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Date	16 March 2018
Publication	New Law Journal
Type of publication	Legal Press

New Law Journal
Leading on debate, litigation and dispute resolution

Soldiers of whiplash reform

Debate over the 'compensation culture' should eschew the insults and focus on common areas of agreement, says Gary Beazleigh

IN BRIEF

- A collaborative approach on common issues may achieve a more favourable outcome than focusing on what divides stakeholders.

Claimant lawyers have drawn their battle lines around access to justice while defendants plot their continued war against the compensation culture.

But what is 'compensation culture'? To the man on the street it is a phrase that conjures images of excessive and unmeritorious personal injury claims captured by ambulance chasers. However, it could be argued that we should beware an equally unattractive counter-culture whereby we create a legal framework that creates firewalls preventing genuine claimants from recovering fair compensation against an alleged tortfeasor. A fair system of compensation should sit somewhere on this spectrum but should be based on a set of values, traditions, beliefs, interactions, behaviours and attitudes, and it is these factors that define what a modern compensation culture should look like.

It was in George Osborne's infamous Autumn statement in 2015 that he announced the government's intention to remove soft tissue injuries arising from road traffic accidents from the compensation culture. This has been refined to a fixed tariff of awards at a level expected to be much lower than they currently are. Amidst the political turmoil, personal injury lawyers and insurers alike anxiously await the detail.

One could have been forgiven for believing that political will was beginning to wane during the closing months of 2017. In January, however, Lord Keen emerged, accepting the government's task of running the reform before the Commons Justice Committee and sending a stark reminder of the government's intention to raise the small claims track limit for soft tissue injury claims to £5,000.

Difficult times

It is widely known that the agenda driving the reforms is to tackle the aforementioned extremities of a compensation culture followed by the natural assumption that insurance premiums would reduce by doing so—an appealing prospect to the electorate and an assumed safe passage through the primary and secondary legislation process required to implement the proposals. That is the business case for reform.

However, the government is sailing through choppy waters in a busy shipping lane with the Battle of Brexit occurring on a daily basis. The passage of time is itself endangering the process as the impact of the LASPO (Legal Aid, Sentencing and Punishment of Offenders Act 2012) reforms begin to surface and provide opponents of the Civil Liability Bill (CLB) with an argument that the reforms cannot achieve the business objective any more than what has already been achieved but will instead cross the red line issue of access to justice. This is a notion that may be reaching deeper into the Conservative Party than one might have previously imagined. The passing of the legislation will require cross party support and while there has been a degree of fatalism, at some point the government has got to get the CLB through Parliament. However, as time progresses, outside commentators continue to analyse where the UK sits on the compensation culture spectrum and this may divide opinion more widely than was commonly understood.

For example, the government's concept of a successful post-reform era was surprisingly exposed by Lord Keen in his frank acknowledgement that claimants' access to the small claims court included the role of a claims management company (CMC), such entities being applauded as 'extremely beneficial'. A sentiment not shared by all, particularly when considered against the context of the rapid expansion of whiplash claims coinciding with the removal of the referral fee ban in 2004 which simultaneously created the rapid expansion of the CMC industry. The inference from Lord Keen's endorsement of CMCs indicates that the government is not just content but wants to encourage market conditions that will allow the same type of entity to flourish in a market that arguably was and still is a major contributor to the culture that the government wants to eliminate.

The battle lines from both sides of the argument can be heard from Birkenhead County Court to the Royal Courts of Justice but while those differences are polarised, let us pause and reflect on some of common areas of agreement.

- Fraud is a crime and no one wants a fraudulent client.
- It is impossible to remove dishonest claimants altogether but there are tools in the box that can discourage this practice and these tools can be sharpened further.
- The horizontal and vertical extension of the Ministry of Justice portal has been largely a success.
- Access to justice is an important benefit to society and disproportionate barriers undermine the fabric of a fair society.
- Cold calling is the gold standard of poor practice in canvassing motor personal injury claims. Remove cold calling and you remove an element of the practice that encourages unwanted behaviour.

A common interest

A collaborative approach on common issues may achieve a more favourable outcome than focusing on what divides stakeholders. Until Elon Musk has achieved a critical mass market of hovering land speeders driven by gold plated droids programmed for etiquette and protocol as the preferred method of transport, the frequency of accidents will not change but the compensation culture will. The culture will dictate the positive and negative outcomes in the post-reform era but there is a common interest in a system that strikes the right balance between individual rights and the need to remove excessive costs from the process.

It is more than the cost of motor insurance that is at stake—our values are in play too. NLJ

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