CIVIL JUSTICE REVIEW IN HONG KONG

A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS

APRIL 2002

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1. The Association of Personal Injury Lawyers (APIL) was formed as a membership organisation in 1990 by claimant lawyers in the United Kingdom. APIL is committed to providing the victims of personal injury with a stronger voice in litigation and in the marketplace generally. We now have around 5,000 members across the UK and abroad, and membership comprises solicitors, barristers, academics and legal executives. We currently have seven members based in Hong Kong.

2. Many of the proposed civil justice reforms reflect those that were introduced in England and Wales in 1999. In view of this, members in Hong Kong have asked APIL to make submissions on how the reforms have operated in this jurisdiction within personal injury practice.

3. Information on the operation and effectiveness of the Woolf reforms in England and Wales remains largely anecdotal, as it is only three years since the reforms were introduced, although both APIL and the Law Society conducted research at an early stage. APIL sought information from its members in October 1999 on the pre-action protocol for personal injury cases and the Law Society has issued four questionnaires to a selected network of practitioners (referred to as the 'Woolf network questionnaires'). In addition, the Lord Chancellor's Department (LCD), in March 2001, published an early evaluation of the civil justice reforms.[1]

4. It is only now, however, that reports based on substantive research are emerging. In April 2002, Tamara Goriely et al published research, commissioned by the Law Society and the Civil Justice Council, on the impact of the Woolf reforms on pre-action behaviour.[2] In the same month, research

[1] 'Emerging Findings: an early evaluation of the civil justice reforms', Lord Chancellor's Department, March 2001

[2] 'More Civil Justice? The impact of the Woolf reforms on pre-action behaviour', Research Study 43, April 2002, Tamara Goriely, Richard Moorhead, Pamela Abrams. This study, conducted two years after the reforms were introduced, focuses on the way that representatives behave before they litigate in

commissioned by the Lord Chancellor's Department into case management conferences has been published.

5. It certainly appears that the Woolf reforms have improved civil litigation in several respects. Tamara Goriely et al state:

   "Most practitioners regarded the Woolf reforms as a success. The reforms were liked for providing a clearer structure, greater openness and making settlements easier to achieve…Most people thought that the dispute culture was now more open, with improvements in the relationship between, for example, personal injury claimant solicitors and insurers, and between clinical negligence claimant solicitors and claims managers working for NHS trusts."[3]

6. This reflects the Law Society's findings following its fourth Woolf network questionnaire, issued in October 2001. 70% of respondents thought that the civil procedure rules were working well, but with some reservations, and "[m]any respondents thought that the new procedures were quicker and more efficient…respondents reported that the procedures were more efficient, telephone case management conferences are working well, there are more settlements, some speed benefits and overall a better service." These findings are further reflected in the judicial statistics, noted in the LCD's March 2001 report, where it stated that there had been an overall drop in the number of claims issued[4] and that the time between issue and hearing for those cases that do go to trial has generally fallen.[5]

7. The Woolf reforms have not, however, been without criticism. Very few respondents to the Law Society's fourth network questionnaire thought that the new procedures were cheaper for the client than the old rules. The problems highlighted were:

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three specific areas of work: personal injury, clinical negligence and housing disrepair. The researchers spoke in depth to 54 lawyers, insurers and claims managers.

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[4] paragraph 3.1

[5] paragraph 6.1

- The frontloading of costs;
- The complexity of cost issues, particularly the production of statements of cost; and
- High levels of work required for case management conferences.

8. In addition, it does not appear that the Woolf reforms have reduced the cost of litigation as intended. Tamara Goriely et al state:

   "Reducing costs was a major objective of the reform process. Although the evidence on this issue is far from conclusive, initial indications do not suggest that case costs have decreased. Each potential saving in the reform is offset by other changes that require more work, or bring forward work to an early stage, so that it is required in a greater proportion of cases."[6]

9. In its submissions, APIL concentrates on the following proposals, which are particularly relevant to personal injury practice:

   - Proposals 4 and 5: pre-action protocols and allowing the court to take into account the parties' pre-action conduct;
   - Proposal 15: Rules governing the making and costs consequences of offers of settlement and payments into court along the lines of part 36 of the civil procedure rules;
   - Proposal 32: summary assessment of costs;
   - Proposal 20: case management.

PROPOSAL 4: PRE-ACTION PROTOCOLS AND ALLOWING THE COURT TO TAKE INTO ACCOUNT THE PARTIES' PRE-ACTION CONDUCT

10. Respondents are asked whether Hong Kong should adopt pre-action protocols. APIL was involved in drafting the pre-action protocol for personal injury cases in England and Wales and believes that it has generally been successful.

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Research conducted by APIL in October 1999 concluded that 48% of respondents felt that earlier settlement had been reached as a result of the protocol and that 33% of cases avoided litigation. Tamara Goriely et al found that "those involved in personal injury and clinical negligence work…felt positive about the protocols. By establishing clear ground rules on how claims should be formulated and responded to, protocols were thought to focus minds on the key issues at an early stage and encourage greater openness. This smoothed the way to settlement."[7]

11. Anecdotal evidence from our members, however, suggests that there may have been a 'honeymoon period'. Some members feel that whilst defendants initially complied with the protocol's requirements, they now do so to a lesser extent. This concern has been reflected by APIL president, Frances McCarthy, who has stated:

"The protocols have transformed the way in which parties deal with each other before litigation. The culture of openness which has been generated, together with the part 36 offer, has led to a dramatic increase in pre-issue settlements. But some insurers are beginning to try and manipulate the protocols. We are receiving letters from insurers in response to the letter of claim which ignore the basic premise that liability is resolved before the issue of quantum falls to be decided. Where liability is purportedly not in dispute, no unambiguous admission is made. Where liability is denied, proper reasons are not given and/or documents in support of the denial are not supplied. The claimant's statement is requested as of right. This behaviour is not universal; many insurers behave perfectly properly, but a disquieting number seem to focus on sliding out of their obligations. What is more worrying is that claimants' lawyers are not always calling them to account."

12. This last point was reflected in responses to the Law Society's fourth Woolf network questionnaire - 60% of respondents had never applied for sanctions following a breach of the protocol. The Law Society notes "[r]espondents

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reported that the discretionary nature of sanctions were problematical and some said that fixed sanctions would be more effective. There was a feeling that generally courts are unwilling to impose sanctions in all but extremely serious cases. Judicial inconsistency was widely reported as a deterrent to an application for sanctions as it was likely to add to delay and costs." Tamara Goriely et al found:

"Personal injury claimant solicitors were particularly concerned about the perceived lack of sanctions when defendant solicitors failed to comply with the pre-action protocol."[8]

13. It is possible for a court to take into account the parties' pre-action conduct when the case has been issued to penalise unreasonable non-compliance with pre-action protocol standards. Anecdotal evidence from our members suggests, however, that this is not always an effective means of either encouraging compliance with the protocol or 'punishing' those that do not. As noted above, this appears to be due to judicial inconsistency and a judicial unwillingness to impose sanctions, through costs or otherwise, in anything other than extremely serious cases.

PROPOSAL 15: RULES GOVERNING THE MAKING AND COSTS CONSEQUENCES OF OFFERS OF SETTLEMENT AND PAYMENTS INTO COURT ALONG THE LINES OF PART 36 OF THE CIVIL PROCEDURE RULES

14. Part 36 allows both claimants and defendants to make offers of settlement that carry cost consequences if those offers are unreasonably rejected. Defendants can do this by making a payment into court. APIL believes that part 36 has been one of the major successes of the civil justice reforms in England and Wales. The LCD reported in March 2001 that "part 36 has been welcomed by all interested groups as a means of resolving claims more quickly."[9]

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[9] Paragraph 4.6

15. The advantages of part 36 payments into court by defendants were most clearly explained by Lord Justice Simon Brown in Amber v Stacey (200) 150 NLJ 1755 where he stated:

"There are to my mind compelling reasons of principle why those prepared to make genuine offers of monetary settlement should do so by way of part 36 payments. That way lies clarity and certainty, or at any rate greater clarity and certainty than in the case of written offers…Payments into court have advantages. They at least answer all questions as to (a) genuineness, (b) the offeror's ability to pay, (c) whether the offer is open or without prejudice, and (d) the terms on which the dispute is settled."

16. Part 36 payments into court increase the likelihood of settlement in several respects and, therefore, operate in the interests of claimants, defendants and, more generally, society. Firstly, a defendant intending to make a payment into court must concentrate his mind on a realistic valuation of the claim. If the valuation is not realistic, the potential cost advantages of making a payment in will be lost. Claimants are, of course, more likely to accept realistic offers and so the current system leads to the increased settlement of claims.

17. Secondly, payments into court afford the claimant some much-needed security. Following a payment in, the claimant can rest assured that the defendant has sufficient money to meet the claim and that the money will be easily obtainable without the need for enforcement proceedings as the money is held by an impartial third party, i.e. the Court Funds Office. This security is extremely important for injured claimants and again will encourage settlement between the parties, which is in the interest of all.

18. Claimant offers of settlement under part 36 also appear to have been successful. Tamara Goriely at el found that "[c]laimant offers under part 36 of the Civil Procedure Rules were singled out for praise"[10]. They further stated:

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"The introduction of claimant offers under Part 36 of the Civil Procedure Rules was seen as an important change. For the first time, claimants have the opportunity to make formal written offers to settle a case that carry penalties if they are refused…Claimant offers were received positively by all groups in our study. Claimant solicitors liked them because they provide a way of eliciting a response. Defendants liked them because they set an upper limit to the bargaining range. However, in all three areas of work, claimant and defendant solicitors varied in how they perceived their use."[11]

PROPOSAL 32: SUMMARY ASSESSMENT OF COSTS

19. It is proposed that the court should be encouraged to make, wherever possible, summary assessments of costs at the conclusion of interlocutory applications. The Law Society, following its fourth Woolf network questionnaire in October 2001, found that "[h]alf of respondents reported that they had encountered difficulties with assessment of costs. The problem reported was overwhelmingly lack of consistency of approach by judges and arbitrary reductions of costs. Claimant firms reported profitability/cash flow implications."

PROPOSAL 20: CASE MANAGEMENT

20. Following its third Woolf network questionnaire in December 2000, the Law Society found that:

    - 32% of respondents felt that case management conferences (CMCs) were working very well;
    - 66% that CMCs were working quite well;
    - 2% that CMCs were not working well.

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Where they are well managed it appears that case management conferences work very well and allow significant progress to be made in a case. It appears that their effectiveness, however, depends on the experience and ability of the individual judges involved and the time the judge has available to get involved in the relevant issues. The LCD commissioned research into the effectiveness of case management and the research team concluded that '"judges should be evaluated for their case management abilities, and case management should be considered as a vital part of judicial training…[A]s judges do not have the opportunity to watch each other's case management practice in court, feedback and discussion about methods should be encouraged."[12]

CONCLUSION

21. Whilst substantive research on the operation and effectiveness of the Woolf reforms is only now beginning to emerge, it certainly appears that the reforms have improved the civil litigation landscape in several respects. There are, however, some doubts about the extent to which the reforms have reduced the cost of litigation.

[12] Page 5, Law Society Gazette, 18 April 2002