Health and Safety/Compensation System

Input into a review conducted by The Lord Young of Graffham

From the Association of Personal Injury Lawyers
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The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation dedicated to tackling negligence, preventing needless injury, and ensuring people who are wrongfully injured receive the redress they need. Our 4,500 members in the UK and overseas are mostly solicitors, with barristers and academics, who are all committed to serving the needs of injured people. The association is dedicated to campaigning for improvements in the law to enable injured people to gain full access to justice, and promote their interests in all relevant political issues. We have regular dialogue with the Government, consumer representatives, the insurance industry and other opinion-formers, to achieve our objectives, which are:

- To promote full and just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise;
- To provide a communication network for members.

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Accidents, negligence and the need for education

APIL's remit has always been to protect and promote the rights of people who are injured through negligence. It is not uncommon in the field of personal injury law for those rights and needs to come under threat as a result of misconception.

For this reason, one of our key activities is to use the vast expertise and experience of our members to explain exactly how our system works to anyone who has an interest in it. This includes injured people themselves who often have no knowledge at all of how the civil justice system works except what they read in the press and see in advertisements, much of which is highly misleading. It also includes organisations such as local authorities, where misconceptions about what the law requires can lead to an over-zealous approach to health and safety. Our key message in this context is that an accident is simply an incident which no-one could have reasonably foreseen and for which no-one is to blame. No-one will win a case against someone who they may think is responsible for an injury, if that injury is the result of an accident.

Negligence, of course, is a very different matter. It does, and should, result in compensation for the injured person. And, of course, the best way to avoid the human and actual cost arising from injuries, is to avoid the negligence which causes it.

The key to a proper understanding of health and safety legislation, which is designed to protect people from needless injury, and of the civil justice system, which is designed to provide redress when things go wrong, is education. APIL has been dedicated for years to offering explanation and education about what the law requires in this area.

In 2004, in its document *Better Routes to Redress*, the (then) Better Regulation Task Force examined this issue in depth and reported that the compensation culture is a myth, but that the perception of a compensation culture can cause problems by affecting behaviour.

The task force called on those in positions of influence to resist talking about the 'compensation culture' as doing so only perpetuates the problem. The report continued:

> "It would be more beneficial to educate people to understand that compensation is minimal in most cases and to educate those litigated against that the best way to avoid litigation is to be aware of the risks and to have taken cost effective measures to manage them." [1]

In the same year, the Citizens Advice Bureau found that only 31 per cent of people who are entitled to claim compensation do actually claim[2]. It is essential now that senior political figures provide the leadership required to cut through the myth surround health and safety, and compensation. Such a commitment would cost nothing, but would help to foster the clear understanding required for the proper, thoughtful application of the health and safety legislation which has been so successful in protecting us all, and a calming of the near-hysteria which characterises discussion of personal injury compensation in public debate.

APIL is committed to playing its part with Government and other parties to increase public awareness of the difference between an accident and negligence, and increasing awareness of the need to take personal responsibility for oneself and others. To this end, we have:

- developed an *Accident or Negligence?* handbook
- developed a series of factsheets to explain the legal process to injured people
- begun work with a consumer advisory group to help us develop our educational messages and information to the public
- run a number of consumer initiatives to advise people about how to avoid needless injury

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[1] 'Better Routes to Redress', published by the Better Regulation Task Force, May 2004, p17
[2] 'No win, no fee, no chance' published by the Citizens Advice Bureau, December 2004

APIL welcomes this review as a serious opportunity for the Government to make a real difference by providing this leadership, dispelling myths and generating clarity where currently there is very little. In helping to generate a well-informed public and a 'commonsense culture', the Government will help to protect its citizens and give individuals the confidence to make sensible, everyday judgements about risk. It will also help to foster the development of increased personal responsibility while continuing to provide access to justice for those injured through negligence.

Perception v Reality

Statistics

As soon as a potential compensator is notified that a claim is to be made, the Government's Compensation Recovery Unit (CRU) must be informed. This applies whether or not a case actually goes to trial (which is, in fact, very rare in personal injury cases). It is commonly held that the number of claims has increased since the previous Government changed the way personal injury claims are funded, ten years ago.

Yet the CRU statistics show very clearly that, in almost all categories of claims, the number of cases reported to the CRU have declined in those ten years, in all categories of claim except motor claims. While there have certainly been peaks and troughs in the statistics, the general downward trend for most claims is unmistakeable, and is illustrated in the table below compiled from statistics obtained by the CRU:

Latest CRU figures for number of claims made between 1 April and 31 March in each respective year

Total numbers of claims registered (combined accident and disease)

	Clinical Negligence	Employer liability	Public Liability	Motor	Other *	No liability **	Total
2000 / 2001	10 901	219 183	95 883	401 757	3120	5087	735 931
2001 / 2002	9779	170 554	100 989	400 445	1953	4595	688 315
2002 / 2003	7977	183 342	109 782	398 892	2290	4414	706 697
2003 / 2004	7121	291,210	91,453	374,761	2069	3629	770,243
2004 / 2005	7,205	253,502	87,247	402,924	2,459	2,538	755,875
2005 /2006	9,321	118,692	81,615	460,097	3,232	1,465	674,422
2006/2007	8,575	98,478	79,841	518,821	3,522	1,547	710,784
2007/2008	8,876	87,198	79,472	551,905	3,449	1,850	732,750
2008/2009	9,880	86,957	86,164	625,072	3,415	860	812,348
2009/2010	10,308	78,744	91,025	674,997	2,806	3,445	861,325

There are many possible explanations for the increase in motor claims. The growing practice of defendants' insurers approaching claimants direct in order to settle claims cheaply ('third party capture') could be a factor, as could the increasing number of newly-qualified drivers on the road, and the fact that one in five drivers are involved in a crash during their first year on the road, according to the AA.

Indeed the growing practice of third party capture is particularly significant in this context, and in relation to this debate in general. APIL members have reported incidents in which people involved in road traffic accidents have not even considered bringing a personal injury claim as a result of the accident, but have been pestered to do so by some insurance companies to the extent that they have felt obliged to claim compensation if only to prevent the unwanted intrusion into their lives.

This knowledge is not restricted to the legal sector. Anyone who knows someone who has been involved in such an accident is likely to have heard a similar story. APIL and others have provided evidence and argument to the Financial Services Authority about this, with negligible results. We would be happy to share this information with the review, as this is a particular mischief which we hope the review will address.

Another area which attracts a great deal of public attention is the perception that school trips have declined because schools and teachers fear litigation if a child is injured. Yet last October the Countryside Alliance Foundation (TCAF) published statistics which demonstrate very clearly that this fear is highly exaggerated.

In response to requests made by TCAF under the Freedom of Information Act, TCAF found that, of the millions of individual school trips taken over the past ten years only 364 ended in legal action, and in only 156 of those were schools found to be culpable. Between 1998 and 2008, the total amount of compensation paid, on average, by local authorities in relation to school trips was just £293.44 a year.[3]

Advertising

APIL recognises Lord Young's frustrations and concerns in relation to advertising and claims management companies, and shares many of them. For every argument put forward to help educate people about the compensation system for personal injury, which can be notoriously complex and stressful, we appear to see or hear an advertisement which glosses over such realities. Yet we do still believe there is a place for legitimate advertising, as it can help people with genuine personal injury claims to find the help they need, and we have already referred to the Citizens Advice Bureau finding that two third of eligible people do not claim redress elsewhere in this paper.

[3] http://www.countryside-alliance.org.uk/rural-services/rural-services-campaigns/the-alliance%E2%80%99s-education-campaign-featured-in-the-guardian./

As we share the concern that advertising (and broadcast media advertising in particular) does not accurately reflect what is involved in making a claim, we would welcome, as part of our own education initiative, an approach from advertisers which clearly explains that compensation is not available for an accident, but only when the injury is a result of negligence.

It is also important that claimants are clear about what kind of organisation is undertaking the advertising (whether it is a law firm or claims management company, for example) its legal qualifications (if any), whether it is accredited in any way, and how the organisation is regulated and paid. This is particularly relevant if the case is going to be passed on to a solicitor or other third party, under which circumstances such advertising should, we believe, carry a 'health warning' explaining the case will be sold to a solicitor and that the initial claims handler is not qualified to provide legal advice.

Any review of this field should, therefore, include an examination of the feasibility of tighter regulation of advertising in the personal injury field, along with clearer guidance from the Advertising Standards Authority on what is deemed to be distasteful and exploitative. We are committed to raising these concerns with the ASA.

Claims management companies (CMCs)

APIL welcomed the regulation of claims management companies (CMCs) as part of the Compensation Act in 2006, having campaigned consistently for such a move for many years. It is our belief that the rapid growth of CMCs over the past ten years has been the prime cause of the explosion in broadcast media advertising which has done so much to generate misconceptions about the law and how it operates. Solicitors wishing to stay in business have often had little choice but to advertise themselves or to join together in their own marketing co-operatives.

Having said that, our view is, and has always been, that there is no real need for people to use the services of CMCs at all. It seems anomalous that when commercial businesses are generally cutting costs by removing middle men, middle men have become an established feature of the personal injury landscape.

We also have some outstanding concerns about the CMC regulations, and especially that the requirement for professional indemnity insurance does not apply to CMCs across the board. While claims handlers who represent injured people are required to be covered, those who simply refer people on to solicitors are not.

This can leave vulnerable people without proper protection if, for example, a CMC does not pass on a claim to solicitors within the proper time limits. Allowing companies to be under-insured means the consumer could be left without redress, which would undermine the whole purpose of the Compensation Act.

We believe the most important thing is that people know how to go direct to an accredited solicitor and APIL's accreditation scheme is designed to make it easier for people to find properly qualified and experienced lawyers to help them, without going through a CMC. Established over ten years, our accreditation scheme recognises experience and expertise in personal injury practitioners. It is easily identified by its quality kitemark, which is supported by a robust code of conduct and our consumer charter.

Another side-effect of the development of CMCs is the increase in the use of referral fees. Referral fees are without doubt distasteful in personal injury cases. They now appear, however, to be a fact of life. APIL's only concern in this is the protection of the injured person, and we believe the only way to achieve this is through a combination of complete transparency for the consumer, and the robust regulation of those agencies involved. We accept the Legal Services Consumer Panel's conclusions, based on a fundamental research project on this issue, that a ban or cap on referral fees risks driving payment for referrals back underground, where there will be no transparency or protection for the consumer.

Another key concern is the lack of public understanding of the possible impact of referral fees on the conduct of personal injury cases and there is a real need for further education to address this. Similarly, injured people who are referred to a panel solicitor need to be made aware that they do have the right to choose their own solicitor and they should be free to exercise that right should they choose to do so.

Health and Safety

At the end of June this year, the Health and Safety Executive announced provisional data for 2009-2010 which showed that the number of people killed at work registered a record low of 151. At the time, HSE Chair Judith Hackitt said "This is performance which owes much to good practice, leadership and employee engagement.... We should also remember that 151 families are mourning the loss of someone who last year went out to work and never came home. Being one of the best health and safety performers in the world means continuing to strive to drive these numbers down further – not getting complacent about what we've collectively achieved ..."[4]

Health and safety laws clearly help to provide protection from needless injury, and the decline in the number of cases registered with the CRU reflects this. Not only that, but they help to ensure redress and rehabilitation for injured people, which in turn limits the call on the state to provide care and benefits. Much of the current relevant legislation relates to what is commonly known as the health and safety 'six pack', which is a series of statutory instruments which came into force in January 1993. These were not, in essence, new in the sense that they repealed a number of provisions previously enshrined in the Factories Act 1961, and other similar old statutes. There have been various amendments to these regulations since 1992-3, and they are a key plank in avoiding the human misery of needless injury and death.

[4] http://www.hse.gov.uk/press/2010/hse-fatals0910.htm

We agree with Judith Hackitt that there is no room for complacency, not least because work-place deaths are only part of the story. HSE statistics for workplace ill health and injury in 2008/2009 (due to be updated in October this year) reported:

- 1.2 million people who worked during the reported year were suffering from an illness (long standing as well as new cases) they believed was caused or made worse by their current or past work. 551 000 of these were new cases.
- 131, 895 other injuries to employees were reported under RIDDOR, a rate of 502.2 per 100, 000 employees.
- 246, 000 reportable injuries occurred, according to the Labour Force Survey, a rate of 870 per 100, 000 workers.

Put into perspective, this meant that 29.3 million working days were lost overall (1.24 days per worker) 24.6 million due to work-related ill health and 4.7 million due to workplace injury.[5]

There is also, of course, a significant cost to the National Health Service in relation to preventable injury in the workplace. Again referring to HSE statistics for 2008-2009, there were 28,692 major injuries sustained by workers. A major injury is defined as an injury which results in a hospital admission of 24 hours or more.

We submit that a generalised assault on health and safety as a way of curtailing what is perceived to be too much regulation is aiming at the wrong target. The key, as already outlined earlier in this paper, is to ensure that the regulations are applied accurately, and with commonsense.

[5] http://www.hse.gov.uk/statistics/index.htm

A major factor in this has to be the proper control and accreditation of health and safety advisers. While there are undoubtedly many well-experienced, well-qualified advisers helping businesses understand how to deal with health and safety regulations, there is no real way for employers to judge the knowledge or experience of a potential adviser. As has been expressed earlier in this paper, APIL is committed to providing the public with clarity about the quality of legal services through a robust accreditation scheme. It is equally important that those companies and local authorities who are relying on others to provide them with accurate health and safety advice are able to rely on a similar system of accreditation, supported by the continuing professional development of health and safety advisers.

This could certainly help to address concerns about bureaucracy and inconsistency in the interpretation of health and safety law, which have been raised in the review.

Access to Justice

Accountability

Anyone who is injured through someone else's negligence is entitled to claim full and fair redress, including financial compensation. We are all accountable for the way we conduct ourselves, whether in relation to our own safety or to the safety of others.

A single negligent act can shatter an individual's life and, while no amount of compensation can repair that damage, financial redress can help to provide the care and practical tools an injured person needs to generate some quality of life in the future.

Compensation Act 2006

Part one, clause one of the Compensation Act effectively lowers the bar of negligence by allowing the court to consider whether the defendant would have been prevented from undertaking a 'desirable activity' if he had complied with the expected standard of care. This completely flies in the face of proper accountability and, in its attempt to address the perception of a compensation culture, the Government of the time succeeded only in exposing vulnerable people further to needless injury. The clause, we submit, should be repealed.

During debate at the time of the passage of the Bill, the constitutional affairs committee, in its report during session 2005/6 on 'compensation culture' (HC 754), called for clause 1 to be deleted. The committee concluded, "while it is undoubtedly well meaning, it satisfies neither those who wish to reduce risk aversion in society, nor those requiring legal certainty."

The difficulty is that an inaccurate perception cannot effectively be addressed through legislation, which is, in reality, inaccessible to many people. Those in a position of responsibility over others must have a clear understanding of their duties in relation to the care of those in their charge. Equally important is the need for them to understand that, provided they discharge their duties, they have nothing to fear from the law. Clause 1 does not achieve this, and serves to emphasise our contention that only a properly-resourced concerted Government programme of education will be effective.

An example of the value of proper attention to health and safety, which was discussed at the time, was that of staff at Hay Lane school in London, who were devastated by the death of a pupil on a school trip. The staff, who were exonerated in the coroner's enquiry, were, nevertheless, determined to prevent another tragedy. The school's unions called for the creation of a health and safety committee, with equal representation from management and the unions, NUT, UNISON and ATL. Improvements were made to safety procedures as a result of this collaboration and their efforts were rewarded when an OFSTED inspection highlighted the *'health and safety culture'* as a strength of the school.

The clause is deeply unjust for people, injured through no fault of their own, whose right to full and fair compensation depends on whether the judge feels that the defendant's activities at the time the injury is caused could be considered 'desirable'. Worse still, the clause could create a situation in which two separate incidents, arising from the same set of circumstances, causing the same injuries to two claimants, will result in one claimant receiving full redress, while the other fails to receive the compensation to which he is entitled simply because the defendant is considered by the judge to be engaging in a 'desirable activity'. Such a situation would be totally iniquitous and contrary to the current common law.

New claims process for road traffic accidents/other initiatives

There has been a consistent drive in some quarters to cut the cost to defendants of compensation claims to such a degree that injured people will effectively be disenfranchised from the system. Some of the recommendations made by Lord Justice Jackson in his review of civil litigation costs, for example, will result in the vulnerable people who are least able to afford to bring claims losing out financially if they try to pursue compensation.

The whole issue of costs and efficiency is at the root of the Ministry of Justice's new claims process for straightforward road traffic cases worth up to £10,000 in damages.

This new claims process, introduced in April, is the culmination of several years of hard negotiation between all relevant stakeholders, under the direction of the MoJ. The result is a new regime of fixed costs and a more efficient process which will affect, according to the MoJ, 75 per cent of personal injury claims. Those cases excluded from the new fixed cost regime are those which involve greater complexity and which, as a consequence, need a greater flexibility if they are to be undertaken effectively on behalf of claimants.

In another initiative, and after a great deal of effort and negotiation by all concerned, a multi track code of practice was set up in 2008, with the aim of establishing good practice between APIL members and insurance industry representatives in cases with a value of more than £250,000. The code is currently in its pilot stage, but it already includes 28 claimant solicitor firms and seven major insurers.

Injured people are individuals, with different responses to similar injuries, different lifestyles and different occupations and it is essential that the system still allows for them to be treated as individuals, and not simply as commodities.

Clinical negligence claims

According to the House of Commons Health Committee patient safety report (sixth report of session 2008-09 volume 1) published in July last year, 'reviews of patients' case notes indicate that in the NHS and in other healthcare systems as many as 10 per cent of patients admitted to hospital suffer some form of harm, much of which is avoidable. Tens of thousands of patients suffer unnecessary harm each year and there is a huge cost to the NHS in consequence.'

When people in other walks of life act negligently, they have to provide redress. The situation with the NHS is no different. In clinical negligence claims it is reasonable to expect those who hold themselves out as having special professional skills to meet their own self-imposed standards. In addition, if the knock-on effect of a clinical negligence award is to help improve medical standards for patients so tragedies are not repeated, we believe that's a positive thing.

There is much written in the press about the cost of clinical negligence claims, yet it must be understood that it is almost always the behaviour of the parties which drives up costs. Historically, our members and injured patients have been subject to unreasonable and unnecessary delay in the conduct of cases which has often added to costs. This can not continue, and APIL has been working with insurers to try to establish where improvements can be made to the system.

In addition, meetings are now being held between APIL and the NHS Litigation Authority, with a view to establishing what more can be done to facilitate the quick and efficient handling of clinical negligence claims.

Conclusion

We hope this paper has helped to illustrate that there is far more to health and safety and compensation than common misconceptions and easy banner headlines. While there may be improvements to be made to the compensation system, the stakeholders involved are no strangers to working together to try to deliver change where it is required.

More importantly, health and safety legislation has played a crucial role in protecting people from serious injury, and protecting the state from the cost of supporting injured individuals. The compensation system we have in place at least allows people who need help and redress to obtain it. The fact that both are now shrouded by myth and misconception should not mean that these protections are watered down but rather that the light of clarity is shone on them, through proper education, transparency and properly-accredited services. Taking sensible steps to avoid needless injury is about taking proper responsibility for society as a whole. We urge the Government not to be seduced by extreme examples of over-zealous health and safety featured in the press but to think instead of others, such as the incident in 2004 when, according to the Cairngorm Mountain Rescue Team, the lives of 39 young girls were put at risk after they and their teacher became lost in the mountains. The school said that procedures governing school trips were not in place at the time.

We also urge the Government not to change the health and safety laws governing the emergency services as a knee jerk reaction to negative press reports. There has been repeated reference during this national discussion to members of the emergency services who are alleged to have put their own safety before that of the public in certain circumstances. Conversely, the three police officers who went into the sea in Blackpool in 1981 to rescue a member of the public in difficulties did not put their own safety first. The member of the public and all three police officers drowned. Health and safety training at its best, when it is properly administered and understood, preserves life and actually enables people to undertake activities from mountaineering to life-saving without causing needless injuries to themselves or others.