THE LONG VIEW

Nick Parsons and James Arrowsmith offer a defendant perspective on the litigation landscape

Twenty five years ago, a newly qualified solicitor would have settled into an office with a secretary who had a typewriter and access to a fax. How things have changed.

The huge change in working conditions, largely technology driven, has been mirrored by wider changes in society, the civil procedure rules and the ownership and business model for law firms.

What is striking is the recurring nature of the arguments deployed both for and against change, the apocalyptic predictions at each major reform, and the constant need for legal service providers to evolve and adapt to meet the needs of the day.

While there have been failed experiments and dead ends along the way, when compared with our position at the start of the nineties, our sector has become better for its clients, and as a facilitator of justice. Organisations like APIL and the Forum of Insurance Lawyers have had a key role in this change. We do not see eye to eye on every issue - and would not be doing our jobs if we did. But we do empower members, represent their interests and the interests of their clients, and support them in keeping pace with the giddying volume of reform and change.

The claims context

An early APIL conference on vehicle safety included discussion of the relatively new technology of airbags. Today, we find ourselves commenting on the imminent trials of driverless cars on our roads. The 'six pack' health and safety regulations also date back to APIL's first decade. In many ways, our world has become a much safer place.

Safer cars, better health and safety regulations and the like should all act as a damper on claims, but annual claims reported to CRU have increased by about a quarter of a million since 2006, when researchers concluded the compensation culture was a myth. Since 2012, there have been more than a million personal injury claims per annum.

No doubt the average person now sees themselves as a consumer. They are better informed of their rights and more likely than previous generations to complain and claim. Similarly, what we now have are legal services businesses that rely on volumes of claims to fuel the business. Online distribution channels and claims management companies all capture potential claimants who are, perhaps, now seen as a commodity.

In those circumstances, it is little surprise that indemnifiers, insurers and government now look to ways to limit the number and cost of claims.

Changing rules of litigation

Looking back to the early 1990s, litigation often proceeded at a slow pace. The parties managed cases rather than the courts, and unsurprisingly cases could easily become bogged down in the system. From the defendant point of view, often the only way to make a claim proceed was to apply to strike out your opponent for want of prosecution.

The Woolf reforms brought an end to leisurely litigation and were a major advance in ensuring access to justice. But then the implementation of up to 100% success fees and after-the-event insurance to take up the slack from the ongoing demise of civil legal aid not only created an uneven playing field, but also made claims disproportionately expensive. Defendant litigators found themselves instructed to compromise cases where the evidence pointed to a good defence, but where a cost / benefit analysis meant that buying off a claim was seen as the better option. The system too often led to far more being spent on claimants' solicitors' costs than on damages themselves; and ultimately this led to the Jackson reforms with which we are working today. The Jackson consultation period

marked a particularly low point in APIL/FOIL relations. On the claimant side, the strong opposition argument to the reforms focussed on access to justice. From a defendant standpoint, while there were some access to justice arguments, the unspoken issue was claimant solicitors understandably seeking to preserve their business model. This is no criticism of the way in which rules were operated by claimant solicitors post-Woolf and pre-Jackson, but routine litigation became just too expensive - and something had to give.

Now that the major arguments are settled, and we largely know what we are dealing with, relations between APIL and FOIL are on an upward curve. Happily, there is increasing evidence of us working together towards improving the system, for instance on the Personal Injury Code, and in rehabilitation. More recently, we have manned the barricades together in our opposition to the imposition of increased court fees. As solicitors, there is more that unites than separates FOIL and APIL, and where we can work together we should be quick to do so.

Many APIL members still think that the Jackson era reforms are not working, but from the FOIL perspective, they are starting to. Rather than rolling back the reforms, we need to roll them forward and embed the whole package.

One aspect that is working well is the low-value claims process. That reform has often been criticised for its high drop-out rates, but that is looking down the wrong end of the telescope. A focus on the number of claims settled within the portal shows that a large number of claimants have received fair compensation in a much shorter time than was otherwise likely to be the case. Having recognised that, we can work on increasing the number who benefit from the reform. In terms of rolling forward, costs budgeting needs more work if we are to properly control the cost of higher value cases. Similarly, fraud remains a nettle to be firmly grasped.

Evolving Sector

Internal changes to the legal services sector in the last 25 years have been dramatic. 1990 saw the introduction of new regulatory rules and the Legal Services Ombudsman, a first step towards the regime of today. Competition has become a key theme in our markets, and as well as competition within the profession, CMCs and third-party claims handlers offer our clients a genuine alternative to traditional legal services in many areas, and for a number of years have been gaining an increasing foothold in the traditional markets of lawyers - though regulation of CMCs has levelled the playing field to some extent.

But the biggest shake-up has surely come as a result of alternative business structures, and that is likely to remain a theme in the evolution of our marketplace for years to come. An ABS licence is not essential to survive. Partnerships can learn from the corporate world to access many of the benefits of an ABS, while maintaining its cultural strengths, but change has been and will continue to be inevitable.

The Next 25 Years

The rules by which we conduct cases will evolve, but it seems inconceivable that management and restraint of the costs of litigation will not be at the heart of future reform. The ability to work to fixed fees and to provide services in bulk may be an area where defendant firms are more experienced than claimants. But that is changing, thanks to a combination of the squeeze on fees ushered in by Jackson, and the irrevocable change wrought by ABSs. Claimant firms are now consolidating at speed; the high street firm in particular is becoming a rare sight. The old adage of 'get big, get niche or get out' is coming to pass. While this is happening, no doubt there is pain in the claimant market as firms evolve to compete in a Jackson world.

Despite the temptation to view the future gloomily, there is no doubt that our profession has an important place in injury claims. Our skill lies in helping opposing parties to a point at which they can reach a just outcome, or in the few cases where settlement is not possible, can have a fair hearing of their case before a judge.

What is of concern is the rhetoric of some politicians reflected, for example, in the recent court fees increase, which fails to appreciate that settlements (with or without lawyers) are only possible because the parties know that if all else fails, they can access experts and a system that will enforce their rights. It is important that legal professionals and their representative bodies continue to work together to oppose damaging fetters on access to justice, as APIL, FOIL and many others are doing in relation to court fees.

Preserving access to justice does not mean we can freeze things as they are. In fact, with ongoing pressure on the public purse and on consumers, we need to show that we are doing our bit to develop a more efficient legal system, which puts justice and our clients at its heart.

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