FINANCIAL SERVICES AUTHORITY CONSULTATION

FINANCIAL SERVICES COMPENSATION SCHEME: DRAFT TRANSITIONAL RULES

A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS

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The executive committee would like to acknowledge the assistance of the following people who contributed to the preparation of this response:

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1. The Association of Personal Injury Lawyers (APIL) was formed in 1990 and represents more than 4900 solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants. The aims of the association are:

   - To promote full and prompt compensation for all types of personal injury;
   - To improve access to our legal system by all means including education, the exchange of information and the enhancement of law reform;
   - To alert the public to dangers in society such as harmful products and dangerous drugs;
   - To provide a communication network exchanging views formally and informally.

2. We welcome this opportunity to express our concerns about the proposed draft transitional rules for the Financial Services Compensation Scheme as they relate to employers liability insurance. For some time we have been extremely concerned about the plight of injured victims who have established their claim to compensation from an employer but where:

   - The employer is insolvent and uninsured or self-insured
   - The employer is insolvent and the insurer cannot be traced
   - Both the employer and insurer are insolvent.

3. Injured victims in this situation, through no fault of their own, are left uncompensated for their injuries and are treated as any other creditor when, in fact, there can be no similarities between them. Moves to ensure that the collapse of Chester Street Insurance Holdings would not leave victims uncompensated were welcomed. We have, however, continued to call for the establishment of an 'employer's liability insurer of last resort', which would provide compensation to injured victims in all of the above situations. Such a

body exists for those injured by uninsured or untraced drivers in the form of the Motor Insurers Bureau. APIL is, therefore, extremely concerned about the limited scope of the proposed FSCS which would deal only with the situation in which both the employer and insurer were insolvent.

4. We are also concerned about the focus of the FSCS. The scheme will not compensate victims as they would have been compensated had their employer still been solvent. If their employer was still solvent such victims would receive full compensation to put them in the position they would have been in had the employer not been negligent. The FSCS would, however, place the injured victim in the place of the employer as policyholder. This means that the compensation a victim receives through the scheme will be the amount of compensation for which the employer was insured under the relevant policy. Under the relevant insurance policy the employer may have been liable to pay an excess. Even if, therefore, a victim is entitled to 100 per cent compensation under the scheme, the victim may not receive the full compensation to which they would be entitled at common law.

5. In addition, the relevant insurance policy may have included limitations on the legal costs that would be paid on behalf of the employer. Even though, therefore, a claimant that has successfully established a claim is entitled to recover his legal costs, not all claimants under the scheme may in fact do so. This could result in claimants paying legal costs out of the compensation they actually need to pay for medical treatment or care.

6. We strongly believe that injured victims who have established their claims should, under the scheme, be put in the same position as other victims with claims against solvent defendants and so should:

    - Be able to recover the full compensation they need and to which they are entitled to at common law;
    - Not be required to meet any legal costs.

7. If, however, our submissions on the scope and focus of the scheme are rejected, we urge the FSA to take into account the following points which relate to the actual draft transitional rules as outlined in the consultation paper. Firstly, under the proposed scheme, those with claims arising before employer's liability insurance became compulsory in 1972 are only entitled to 90 per cent of the compensation due under the relevant policy, whereas those with claims arising after that date are entitled to 100 per cent. We do not believe there can be any justification for treating victims with claims arising before 1972 less favourably. If the moral justification exists for the insurance industry to pay the compensation of these victims in part, it also exists for it to do so in full. Whilst paying an extra 10 per cent in such claims would have little financial effect on the insurance industry in relative terms, receiving the extra 10 per cent compensation would make a big difference to an injured victim.

8. In addition, there are also practical justifications for awarding those with claims arising before and after 1972 100 per cent compensation regardless of when the claim arose. Many of the claims that will be dealt with under the scheme will be asbestos-related claims. It is certainly not uncommon for employees to have been exposed to asbestos for long periods spanning both before and after 1 January 1972. Under the scheme the victim would be entitled to only 90 per cent compensation for the part of the injury caused before that date and 100 per cent compensation for the part of the injury caused after that date. Calculating the compensation due on this basis would cause considerable difficulties for legal advisers and experts and also cause difficulties in assessing costs.

9. Secondly, rule 5.4.3 deals with the situation in which a contract of insurance is not evidenced by a policy. Considerable difficulties can, however, also be encountered in identifying and tracing an employer's insurer for the relevant dates. A code of practice for tracing employer's liability insurers does exist but unfortunately, we understand that it has a very low success rate. In view of this, we believe the scheme should include, at the very least, a presumption that where the insurer is not identifiable or where a contract of insurance is not

evidenced by a policy, that an enforceable policy did exist and that the claimant is entitled to take advantage of the scheme.

10. In conclusion, whilst APIL believes the draft transitional rules represent a welcome start in tackling the problems caused to injured victims where they can no longer claim compensation from their employers or their employer's insurers, we do not believe the proposals go far enough. With the recent collapse of major insurance companies and the collapse of Turner & Newell – employers of many with potential asbestos-related claims – we believe the time is certainly ripe for the establishment of an employer's insurer of last resort to ensure that injured victims receive the compensation they need and to which they are entitled.