BACH COMMISSION ON ACCESS TO JUSTICE

EVIDENCE FROM THE ASSOCIATION OF PERSONAL INJURY LAWYERS (APIL)

APRIL 2016

The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers to represent the interests of people injured through no fault of their own. It is a not-for-profit organisation, dedicated to campaigning for improvements in the law to enable injured people gain full access to justice, and promote their interests in all relevant political issues. We have a history of working with parliamentarians of all parties to promote the interests of injured people. Our members comprise principally practitioners who specialise in personal injury litigation and whose interests are predominantly on behalf of injured claimants. APIL currently has around 3,800 members in the UK and abroad who represent hundreds of thousands of injured people a year.

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; and
- 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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TOPIC 1 – The current state of access to justice

Our greatest concerns about access to justice can be summarised as follows:

1. Too many people who have valid claims find it difficult, or impossible, to advance those claims due to lack of funding.

2. New rules about proportionality and fixed costs are causing delays and can prevent meritorious cases from being brought in the first place

3. The current funding system has the potential to create unnecessary conflict.

Details

1. The funding gap

Under the current system it can be very difficult to obtain funding to pursue valid claims, and funding can be disproportionately high, especially in cases which attract relatively low levels of damages.

People suffering from work-related asbestos related disease, for example, are often only able to claim a proportion of their damages because they are unable to trace all the defendants who exposed them to the asbestos. So they are already at a practical disadvantage.

Despite this, many who are suffering from low level, benign asbestos related disease, desperately want to secure provisional damages, which provide them with the option to return to the court to seek a further sum of compensation if they develop asbestos-related cancers in the future. The damages they can recover for asbestos-related disease in the first instance is often only around £10,000.

The problem is that these people and, indeed, all potential claimants in personal injury actions, may be advised to take out insurance to cover the cost of their 'disbursements' (ie expenses, such as expert witness reports). Since the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act, these 'after the event' (ATE) insurance premiums cannot be recovered from the defendant if the claimant should win his case.

These premiums can be very high, to the extent that people risk having to use most of their damages to pay them. In the end, some people with asbestos related diseases decide it simply isn't worth going through the stress of making a claim, when there is so little return. In some instances law firms may be able to provide finance for these expenses, but that is not always the case and, regardless, it is unacceptable that the justice system should rely on solicitors to fund cases.

By way of example, one of our members acted for a client who needed to claim compensation for asbestosis. The full amount to which he would have been entitled was estimated to be around £40,000 but, because he couldn't identify all the employers who exposed him to asbestos, he would have been able only to claim a proportion of his damages from those employers he was able to trace. This would have reduced his estimated award to just £6,956. He had already received a payment of benefit (under the Pneumoconiosis Workers Compensation Act) for £4,203 which meant he would receive compensation of £2,753. His ATE insurance premium would have been just over £3,000. The client had a sound case but, for obvious reasons, it was decided not to proceed.

This problem has arisen because it was envisaged that the LASPO Act would largely negate the need for ATE insurance as a result of the introduction of 'qualified one-way costs-shifting' (or 'QOCS'). In essence, QOCS means that losing defendants have to pay the costs of successful claimants (subject to certain exceptions) but do not recover their own costs if they defend the case successfully. It is important to note, however, that QOCS protection does not extend to the payment of the claimant's disbursements, which is why ATE insurance may be advised in many cases.

Funding difficulties can also prevent important points of law from being established in the courts. We are aware of several examples of this occurring in the past 12 months. One case involved a dispute about the costs available to the claimant in pursuit of his claims. Insurers argued that the claimant was entitled to a fraction of the costs actually awarded and lodged an appeal. The claimant's lawyers could not secure funding to fight the appeal.

It is worth noting at this point that delays are evident throughout the system following the introduction of costs budgeting processes. Following implementation of the LASPO Act there are backlogs in the courts as court staff and the judiciary attempt to deal with these procedures.

We have no problem with efforts to make costs budgeting work, provided that it works in a way which ensures proper access to justice for the injured claimant and is not a slave to proportionality and the fixing of costs (see below).

2. Proportionality and fixed costs

One of the most significant problems generated by the LASPO Act is the new approach to the principle of 'proportionality'. Before the Act, a judge would need to consider if costs overall were disproportionate and, if there was a possibility that they were, it would have to be shown that each item of spend was reasonable. Following the Act, new rules were introduced, which included Civil Procedure Rule 44.3(2)a which says the court will:

> "only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred"

This is a fundamental shift of philosophy from a focus on what is reasonable to what a case costs. The result is that often, particularly in lower value multi-track cases (ie cases where damages are valued at above £25,000) the claimant is under pressure and has to settle for lower damages so as not to fall foul of the proportionality rule. In a case where damages are valued at £50,000, for example, the issues to be decided can be very complex. The costs of investigating can therefore be substantial. The case may have merit and a good chance of success but the proportionality rule can mean that the claimant is forced to consider settling for less than the case is worth. Sometimes the case will be abandoned altogether.

An example of this is where a child dies through negligent treatment while in the care of the NHS. Assuming the child did not suffer needlessly before death, all a parent would be entitled to receive is the statutory bereavement award (£12,980 in England and Wales) and a contribution to funeral expenses. The actual costs of pursuing a case, however, either through legal representation at an inquest or through a civil claim for compensation, are likely to be substantially higher than this. There is a clear interest, both from the private and the public perspective, in full and public exploration of the facts in such cases, but the proportionality rule would effectively prohibit the parents from taking legal action.

We recommend, therefore, that the rule on proportionality should be repealed or, at the very least, reviewed.

There is a common misunderstanding of what ‘low value’ means in personal injury cases which can have serious consequences. For example, in August last year, the Department of Health issued a pre-consultation letter outlining proposals to introduce fixed costs in ‘lower value’ clinical negligence claims. ‘Lower value’ was defined as cases in which the compensation would be up to £250,000. While it is certainly true that in commercial cases £250,000 is probably considered a lower value case, personal injury cases are very different. Around 70 per cent of personal injury cases are valued at £5,000 or less.

The reason why this matters is that cases which attract damages of £250,000 will include compensation for life-changing injuries. These cases are extremely complex, requiring a lot of work from the most experienced and well qualified lawyers. The belief that they are lower value (and therefore less complex) is leading policy-makers to suggest inappropriate cost-cutting measures (such as fixing the amount the injured person can spend on a lawyer and an expert) which effectively restricts the service the lawyer can provide in the types of case where the most comprehensive service is necessary.

In general terms of what might be regarded as ‘low value’, this ought to be looked at in light of national average earnings of £26,500 a year, and the new national living wage of £7.20 an hour.

3. The funding system and conflict

The current conditional fee arrangements create conflicts. Arguments with ATE insurers about the merits of taking on cases are not, for example, unusual, particularly if a case is initially unsuccessful and may have to be taken to appeal, at which point many insurers would rather ‘cut their losses’. The solicitor may have a meritorious case but the prospects of success may be finely balanced. While the solicitor will wish to take the case forward because of its merits, the ATE insurers won’t underwrite the expenditure on disbursements or cover adverse costs because, in a commercial context, it is not worth it for them. It might, however, mean everything to a client.

TOPIC 2 – Transforming our justice system

To ensure access to justice is available for personal injury cases we recommend:

1. Personal injury victims should be entitled to receive 100 per cent of their damages, without having to pay deductions for costs.

2. Conditional fee agreements (CFAs) should be retained, but the ability to recover full costs and disbursements from the losing side should be restored.

3. Attempts to improve the process with the use of technology should be welcomed, but access to the courts must be retained.

Details

1. Personal injury victims should be entitled to receive 100 per cent of their damages

The principle of damages for personal injury claims is that people who have been injured through no fault of their own are entitled to be put back, so far as damages can achieve this, in the position they were prior to the negligent act. Damages are calculated very carefully to ensure this is achieved. In higher value cases, where a lump sum is awarded to the injured person, that sum is discounted to ensure that the claimant does not benefit from any investments he may make with that lump sum payment. The courts are careful to ensure that the injured person receives the compensation to which he is due – not a penny more, not a penny less.

There has long been a principle in personal injury law that the wrongdoer should pay in successful cases (sometimes referred to as the 'polluter pays' principle). This reflects the fact that the claimant has been injured by someone else who did not, or who could not be bothered, to take proper care. Someone who has been injured in this way should not have to pay for the privilege of being able to prove his case in court.

This principle has been eroded over the years. The Law Commission has examined levels of damages on several occasions in recent years and has found them to be too low. The issue came before the Court of Appeal in *Heil v Rankin* in 2000. In that case, damages were increased, but not to the level recommended by the Law Commission.

Not only are damages too low but, under the terms of the LASPO Act, the cost of ATE premiums and claimant lawyers' success fees, have to be borne by the claimant, rather than the losing defendant. This is, effectively, a deduction from the claimant's damages.

The reason for this, according to the justice minister at the time the LASPO Act was progressing through Parliament (Jonathan Djanogly) was to ensure injured people have 'skin in the game'. We submit that anyone who makes a personal injury claim is 'in the game' because someone else's negligence has put him there and that he deserves to be fully compensated, without any deductions from his damages.

2. Conditional fee agreements (CFAs) should be retained, but the ability to recover costs from the losing side should be restored.

We recommend that the provisions in the LASPO Act which make the claimant pay for his solicitor's success fee and ATE premium should be repealed.

One of the points raised in the call for evidence was whether personal injury should be brought back within the scope of legal aid. In 1997, APIL produced a paper commenting on the review of the legal aid system in which we demonstrated that legal aid for personal injury was a great success and that the cost to the fund was minimal. Large amounts of damages were recovered for victims and, overall, the Government benefited from the operation, once recoupment of benefits was taken into account. At the time, our arguments were in favour of retaining legal aid for personal injury.

Another concern which was raised at the time, of course, was that legal aid left a 'justice gap' because only the very poor had access to it. It was this injustice, among other things, that conditional fee agreements were designed to address.

In the end, after considerable argument and time-consuming satellite litigation (which became known as the 'costs war' and dragged on for several years) conditional fee agreements (CFAs) did work for personal injury cases – until the changes encompassed in the LASPO Act outlined above. For this reason, and because it would cost a substantial amount to revive the legal aid fund for personal injury, we recommend the retention of CFAs, but that success fees and ATE premiums should be recoverable from the losing defendant.

It is worth noting here the purpose of success fees, which have been considered crucial to the operation of CFAs from the outset. A success fee is an additional fee to be paid to the claimant's solicitor if the case is won. It is very rare in business for a professional only to be paid when he is successful: in personal injury law, losing a case is extremely expensive for the solicitor to the effect that, even in a very large firm, the impact can be crippling. Success fees were designed to mitigate that risk by allowing solicitors to develop business models which enable them to subsidise the investigation of cases which would otherwise not be taken on. These might include, for example, cases which have genuine merit but are risky, and cases which are considered to have merit but have to be abandoned if adverse evidence comes to light.

There has also been renewed discussion about the feasibility of a Contingent Legal Aid Fund (or CLAF) following a speech by Lord Justice Jackson on the subject in February this year.

This is an issue which has been considered at APIL over many occasions in recent years. It would essentially operate as a mutual fund where successful cases are used to fund unsuccessful cases.

The difficulty with a CLAF, however, is that if the fund is financed by contributions from successful claimants, those injured people with strong cases would be less willing to join the scheme if it means more of their damages will be used to supplement the fund. They would instead choose to fund their cases through CFAs, even with the drawbacks that would currently entail. Another difficulty with the CLAF is that it would require a considerable injection of funds from the Government to get it off the ground.

It is some time since APIL undertook a considered examination of the issue but, in 1998, we calculated that it would cost £34 million to set up a CLAF for England and Wales. It is regarded as a very respectable aspiration but it is felt that it is highly unlikely that the necessary 'seed funding' will ever become available.

Inquests and test cases

We would argue, however, for legal aid to be available for two specific types of case regardless of the means of the applicant, and so available to all. The Coroners and Justice Act 2009 was a missed opportunity to ensure legal aid is available for bereaved families at inquests where the death has a 'personal injury' element.

We have long argued for a level playing field for bereaved families at inquests. They should have access to legal advice before inquests and legal representation during inquests. Families should not be left to fend for themselves, when all other interested parties are invariably represented, often at the expense of the state.

Whenever employees of the state, including doctors, nurses, prison officers and police officers are involved in a fatal case and their conduct is being questioned, they will be represented at an inquest by experienced solicitors and counsel. The organisations themselves are also often represented. The law of evidence is complex, and so are coroners' rules. There is no way families without legal representation can participate on equal terms when faced with opposing legal teams.

This is illustrated in the recent, widely-reported case of seven-year-old Zane Gbangbola who died after his home was engulfed by water. He had been ill for some days beforehand and his parents believed he was poisoned by toxic gases from an adjacent landfill site.
His parents were refused legal aid for the inquest. The following is an extract from *The Sunday Times*[1] of 27 March this year, which illustrates the point:

> 'While the Legal Aid Agency ruled the family did not meet the statutory requirements for funding, the public authorities attending the six-week inquest will have barristers paid for from the public purse or from taxpayer-funded legal insurance. Even the coroner will have his own counsel, also paid out of public funds, because the case is so complex.
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> Kye Gbangbola said: "I don't understand why as grieving parents we have to go up against the might of the state, with their lawyers funded from public expense, while publicly funded legal representation is denied to us. It is a disgrace."'

[1] http://www.thesundaytimes.co.uk/sto/news/uk_news/article1682277.ece

Test cases

It is very difficult to obtain funding on points of law which can affect a wide range of cases. Historically legal aid funding – which would no longer be available now – has supported cases which have fundamentally improved and clarified the law for the good of many.

APIL's president specialises in obtaining compensation for people abused in childhood. He was able to challenge the law on limitation in child abuse cases with the benefit of legal aid funding back in 2008 in the House of Lords (A v Hoare & related appeals [2008] 1 AC 844). This was a landmark case which changed the law on limitation for deliberate assaults and has given access to justice to hundreds if not thousands of claimants since then. A year later legal aid funded Pierce v Doncaster Metropolitan Borough Council [2009] 1 FLR 1189 – the first case where damages were awarded for a failure to retain a child in care by a local authority (Court of Appeal).

3. Use of technology

We would welcome the greater use of technology to make the legal process more efficient, provided adequate resources are allocated to IT projects. We also applaud Lord Justice Briggs' ambition and vision in his proposals for an online court.

We remain of the view, however, that all but the most straightforward of personal injury claims (usually those with a value of under £1,000) will require access to a lawyer. As we have said, most personal injury cases are valued at £5,000 or less, but even these cases are rarely straightforward as the value of a case rarely reflects its complexity.

Personal injury cases are different from other types of case where the law is more cut and dried. There is nothing cut and dried about an injury to the body (or a psychological injury) or about the way that injury affects the victim. These cases can be complex and difficult and all require, at the very least, an ability to gather the right evidence and the ability to identify the value of the claim before a claim can be successful. In a survey commissioned by APIL about people's attitudes towards whiplash claims[2] 70 per cent said they would not know how much to claim for their injury.

[2] The Whiplash Report 2012, APIL

It is very important that technology should never prevent an injured claimant from having the opportunity to give ‘live’ evidence to a court. In a personal injury case, the opportunity for the claimant to tell his own story in court, and to convey directly the affect of the injury on the claimant’s life is important. This has both therapeutic importance for the injured person and can also ensure that appropriate damages are awarded.

- Ends –

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