

DAMAGES: Solicitors Journal: July 2009

Living in Hope

I was hopeful, over two years ago now, when I heard the Government was planning to take another look at various Law Commission recommendations on damages which meanwhile had been gathering dust.

I was then encouraged when I saw the extent of the recommendations at the time that “The Law on Damages” consultation was published.

So, the publication of the Government’s response, some two years after the closing date, has been a bitter disappointment. That response simply fails to deliver.

It is worth remembering why the topic of damages is so important. Damages matter because the law of tort, and specifically personal injury law, matters. Lady Hale reminded us, in Parkinson -v- St James & Seacroft University Hospital NHS Trust [2001] EWCA Civ 560, that:

“The right to bodily integrity is the first and most important of the interests protected by the law of tort ...”

But rights mean nothing without remedies. As Lord Hope noted in Chester -v- Afshar [2004] UKHL 41:

“The function of the law is to enable rights to be vindicated and to provide remedies where duties have been breached. Unless this is done the duty is a hollow one ...”

The approach to damages, as the remedy necessary to ensure the rights conferred by law remain meaningful, has been well-established in personal injury law for over a century. That approach was summed up in the well known statement of Lord Blackburn in Livingstone -v- Rawyards Coal Company (1880) 5 App Cas 25 that:

“I do not think that there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which would put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.”

After all the waiting has the Government’s response properly reflected these principles?

Furthermore, given that at one time assessment of damages would have been a jury issue, it might be asked whether the response tries to reflect how a jury might, these days, assess damages in personal injury claims.

A few key areas of the response suggest it is quite inadequate for its purpose.

- It is in the area of fatal claims that, perhaps, the current law most starkly fails to reflect public opinion where surely that is the yardstick that should be applied. Yes, it is encouraging an extension of eligibility for bereavement damages is proposed but this does not go nearly far enough. Where is the justice in the arbitrary limit set on the level of bereavement damages? Why should this be reviewed only every three years? Why has the system not been brought into line with the law in Scotland in this area? Most members of the public, those who would comprise any jury assessing damages, would surely consider the level of damages for bereavement to be woefully inadequate.
- Further delay on the question of public/private provision of services is unacceptable when there was a clear majority in favour of the principle that the tortfeasor should pay. Remember that where the tortfeasor does not have to pay the burden will be passed to the taxpayer. That is not consistent with a “polluter pays” approach, which is surely more appropriate and in line with public opinion.
- This was an opportunity to clarify the law on psychiatric injury. Leaving the courts to develop the law in this area simply avoids the issue and leaves uncertainty when there was a real opportunity to gain clarity.
- No action is planned in relation to redundancy payments, yet such a payment is a reward for past service and so, by definition, has been earned prior to any accident and ought not to be deducted from damages for loss of earnings.
- On top of all this the Government has not even considered increasing levels of damages for pain and suffering, despite Law Commission recommendations.

All of this leaves injured people without the redress society might reasonably anticipate would be provided by those responsible for the injuries.

Furthermore, it is sometimes suggested that costs in personal injury claims are disproportionate. Proportionality does, of course, relate to the issues not just the value of a claim. Leaving that point aside the failure to put damages at proper levels becomes a significant issue, irrespective of the failure to properly compensate injured people, when this type of argument on disproportionality is advanced. That point becomes all the more pressing when reforms, which may limit the ability of a modestly-resourced litigant, are proposed largely on the basis of what is considered proportionate.

Two years ago APIL urged the Government to grasp the opportunity for fundamental reform of damages. That opportunity has been wasted. The response is a huge disappointment.