The Civil Liability Bill – European Convention on Human Rights

Introduction

1. This memorandum addresses issues arising under the European Convention on Human Rights ("ECHR") in relation to the Civil Liability Bill ("the Bill"). It considers the Bill's provisions as amended by the House of Lords. On introduction in the House of Commons, Rory Stewart OBE MP, Minister of State for Justice, made a statement under section 19(1)(a) of the Human Rights Act 1998 that in his view the provisions of the Bill are compatible with Convention rights.

2. Only the clauses which contain substantive ECHR issues are discussed. The Department considers that the provisions of the Bill which are not covered by this memorandum do not give rise to any substantive ECHR issues.

Summary of the Bill

3. The Bill was announced in the Queen's speech. The Bill is in 3 Parts.

4. Part 1 makes provision in relation to whiplash, subjecting damages for pain, suffering and loss of amenity for minor soft tissue injury claims arising out of road traffic accidents to a tariff, as well as providing for an uplift on the tariff figures, and regulating the settlement of such claims.

5. Part 2 makes provision in respect of the discount rate for lump sum awards of damages for future financial loss for personal injury ("the discount rate") which is set under the Damages Act 1996, changing the methodology for setting the discount rate, providing for regular review and making provision for specified consultees to advise the Lord Chancellor.

6. Part 3 makes the necessary legal provision for the short-title of the Bill, the extent, regulations and parliamentary procedures, and powers to make consequential, incidental etc. provision.

7. An earlier Bill (the Prisons and Courts Bill), which included similar provisions in respect of whiplash injuries, was introduced into the House of Commons on 23 February 2017, but did not complete Committee stage due to the time available to consider the Bill before the dissolution of Parliament prior to the general election.

Part 1

Whiplash

8. Clauses 1 to 5 make provision for compensation for pain, suffering and loss of amenity ("PSLA") in respect for whiplash injuries of a duration of up to two years arising out of road traffic accidents to be subject to a tariff. Regulations may provide for the court to increase the amounts specified in the tariff in a particular case, to be capped at a percentage of the tariff amount. The tariff will be subject to triennial review, required to be undertaken by the Lord Chancellor.

9. Clauses 6 to 9 make provision regulating the settlement of such claims in advance of receipt of a medical report.

10. These provisions are intended to tackle the high incidence of claims for whiplash injuries following road traffic accidents which the Government considers are minor (and may be exaggerated or fraudulent). By reducing levels of compensation payment for this head of damages, the intention is to reduce the size and volume of claims, saving money for insurers which, it is intended, they should pass on to consumers in the form of lower motor insurance premiums.

11. It is important to note that only PSLA losses are affected – these provisions do not affect other areas where damages may be awarded, for example claims for medical fees or lost earnings.

Article 1 Protocol 1 ECHR

12. Article 1 Protocol 1 (protection of property) may be relevant, in so far as a civil claim can be 'property' and it could be argued that limiting PSLA damages amounts to depriving the possible claimant of possessions.

13. However, these changes will be prospective in effect. It will only apply to new claims where the cause of action is complete after the point at which the changes come into force. Only once a cause of action has crystallised (usually at the point the damage occurs, in a tort claim) will Article 1 Protocol 1 be engaged (*Pressos Compania Naviera SA v Belgium*[1]).

[1] (1995) 21 EHRR 301

14. The Department does not therefore consider that Article 1 Protocol 1 is engaged by the provisions in Part 1.

Part 2

Personal injury discount rate

15. Clause 10 inserts before section 1 of the Damages Act 1996 a new section A1 making provision for the setting of the discount rate for England and Wales and replacing, for England and Wales, provision in section 1 of the 1996 Act. The power to set the discount rate is reproduced, rather than being a new power, and does not differ in its essential nature from the power presently in section 1 of the 1996 Act, being still the power to prescribe a rate of return which the court must take into account in determining the return to be expected from the investment of a sum awarded as damages for future pecuniary loss in an action for personal injury. Subsections (1) to (3) of the new section A1 are accordingly identical (bar a small drafting change) to subsections (1) to (3) of the 1996 Act. Subsection (4) clarifies the power under subsection (3) to prescribe different rates of return for different classes of case. Subsection (5) introduces Schedule A1, where new detailed provision is made about how the Lord Chancellor is to approach the setting of the rate

16. The new Schedule A1 makes provision for the Lord Chancellor to be required to review the discount rate on a regular basis, at least every five years; for there to be an expert panel chaired by the Government Actuary to advise the Lord Chancellor in carrying out such a review for each review after the first review; and for the Lord Chancellor to be required to follow certain principles, make certain assumptions and take into account certain factors in carrying out the review. None of these provisions affects the nature of the discount rate or the power to set the discount rate, which remain as they are under the existing section 1 of the 1996 Act.

Article 1 Protocol 1 ECHR

17. Article 1 Protocol 1 (protection of property) may be relevant, in that a sufficiently "crystallised" civil claim can be 'property' and it could be argued that changes in the discount rate, affecting the overall lump sum award, amount to an interference with property.

18. The nature of the discount rate, however, is that it is set from time to time and applies (that is, is to be taken into account by the court when determining the lump sum award) when set. This does not mean that the setting of a new rate has retrospective effect or interferes with vested interests: no argument was ever made to that effect when the rate was first set in 2001

or since, and it was confirmed that there was no retrospective effect in the setting of a new rate in *R (on the application of the Association of British Insurers) v. Lord Chancellor* [2017] EWHC 106 (Admin). Furthermore, as indicated above, the provisions of Part 2 of the Bill do not change the nature of the discount rate or of the power to set the rate, which remain as they are under the Damages Act 1996.

19. The Department does not therefore consider that Article 1 Protocol 1 is engaged by the provisions in Part 2.

Ministry of Justice

28 June 2018