Civil Justice Council

Call for evidence on enforcement

A response by the Association of Personal Injury Lawyers

September 2024

Introduction

APIL welcomes the opportunity to respond to the Civil Justice Council (CJC)'s call for evidence on enforcement. We have responded in respect of personal injury law only. While we do not have specific comments about the range of enforcement options, we have provided general comments and illustrative case studies on the circumstances where enforcement of judgments in personal injury claims is an issue. We felt it useful to draw attention to these wider general issues, and the impact that they have on those who are injured as a result of negligence, for the CJC to consider alongside specific comments about enforcement methods.

Issues with enforcement of judgments in personal injury cases can result in claimants struggling to obtain representation for their case. Enforcement therefore strikes at the heart of access to justice for victims of negligence. Where there are enforcement or insurance coverage issues, this can impact an individual's decision on where to pursue their case, in turn creating difficulties in funding the costs of pursuing a claim – notably where the only viable option – because of an enforcement risk - is for the individual to proceed overseas in a country where Conditional Fee Agreements or their equivalent are not available. If an individual cannot secure representation to proceed in England because the risk of enforcement overseas is considered too high, then injured individuals will not be able to access the necessary compensation to put them back, as closely as possible, to the position they were in prior to their injuries.

In cases where there is inadequate insurance coverage, or insurance cover is simply not in place, the injured individual's only option will be to pursue a defendant directly. If the defendant does not have the funds to satisfy the claim (which will be increasingly likely the higher the value of the claim, and the more severely injured the claimant), the injured individual will be left with no compensation to restore them as closely as possible to their life prior to the negligence.

2) Are there any barriers you have experienced in seeking to enforce or satisfy a judgment and, if so, what were they?

<u>1. International enforcement of domestic judgments</u>

There are a range of barriers to enforcement that our members report in respect of personal injury claims. One of the largest barriers relates to cases involving an international element. Post-Brexit, and since the UK is no longer a party to the Lugano convention, establishing jurisdiction and subsequent enforcement of domestic judgements abroad is extremely challenging. Members who specialise in this area report that claimants go through the time, effort, costs and stresses of securing a judgment in the UK, and then enforcement of that judgment abroad is decided on a case-by-case basis, which leads to uncertainty, and, where it is not possible to enforce the judgment, this leaves the claimant – vulnerable and at a very traumatic time in their life – uncompensated for their often very severe injuries.

Prior to Brexit, claimants benefited from special provisions on jurisdiction, giving wider choices to where they could bring a claim for damages. If the claim fell within European Union rules on jurisdiction set out in the Brussels recast Regulation or Lugano, the defendant could not challenge jurisdiction on the basis that courts of another country were a more appropriate place to hear the claim (the common law doctrine of *forum non conveniens).* Any judgment arising from proceedings brought under the European jurisdiction rules could be easily enforced across the EU, Switzerland, Norway or Iceland. Following Brexit, and the European Union's refusal to allow the UK to reaccede to the Lugano convention, claimants based in the UK who are injured abroad face huge challenges in accessing justice. Where proceedings can be brought in the UK courts (for example where the tort gateway at Civil Procedure Rule 6BPD 3.1(9)(a), confirmed in *Brownlie*[1]*,* can be applied), defendants are still able to raise arguments around jurisdiction, giving rise to uncertainty and additional costs.

Even if claimants can overcome this hurdle and secure a judgment in the UK, uncertainty remains on the question of enforcement of any such judgment. Currently, enforcement in these cases is determined on a case-by-case basis, depending on the country in which the claimant is seeking enforcement. It will not be clear until the judgment is secured, the international defendant refuses to pay, and attempts are made to enforce the judgment, as to whether it will be possible to do so. Expert legal opinion is required from an appropriately qualified expert in the overseas territory in which the defendant is domiciled or registered, or in which the claimant may otherwise need to seek enforcement of a judgment, to determine the enforceability of any judgment from the UK courts as soon as reasonably practicable in claims that may be affected in this manner. This advice tends to come at a considerable cost, and is qualified, given that the system has not been tested as of yet and so any opinions expressed are often purely hypothetical. The claimant, who will be in an extremely vulnerable position, having likely suffered a very serious, life-changing injury, faces great uncertainty (potentially for years, while they await full and final settlement of their claim) and they may ultimately be left with no compensation at all. The cost of enforcement proceedings may also not be covered by a CFA agreement for the main proceedings, giving rise to further access to justice issues and a cost burden that seriously injured individuals rarely, if ever, have the resources to meet.

While there has been a step in the right direction, with the UK ratifying the Hague Convention 2019, this has limitations. APIL believes that an unacceptably high proportion of cross-border injury victims will still need to continue to rely on the domestic rules of enforcement in the country where the international defendant against which enforcement is pursued, is based. APIL has highlighted the issues stemming from the Hague convention to the Ministry of Justice on a number of occasions, and Christopher Deacon, APIL international special interest group co-ordinator, has written extensively on the subject, and his articles can be found on the Stewarts website[2]. The main limitations of the Hague Convention to injury victims we have identified are summarised below:

- It excludes the carriage of passengers and goods, which means that a passenger in a motor vehicle collision cannot rely on Hague 2019 to enforce a judgment. There are other international conventions governing the carriage of passengers, but no other conventions cover the enforcement of a judgment arising from the injury of passengers in a motor vehicle. Most serious international injury claims will relate to

[1] [2021] UKSC 45

[2] https://www.stewartslaw.com/news/hague-2019-ratified-by-the-uk-what-next-for-injury-victims/ ; https://www.stewartslaw.com/news/hague-2019-judgments-injury-victims/

road traffic collisions, and for these claimants, the Hague Convention will simply be of no use.

- Interim measures are excluded from the scope of the Convention. This means that enforcement of an interim award of damages, which can be vital to serious injury victims to help with funding care costs and rehabilitation, for example, will be excluded from the scope of Hague 2019.

- Under English law, as mentioned above, the victim of a serious injury overseas has the option of returning to the courts of England and Wales and bringing a claim under the tort gateway at Civil Procedure Rule 6BPD 3.1(9)(a). Contrary to the Supreme Court's judgment in *Brownlie*, Hague 2019 requires that in a claim for tort, the damage must have occurred in the state of origin of the judgment, irrespective of where the harm occurred. Thus, a judgment relying on *Brownlie* will presumably be unenforceable using Hague 2019. The fact that the victim is suffering the "indirect, ongoing consequences of the act or omission" in the state of origin of the judgment will not suffice.

- It could also exclude enforcement of a judgment obtained by a claimant for loss of financial dependency on the deceased following a fatal accident on the basis this is an "indirect" loss. Hague 2019 refers to harm being "directly caused", which may exclude indirect loss consequential to the original injury or death. On the other hand, as the claim for financial dependency "arises from the death", it may be within scope. The Explanatory Notes to Hague 2019 recognise there are issues over how the Convention might be interpreted, leaving the question of interpretation of this part to national courts, which further highlights the uncertainty of the regime for weaker parties.

- There may also be issues with refusals of recognition and enforcement for public policy reasons. The Convention sets out the basis on which a judgment may be refused recognition or enforcement by the Requested State. APIL is concerned that serious injury victims who have obtained a judgment from the UK courts are likely to be refused enforcement due to the use of a conditional fee agreement (ie. "no win, no fee" arrangement) to fund the legal costs of bringing their claim. This is a common method of funding that enables access to justice for injury victims in the English courts. At the successful conclusion of the claim, an injury victim will have a judgment ordering the defendant to pay damages but also a judgment requiring the defendant to pay the majority of the legal costs incurred by the victim in pursuing their claim.

  Our members have seen problems with the recognition and enforcement of English judgments by European countries on the basis that an award of costs under the English loser-pays principles offended public policy. The Greek Court of Appeal has previously ruled against enforcement of an English costs award on the basis the costs were "excessive", (a decision subsequently overruled by the Greek Supreme Court under the European regime, on the basis it was a breach of the EU law concept of mutual trust). We are concerned that injury victims will face uncertainty, delays, and additional costs in trying to defeat public policy arguments on enforcement regarding the Contracting States' interpretation of Article 7 of Hague 2019.

APIL considers it is important that the UK Government does not lose sight of the importance to individuals, consumers and victims of re-joining the Lugano Convention 2007. Serious injury victims have lost a number of important protections afforded to weaker parties by the European regime on jurisdiction and enforcement. As such, APIL encourages the UK government to renew efforts in this regard and to ensure that from a political and diplomatic standpoint ratifying Hague 2019 does not stop ongoing efforts in relation to the UK re-joining the Lugano Convention. The Lugano Convention is the best model for continued cooperation in the enforcement of judgments in relation to the EU and EFTA states post-Brexit for individuals, consumers and victims, with an associated set of jurisdictional rules that offer weaker parties certainty.

An increasing number of claimants are likely to be advised that there are challenges with establishing jurisdiction in the UK and therefore they should consider pursuing the action in the relevant country accordingly. This creates access to justice issues. The UK jurisdictions are in the minority in Europe in allowing a litigation funding regime that enables the claimant to defer the costs involved in pursuing a claim can to the end of the claim, and where the costs will only need to be paid if the claim is successful (CFA funding). In many other European countries, costs may either need to be paid as they are incurred, or up front. Even where this is not the case, within European member states it is commonplace for disbursements to be paid by the claimant as the case progresses. This can prove to be difficult if the injured party has lost their job, and is reliant on state benefits and requires extensive care and support due to the injuries suffered. Alternatives are sometimes provided, such as contingency fee agreements, but in those instances there may be arguments that the injured party is required to accept a significant deduction from their damages at the end of a successful case and that the extent of that deduction would be far greater than under the terms of a CFA that may have been available had the claim been pursued in the UK.

Case studies 1.1 - examples provided by members

Members provided some examples of potential cases arising out of accidents abroad which could have been routinely pursued in the UK under the Brussels / Lugano regime but which can now only be pursued in the UK with great uncertainty, or pursued abroad:

1. A UK based claimant who sustained serious injuries in a funfair in France.
2. Several UK based claimants who sustained serious injuries in road crashes in France and Spain.
3. A UK based claimant who was negligently treated in a hospital in Spain and sustained terrible injuries as a result.

In all these examples, the claimants would have had the automatic right, under the Brussels / Lugano regime to pursue their case in their home court with all the advantages that that would bring:

- The case would be conducted in their own language.
- Legal representation would be easily accessible.
- The claimant’s lay and expert witnesses (giving evidence on the claimant’s losses) would all be in this jurisdiction.
- Any medical examinations and court hearings would be easy to attend.
- Domestic costs rules would apply.

- Judgments would automatically be enforceable against the foreign defendant.
- The predictability if the Brussels / Lugano regime in relation to enforcement of judgments would encourage the parties to co-operate in the resolution of the case

The following case studies were provided by members to demonstrate the uncertainty that arises in cases involving injuries occurring overseas.

[Case studies redacted in this version of the response, for confidentiality purposes]

2. Issues relating to insurance

A further barrier to enforcement is where there is a lack of adequate insurance on the defendant's part. There are issues with the following:

- businesses not having public liability insurance in place;
- tour operators self-insuring and the risks this poses should a tour operator become insolvent;
- employers' liability compulsory cover not being set at a sufficient level;
- a lack of regulation over appropriate cover for clinical negligence cases involving private healthcare professionals.

When a tortfeasor is properly insured, this can also provide a route to redress and enforcement through the Third Parties (Rights Against Insurers) Act 2010 (and the earlier legislation to the extent this is still relevant).

Public liability insurance

Members report that there are difficulties in enforcement in occupiers' liability cases, where the owner of the land does not have insurance to cover claims for injuries that arise outside of employers' liability. Premises such as construction sites are inherently very dangerous, but in many instances there is not insurance to cover claims if someone gets hurt. APIL calls for any organisations and businesses which come into contact with the public to be required by law to have public liability insurance. The cost of public liability insurance to most small businesses would be negligible in comparison with the potentially devastating cost of a personal injury claim. If public liability insurance were to become compulsory, a greater number of policies would be issued which would obviously mean that insurers would be able to spread their risk further. APIL's concern is, and always has been, the rogue businesses who are more likely to take shortcuts over health and safety and are least likely to have cover. If public liability insurance were to become compulsory and insurers were to use that fact to advise on safety standards before issuing cover, such companies would either have to improve standards or cease trading. Either way, unsuspecting members of the public would be far less likely to be injured needlessly.

Self-insured tour operators

Highlighted by the insolvency of Thomas Cook in 2019, self-insurance, in place of public liability cover, is understood to be particularly popular among larger tour operators, where passenger numbers would otherwise mean high public liability insurance premiums. In the case of Thomas Cook, the company only insured for the largest of claims, and self-insured for the remainder. When the company entered liquidation, the vast majority of people with personal injury claims, including those who had suffered serious injuries or bereavement, were treated as unsecured creditors. It was therefore almost impossible for those injured people to receive any compensation. This included for financial losses those customers may have to endure on a lifelong basis as a result of a serious injury while on holiday. Public

liability insurance should be compulsory, to ensure that this situation is not repeated. There should also be a requirement that such policies do not carry prohibitive self- insured excess levels. Currently, consumers are induced to purchase holidays that are ABTA and ATOL protected, and while ABTA requires liability insurance to be in place, no enquiries are made about the level of coverage or the self-insured excess that might apply. Companies operating in the same way as Thomas Cook would appear to be able to confirm to ABTA that insurance is in place, without revealing that it only covers a small percentage of the claims for injury damages made by customers each year. The ATOL scheme has no requirement for third party liability insurance to be in place.

Indemnity levels for employers' liability cover

Another issue relates to employers' liability. While employers' liability insurance is compulsory, the Employers Liability (Compulsory Insurance) Regulations 1998 require that insurance should not be less than £5 million. This is far from adequate, and even though most employers' liability policies offer cover of £10 million, this is still not sufficient in many instances, particularly where the claimant would benefit from a periodical payment order (PPO). There are circumstances where a PPO would be the best option for a claimant – for example where the claimant has been catastrophically injured and has life-long care needs, but a court is not able to grant the order because it could potentially be more than the limit on the insurance policy. Members have provided a number of examples to highlight the issues around employers' liability cover.

Case study 2.1

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 requires ongoing care for the remainder of his life, calculated at 46 years. A periodical payment order in this circumstance was not awarded as it was not reasonably secure – on any reasonable rate of inflation, it was assumed that the accumulated value of the periodical payment breached the defendant's indemnity limit 20 years before the claimant's life expectancy. The PPO would have therefore stopped 20 years before he passed away. The client therefore received all of his funds as a lump sum, despite periodical payments being a fairer way of compensating victims to ensure that they get funds for the rest of their life, regardless of how long they live. The claimant would now need to manage his lump sum to ensure that his care needs can be met. This was largely dependent on how the investment markets perform.

Case study 2.2

L fell from a ladder while attempting to erect a sign in a shopping centre managed by the defendant. L now has a reduced life expectancy of 20 years, and is a wheelchair user and will require care for the remainder of his life. When the cost of L's ongoing care was calculated, it was identified that the indemnity limit on the employer's policy 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 the funds to meet his needs past his agreed life expectancy. This problem is particularly acute in short life expectancies and could end with L being undercompensated by a significant amount (anywhere between 10 and 50 per cent).

Inadequate insurance cover in clinical negligence claims

While there is a state-backed indemnity scheme for claims arising from NHS hospital trusts, and there is now a state-backed scheme for General Practitioners, issues arise in cases involving other healthcare professionals (e.g. dentists), and those providing services in a private capacity. Members have also reported difficulties in enforcing claims against GPs that were brought prior to the indemnity scheme coming into force. There is a lack of regulation currently to ensure that those who hold private indemnity insurance hold the correct level of indemnity, that their insurance cover is suitable for their practice, or that they even hold valid insurance cover. We set out below a number of examples received from our members on the impact that the current situation relating to insurance in clinical negligence claims has on claimants. There are some examples of claims being discontinued due to a lack of indemnity cover, and some examples of judgments being handed down, or settlements being reached, but then enforcement of those decisions being impossible due to a lack of appropriate insurance and lack of funds on the defendant's part to satisfy the claim, particularly where the defendant has several similar claims against them. In either instance, the claimant is left without the compensation that they need and deserve.

Case study 2.3

The client suffered poorly fitting upper and lower implant retained bridgework costing £19,000 which resulted in pain, discomfort, difficulties eating and requirement for protracted remedial dentistry costing £23,000.

Damages of £37,184 were awarded to the client against Dr M at a disposal hearing. However, the client has not recovered damages due to non-cooperation from the insurance provider, and an absence of funds on the part of the defendant.

Case study 2.4

The client saw a private surgeon in August 2016 following an MRI scan which had identified large disc prolapse in her thoracic back. She was advised that she required urgent surgery to decompress the spine as otherwise she risked becoming paralysed.

She underwent her first surgery shortly thereafter but full decompression was not achieved and further surgery was recommended and proceeded with within a short period of time thereafter. Unfortunately following her second surgery she suffered neurological deficit and required emergency revision surgery but her neurological status did not improve. Subsequently and upon consultation with other surgeons, her treating surgeon recommended and proceeded with a fourth surgery to further decompress the spine.

The client remains with significant neurological deficit affecting her bowel and bladder function as well as sensation and power in her lower half. She requires assistance with most aspects of her life and has been unable to resume employment. She has significant disability and long-term needs; her claim is likely to be of very significant value.

The case involves allegations of negligence against her treating surgeon as well as the private hospital (on the basis of vicarious liability for the actions of the surgeon, breaches of non-delegable duty of care and in respect of nursing care).

Shortly after the claim was commenced, the claimant's solicitors were advised that there were issues with indemnity insurance for the surgeon. He had to obtain privately funded legal representations due to lack of indemnity insurance. It took a long time to understand the issues and the claimant solicitor's requests for information were ignored or firmly refused on the basis that the client did not have right to make any such enquiries. The surgeon had not notified his insurer of potential grounds that could give rise to a claim, and when he

changed indemnity insurer, the new insurer refused to insure due to lack of timely notification to the previous insurer. The defendant has now passed away, and the claim proceeds against the surgeon's estate. There are similar claims against the same surgeon and there are concerns about the claimants being able to enforce any judgments against the surgeon's estate given the number of claims and issues with indemnity insurance.

Case study 2.5
A case involving a consultant and the failure to diagnose a recurrence of metastatic breast cancer. This resulted in the collapse of her L2 vertebra and nerve root compression. The defendant was without indemnity and was also the subject of fitness to practice proceedings at the General Medical Council during the course of the litigation. The claim was contested. A settlement was eventually agreed at 5.47% of the pleaded value of the claim and, on any basis, was a substantial under-settlement of the true value of the case.
The value of the settlement was at least equivalent to the value of the claim for bodily injury alone, but disregarded any of the costs of medical costs already incurred or onward private medical treatment and loss of earnings. Those losses were all substantial. The claimant accepted the settlement offer at that level taking into consideration the risk that the defendant may not have sufficient assets to cover the full cost of this (and any other) litigation and also his ongoing regulatory proceedings, which may have resulted in protracted litigation and a pyrrhic victory with no access to any damages at all.

Q38) Are there any other areas of enforcement that you feel could be improved and in what way and by which methods?

We have set out above the areas where enforcement presents the most issues for our members. In each area there are improvements/reforms that could be made to address the problems arising. We have touched on these already in answer to question 2, but repeat them here for completeness. In relation to enforcement of domestic judgments overseas, it is vital that the UK Government continues its efforts to rejoin the Lugano Convention, or at least considers other options, such as new bilateral treaties, to address the gaps left for individual injury victims following the UK's ratification of Hague 2019. There could be consideration of a bilateral agreement between the UK and EU specifically on the recognition and enforcement of judgments, or consideration of bilateral agreements between the UK and individual EU member states.

APIL maintains that there should be compulsory public liability insurance in place for any business which come into contact with the public.

In relation to inadequate employers' liability cover, we believe that the Government should introduce reform to the legislation to provide that employers liability cover must be unlimited.

With regard to adequate clinical negligence cover, we would welcome regulation of private indemnity insurance to ensure that healthcare professionals have insurance in place and that it is set at the appropriate level of cover to satisfy claims. We would also welcome the introduction of a "safety net", with contributions made by private healthcare professionals, which would provide indemnity where there is no insurance in place, the insurer refuses to indemnify or the cover is not adequate. This would ensure accountability on private healthcare providers to ensure that those who carry out work for them have the correct insurance in place.

If you have any questions in relation to our response please contact, in the first instance:

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