Commons Select Committee

Inquiry into access to justice and sentencing proposals

Written evidence by the Association of Personal Injury Lawyers

December 2010

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation with more than 4,700 members who help injured people to gain the access to justice they deserve. Our membership comprises mostly solicitors, along with barristers, legal executives, paralegals and some academics who are all committed to, or sympathetic to serving the needs of people injured through the negligence of others. The association is dedicated to campaigning for improvements to the law to enable injured people to gain full access to justice and promote their interests.

The aims of the Association of Personal Injury Lawyers (APIL) 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.

Any enquiries in respect of this response should be addressed, in the first instance, to:

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APIL's experience is limited to personal injury and clinical negligence.

Executive Summary

- APIL recognise the political appetite for further efficiencies and streamlining particularly given the current economic climate however, the most disadvantaged and poorest members of society will be hit the hardest.
- Lord Justice Jackson's recommendations largely ignore the impact of the new process for lower value fast track road traffic accident (RTA) claims.
- The new road traffic accident claims process provides a procedure for dealing with 75 per cent of all claims within a streamline fixed cost process.
- At a stroke the new RTA claims process which was introduced with industry wide consensus following negotiation (which took place during Jackson's year long review on civil cost) has undermined his key conclusions that costs are disproportionate.
- Behaviours of defendants and their insurers who are not only responsible for the initial injury but also contribute to increased costs by making claimants jump through hoops causing delay or discouragement.
- Removal of legal aid for clinical negligence cases coupled with Jackson's primary proposals will reduce access to justice and take damages from the most vulnerable.
- Leading counsel suggests that primary proposals for reform could discriminate against the disabled and infringe their human rights. There are also issues surrounding the Equality Act 2010 and Disability Discrimination Act 1995.
- The cost saving of 17 million to the legal aid budget if clinical negligence claims are excluded is less than one per cent of the overall legal aid budget of 2.2 billion.
- Removing clinical negligence from legal aid whilst reducing the availability of no win no fee agreements will result in the NHS becoming even more unaccountable to those injured through its negligence.

- Damages are purely compensatory and therefore APIL believes that it is fundamentally wrong that costs should be paid out of them.
- Damages for pain suffering and loss of amenity are too low, meaning that it is totally unsatisfactory for costs to be deducted from damages also.
- Data from a catastrophic injury case load demonstrates that LJ Jackson's proposal to end recoverability of success fees by offsetting with an increase in general damages would be wholly insufficient and would adversely affect the most seriously injured.
- There has been no consideration as to the impact alternative business structures may have on access to justice.

1. APIL understands the need for costs to be streamlined and systems to be efficient, particularly in the current economic climate. But this should never be at the expense of vulnerable, injured people, and cuts to legal aid coupled with Appeal Court Judge Lord Justice Jackson's primary recommendations will have the effect of not only taking much-needed compensation from injured people but also barring access to justice. This will hit the poorest in society the hardest.

2. Lord Justice Jackson commenced his review of civil litigation costs, at the request of former Master of the Rolls, Sir Anthony Clarke, in November 2008. This review looked at civil litigation in the round and did not just concentrate on personal injury and clinical negligence as the most recent consultation appears to have done.

3. Jackson LJ's work largely ignores the impact of the work undertaken by the Ministry of Justice (MoJ) at that time to streamline the process for lower value fast track road traffic accident cases. During Jackson LJ's yearlong review the Ministry was working with both sides of the industry to improve the speed at which injured people received their compensation and to fix the amount of work involved in pursuing these claims in return for fixing the fees recoverable.

The new claims process introduced this year deals with 75 per cent of all personal injury claims[1].

4. The conclusions reached by Jackson LJ, therefore, need to be approached with caution as a large percentage of the personal injury market has been reformed to be streamlined and more cost efficient and whilst teething problems are many, because of the speed with which the reforms were introduced, in the long term this process could be successful.

5. It is essential that we maintain individual human rights and prevent injury where possible through social responsibility. Negligent actions will unfortunately happen and when this occurs we must have a system that provides access to care, rehabilitation and full redress to ensure, so far as possible, that the injured person is put back into the position that he was in before the negligence occurred.

6. Whilst efficiency of process is important it must not be to the detriment of the injured person, who should be at the heart of our compensation system. APIL believes the civil justice system should provide:
   - The right to bodily integrity;
   - Equal access to justice for all in our society;
   - Protection for those who have been injured by the negligence of others;
   - Public confidence in the system;
   - Full redress;
   - Freedom to chose a lawyer;
   - An insurance system that offers protection to all concerned.

[1] Page 38 Case track limits and the claims process for personal injury claims summary of responses.

7. In every claim for personal injury the burden of proof rests with the injured person. Nothing about a case is presumed and the individual must prove each element of his claim, the facts of his case, duty of care, breach of duty, causation and quantum. The defendant not only caused the injury but is also free to make a claimant jump through hoops, causing delay or discouragement.

8. Removing legal aid for clinical negligence cases coupled with the primary proposals currently being consulted upon by the Ministry will have the effect of making it difficult for any person with a meritorious case but with difficulties on liability to pursue their claim. There is a streamlined process for the more straightforward road traffic accident claims and it is essential that it is recognised that the more complex cases must not be prevented from being brought by the removal of funding.

9. APIL along with PIBA[2] obtained advice from leading counsel in September this year which advised on the implications of the Jackson proposals to reverse the recovery of CFA success fees; cap success fees at 25 per cent of general damages and damages for past losses; and increase general damages by ten per cent. The advice expresses considerable doubts about whether the proposals could be defended under the European Convention of Human Rights, if applied to seriously or catastrophically injured claimants. Specifically, counsel have advised that the proposed changes would affect the right of access to justice of such claimants, which is guaranteed by Article 6 of the Convention (in conjunction with case law which deals with the issue of adequate means of funding) because they would be reliant on finding a suitable legal team prepared to forgo payment for the financial risk of conducting the claim on a CFA. Article 14 of the Convention protects such

[2] Personal Injury Bar Association is a specialist bar association for barristers who practice in the field of personal injury law.

individuals who may be at a disadvantage in this way[3]. Counsel was also of the view that the vast majority of claims could be vulnerable to challenge under section 21D of the Disability and Discrimination Act 1995 and section 19 of the Equality Act 2010.

10. The actual cost of clinical negligence cases to the Government in funding is 17million a year out of a legal aid budget of 2.2 billion[4]. Therefore the overall cost saving to the legal aid budget if funding is removed for clinical negligence case is less than a one per cent saving.

11. In absence of legal aid or some other adequate method of funding clinical negligence cases there is little way of holding the NHS accountable for mistakes that it makes. Bringing a claim makes the NHS accountable for its actions in a way that the complaint procedure does not. In the period January to September 2009, 11,449 adverse incidents were reported to the Reporting and Legal Services Department at the National Patient Safety Agency[5]. 3,679 incidents were reported to have resulted in death[6] and 7,770 caused severe harm[7]. In the same period only 6,652 claims were brought against the NHS[8] . Approximately 55 per cent of claims received by the NHSLA in the last ten years have been successful[9]

12. Damages are purely compensatory and therefore APIL believes that it is fundamentally wrong that costs should be paid out of them. This is what is being proposed as an alternative to legal aid. We believe that the wrongdoer

[3] A copy of the advice was sent to the Secretary for State for Justice.
[4] Legal Aid (Clinical Negligence Cases) Oral Answers to Questions — Justice House of Commons debates, 23 November 2010, 2:30 pm
[5] Patient Safety Incident reports Quarterly data report 12, 13, 14.
[6] Same period and reports as above
[7] Same period and reports as above
[8] NHSLA Report and Accounts 2009/10 page 13
[9] NHSLA Factsheet 3 as at June 2010

should pay. It is this principle that allows an injured individual to challenge the large defendants such as the NHS. A claim for damage is not a windfall but an attempt to restore the person, as far as possible to their pre-accident status,[10] by those that have been negligent (to the extent that money can do this). Why then should the defendant and their insurance representative be given a rebate by not fulfilling their obligation.

13. In cases of serious injury damages for future losses, such future care, continuing medical costs and loss of earning capacity are likely to be the largest element of the compensation awarded. These losses are difficult to value accurately, because there can be no certainty about what will happen in the future or about what would have happened had the accident not occurred. Damages therefore have to be assessed on the basis of many assumptions about the future, as they will affect claimants personally and more widely.

14. The aim in assessing those damages is to provide a capital sum which can be invested to yield exactly enough to cover the anticipated needs and loss of earnings every year, for as long as they are expected to continue. The period of time over which these needs will continue will be determined by the court and/or agreed by the parties if a case is settled.

15. Given the difficulty with assessing these needs accurately and the anticipated return on investment of any award, a discount rate of 2.5 per cent is currently applied. This rate was set in 2001 when the return on investments was considerably higher than it is now. The discount rate ensures that the injured

[10] Lord Blackburn in *Livingstone v Rawyards Coal*(1880) 4 App Cas 25 *: "I do not think that there is any difference of opinion as to it being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get that sum of money which will put the party who has been injured or who has suffered, in the same position as he would have been if he had not sustained a wrong...".*

person is not over compensated. Currently an investment of around 6 or 7 per cent gross return needs to be found to ensure that their compensation keeps pace with inflation. Presently this is impossible. In addition to these problems claimants with accommodation needs are also prevented from full recovery of accommodation costs[11] and in effect would have to borrow from other areas of damage, in the award which will have been careful calculated to compensate the injured persons other needs, for example loss of earnings .

16. All these problems coupled with the Law Commission's recommendations,(made over 10 years ago and still not fully acted upon) that concluded damages for pain suffering and loss of amenity were too low, mean that it is totally unsatisfactory for costs to be deducted from damages also.

17. APIL remains concerned about the handling of the 25 per cent of claims not covered by the new streamlined system. Research conducted by APIL president Muiris Lyons' firm, Stewarts Law, showed that the proposal to offset abolishing recoverability of success fees by an increase to general damages of 10 per cent would be nowhere near sufficient for those with serious injuries within this 25 per cent bracket. The maximum net loss arose in a claim for a young tetraplegic man and would have resulted in a reduction in his damages of £236,044. The Ministry of Justice has been provided with a full copy of this report and data.

18. None of the proposed reforms have been considered in the context of the effect that alternative business structures, which are to be introduced to the system next year, may have on access to justice.
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[11] Robert V Johnston [1989] QB 878