Modern Claims Magazine Article: One Nation or Two?

Occasionally a number of topical news stories, when those individual threads are drawn together, weave a bigger picture which puts those stories into proper, and relative, context.

We have recently been through one of those times in the legal world where the bigger picture, emerging from separate strands, is of particular significance to injured people and those acting for them.

So what is this bigger picture?

The broader canvas is surely about the increasing inequality between litigants, and indeed their lawyers, in those areas of the law it might be said matter most to individuals which in turn raises issues about the values of our society.

An area of the law which is of real significance to individuals is personal injury. That, indeed, has historically been recognised by the courts. In Parkinson –v- St James & Seacroft University Hospital NHS Trust [2001] EWCA Civ 530 Hale LJ said:

> "The right to bodily integrity is the first and most important of the interests protected by the law of tort…."

But before returning to this bigger picture what are these individual stories?.

The first, and most directly relevant, is the inaugural policy speech of the new Lord Chancellor, Michael Gove, when he asked "what does a one nation justice policy look like?"[1] that followed on from the Prime Minister's vision for a one nation Britain which he set out on 22 June.[2]

The Lord Chancellor, in his speech, recognised that there are "two nations in our justice system" with "one for the rich and the other for everyone else".

In that same speech the Lord Chancellor also observed that the courts of England and Wales are "the best place in the world when it comes to resolving matters by law" and identified a figure of £20 billion earned each year as a result of that global leadership.

Just the day before the Lord Chancellor's speech the Chancellor of the High Court, Sir Terence Etherton, had made a speech advancing the same points, which the Law Society Gazette[3] reported by stating:

> "Etherton stressed the importance for the domestic economy in getting these matters right, with increasing competition for

[1] Speech at the Legatum Institute 23 June 2015
[2] Prime Minister's Office 22 June 2015
[3] Law Society Gazette 25 June 2015

commercial work from New York, Hong Kong, Singapore, the Hague, Dubai and Qatar."

Sir Terence Etherton also stressed the need for efficiency, in order to meet that competition, making specific allusion to cases with an international element including those that have "nothing whatever to do with the United Kingdom other than that the parties have provided for an adjudication under English law or by English courts in the event of dispute".

These views echo those made on many previous occasions referring to the international competition for dispute resolution and the need for the justice system of England and Wales to remain at the forefront in that arena.

There is no doubt that an increasing amount of such work is being litigated in London. In 2013 it was reported that litigants from abroad had increased by 30% over the previous 4 years and already accounted for over 60% of the litigants in the Commercial Court[4].

There has not, however, always been a consistent approach to the litigation, in this jurisdiction, of cases with an overseas element. For example, in a case brought by a claimant domiciled in England and Wales but arising out of an accident in New South Wales the Court of Appeal made reference to "a tendency for forum shopping"[5].

With this increase in overseas work it is worth noting that only last year the Lord Chief Justice suggested steps must be taken to examine why the cost of legal services here was increasing despite changes in the legal market and the expectation that competition would reduce cost.[6]

There is surely an obvious link between the influx of overseas work and the cost of domestic legal services. Simple economics suggest that if there is increased demand for a finite supply then cost will increase.

In June The Times[7] reported the salaries of American lawyers working in London were pushing up rates across city firms. Unsurprisingly an increase in the cost of legal services in the City of London will push up legal costs, because of a knock on effect on salaries, across London, the south east as a region and the nation as a whole. That is inevitable when good quality legal advice is a scarce commodity. The solution is not just to rely on pro-bono activities.

Most of the work identified by Sir Terence Etherton is undertaken by major firms in the City of London. That connects with another recent story which suggested, according to the Government's Social Mobility and Child Poverty Commission, such firms are "systematically excluding bright working-class people from their

[4] Hogan Lovell's partner Jeremy Coles speaking at a seminar organised by the Russian Legal Information Agency September 2013.
[5] Sir William Aldous in Harding –v- Wealands [2004] EWCA Civ 1735
[6] The Lord Chief Justice's Report 2014
[7] Times 17 June 2015

workforce". This has been described by some commentators as a "poshness test".[8]

The news about "poshness" might be seen to chime with yet another story,[9] though at first sight very much on a tangent, that the first students have been sitting finals at AC Grayling's New College of Humanities. That is an institution which promises a quality education for those, or perhaps more accurately those whose parents, can afford it. The cynic might regard this as education with the appropriate gloss of "poshness".

The increasing divide between litigants, and indeed their lawyers (if there is such a thing as a "poshness test"), across the range of legal work with particular importance for individuals makes all the more troubling the perceived need to introduce fixed costs for claimants, but not defendants, in many clinical negligence claims. Any such measure, at least without steps to fix and make more predictable the process, are likely to further tip the scales of justice from the weaker to the stronger and, it might be said, better reward the "posher" end of the legal profession. As well as making it more likely there will be "two nations" of legal consumer this also militates against stated governmental aspirations towards greater social mobility, particularly in the professions (which in turn ultimately shape the judiciary).

It is also worth remembering there is unfinished business from the last round of fixed costs, namely the promised review of defendant's costs and the need for those to be fixed for ex-portal claims just as they have already been for claimants.

Whilst fixed costs may have a part to play in work subject to a largely predictable process it might be thought that applying this approach in other circumstances is a somewhat statist, and potentially anti-competitive, approach as it fails to reflect, in either direction, market forces.

Those who chose the jurisdiction of England and Wales to litigate international disputes do so because they respect all that this system embodies; a history of recognising the rule of law and equality before the law as well as impartiality and efficiency. Ultimately if the system is undermined for the domestic user it will become less attractive for the overseas litigant. On this basis it might be said the cost of providing a world class service for the domestic, tax paying, user is essential expenditure in ensuring the substantial inflow of earnings highlighted by the Lord Chancellor in his recent speech as well as, quite simply, being the right thing to do.

Whilst it could be said the recent increase in court fees will mean users of the court system, rather than the taxpayer, will fund the justice system that rather misses the point. Significantly increasing court fees is unlikely to deter the wealthy overseas litigant but certainly acts as a bar to the domestic taxpayer who needs recourse to the law on matters that may involve less than the sums involved in

[8] Law Society Gazette 15 June 2015
[9] The Times 23 June 2015

high value international litigation but which are of no less importance to the individuals concerned.

All of this has particular resonance for those practicing in the fields of personal injury and clinical negligence law and, of course, for their clients; those unfortunate enough to be needlessly injured.

When looking at the bigger picture that emerges from all these recent stories there does indeed appear to be a real risk of a “two nation” legal system. The words of an individual litigant, who had to fight his case all the way to the Supreme Court, are telling. James Rhodes, recognising the help he had received from supporters such as Benedict Cumberbatch and Stephen Fry, said this:

> ““What would it take for someone from Rotherham or any of these countless millions of others who don’t have these resources or connections”.[10]

It is notable these stories have all been run at a time when the 800th anniversary of Magna Carta has been celebrated; surely the principles then enshrined are as important today as they were all that time ago.

The candour and incisiveness of the new Lord Chancellor is very welcome. Of concern, particularly to those practising the fields of personal injury and clinical negligence, is that the proposed solutions, in some areas, do not address the problems faced in those areas of the law by both litigants and lawyers. Indeed, other proposals point in the opposite direction and seem hard to square with the ideals of increased equality and the related issue of social mobility.

We must not have a two nation system. The rule of law must prevail. This is an important issue about national, let alone international, values.

[10] The Times 25 May 2015