Law Commission

13th Programme of Law Reform: Call for Ideas

A response by the Association of Personal Injury Lawyers

October 2016

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 over 3,500 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 campaigns on a wide range of subjects affecting the rights of people injured through another's negligence. We believe that the following topics fit the criteria and are suitable for inclusion in the Law Commission's 13th Programme of Law Reform:

- Reform of employers' liability insurance
- Compulsory public liability insurance

Reform of Employers' Liability Insurance

The current law

The Employers' Liability (Compulsory Insurance)Act 1969 requires every employer carrying on business in Great Britain to insure and maintain insurance against liability for bodily injury sustained by his or her employees and arising out of and in the course of their employment in Great Britain in that business. The Employers' Liability (Compulsory Insurance) Regulations 1998 require that the insurance indemnity should not be less than £5 million[1].

The law as it stands, on both the minimum indemnity and the interpretation of the 1969 Act, leads to substantial unfairness and must be reformed.

Problem (1) - The minimum indemnity

The minimum insurance indemnity for compulsory employers' liability cases causes problems in high value catastrophic injury cases, where periodical payments are sought.

Periodical payments are often the fairest way to award damages in catastrophic cases. In cases where there is short life expectancy, periodical payments prevent under-compensation, as even if the person lives beyond the predicted life expectancy, there is still an obligation for periodical payments to continue to be made, ensuring that the needs of the injured person are met. Additionally, unlike with lump sum awards, the claimant will not have to carry the worry or risk of managing the investment to ensure that there is enough income to meet their needs for the rest of their life – the investment risk is transferred to the defendant/insurer.

Problems arise when the limit on the specific insurance policy is less than the sum of the periodical payments. In order for periodical payment orders to be awarded, the court must be satisfied that the payments are reasonably secure[2]. If the limit on the policy is less than the sum of the periodical payments order, the payments will not be reasonably secure and the Court will then not grant the order. As the minimum indemnity on employers' liability insurance is currently only £5 million, the refusal to award periodical payments is unfortunately a common occurence. The case study examples below, provided by APIL members, highlight the unfairness.

[1] Regulation 3(1)
[2] S2(3) Damages Act 1996

Case study 1

P was 26 when a chimney stack collapsed on him. He suffered a severe brain injury, a partial traumatic left through knee amputation and multiple other injuries. He has been left largely wheelchair dependent and has significant cognitive defects, plus behavioural problems. P was assessed as requiring between £100k and £150k per annum of care costs for the remainder of his life – calculated as a further 46 years. The indemnity limit for the insurer was £10m. On any reasonable rate of inflation assumed, the accumulated value of the periodical payment breached the defendant's indemnity limit 20 years before his life expectancy. Therefore if a PPO had been awarded, this would have stopped 20 years before P passed away. The PPO was not reasonably secure and therefore could not be awarded. Despite periodical payments being a fairer way of compensating the victim, to ensure that they get the funds they need for the rest of their life regardless of how long they live, P was awarded a lump sum. P will have to carefully manage this to ensure that it can meet his care needs for the rest of his life. Whether he is able to do so will depend largely on how investment markets perform.

Case study 2

L fell from a ladder whilst attempting to erect a sign in a shopping centre managed by the defendant. L is 53 with a now reduced life expectancy of 20 years. He is a wheelchair user and will require care for the remainder of his life. L was assessed as requiring care of close to £200k pa. The indemnity limit for the insurer was £5m. This was likely to have been exhausted within 10 years and therefore a PPO could not be deemed reasonably secure. L's life expectancy is short and therefore the biggest risk of a lump sum settlement is that he lives longer than estimated at the time of settlement. If he does live longer, then had he received a PPO he would have been able to continue funding his care. With a lump sum settlement he hasn't received funds to meet his needs past his agreed life expectancy. This problem is particularly acute in cases where there is a predicted short life expectancy, and could end with L being undercompensated by a significant amount (between 10% and 50%).

Case study 3

H was injured in an accident at work that left him paralysed from the chest down. H is a young man who had high earnings and who will now be a wheelchair user for the remainder of his life. The indemnity limit was £10m. Due to H's earnings the value of his claim was worth more than the indemnity limit. This means that a PPO cannot be built and he had to pursue the employer for the amount over the indemnity limit. Fortunately in this case the employer was a large company. If the company had been smaller, this would not be possible. H could have received significantly less than his claim was worth simply because the company did not have enough insurance cover.

The Government last reviewed the indemnity limit in 1995. After discussions with the insurance industry, the legal minimum limit of indemnity was increased from £2m to £5m from January 1st 1999. This was considered to be the largest increase that could be borne by the insurance market, bearing in mind that reinsurance is finite. As the case studies above highlight, even in cases where the limit is £10m, double the current compulsory limit, there is unfairness and periodical payment orders have not been awarded where they are

the best way to ensure full and proper compensation. It is clear that it is time for the Government to revisit the cap.

Problem (2) – Where employers' liability insurance is non-existent, inadequate or void

Despite the requirement that employers' liability insurance is compulsory, the current law creates unfairness where the employers' liability insurance is either not in place, is in place but void, or is otherwise inadequate. If the employer in question is insolvent or unable to pay out compensation in the absence of insurance cover, the injured employee will be left without the compensation that they need to be put back, as closely as possible, to the position they would have been in had the negligence not occurred. In an attempt to secure the compensation that they need in these circumstances, some claimants have sought to sue the directors or officers of companies directly, for failing to arrange appropriate insurance.

The recent Supreme Court case of *Campbell v Gordon*[3] appears to have confirmed once and for all, however, that there is no civil liability on the part of the directors or officers of companies in these circumstances.

In the case, Mr Campbell was injured in the course of his employment as an apprentice joiner at Peter Gordon Joiners Ltd whilst using an electric saw. The company's employers' liability insurance excluded any liability for injuries arising out of the use of electric powered woodworking machinery, such as the electric saw. The company had also gone into voluntary liquidation, and they had no funds to meet the claim. As a claim against the company would therefore be worthless, Mr Campbell sought to bring a claim against the sole director of the company, Mr Gordon. Mr Campbell argued that the company was in breach of Section 1 of the Employers Liability (Compulsory Insurance) Act 1969, and that Mr Gordon was liable as sole director under Section 5 of the Act, as he arranged the insurance. Section 5 of the 1969 Act provides that:

"S 5. An employer who on any day is not insured in accordance with this Act when required to be so shall be guilty of an offence...where an offence under this section committed by a corporation has been committed with the consent or connivance of or facilitated by any neglect on the part of, any director, manager...he, as well as the corporation shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly."

Mr Campbell argued that this section, and section 1 of the Act requiring compulsory insurance to be in place, meant that the director could be held civilly liable for permitting the employer company to carry on its business without having in place an approved insurance policy insuring the employer against any bodily injury or disease sustained by employees in the course of their employment. At first instance it was held that there was no reason to conclude that the Act did not give rise to civil liability on the part of the director or other officer.

[3] [2016] UKSC 38

Gordon appealed, and was successful in the Court of Appeal with the majority agreeing that the provisions of the 1969 Act did not reveal a "legislative intention" to impose civil liability upon directors.

The case proceeded to the Supreme Court, where again, the court found in favour of Gordon. A 3-2 majority held that the wording of the statute was clear – that the obligation to insure is on the company and not the director, and there was no basis for "looking through the corporate veil". It was held that civil liability under statute for a breach of the obligation to insure imposed by the Employers' Liability (Compulsory Insurance) Act 1969, s.1 does not attach to the director even where he is deemed guilty of the same criminal offence as the company under s.5 of the Act. The majority held that this appeal was not about fairness, but the formal contextual interpretation of the Act. Lord Toulson and Lady Hale, dissenting, said that it was plain that the legislation was intended for the protection of employees and that the protection inteded was that they should be compensated for their injuries even if for whatever reason, the employer was unable to do so. To interpret the Act in any other way would leave the very class of people the Act seeks to protect without that protection.

The *Campbell* decision means that for those injured at work, whose employer either does not have any insurance, or where the insurance excludes liability in certain circumstances, or is otherwise invalid, the only option for redress is to pursue the employer directly. If the employer is a smaller company, or has gone into liquidation, any claim against them will be worthless and the injured employee will be denied compensation. Everyone has the right to go to work and come home uninjured, and should an injury occur due to the employer's negligence, the employee should be able to obtain compensation that puts them as closely as possible back to the position they were in before the accident. The current situation is highly unjust.

APIL calls for:

An increase to the minimum indemnity limit of compulsory employers' liability insurance

The minimum indemnity limit for employers' liability insurance was last increased in 1999, and is long overdue for a further review. The limit of £5 million creates substantial unfairness to those who are catastrophically injured at work, particularly in cases where there is a short life expectancy and periodical payments are the only way to ensure that the injured person is properly compensated, and/or where the company is unable to meet the cost of periodical payments without the assistance of insurance.

An amendment to the 1969 Act to make directors or officers liable

APIL calls for amendment to the Employers Liability (Compulsory Insurance) Act 1969, to provide that in the event that a claimant is injured and the insurance arranged by the employer is not adequate or able to meet the costs of the claim, that the director/officers of the business should be civilly, as well as criminally, liable. It is clear that the Act is in place to protect employees, yet the current interpretation of the Act by the courts does not provide this protection.

An MIB style fund

A further option, which would go some way towards addressing the problems at both point 1 and 2 above, is to create an entity similar to the Motor Insurers' Bureau, for employers liability claims where the insurance is either not in place or is invalid or inadequate. Although there is a requirement within the Employers' Liability (Compulsory Insurance) Act 1969 to take out insurance, there will be instances where employers may not take out any insurance, or the insurance does not cover all of the activities undertaken by their employees. If the insurance is not present, excludes some activities carried out by the employees, or is void, the injured employee will be left without compensation if the employer is bankrupt or without the means to otherwise meet the costs of compensation.

An MIB style fund could also be drawn on to cover the shortfall if the indemnity limit of the policy is too low for periodical payments to be awarded in a case where they are needed, or if the employee was injured in the course of their employment whilst working overseas (the 1969 Act only requires an employer to insure their employees against risks arising out of and in the course of their employment in Great Britain).

Compulsory Public Liability Insurance

The current law

Public liability insurance, when in place, covers the cost of compensation for personal injuries, loss or damage to property and death, and most public liability policies cover incidents that occur on business premises, incidents that take place off site, and at events organised by the business. Public liability policies cover anyone, apart from employees, with whom the business interacts as part of their operations, such as customers, clients, people taking part in events/activities organised by the business.

It is not currently compulsory for businesses and organisations which come into contact with the public to have public liability insurance in place. This means that people injured by the negligence of those businesses and organisations may be unable to access the compensation that they need, and to which they are entitled. It may be that the injured person can sue the defendant directly, but it is unlikely that the defendant will be able to provide full redress without insurance cover in place.

The unfairness arising where there is no public liability insurance in place is demonstrated in the following case studies:

<u>Case study 1</u>
In the early 1970s, when he was just 13, S was subjected to repeated sexual abuse while attending boarding school in Exeter. After three decades, he finally felt able to report what had happened to the police. The school's former chef was arrested, and he confessed. S was entitled to sue both the abuser and the school for compensation, but the abuser had no assets. The school, as an institution, was liable for the chef's actions because he was employed there, and his employers knew his job involved looking after children in the kitchens.

The school had, however, closed, and the company which owned it had also folded. This would not have been a barrier in itself to making a claim, becase if the institution had been insured at the time of the incident and the insurer could be traced, the instition could have been legally "resurrected" and sued, and the insurance company would have paid compensation. In this case, however, there was no information about whether the school had been covered by public liability insurance at the time of the offence, and if it had, by which insurance company. It was not obligatory for the school to have public liability

insurance. If it had been compulsory, and if there had been a central register of insurers, appropriate steps could have been taken to make a claim for compensation but, under these circumstances, it was impossible. The only recognition for the wrong that was done to him was a token award of £12,000 compensation from the Criminal Injuries Compensation Authority – ultimately paid for by the taxpayer, raher than those who were responsible for something which should never have happened in the first place.

Case study 2
E, a 14 year old girl, had her upper ear pierced in a piercing and tattooing parlour in London. The man who pierced her ear used a "piercing gun", which according to the British Body Piercing Association, should not be used to pierce the top of the ear due to the risk of crush injuries to the cartilage of the ear, and infection. E's ear was immediately painful and within a week had become extremely sore and swollen. Her GP prescribed two courses of antibiotics, but these failed to clear the infection. She was then referred to a specialist ear nose and throat consultant. E underwent two procedures under general anaesthetic to remove excess fluid from her ear and have the wound sewn. She spent a total of two weeks in hospital. As a result of the infection, she suffered from a loss of skin and cartilage and has been left with a significantly deformed ear. E will require plastic surgery to re-build the ear, involving removal of a piece of rib.

The man who pierced E's ear did not have public liability insurance, so no claim for compensation could be made. As well as denying E compensation for her pain and suffering, the bill for the operation, which would cost around £15,000, will be paid by the taxpayer through the NHS.

Case study 3
In 2015, S visited a local motocross track with friends. The track was evidently in poor condition. There were no marshals, no direction signs and no health and safety in place at all. During a ride around the track, S hit a large rock and crashed. S broke his neck, back, ribs and sternum and also sustained a punctured lung. He spent four months in hospital and is now paraplegic. S requires a wheelchair and needs help with day to day tasks, such as getting dressed. S can no longer continue his previous employment as a yard manager for a building company and works two days in an office. He also requires adaptations to his house. He cannot get out into the garden to play with his dog, and he has sold his car as he can no longer drive it. The company which owns the motocross track has accepted that there was no risk assessment, no marshals were in place, and there was no supervision. It has also advised that there is no public liability insurance, so S will go uncompensated.

APIL calls for:

A requirement for all organisations and businesses which come into contact with the public, and which are already required by law to have employers' liability insurance, to also have public liability insurance.

Everyone who has suffered an injury due to another person's negligence has the right to be put back in the position that they were in prior to the negligence. If an accident occurs as a result of a business' negligence, the member of the public should be entitled to claim compensation to be put back in the position that they were in before the accident, in the same way that an employee can claim compensation for an accident at work. If the business does not have public liability insurance, the injured member of the public may not receive the full compensation that they are entitled to, as without insurance, the business may effectively be a "man of straw".

Having a system of compulsory public liability insurance, as well as employers liability insurance, will also have a number of other benefits:

The role of insurance in maintaining health and safety standards and ensuring competence

Making public liability insurance compulsory would mean that it would be compulsory for businesses to have it, but not necessarily compulsory for insurers to provide it. In order to assess the risk of insuring a business, insurers may carry out liability surveys (particularly in the case of large businesses) to examine the business' risk management procedures and even make recommendations for improvement. Businesses in turn will have to ensure that they reach a certain standard of competence in order to obtain insurance. If insurance is obtained, it is likely that specific precautions will need to be taken when carrying out certain types of work, and failure to do so will void the policy[4].

If a business cannot obtain insurance, it will have to improve its standards, or cease trading – and accidents that may have happened due to incompetence will no longer occur. At a time when health and safety regulation is being reduced, and workers and members of the public are being put at risk, making public liability insurance compulsory could help to maintain and even drive up health and safety standards. The idea that insurance is relevant to the competence of the business is highlighted by Latham LJ in *Naylor v Payling*[5], when referring to the case of *Bottomley v Todmorden [2003] EWCA Civ 1575* – "Chaos Encounters were inexperienced and largely ignorant of basic safety requirements of the discharge of pyrotechnic. Proper checks would have revealed this, and would have revealed that Chaos Encounters had no public liability insurance. It was said that this was relevant to the issue of competence because insurers would wish to reduce the risk of meeting liability claims and were likely to ask questions to throw light on the extent of the risk that was to be covered and to have conditions in the policy which reduced the risk of claims being made. Furthermore, if an organisation was unable to procure insurance, there might be a good reason for that which could in itself be relevant to the competence of the organisation".

The link between public liability insurance and competence, professionalism and health and safety standards is highlighted in a number of other cases. An expert in *Bottomley* considered that when deciding whether a pyrotechnic stunt performer was competent, an enquiry about insurance was an "elementary precaution". King J in *Tafa v Matsim Properties [2011] EWHC 1302 (QB)* also stated that "had a check been made it would have established that Peter McDonald had no such insurance, which in turn would have indicated his lack of competence and professionalism.".

Compulsory public liability insurance would be good for businesses as well as injured people

Even if a business has good standards, there can be no guarantee that an accident will not happen, so cover should be in place just in case. Having public liability insurance will protect the business from becoming bankrupt, should an accident occur which requires a payment of compensation to be made to an injured person.

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[4] Page 13 of AXA's public liability insurance policy provides an example of certain conditions that must be complied with when dealing with "heat work", in order for public liability insurance to remain valid. http://www.axa.co.uk/uploadedFiles/Content/Insurance/Business/Public_Liability/PL_Trades_FCA_MM.PDF

[5] [2004] EWCA Civ 560

A database could be established, which would mean that it would be easier to trace a business' public liability insurer

There are often difficulties at present with tracing a business' public liability insurer. This can waste time in a case and make it more costly. If public liability insurance was compulsory, a tracing scheme could be established, making it easier to find the insurer and allow the claimant's solicitor to get on with the claim. This would be of particular assistance in cases like S's above, where the institution/organisation has since gone bankrupt. A database would allow the relevant insurer to be traced.

Public liability insurance will ensure that it is those responsible for the negligence who are held accountable and pay the damages

As demonstrated by the case studies above, a lack of public liability insurance will mean that the defendant will only be able to meet part of the claim, or perhaps will not be able to meet the claim at all, and will not be held accountable for the damage caused by their negligence. If the injured person is unable to recover the compensation that they need to put them back in the position they would have been in had the accident not occurred, it will often be the taxpayer who is left to foot the bill. As in the case of E, damages will not be recovered to cover the cost of necessary medical treatment and the NHS will have to pay without any prospect of recovering this cost back.

- Ends -

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