Law Commission

Twelfth Programme of Law Reform

A response by the Association of Personal Injury Lawyers

October 2013

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation with a 20-year history of working to help injured people gain access to justice they need and deserve. We have around 4,000 members committed to supporting the association's aims and all of which sign up to APIL's code of conduct and consumer charter. Membership comprises mostly solicitors, along with barristers, legal executives and academics.

APIL has a long history of liaison with other stakeholders, consumer representatives, governments and devolved assemblies across the UK with a view to achieving the association's aims, 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.

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

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Introduction

APIL welcomes the opportunity to submit suggestions for the Law Commission's twelfth programme of law reform. We call for reform in the following areas:

- Bereavement damages
- Lifetime and post-death dependency claims in fatal disease cases
- Psychiatric injury and secondary victims
- Exemplary damages

Bereavement damages

Current law

Problem and impact

The current law on bereavement damages in England and Wales requires urgent reform. There are two areas in which reform is required – the category of those who can claim for bereavement, and the level of damages awarded. The law as it stands is illogical and creates anomalies which lead to unfairness.

1. *Categories of claimant*

Those who qualify for a bereavement damages payment currently fall into a very narrow category. The current law, contained in s1A(2) of the Fatal Accidents Act, allows only the wife, husband or civil partner of the deceased; or where the deceased was a minor who was never married, only his parents if he was legitimate, and his mother if he was illegitimate, to bring a claim.

Many who we feel should qualify for a payment are missing out under this legislation. Children (including adoptive children), those living as husband and wife or civil partners, fiancés, and siblings of the deceased are all excluded under the current law, and we believe that they should be entitled to bring a claim.

It is also unjust that once a child reaches eighteen, a parent is no longer entitled to a claim for bereavement damages. It is an unnatural sequence of events for a parent to experience the loss of a child, and that loss is no easier to bear just because the child has reached eighteen.

i) Cohabitees

The unfairness of the strictly limited categories of claimant can be demonstrated where, for example, a woman had been living with her partner and had a child with him. Her partner died following an accident at work. If the couple were unmarried, regardless of how long they lived together, and regardless of the fact that they had a child together, she would never be entitled to a claim for bereavement damages for her pain and suffering as a result of her partner's death. If the woman and the deceased had been married for just one day, she would have been entitled to a claim. This is unjust and irrational. If a couple live together as if husband and wife, or civil partners, this should be enough to qualify for a claim for bereavement damages. According to the Office of National Statistics, cohabitation is the fastest growing family type in the UK; the number of people cohabiting increased by 50 per

cent between 1996 and 2012[1]. The law of bereavement damages does not reflect modern trends, and is in desperate need of reform to ensure justice.

ii) Father of an illegitimate child

In a similar vein, the father of an illegitimate child is unable to bring a claim for bereavement damages. If a mother and father are living together as if husband and wife, but are not actually married, then if the child dies only the mother is entitled to claim. The father does not suffer any less because he is not married to the mother; he has still raised the child, and will feel the same sense of loss at the death.

iii) Parents of children over eighteen

The current law prevents parents being eligible for a claim for bereavement damages if the child is over eighteen. This creates unfairness, as no parent should outlive their child. Just because a child turns eighteen, this loss does not become easier to bear. It is, surely, both distasteful and impossible to argue that a child over the age of eighteen is any less of a loss than a younger child. In *Porter v Newman,* a 17 year old girl died of deep vein thrombosis, caused by her GP's negligence. Her father received bereavement damages and a payment for funeral expenses under the Law Reform (Miscellaneous Provisions) Act 1934 section 1, in total amounting to an out of court settlement of £15,922. If the girl had been eighteen, he would have experienced the same grief of losing a daughter, yet would only have been entitled to the payment under the Law Reform (Miscellaneous Provisions) Act 1934 for funeral expenses. A further case demonstrating this distasteful distinction is *Doleman v Deakin*[2]*.* Here, the accident to the claimant occurred before his eighteenth birthday, but he died of his injuries once he had turned eighteen. As a consequence, his parents were not entitled to bereavement damages. It is unacceptable that a parent can be assumed to not be as affected by the death of their child just because they are no longer legally classed as a minor.

2. Level of damages

The current statutory payment for bereavement is £12,980. APIL recently commissioned a survey of 2,000 members of the public, and found that this amount is far out of kilter with public expectations. Whilst no amount of money can bring back a loved one, eighty per cent of those interviewed believed that the statutory payment is too low. The set statutory payment means that it is cheaper to kill than to maim, which we find to be unacceptable.

Further unfairness is evident where two parents wish to claim for bereavement damages. The parents will only receive one bereavement damages payment between them. This is insulting, as it insinuates that two parents would only suffer half as much as a single parent.

Deaths caused by an emanation of the state

Where the death is caused by an emanation of the state, for example the fire service, the claimants may be entitled to claim under the Human Rights Act, and therefore obtain a more suitable level of damages. Because of the low statutory payment for bereavement, this creates an unfounded distinction between deaths caused by the state, and deaths caused

[1] http://www.ons.gov.uk/ons/rel/family-demography/families-and-households/2012/cohabitation-rpt.html
[2] (1990) 87(13) LSG 43Times, January 30, 1990

by the private sector. In *Rabone v Pennine Care NHS Foundation Trust*[3], a 24 year old woman was detained in the psychiatric unit of an NHS hospital, after suffering a severe manic episode and attempting suicide a number of times. She was allowed two days leave to go home and in this time, she hanged herself. The parents of the woman were not entitled to the statutory bereavement award under the Fatal Accidents Act because the daughter was over eighteen. Because the hospital was an emanation of the State, however, the claimants could bring a claim for their loss and suffering under the Human Rights Act section 7, which states that a claim that a public authority has acted in a way which is incompatible with a Convention right may be brought before the courts only if the person bringing the complaint "is (or would be) a victim of the unlawful act". The hospital had acted in a way incompatible with Article 2 of the European Convention on Human Rights, and Mr and Mrs Rabone were victims under Art 34 of the European Convention on Human Rights. In addition to £7,500 awarded under the Law Reform (Miscellaneous Provisions) Act 1934, they were awarded £5,000 each for the breach by the defendant of Art 2 of the European Convention on Human Rights. If Mr and Mrs Rabone's daughter had been in a private hospital, this additional route to redress would have been unavailable and they would only have received £7,500 between them for the loss of their daughter. The law as it stands, therefore, creates an illogical distinction between cases where a person was killed by the negligence of an emanation of the state, and where they were killed by a private entity. The fixed sum for bereavement damages should be increased to ensure that domestic law gives proper redress to claimants.

Ideas for reform

There should be flexibility in the law surrounding bereavement damages, as is the case under Scottish law. In Scotland, courts have a discretion regarding the amount of damages they can award. Cases are taken on their merit, which means that damages are generally higher. Similarly, the category of relatives who can claim is far wider reaching and much more flexible. Under Scots law, the class of individuals, as set out in section 14 of the Damages (Scotland) Act 2011, includes spouses and civil partners, those living as spouses and civil partners, brothers, sisters, parents, children (regardless of age), aunts, uncles, grandparents and grandchildren, and those treated as children of the family.

<u>APIL calls for</u>:

Greater flexibility in the category of claimants

The law on bereavement damages in England and Wales to be reformed to allow for the same level of flexibility and fairness as is currently achieved in Scotland. The category of relatives entitled to bereavement damages should be broadened to ensure fairness in today's society – allowing for those living as spouses and civil partners, and those treated as children of the deceased, to claim, as well as allowing parents to claim regardless of the age of their child. Fiancés and siblings should also be entitled to bring a claim.

Flexibility in the damages awarded, and court discretion

[3] [2012] UKSC 2

The amount awarded in bereavement claims should be decided through the court system. It should not be cheaper to kill than to maim, and there should be a closer correlation between damages paid to the bereaved and damages paid for serious injuries.

Separate payments to each claimant

All of those eligible should be entitled to a separate, not a shared, payment. The principle of bereavement damages should be the same irrespective of the size of the deceased's family.

Lifetime and post-death dependency claims in fatal disease cases

Current Law

Under the current law concerning fatal disease cases, there is a disparity in the way a dependency claim is calculated, depending on whether the claim is settled in the claimant's lifetime or on their death. The law as it stands does not allow the courts to award bereavement and dependency damages whilst the victim is still alive, even though the death is certain and imminent. Settling the claim post-death, therefore, will mean that the dependency awards will be taken into account, and any dependents' future financial needs will be catered for.

As such, the claimant in a terminal disease case has the right to delay the settlement of the claim until after his or her death, instead accepting an early interim payment to pay for the costs of his/her care in the last months of life. The claim can then be completed once the claimant has died, and dependency and bereavement awards can be calculated. This is particularly important in cases such as those where a wife is disabled and her husband, who has developed mesothelioma, has been her carer and always looked after her. The wife will need care for the rest of her life once her husband has died, and so in this situation, settling the claim after her husband's death would allow her to claim the costs necessary to pay for her on-going care needs. When the claimant is younger, there may be dependent children whose financial welfare should be secured for the future.

The decision to delay settlement can increase stress and anxiety at a traumatic time for the family, and the claimant will pass away not being fully sure that their dependents will be taken care of. This is a dreadful decision to have to make, and one which should be unnecessary.

Ideas for reform

<u>APIL calls for:</u>

No difference in lifetime and post-death claims

The law which prevents dependency claims from being calculated, and bereavement damages from being allocated until death has occurred is anomalous and should be changed. We believe that the claimant should not have to make a decision to delay settlement until after his or her death in order to ensure his or her dependents are adequately compensated. We believe that it is a legal nonsense to treat lost years claims (where a living adult with dependents may make a claim for loss of life expectancy, including lost earnings in the "lost" years), and dependency claims differently. Finalising the

dependency calculations whilst the victim is alive would be much fairer on all concerned, allowing the victim to set his affairs properly in order.

Claimants to be entitled to elect how their claim should be settled

If lifetime and deceased claims cannot be treated the same, we believe that claimants should be entitled to elect whether their case is to be settled as a lifetime or deceased claim, whilst they are still alive, rather than leaving the decision to chance. It is already possible to claim the costs of one's own funeral whilst still alive, as held in *Bateman v Hydro Agri (UK)*[4]*,* and this should be extended to claims for dependents. If the claimant elects to settlement the claim as if they have died, the claim will proceed on this basis and the funds would be received by the family at an earlier stage in the claim. The claimant would then die knowing that the claim has settled, and that his family has been adequately provided for and all his affairs are in order.

Secondary victims/psychiatric injury

Problem and impact

We believe that the current law surrounding psychiatric injury is in need of urgent reform. The leading case on this issue, *Alcock v Chief Constable of South Yorkshire Police*[5] creates unfairness and is outdated. The case came about as a result of the 1989 Hillsborough disaster, and concerned families of the victims claiming for psychiatric injury as a result of either watching the disaster unfold from another area of the stadium, or watching it on the television. The reasoning for the decision was policy based, aimed at preventing the "floodgates from opening" by limiting the number of people who could legitimately claim after a major disaster. The Judicial Committee of the House of Lords enforced a number of strict "control mechanisms" which must be fulfilled in order for a duty of care to be found in these cases. The claimant must perceive a shocking event with their own unaided senses or view its immediate aftermath, and they must suffer a sudden shock. Further, there must be a close tie of love and affection which is presumed for spouses and fiancés, and parents and children, but must be proved in all other circumstances – including in the case of siblings. Lastly, it must be reasonably foreseeable that a person of normal fortitude would suffer psychiatric damage. Lord Hoffmann stated in *Frost v Chief Constable of South Yorkshire*[6]*,(*quoting Lord Lloyd in *Page v Smith*[7]*)* that the control mechanisms were createdas "more or less arbitrary conditions that a plaintiff had to satisfy and which were intended to keep liability within what is regarded as acceptable bounds".

The policy-based decision is extremely harsh and restrictive, leading to unjust results in subsequent cases, as demonstrated in *Taylor v A Novo*[8]*.* Here, a woman had an accident at work and died a few weeks later as a result of her accident causing deep vein thrombosis and a pulmonary embolism. She collapsed and died in the presence of her daughter and as a result, her daughter suffered significant post-traumatic stress disorder. At first instance, the judge held that the daughter was entitled to damages as a secondary victim because the

[4] 15/9/96 QBD
[5] [1992] 1 AC 310
[6] [1999] 2 AC 455
[7] [1996] AC 155
[8] [2013] EWCA Civ 194

relevant event to which she had proximity was the mother's death. On appeal, however, it was held that the daughter could not claim against her mother's employers because she did not satisfy the criteria in *Alcock.* She was not sufficiently proximate to be owed a duty of care, as she was not present at the scene of the accident and was not involved in its immediate aftermath. It was held that the judge at first instance had potentially extended the scope of liability to secondary victims considerably further than had been done before, and that the existing limitations should continue to apply unless and until Parliament intervenes. It is clearly unjust that the daughter could not bring a claim against Novo in this situation, and that she was not compensated for the severe post-traumatic stress disorder caused by watching her mother die in front of her.

Ideas for reform

In 1998, the Law Commission published its intention to reform the law on psychiatric injury, through legislation which would rectify the unfairness in the current law, whilst still allowing developments in this area through common law. These reforms were not implemented, and we recommend that the Law Commission looks again at reform of this area. We agree that there should be statutory intervention, which is supplementary to the continued development of the common law in this area.

It is clear that the policy behind the restrictive approach in *Alcock* is inappropriate for all secondary victim cases, and there should be statutory intervention to ensure that fairer results are achieved. Concerns following the *Alcock* decision have been raised by several judges in subsequent secondary victim cases. Lord Hoffmann in *Frost* stated that the "search for principle had been called off (in *Alcock)",* and Lord Steyn in *White v Chief Constable of South Yorkshire Police*[9] described the law on recovery for psychiatric harm after *Alcock* as a "patchwork quilt of distinctions which are difficult to justify". We do not accept that amendment to extend liability in secondary victim cases would open the floodgates to claims. Views are skewed by the fixation on major accidents and the claims that could ensue, but in reality, only a small number of people bring claims for psychiatric injury compared to personal injury claims as a whole. Psychiatric injury is not an inevitable consequence for eye witnesses to distressing events, or those close to the primary victims. It is also not easy to falsify a psychiatric injury, and unmeritorious claims have very little chance of success.

<u>APIL calls for the requirements in Alcock to be made more flexible</u>

The requirement that there is a "shocking event" should be reduced to a "distressing event".

The requirement that there are close ties between the claimant and the primary victim should be broadened to include extended family, and certain employment relationships, such as team workers. There should be a rebuttable presumption of a close tie for an extended list of relationships, but claimants not on the list should also be able to claim if a close tie of love and affection can be proven.

A secondary victim with close ties of love and affection with the primary victim should not be required to show that they are close in time and space and have perceived the event through their own unaided senses. It should be sufficient that a person of reasonable fortitude in the

[9] [1999] 2 AC 465

same close ties with the primary victim would reasonably foreseeably have suffered mental distress in that situation. We believe that the normal principles of causation and the requirement to prove injury would be sufficient bars to unmeritorious claims, whilst the abandonment of closeness in time and space in these cases would achieve fairness in cases such as *Taylor.*

Reform of this area is also necessary to ensure that the law is in line with developments in technology. Video messaging as a form of communication is extremely popular, and can allow people to perceive events in real time, as if they were physically there. As the law stands, a person suffering from psychiatric harm as a result of witnessing an event through video messaging, such as Skype or Facetime, would not be entitled to claim as a secondary victim, having not satisfied the requirement of being close in time and space. There must be more flexibility in this area to ensure fairness in keeping with today's society.

Exemplary damages

Current law

At present, exemplary damages can only be awarded in a case where the facts satisfy the categories test and the cause of action test. In the leading case of *Rookes v Barnard*[10] Lord Devlin attempted to set out the, somewhat arbitrary, categories of cases in which exemplary damages can be awarded;

a) Where there is oppressive, arbitrary or unconstitutional action by servants of the government;
b) Where there is wrongful conduct which has been calculated by the defendant to make a profit for himself, which may well exceed the compensation payable to the plaintiff;
c) Where an award is expressly authorised by statute.

Even if the case satisfies the categories test above, according to *AB v South West Water*[11] the claim must also be in respect of a cause of action for which before the case of *Rookes v Barnard* in 1964, exemplary damages could have been claimed. Even if both tests are satisfied, the court still has the discretion not to award exemplary damages.

Exemplary damages are intended to punish the defendant for outrageous misconduct, and should play a necessary and important role in the civil justice system. There are both financial and social benefits to society of exemplary damages. These damages should be awarded where the criminal law is unable to reprimand the defendant appropriately.

Problem and impact

The law on whether a person can obtain exemplary damages is unprincipled and inconsistent. The above categories in *Rookes* are far from definitive, and the unclear and unprincipled approach currently leads to unfair results. For example, in *Sharma v Noon,* an employee of Noon Products severed a finger due to unsafe workplace practices. Following prosecution by the HSE, the employer was given the maximum fine of £20,000, and the HSE also noted that the defendant placed making money ahead of employee safety. This case

[10] [1964] UKHL 1
[11] [1993] CA

would therefore satisfy the categories test in *Rookes v Barnard,* because this would fall into the category of the defendant making a profit from tort. Despite, however, the employer being found liable to the fullest extent by the HSE, and even though the HSE found that the defendant had lied and continually put making money ahead of employee safety, this was still not enough for Mr Sharma to be entitled to claim exemplary damages.

Exemplary damages in relation to personal injury should be awarded in cases where the criminal law leaves a gap, for example in HSE prosecution cases, where the fines are often inadequate to fully punish the wrongdoer. However, the threshold for exemplary damages in personal injury cases is unclear and appears far too high, as Mr Sharma's case demonstrates.

The current law also creates anomalies. In *Rowlands v Chief Constable of Merseyside*[12]*,* a police officer arrested a woman in front of her children, and put the handcuffs on too tight, deliberately hurting her wrists, then gave false information to ensure that she remained in detention. She claimed damages for psychiatric injury and personal injury, and was awarded exemplary damages. The Court of Appeal held that exemplary damages could be awarded under the category of "oppressive, arbitrary or unconstitutional action by servants of the government", as the defendant had "without having had any legitimate reason for doing so…handcuffed her and placed her in a police car; deliberately caused her unnecessary pain by tugging on the handcuffs while she was in the car…procured her continued detention by giving false information to the custody sergeant…and had given false evidence at trial in an attempt to secure her conviction". Whilst this was a serious act of oppression and arbitrary unconstitutional action by the police officer, and exemplary damages were rightly awarded, it seems that there is inconsistency in the approach as to when exemplary damages can and should be awarded. Mr Sharma suffered a physical injury as a result of the defendant's greed and disregard for his employees' safety, yet no exemplary damages were awarded whereas in *Rowlands,* the claimant experienced pain from the handcuffs and mental distress including feelings of humiliation and resentment and exemplary damages were awarded. There is no clear or uniform approach at present.

Ideas for reform

<u>APIL calls for:</u>

Clarity and expansion in the use of exemplary damages in appropriate cases

The law in this area must be clarified, and whilst we do not suggest that exemplary damages should become widely available, the courts should be able to use them to punish defendants in cases of serious wrongdoing which have led to severe injury or death. Wider use of exemplary damages in these circumstances should be encouraged. The Law Commission, in 1997, recommended that the categories test be abolished, and exemplary damages should be awarded for any tort or legal wrong (other than breach of contract) if the defendant had "deliberately and outrageously" disregarded the plaintiff's rights. The Law Commission recommended that the test of availability, as used in Canada, Australia and New Zealand and designed to catch any example of morally reprehensible civil wrongdoing, should be adopted, but with limitations. APIL agreed that exemplary damages should be expanded, but that a generally drawn statutory test would be preferable, which would allow exemplary

[12] [2006] EWCA Civ 1773

damages where the defendant can be shown to have acted maliciously, otherwise outrageously, or with wanton or reckless disregard for safety. We suggest that the law is reformed in this way, to deter seriously wrongful behaviour where the criminal law is unable to punish effectively, for example in cases of serious breaches of health and safety law which have resulted in serious injuries or death.

Exemplary damages should reflect their punitive nature

Damages received as compensation should not have any effect on the award of exemplary damages, and there should be no cap on the award. The conduct of the defendant should be the starting point in an assessment of exemplary damages, but the means of the defendant should also be a relevant consideration in each case where an award is to be made.

Exemplary damages should survive for the benefit of the estate of the victim

APIL also recommends that claims for exemplary damages should survive for the benefit of the estate of the victim, and against the estate of the wrongdoer. The current law creates a perverse situation whereby a defendant can be liable for exemplary damages if they seriously injury the claimant, but if the claimant dies as a result of their injuries, then by virtue of the Law Reform (Miscellaneous Provisions) Act 1934 s 1(2)(a), the claim for exemplary damages does not survive and the defendant pays less damages. Again, this creates a situation where it is cheaper to kill than maim, and this is an unacceptable consequence of the current law.

- Ends -

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