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APIL RESPONSE TO 'CYNICAL' ACTUARIES REPORT

Actuaries' criticisms of personal injury litigation have been dismissed as "cynical mischief-making" by APIL vice president David Marshall.

After careful study of "*The cost of compensation culture*" a paper published by a working group of the actuarial profession last month, and comparison with a previous report from Datamonitor: "*UK Personal Injury Litigation 2002 (the compensation culture myth exploded)*" Marshall made the following comments:

In 1997, four-year-old Tom Dowling suffered severe brain damage and paralysis after being infected by e-coli bacteria while on a school trip to a farm. According to "*The cost of compensation culture*" a paper published by a working group of the actuarial profession in December 2002, this is one recent decision which has "*stretched the definition of 'proximity' and 'foreseeability' and risk[s] curtailing almost any activity.*" The risk of e-coli infection on school trips to farms had been well known since at least 1994 and two previous cases had occurred on the same farm earlier in the same year. Expert evidence suggested that the farm should have been closed down as a result before Tom Dowling's visit.

The local education authority had sent out a circular to schools warning of the risks of e-coli and setting out extra precautions to be taken. The claimant's case proceeded on the basis that relevant staff had not seen this circular, the suggested precautions were not taken and parent helpers on the trip were not aware of the risk of e-coli or of the extra precautions required. Most importantly of all, however, this was not a case where an aberrant judge extended the boundaries of the tort of negligence. The defendant admitted liability.

In the last five years, 20 children and 2 adults have been killed on organised school trips. On any view, this is an unacceptable record. But to suggest as a result that school trips be cut back or stopped because of a 'compensation culture' is missing the point. Accidents will still happen even if everyone has taken every care to avoid them.

But the whole point of health and safety law and of proper risk assessment is to require those responsible to think about how to reduce risk to the lowest achievable level by the taking all reasonable precautions. Everyone hopes that injuries and death will then be avoided.

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But if they cannot be, and they were caused by negligence or breach of statutory duty, society expects the wrongdoer to compensate the victims. Normally the wrongdoer will have taken out insurance against this risk.

Someone has to pay for the consequences of injuries to accident victims – to compensate them for pain, suffering and loss of amenity, the inability to work and to earn a living and the expense of providing care. There are only three possibilities: the individual, the state or the wrongdoer.

If the individual is expected to insure himself against all risks in advance, but can expect no additional support from the state and is forbidden from seeking compensation from the wrongdoer, the better off could afford personal insurance (although they might not much like paying for it). The poor will not be able to afford it, will not take out personal insurance and will be risking an accident plunging them into destitution – a real return to ‘Victorian values’. This is not a realistic option for society today.

The state means the taxpayer. But this government is clearly seeking to reduce the burden on the taxpayer and there is no sign that it wants to take over the full responsibility and cost for compensating for injury.

This leaves the wrongdoers and their insurers. The insurance industry is faced with having to justify a rise in insurance premiums to the public. But what is often ignored is that premium rises are not just a result of the number or amount of claims, but also of a long-term under-pricing of both motor and employers’ liability policies leading to massive year-on-year underwriting losses.

Motor policies were knowingly sold by insurers at a massive loss for years to gain or retain market share. According to independent industry analysts Datamonitor, this had led to an underwriting loss of more than £1 billion in 1997, well before the abolition of legal aid and its replacement with ‘after the event insurance’ which is identified by the actuaries as “*one of the biggest factors fuelling compensation claims*”. Businesses also have not historically borne the true cost of employers’ liability claims, with insurers looking to sell it to them as a ‘loss leader’, packaged along with other commercial insurance. In retrospect, such huge underwriting losses were never sustainable and the insurance industry was storing up enormous problems for the future.

Datamonitor reported last September that, in fact, the number of claims to insurance companies had fallen by 7% over the previous year. Datamonitor’s figures were taken from the statistics of the state agency, the Compensation Recovery Unit, to which insurers must notify all compensation claims.

Headline stories in the press following publication of the actuaries’ paper was “*the cost of compensation is £10 billion per annum and 1% of GDP*”. In isolation this is meaningless, as we are given nothing to compare it with. Exception might also be taken to some of the actuaries’ figures, particularly the inclusion of the exceptional cost of the BSE crisis.

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And buried away in the actuaries' report is a summary of a comparison published in February 2002 by independent consulting actuaries Tillinghast-Towers Perrin. This shows that the UK has the lowest 'tort cost expressed as a percentage of GDP' (0.6%) in the industrialised world, compared to the US (1.9%), France (0.8%), Japan (0.8%), Canada (0.8%), Australia (1.1%), Germany (1.3%) and Italy (1.7%). The actuaries fail to mention in their paper that in 1994 Tillinghast had found the UK percentage was 0.8% so that the comparable UK figure has in fact fallen.

But it is not so much the numbers as the tone of the report which is most mischievous. The actuaries bemoan the perceived loss of the British '*stiff upper lip*' and predict (somewhat eccentrically) "*that the rich tapestry of life gets dumbed down and reduced to bland humourless interactions, which is not what we fought a war for*". It is nonsense to complain when the pre-war forelock-tugging deferential society is replaced by a society where individuals are willing and able to properly assert rights given to them by parliament and the common law.

As well-heeled professionals, maybe actuaries do prefer the "*rich tapestry of life*" to full compensation for injuries caused by someone else's fault. Others in society cannot afford that luxury.

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