Speech: Lord Keen’s speech on civil justice reform

May I start by thanking Brett Dixon for providing me with the opportunity to make this speech at the annual Association of Personal Injury Lawyers conference. It is encouraging to see so many of you here today.

I will be focussing today on a number of the important government reform programmes relevant to you as personal injury lawyers.

The first is the Civil Liability Bill, which we introduced into the House of Lords on the 20 March. This Bill makes important changes to both the whiplash claims process, and to the way in which the personal injury discount rate is to be calculated. It will begin its Parliamentary passage in earnest on 24 April, when it has its second reading.

I will also be using this opportunity to talk about some of the other reforms we are taking forward, such as measures to tackle the recent surge in holiday sickness claims, legislation to strengthen the regulatory regime for claims management companies as well as looking at the options for taking forward Lord Justice Jackson’s recent recommendations in relation to fixed recoverable costs.

But more about these issues later, as I would like to start by saying a few words about the government’s whiplash reform programme.

The government accepts that there are genuine personal injury claims, but there are also too many unmeritorious whiplash claims made each year which proceed without challenge or investigation.

The number of road traffic accident related personal injury claims remains around 70% higher than in 2005/06 and around 85% of these claims are for whiplash related injuries. This is despite extensive improvements in both vehicle safety and a decline in the number of reported accidents in recent years.

The level of compensation paid out for such claims is, in the government’s view, also out of all proportion to any genuine injury suffered, especially when balanced against the effect they have on the price of premiums paid by ordinary motorists.

This concern about whiplash claims is not just confined to the UK, and similar measures to those we are introducing have already been adopted in other jurisdictions, such as Italy and Spain.

This government remains committed to tackling the continuing high number and cost of whiplash claims, as well as ensuring that meritorious claims are backed by good quality medical evidence, provided by properly accredited medical experts. This is the basis for our action in the Civil Liability Bill.

The Bill will introduce a tariff for compensation for pain, suffering and loss of amenity for whiplash claims. The tariff will provide for genuinely injured claimants to receive a proportionate amount of compensation for their pain and suffering. All claimants will also continue to receive 'special damages' to cover any particular financial losses such as the costs of rehabilitation or loss of earnings, as they do now.

In addition, the Bill will also introduce a ban on settling whiplash claims without medical evidence. I know that many of you here today support this important measure, and that you will agree with me that the introduction of a prohibition on pre-medical offers is necessary. It will of course, deter both unmeritorious claims, by ensuring they are investigated and supported by medical evidence, as well as helping to protect claimants from accepting offers to settle without first identifying the full extent of their injuries.

These measures will apply to 'whiplash' injuries as defined in the Bill. The definition on the face of the Bill will broadly cover soft tissue injuries to the neck, back or shoulder, and there will be a supplementary Regulation which will further ensure that the group of claims causing most concern is captured. This Regulation will be subject to debate by Parliament under the affirmative resolution procedure, following the Bill achieving Royal assent.

The second element of the whiplash reform programme will be to make changes to the Civil Procedure Rules (CPR) to increase the small claims limit for road traffic accident (RTA) related personal injury claims to £5,000, and for all other personal injury claims to £2,000.

This is against a background of the small claims limit for personal injury claims remaining unchanged at £1,000 since 1991, with just a minor technical amendment to the limit in 1999. In the same period the limit for nearly all other types of claim has risen to £10,000.

The government believes that many RTA related personal injury claims are suitable to be heard in the small claims track, which is designed to be uncomplicated and accessible to litigants in person. They are not so complicated as to always require legal representation – particularly in the case of whiplash claims where the introduction of the tariff will now provide certainty as to the value of the claim. I should also stress though, that claimants are not, and will not be, precluded from engaging legal representation in the small claims court should they wish to.

Now, some might say that raising the small claims limit is a simple task, requiring only a small amendment to the CPR. The government however, recognises that just changing the rules without underpinning those changes would be unwise. That is why we are working with wide range of stakeholders on a new supporting structure, including the development of a new accessible IT system. This work will provide helpful guidance and enable all claimants to process their claims and access MedCo and other services as required.

MOJ officials have established a number of expert working groups to consider the specific challenges and to develop effective solutions. We have also begun the process of engaging with specific third sector advice providers to

ensure that appropriate help and support is available, if it is required by users of the new system. I would like to take the opportunity to thank a number of APIL representatives who have given much time and effort to participate on our expert working groups in a pragmatic and helpful way.

These measures will support the MedCo reforms introduced in April 2015. I would also like to assure you that both MedCo and the Claims Portal remain central to the reform programme, and both will continue to provide an important part of the claims infrastructure as we move forward.

Whilst much work is still to be completed, I am confident these reforms will reduce the costs of civil litigation and tackle the continuing high number of whiplash claims, benefitting consumers through reduced motor insurance premiums.

There is of course a second part to the Civil Liability Bill which many here will also be interested in hearing a bit more about. This is the reform of the legal framework for setting the personal injury discount rate.

As you know, the discount rate is applied to lump sum awards for future financial loss to reflect the fact that the claimant is able to invest and earn interest on the award. The aim of the discount rate adjustment is to ensure that the future loss award is calculated as accurately as possible to put claimants in the same financial position they would have been in had they not been injured.

I can assure you that the Government is fully committed to the 100% compensation principle, where claimants should receive neither more nor less than full compensation, and that individuals who have been unlawfully injured are put at the centre of the personal injury system. It is important that they are provided with the compensation they need to meet all their expected future financial losses, including medical and care costs.

That said, the evidence that we have gathered demonstrates that the current approach to setting the rate does not reflect the actual investment behaviour of claimants, and this is resulting in systemic over-compensation.

Research by the Government Actuary indicates that on average (after deductions for investment management and taxation) awards will currently produce about 120 to 125% of the required compensation. Such over-compensation means that the NHS in particular is overpaying on claims for clinical negligence, putting increasing pressure on the public purse. Every pound that is being spent on over-compensation could be spent on frontline NHS services.

The government believes that it is necessary to adjust the basis for setting the rate so that it reflects more closely the reality of how claimants actually invest their money. The Bill therefore specifies that the rate is to be set by reference to expected rates of return on a low risk portfolio of investments, rather than very low risk investments as at present.

The discount rate only applies to compensation for future financial loss

taken in a lump sum, and does not apply where the compensation is taken in the form of a periodical payment order (PPO). Such PPOs have many benefits, as they provide a regular income over a claimant's lifetime, they are not subject to the discount rate and do not expose the claimant to investment risk. PPOs are available for all or part of the future loss award in all long-term serious injury negligence cases against the NHS and in almost all such cases where the defendant is insured by a UK regulated insurer.

The government considers that PPOs are in principle a better form of taking compensation for future loss than a lump sum payment, and supports their use. That said, it is also right that claimants should be able to choose a lump sum if they wish. To assist claimants in reaching decisions on how to receive their compensation we intend to provide or endorse guidance on standard practice to ensure that claimants are properly informed as to the implications of choosing between a lump sum and a PPO. We will also investigate whether there are any ways in which the present law and practice regarding PPOs could be improved to ensure that any avoidable obstacles to their use are removed.

The reforms contained in Part Two of the Bill also create a new procedure for the setting of the rate, including the introduction of an independent expert panel, chaired by the Government Actuary, to advise the Lord Chancellor in its setting. This will ensure that the Lord Chancellor takes expert advice before setting a new rate. There is also a requirement on the Lord Chancellor to provide reasons for his or her decision on the rate and to publish information about the panel's advice, ensuring that the decision-making process is transparent, objective and impartial.

The final requirement is for the rate to be both reviewed promptly after the legislation comes into force, and at regular intervals thereafter. We propose that a review will be held at least every three years, to ensure that intervals of many years between reviews, which causes unnecessary uncertainty for both claimants and defendants, will no longer be possible.

Taken together, we believe that these measures will ensure that the discount rate is set regularly, fairly and more transparently, providing certainty and fairness for both claimants and defendants.

The government fully expects insurers to pass on the savings from reforms to the whiplash programme and the Discount Rate to consumers through lower premiums, and leading insurers covering around three quarters of the motor sector have already publicly committed to do so. The Government does however, fully intend to hold the sector to its word, and we will be monitoring the effect of these reforms on the price of motor insurance and will consider further action if necessary

Let me touch now upon the government's wider reform programme.

There is no doubt that many whiplash claims are driven by a substantial industry that encourages unnecessary, inappropriate or even fraudulent claims through cold calling and other social nuisances. This is why, in addition to the whiplash measures, the Government has recently introduced an amendment to

the Financial Guidance and Claims Bill which will implement a wide-ranging ban on cold calling, including by CMCs, which will be enforced by the Information Commissioner's Office.

The Financial Guidance and Claims Bill will also further strengthen the CMC regulatory regime, by transferring responsibility for CMC regulation to the Financial Conduct Authority (FCA). It will also give the FCA the power to impose a cap on the fees CMCs charge consumers, and will restrict the ability of CMC directors to simply phoenix into new regulated entities, after they have already fallen foul of the regulatory regime.

The new reforms I have spoken about today build on previous measures, such as those taken forward in part two of the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012, which implemented a number of Lord Justice Jackson's recommendations from his review of civil litigation costs.

The government is carrying out a post-implementation review of LASPO Part 2 this year. This will assess the impact the reforms have had on civil litigation funding and costs and to what extent they have achieved the government's aims; which was to reduce civil litigation costs overall, and to rebalance the costs liabilities between claimants and defendants while ensuring that parties with a valid case are able to bring or defend a claim.

The Civil Justice Council has agreed to host a stakeholder conference to consider the impacts of Part two. We will also be seeking structured feedback and data from all interested stakeholders, and I would encourage you all to contribute to this process. We will be announcing more details about how the review will work in due course.

I'd like to now turn to the issue of fixed recoverable costs (FRC). The benefits of FRC in civil cases are that they provide transparency and certainty for all parties, and incentivise the amount of work done to be proportionate to the value of the claim (rather than encouraging higher costs irrespective of the value of the claim).

Legal costs remain disproportionate in many areas of civil litigation and it is now time to consider the extension of FRC. The Government supports the principle of extending FRC and Sir Rupert Jackson was asked to conduct a review of this important issue. In his report, published 31 July 2017, an extension of FRC in the fast track (up to £25k damages) was proposed, as well as the creation of a new intermediate track, with a fixed costs regime, for cases up to £100k damages. In light of Sir Rupert's report, the government is now considering the way forward, including how best to deal with differences between types of civil litigation. The Government will consult before implementing any changes so stakeholders will have a further opportunity to express their views.

Let me finish with a recent example of government action on a particular area of concern – the increase in holiday sickness claims which damage the package holiday business. We have seen an escalation in the number of these claims which, as with whiplash claims, appears to be something unique to the UK.

Yesterday, we laid before Parliament new robust measures to fix the costs of holiday sickness claims, which we intend to come into force on 7 May 2018. These changes, introduced by new Civil Procedure Rules and a new Package Travel Pre-Action Protocol (PAP), are significant and necessary step which will be in place in advance of the upcoming holiday season.

The government will shortly publish its response to the earlier Call for Evidence, which sets out the way forward on gastric illness claims in a fair and equitable way.

My officials have worked closely with both a Civil Justice Council working group and the Civil Procedure Rule Committee to finalise the new PAP and rules. I would like to acknowledge the significant input into their development from Brett Dixon, in his role as a member of both groups.

APIL also played an important role in defining the scope of our reforms. The initial proposal, as set out in the Call for Evidence, was to apply FRC to all low value package holiday personal injury claims under £25,000. APIL argued that that proposal represented a ‘cure that goes much further than the identified malaise’. That was a fair point, and we listened and accepted it.

The outcome is that we decided to limit the scope to gastric illness claims and not wider package holiday PI claims. I should add, however, that if the ‘malaise’ should spread beyond gastric illness claims, we will not hesitate to also extend the scope of the ‘cure’.

To conclude, I would once again like to thank you for the opportunity to address you today. I hope my speech has given you a small insight into the considerable amount of work going on to reform our civil justice system in general, and in the area of personal injury in particular.

The government remains fully committed to engaging with key stakeholders, including APIL, both now and in the future. This is particularly important as together we embark on an ambitious reform programme to make a civil justice system work for the 21st century.