ASSOCIATION OF BRITISH INSURERS / TRADES UNION CONGRESS

‘GETTING BACK TO WORK’ – A REHABILITATION DISCUSSION PAPER

SUBMISSIONS OF THE ASSOCIATION OF PERSONAL INJURY LAWYERS

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1. The Association of Personal Injury Lawyers (APIL) was formed in 1990 by claimant lawyers with a view to representing the interests of personal injury victims. APIL currently has around 5,000 members in the UK and abroad. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants. APIL does not generate business on behalf of its members. 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 promote health and safety;
    - 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.

Introduction

2. APIL welcomes the opportunity to comment on the very important issue of rehabilitation in the workplace. Overall, we consider that currently there is a great deal of work to do to improve the co-ordination and funding of rehabilitation in the UK. APIL has co-operated with several other parties to develop the rehabilitation Code of Best Practice, which has been developed for the purpose of encouraging greater co-operation between the parties, and we encourage all parties to use it more widely. It is also our firm belief that a rehabilitation policy should be mandatory for employers in the same way that a risk assessment is a legal requirement of a health and safety strategy. We also propose that an employer should have a statutory duty to consider an employee’s request for rehabilitation. In addition, where rehabilitation is provided, it is crucial that it should be of a consistently high quality, carried out by

suitably qualified experts and conducted independently of the paying party. There is also a real need to examine the role of the NHS as a key rehabilitation provider.

Question 1: Do you agree that the definition is appropriate for the promotion of an overall objective for rehabilitation in the workplace?

3. APIL considers that the definition given is as good as any other that has been yet put forward. We do feel, however, that in order to be as widely understood as possible and particularly for the benefit of the person to be rehabilitated, the definition should avoid the use of jargon. A notable example is "functional intervention". We stress the importance of the use of plain English in the definition.

Question 2: What fundamental concerns do you have, if any, with developing the UK's rehabilitation system?

4. APIL's fundamental concerns are the funding and infrastructure of rehabilitation in the UK. The current lack of investment in rehabilitation is a major limiting factor on the availability of services. Consequently, no matter how deserving a victim may be, if the cost is prohibitive the rehabilitation will simply not take place. Adequate funding is a necessary precursor to a successful rehabilitation scheme.

5. If, as we hope, rehabilitation becomes more widely available, it will also be crucial that the organisation of rehabilitation services is developed and that the capacity is extended. There are currently inadequate supervisory mechanisms to cover all those who work in the rehabilitation business. There must be a mechanism for ensuring quality and consistency of rehabilitation for the benefit of victims of injury.

6. An additional concern of APIL is that there is insufficient independence between insurers and rehabilitation providers. As the AIG example in the discussion paper illustrates, many providers and managers of rehabilitation are set-up and funded by insurers. We are concerned that in many cases, rehabilitation may be conducted on the terms of the insurer and not necessarily on those of the person to be rehabilitated.

We feel strongly that it is in the best interests of a victim that rehabilitation is conducted independently of the paying party.

Questions 3: Do you believe that a commitment to rehabilitate injured or ill workers should feature in a workplace health and safety strategy? Or should a mandatory Rehabilitation Policy be introduced for all companies, similar to the mandatory H&S policy requirements?

7. APIL believes it is essential that rehabilitation is an integral and key part of an employer's health and safety strategy. We believe that change will only be effected if employers are under a duty to commit themselves to rehabilitation. We consider that a rehabilitation policy should be mandatory for employers in the same way that a risk assessment is a legal requirement of a health and safety strategy.

8. We also propose that an employer should have a statutory duty to consider an employee's request for rehabilitation. This would protect the needs of an employee and ensure that an employer receives the full benefits of rehabilitation. A precedent for this is expected to be implemented by the Government in relation to a new right to flexible working. This will require employers, as from April 2003, to *consider* applications for flexible working from employees who are parents of children aged under six, or of disabled children aged under 18. Employers who do not consider requests seriously will risk being taken to an employment tribunal and possibly having to pay compensation to their employee. It is also possible that the tribunal will order the employer to reconsider the request. We are not suggesting (at this stage at least) a right to rehabilitation. This proposed measure is intended to raise the awareness of rehabilitation in the workplace and to remove the employee's apprehension of requesting rehabilitation from his employer.

Question 4: If yes, how do you think this could most effectively be brought about?

9. In order to convince employers to treat rehabilitation as an integral part of their health and safety strategy, a strong business case should be developed. We believe that an

important part of a business case should be to establish what steps an employer should take to help an employee get back to work, and crucially, *why* it is worthwhile to have a rehabilitation strategy.

10. In order to establish a strong case, APIL believes that further research on rehabilitation is necessary. The aim of research would be to demonstrate that it is cost-effective for a company to put funds into the rehabilitation of injured workers on the basis that the benefits they gain from an early return to work outweighs the cost of rehabilitation, and leads to the avoidance of direct and indirect employment costs.

11. In order to spur activity towards improving rehabilitation services, it will be necessary for an independent, credible organisation to take the initiative in bringing all stakeholders together.

Question 5: In view of their widespread potential benefits, how do you think rehabilitation services should be funded?

12. APIL considers that it would be unfair to place the burden of funding on a single organisation or body. We approve of the idea of spreading the cost among a number of stakeholders. In practice, this would mean that employers pay for rehabilitation, but could then recoup some or all of their costs from an insurer or a Government grant. This system operates satisfactorily where the NHS recovers costs of treatment in certain circumstances from insurers, so we see no reason why employers should not be able to do the same for the costs of rehabilitation.

Question 6: What practices do you use currently, or are aware of, that are effective in ensuring early referral to rehabilitation services? Question 7: How could the current system be improved?

13. Insurers and solicitors who are aware of the Code of Best Practice will ensure an early referral to rehabilitation services. Some employers also have "back to work" rehabilitation schemes and these should be encouraged.

Question 8: What professional experience do you think is best suited for the role of co-ordinator / case manager?

14. It is important to remember that case managers do not make decisions about the level and type of rehabilitation that is required; they only organise that which has been recommended by others. It is, nonetheless, necessary that case managers have a certain level of expertise in order to best appreciate the patient's needs. The level of qualifications and experience necessary will be determined ultimately by the type of injury being treated. A case manager is, therefore, most likely to be someone with a medical background such as an occupational therapist, physiotherapist, speech therapist or nurse with practical experience of treating the types of injury for which (s)he will be organising rehabilitation. Whatever the qualification or experience, however, it is important that the case manager's capability should match the needs of the patient. Too often our members have, for instance, seen examples of physiotherapists assessing head injury cases.

Question 9: Do you think an independent system of case managers should be developed in the UK? Question 10: How do you think a case manager system should be funded?

15. APIL fully supports the efforts of CMS UK to bring quality accreditation to the work of case managers. We believe it is a promising initiative, which should be built upon in the future. APIL considers that case managers should fund their own accreditation scheme.

Question 11: Do you agree with the flowchart?

16. APIL does not agree with the flowchart. It is our view that a flowchart would be wholly inappropriate in any case, but our main concern is that 'liability claim' is too far down the chart. Under the tort system, liability is one of the earliest matters to be dealt with and not one of the last. Liability would be most suitably featured between 'acute care' and 'post-acute care'. In addition, we would point out that alternative

dispute resolution (ADR) should feature as an alternative to Court proceedings and not as a direct replacement.

Question 14: What do you think the various stakeholders could do to bring about closer co-operation for the more extensive use of rehabilitation?

17. All relevant stakeholders should be encouraged to adopt greater use of the Code of Best Practice for Rehabilitation. The code was developed for the purpose of encouraging greater co-operation between the parties.

Question 15: Unions have sought to promote the issue of rehabilitation to the workplace to date, how can they develop their work in this area?

18. The work that trade unions do to promote better health and safety and rehabilitation in the workplace would be enhanced if, as suggested in our answer to question 3, employers were under a statutory duty to consider an employee's request for rehabilitation. The fact that there is a right at all, will enhance the potential for promotion.

Question 16: What problems do employers face in bringing about improvements to their approach to rehabilitation? How might these problems be overcome?

19. As the discussion paper has identified (page 14), the lead in developing proper rehabilitation programmes has been taken on mainly by large employers. Whilst this undoubtedly has benefits for the employees of large firms, the majority of workers in the UK are employed by small and medium enterprises (SMEs). Unfortunately, it is unlikely that SMEs will appreciate the business case for rehabilitation, simply because the cost of rehabilitation may be seen as a major obstacle for employers in this sector.

20. Overcoming the cost of rehabilitation could be achieved by the NHS taking a more active role in providing rehabilitation services. There is an inadequate balance, currently, between primary care and rehabilitation. As a result, victims of injury are treated but are not given sufficient post-care support. This can lead to injured people

being re-admitted for primary care and thereby taking more time off work. Improved rehabilitation in the NHS would break this cycle, enabling more people to return to work in better health and therefore, remain at work for longer. The end result would be less expense for SMEs, greater productivity and a healthier workforce.

21. The NHS should, however, be able to recover its costs from the tortfeasor or their insurer, as there is little good reason why an already overburdened NHS should bear the brunt of actions or inactions of careless employers who pay insufficient regard to health and safety.

Question 17: What fundamental rehabilitation services should be available (for all employees) in the workplace?

22. Rehabilitation is only practical in the workplace for large organisations. It would place too much of a burden on smaller firms to have rehabilitation services on-site, but services and facilities should still, nonetheless, be made readily available off-site.

Question 18: Do you agree that insurer's role in rehabilitation had traditionally been reactive?

23. APIL gives credit to the insurance industry for promoting the practice of rehabilitation although it is unfortunate that some have been prepared to use it as an offensive tactic rather than a means to a proper resolution. Claimant solicitors have, nonetheless, played and continue to play an important role in developing and promoting the rehabilitation Code of Best Practice, which we encourage all parties to use.

Question 19: From an insurer's perspective, is there a business case for rehabilitation?

24. Yes, but as we have outlined, further research on the benefits of rehabilitation is necessary to establish a business case.

Question 20: Do you think that the approach adopted by AIGMR, as outlined, can provide a model for other insurers to follow? If not, why not?

25. The main problem with AIG MR is that it is not independent of the paying party, i.e. the insurer. We feel the AIG MR model would represent a positive and sensible approach to providing rehabilitation, subject to it being completely independent of the insurer. We are concerned that AIG MR may not operate outside AIG claims business.

26. In the experience of our members, an employee who is injured at work does not always see his employer's insurer as an independent body, which has his best interests at heart. Indeed, it often seems that rehabilitation is carried out on the terms of the employer rather than the employee, and this is clearly unsatisfactory. In order to retain the confidence of users of rehabilitation schemes, we cannot stress enough that rehabilitation providers must operate independently of the paying party.

Question 21: Do you agree with this analysis of the current barriers to effective rehabilitation in legal claims?

27. A significant barrier to rehabilitation is that claimants often receive less damages if they make the effort to improve their health through rehabilitation. This is clearly an injustice to victims who are being penalised for making a commendable effort to get back to work If levels of damages for pain and suffering, as recommended by the Law Commission, were higher, *post*-rehabilitation, claimants would be more encouraged to undergo rehabilitation.

Question 22: What would you consider to be the 'best outcome' for the claimant, and would it include a package of rehabilitation.

28. APIL believes that the best outcome for any victim of work-related injury should be to return the employee to the best possible level of health, fitness and employability, with compensation following at the end to reflect past loss and continuing deficits.

29. APIL objects to the assertion in the consultation document that 'the legal profession has realised that the moral responsibility to an injured party…is to obtain good compensation'. It must be remembered that there are often many other reasons for bringing a claim for damages apart from the desire to obtain compensation. Remedies will include the provision of an explanation for the causation of the accident, an apology, an undertaking as to future conduct and perhaps in lieu of a claim for future loss of earnings, an undertaking about future employment. Obtaining compensation for the victim is only part of the solicitor's duty 'to act in the best interests of the client'[1]. We do not consider that there is any conflict between the duty to act in the best interests of a client and the availability of rehabilitation. Both are obtainable where an holistic approach is adopted in helping the victim return to work.

Question 23: How, in your view, could claimants, lawyers and defendants most effectively build on the culture of the Woolf reforms further to promote rehabilitation?

30. We believe that the culture and philosophy of litigation has now changed to the effect that a claimant's needs are now more paramount. The judiciary is well placed to encourage the new culture and should take a pro-active approach to spreading the word amongst all parties.

Question 24: What can the Government do to co-ordinate efforts to effect improvements to rehabilitation in the UK?

31. APIL considers that the Government has a great deal of work to do to improve the co-ordination of rehabilitation in the UK. There is a real need to examine the role of the NHS and develop a more "joined-up" approach.

[1] According to the Law Society's Guide to Professional Conduct, Rule 1(c), 'the solicitors duty [is] to act in the best interests of the client'.

Question 25: In developing the rehabilitation system in the UK, which funding approach would be the most appropriate? Are there any other methods not outlined above that should be considered?

32. As we have outlined throughout our response, it would only be fair to spread the cost of rehabilitation among a number of stakeholders. This would involve employers recouping costs from the wrongdoer's insurer or a Government grant, and the Government accepting the NHS's role as a key provider of rehabilitation services.

Question 26: What would be the advantages / disadvantages of a policy offering first-party benefits designed to meet the early costs of rehabilitation? Is this a feasible approach to helping to fund rehabilitation costs?

33. This is an interesting concept. Our current experience of before the event insurance, however, is that the claim, or in this case the rehabilitation process, is controlled by the insurer, which for reasons stated, we find unacceptable.

Questions 27: Do you agree with the barriers to rehabilitation and endemic issues outlined above?

34. All of our main concerns relating to barriers to rehabilitation have been outlined earlier this response.

Question 29: Do you agree with the points raised above? [at p28-29 of the discussion document]

35. APIL objects to the suggestion that the 'adversarial nature of the tort system' would be reduced by the development of 'joint instructions'. The Code of Best Practice is acceptable and there is no need for it to be changed.

Question 30: Which Government Department would be the most suited to lead on this issue?

36. It is APIL's view that the Department for Work and Pensions would be most suitably equipped to lead on the issue of rehabilitation. The Department of Trade and Industry (DTI) has the most experience in dealing with employers and employer-employee

relations, and because there is a need to convince employers of a business case, the DTI will have to work closely with the DWP.

Further comments on the discussion paper

No-fault compensation

37. APIL does not agree with the assertion at page 16 of the discussion document that "[r]ehabilitation is undoubtedly easier to provide in a no-fault system of workplace compensation". We cannot support calls to introduce a no-fault compensation scheme. Whilst such a scheme may initially look attractive, deeper analysis reveals that it would have several deficiencies in practice. Other countries have found that no-fault schemes, by their very nature mean that more people receive compensation. This in turn creates an unworkable burden on the State, unless every payment made under such a scheme is extremely limited, which would be totally unacceptable to people injured through negligence.

Structured Settlements

38. APIL supports the claimant's right to get his compensation through either lump sum, structured settlement or periodic payments. The appropriateness of any of the systems should depend on several factors including, most importantly, the claimant's wishes and future plans and also the basis on which the case is concluded as compared with its full value.

39. APIL has suggested in its response to a consultation by the Lord Chancellor's Department on periodic payments, that a practice direction should be developed setting out the considerations which a court should take into account when deciding between a lump sum, a structured settlement and a periodic payment.