning of the impending collision bracing themselves, allows for their claim to sit outside of the tariff and wider spirit of the draft legislation?

It is also notable that the potential for exceptions are outlined in the Bill but no definition of "exceptional" is provided. Will this create test litigation to provide the required certainty?

In addition, while the Bill deals relatively thoroughly with outlawing pre-medical offers, it seems to allow them in cases that do not fall within the definition of whiplash. It remains to be seen whether this was the intention of those drafting the Bill.

We will be monitoring the passage of the Bill and related activity closely and working to help ministers ensure that the whole bill leaves as little room for ambiguity and argument as possible.

FURTHER INFORMATION

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