



Personal Injury Claims Proposals for Change

TUC proposals for improving access to justice for claimants

Personal Injury Claims

There have been growing calls for changes to the way that personal injury claims are handled. It is claimed that costs are too high, claims often take too long to settle, and that they fuel the “compensation culture”.

Among the “solutions” proposed are reducing the role of lawyers, increasing the small claims limit, or even removing the entire process from the legal system.

For the TUC, much of this debate seems to have been driven by an attempt to reduce either the number of those, including workers and their families, who get compensation following an illness or injury caused by the fault of employers and others, or to cut the level of payments.

While it is agreed there is scope for improvements to the personal injury claims procedures, many of the criticisms being voiced at present are aimed more at reducing costs for blameworthy employers and others and their insurance companies, rather than promoting the rights or interests of claimants. In reality the present system is working remarkably well for employers, and claims that the system is totally broken do not hold water.

Compensation Culture?

Every year over 850,000 people are injured or made ill as a result of their job and over 25,000 people are forced to give up work every year as a result of a work-related injury or illness. Of those only around 10% will actually get any form of compensation from either their employer, or from the state.

In fact the number of claims for compensation from employers as a result of accidents have fallen every year for the last five years and, despite the introduction of “no win – no fee” claims, the total costs of compensation cases in Britain has remained, in real terms, static since 1989.

The reality is that Britain pays out much less in civil compensation as a proportion of its GDP than any other major European country apart from Denmark, and a third of that of the USA.

Trade Union Legal Services

Trade unions provide easy access to a wide range of high quality legal support for members. The legal cover includes personal injury (including advice for those the subject of criminal assault while at work), employment law advice,

conveyancing, wills, free legal advice helplines and criminal advice. Unions affiliated to the TUC also represent members injured outside the workplace and their families wherever they may suffer injury through no fault of their own. The vast majority of trade unions offer some legal services to the families of members, usually partners and children.

Trade unions are non-profit making and exist to support and protect their members. Most claims management companies on the other hand are profit-making bodies that make their living through selling cases on to a panel of solicitors and whose main responsibility is to their shareholders. Likewise the main interest of the legal expense insurer and the law firm is to maximise profit and avoid unnecessary risk.

Trade unions represent more people making personal injury claims than any other body. Last year there were 64,000 new cases instigated through trade unions. The service unions provide is second to none. Union legal services represent tremendous value for members, for the legal system and also for the employers and insurers. In 2005 the Lord Chancellor stated “Trade union legal services are the foundation stone to a progressive and fair society. If we don’t have an effective legal redress against employers then we can’t ensure that standards are kept up.”

Case study

A train driver took a claim for personal injury through a claims management company. He was dissatisfied with the service he was getting and approached his union. The union solicitors did not only pursue his personal injury claim, they also saw he had a claim under the Disability Discrimination Act and pursued that as well. As a result he received £41,000 compensation and his employers were ordered by a tribunal to send all managers on disability rights training.

Legal services have long been an important part of the trade union movement’s work and can have a major impact on the lives of those who claim. Trade unions have taken almost all the cases that have lead the way in the personal injury field, creating legal precedent in a wide range of cases including stress, asbestos, occupational deafness, asthma, latex allergy and even passive smoking.

Apart from giving access to justice for many millions of workers, union claims for compensation also help ensure that employers have to take responsibility for their actions and hopefully encourage them to prevent further injury and illness in the future.

The primary role of unions is in prevention and, unlike most claims management companies, whose role is to try to encourage anyone to claim, unions will first and foremost try to ensure that there is a safe working environment that prevents workers being made ill or injured.

Where a member makes a claim unions will normally seek an early settlement and will aim to keep legal and medical costs to a minimum. In addition union involvement provides a useful filtering mechanism which prevents frivolous claims, while at the same time giving an increased level of protection to claimants.

Unions do not charge costs or deduct from damages in personal injury cases. The amount that the member wins is the amount they will normally get. This means the norm in a union backed case is for “no fee: win or lose”. The member will not have to pay additional costs should they lose a case, unlike most Conditional Fee Arrangements (also called “No win - No fee” schemes) where there can be disbursements, medical costs and an insurance premium to pay if the case is lost and fees to pay on winning.

Members and their families who benefit from union legal services also do not need Before The Event insurance - where an average premium is £20 a year - despite the vast majority of people having such insurance bolted on to a household or other insurance policy. There is evidence that most people with BTE insurance do not even know they have it and have never specifically asked for it and it is not free. A large number of people have paid for more than one policy anyway.

Unions are also more likely to advise members to claim compensation from other sources such as the state-run Industrial Injuries scheme rather than rushing into litigation.

Case Study

A union member received £1,250 in compensation after a car crash, and then got a bill for over £2,000 from the claims management company that had handled his case. This debt was made up of a “loan” of almost £1,000, with interest at 15.9% APR, a “document fee” of £20 and £799 disbursements. Had his solicitor followed law society rules and advised him to approach his union, he would not have had to pay a penny in legal costs.

Trade unions won compensation for personal injury of over £300 million in 2004. This figure has remained at around the same level for the past four years.

In addition the trade union network of over 150,000 safety representatives ensures a clear link between injury/illness and prevention and ensures that, where an injury happens, or a worker is made ill through work, immediate action is taken to ensure there is no repetition. Trade union activity within the workplace has been shown to reduce serious injury levels by 50% and general injury and ill health by approximately 30%.

It is also very important to understand that union legal work on personal injury also complements union legal work on employment rights, and equalities. This

is crucial to consideration of access to justice for many people.

Need for change?

The TUC accepts that the current system, on occasions, is failing to deliver for claimants and can lead to unnecessary costs being incurred.

The TUC would welcome improvements to the way that claims are handled with a view to increasing access to justice and streamlining the current procedures.

Personal Injury cases are not comparable with most other claims for a number of reasons.

- Damages are a much more complex issue than in other cases and can be more complex still in the Employers' Liability field. Claims require legal advice as to the appropriate medical expert and the correct level of damages. Claimants also need guidance regarding what other claims for loss of expense can be made such as loss of promotion prospects, etc. There is evidence that, where offers are made with legal advice, they are around 50% higher than when no legal advice is received.
- The defendants (that is the employers or the driver in a road traffic case and others) are invariably insured. They therefore will instruct lawyers to represent them, even in small claims when the injured worker is unable to use the "no win - no fee" option.
- Personal injury claims in employment almost always arise out of the "master-servant relationship". This means the claimants are much more vulnerable than in other cases. Most claimants continue to work for the employer while taking action against and require external support to make sure there is no undue pressure on them.
- The other major difference between personal injury cases (especially in employment cases) and many other civil compensation cases is that liability is far more often in dispute. The link with employment, and the issue of negligence, can be more difficult to establish, especially with occupational diseases which can be common within the general population, such as back injuries, skin diseases, deafness, and some repetitive strain injuries.
- There are a whole raft of statutory duties that an employee or a worker can look to rely on to establish liability. They are simply unfathomable to a non-expert and an injured person cannot rely on the insurance company responding to a claim to tell them.

In 1998 civil procedure rules and a pre-action protocol for personal injury cases

were introduced to promote consistency and best practice between the parties. Where this protocol is used, it makes sure that, from the very start, the claim runs in a way that should allow many cases to be resolved without the need for proceedings to be issued. Where proceedings are begun the protocol should ensure that, as far as possible, the issues be narrowed and expert evidence controlled so that the proceedings can be run proportionately.

Sadly these protocols are often ignored. In particular liability is not admitted until the final stages of a case. This means that unnecessary evidence is collected to prove negligence, at the same time medical evidence is collected and often duplicated. This leads to lengthy delays and great increases in the proportion of costs in personal injury cases. The Association of British Insurers (ABI) estimates that the average employers liability claim takes an average of 1,000 days to get compensation to the claimant.

Although the pre-action protocols have made a slight difference, (a 5% drop in claimants legal costs and a 10% drop in defendants legal costs), the real savings would have been much greater had the procedures been enforced. In practice there are no real sanctions against those who do not follow the procedures, and there is evidence that, in many cases, it is simply ignored by the defendants.

This means that, according to the ABI, the costs in employers and public liability cases are an average of 37% of the value of the final settlement. In cases below £5,000 the average claimants' costs is 93% of the damages. This has been viewed as "disproportionate" in comparison with other legal claims involving damages, although this is not actually the case. The average costs in motor claims, for example, are 38% of the settlement.

The current procedures allow defendants to challenge any claim they believe to be unreasonable through the costs assessment process, however challenges, when they do take place, rarely lead to any substantial reductions. This is because they are both appropriate and proportional.

Case Study

If proof were needed about the arguments and problems insurers can create in personal injury cases, even those that are road traffic just look at Janet Tyndall v Battersea Dogs Home in the High Court on 16 September 2005. In that case "The Claimant was proceeding around a roundabout to take the second exit when the Defendant's vehicle, travelling in the wrong direction, drove into collision with the Claimant" liability was still at trial on 9 August 2004, when the Judge awarded £3,345.67 inclusive of interest. The Claimant had offered to accept £2,672 over a year earlier, but the Defendant's insurers chose to reject it. This sort of action by insurers drives up the average costs that they complain about.

Costs must also be seen in comparison with the levels of damages. Seven years

ago the Law Commission recommended raising the damages for non-pecuniary loss in personal injury cases by increasing them to up to double the current rate. Since then no action has been taken. The average case settled by a trade union is £4,430. Many of these cases involve a long-term injury, loss of earnings, or considerable pain and suffering. It is therefore not the costs that should be seen as disproportionate, but the damages.

The reality is the compensation payments in the UK are much lower than in many other countries. They are based on compensating the actual loss and even where there is debilitating and life destroying disease the compensation is never more than that outlined in the guidance that is given to judges

Small claims limit

Because of the large number of “low value” claims, the insurance industry has sought to raise the small claims limit in personal injury cases.

At the moment personal injury claims which are likely to lead to a payment of general damages for pain and suffering less than £1,000 are subjected to the small claims procedures. This means that no legal costs are recoverable. There have been proposals to increase this to a number of levels including, most recently, £2,500 and £5,000.

A level of £2,500 would mean that between 40 and 50% of cases would no longer be able to be pursued using the current court procedures. A figure of £5,000 would mean that roughly 75% of cases would be excluded.

While this may seem attractive on the face of it, placing personal injury claims into the small claims track would mean that the claimant (that is the injured worker) would almost always be legally unrepresented. However the defendants, the businesses and their insurers, are almost always legally represented even in the small claims court. The ABI has confirmed that were the small claims limit to be lifted, they would continue to use lawyers in almost all cases. This moves the goal posts even further away from the claimant and will reduce access to justice even further.

It is completely unacceptable to expect an injured person to run their own case. Most people know nothing about how to get medical reports, let alone how to build a case to prove the other side injured them through negligence.

Solicitors are involved in the process for good reason and you cannot expect a person who has no legal training to be expected to work out how much compensation they may be entitled to.

Raising the limit would also make it impossible for trade unions to support about half or more of those they are currently able to represent. Under the present

system unions' costs in processing claims are recovered through their solicitors. This means that unions can provide this service for free to their members, regardless of whether they win or lose.

Were these small claims limits to be increased, the only winners would be the insurers and those employers who are negligent. Instead claimants would be at the mercy of insurers who would be effectively the final arbiters in whether to pay, and if so, what level of compensation to pay.

It has been argued that personal injury claims under £5,000 can be taken into the "small" claims procedure. The idea that £5,000, or even £2,500, is a small amount shows a complete lack of understanding of the position of most people making claims where it represents several months income. It is also these claims which represent injuries that are usually the most preventable. Were they not to be pursued by the claimants there would be far less incentive on employers to prevent these injuries. This would have a considerable impact on the Government's targets for reducing sickness absence.

Insurers have also called for more fixed costs in personal injury cases. They claim that this will reduce costs if solicitors have a fixed fee for handling cases. Fixed costs give insurance companies an incentive to draw out cases to the limit of costs, so that the claimant's representative has no incentive to fight on even though the client has not received a fair offer. Fixed costs would also mean that solicitors would be more reluctant to take on claims that might prove complex. Fixed costs would just be another way of increasing the advantage that the insurer has in the process and reducing the right of working people to justice.

Calls have also been made for a tariff system on compensation, or a computerised system of damages. All such systems have proved to be fundamentally flawed and vulnerable to erosion – from the Worker's Compensation Scheme, through the National Insurance scheme in 1946, to schemes currently in force in the UK and elsewhere.

The reality is that assessment of damages is not as simple as pricing vegetables. Judicial assessment of damages has grown up over many years, and although it can be based on guidance from the Judicial Studies Board, this is a range which can reflect the variations in individual cases and even that does not apply to all cases. In addition, in Personal Injury cases, the bulk of the settlement is more likely to be loss of earnings. An example of a seriously flawed tariff scheme is the Criminal Injuries Compensation Scheme.

Proposals for change

However trade unions are not adverse to change. They are keen to work with other stakeholders such as insurers, the Department for Constitutional Affairs (DCA) and employers to reduce frictional costs and speed up the process if that

provides better access to justice.

That means ensuring that standards, service delivery and lawyer access are either maintained or improved.

The TUC believes that change must be driven by desire to improve justice for all who have suffered injury through no fault of their own. Any changes must be based on the fundamental right to claim just compensation for loss and injury arising from fault or negligence. The TUC is keen to keep the costs to employers, the state and insurers to a minimum while increasing the ability of workers to claim their just entitlement simply and speedily and at no cost to them.

Many of the drivers for change have not reflected these ideals. Instead the impetus for revision to the current procedure has come as a result of difficulties within the insurance industry in setting appropriate premiums in the past, the high cost of asbestos-related claims, the failures in adhering to the timescales in the current personal injury protocols and thus reduce the need for investigative costs, and the inability of employers to reduce the level of absence caused by work-related injury or illness.

The TUC is however eager to ensure that the system does deliver effectively, and efficiently. As such we wish to make a number of proposals on how the current system can be either improved or made more effective.

1. Pre action protocols

There is a lot of frustration that the new procedures introduced following the Woolf reforms have not had the expected impact. There is major concern among both unions and lawyers that courts are not using their enforcement powers, in particular over timescales, and this has meant the expected reductions in costs and savings in time have not been seen.

The TUC recommends that the DCA should investigate the extent to which the existing protocols are not being adhered to, and the reasons for that. The TUC would recommend that sanctions be developed to ensure greater compliance. We believe that failure by defendants to comply with the timescales should result in an automatic reversal of the burden of proof, or a deemed admission, after a certain time. In addition notification from the insurers of an intention to defend, followed by a failure to do so, should also be followed by a penalty.

2. Medical costs

One of the causes of high costs is often medical reports. The TUC wishes to see an end to regular examination of medical records, most of which are irrelevant in the great majority of cases. We would wish to see the claimants' lawyers obtaining evidence from a medical expert. Doctors are now well used to complying with their overriding obligation to the courts, which will continue. Insurers could apply to court, explaining their grounds for wishing to seek an alternative opinion if they believe this to be appropriate.

3. Early admission of liability

The earlier the defendants, or insurers, admit liability, the lower the costs, and, hopefully, the quicker a settlement. Early admission is therefore in everyone's interests.

Although procedures are already there to help the insurers consider a claim and make a decision on liability before court proceedings can begin, these protocols front load cost and consideration could be given to whether or not a short period of time could be given to insurers to respond to a claim, giving an indication of whether they admit liability, prior to the pre action protocol being used and before any costs be incurred. This would benefit both insurer and the insured and lead to significant savings of costs of investigation and consideration of the issue which in many cases is not in dispute. It would however only be effective in reducing costs if the insurers and the employers were able to develop procedures which would allow such admissions of liability to be made quickly.

4. Rehabilitation

The TUC recognises that early access to rehabilitation is in the interest of both workers and employers and is a way of reducing costs, however only 12.5% of UK employers provide any access to rehabilitation services.

We are eager to work closely with insurers and the Department for Work and Pensions (DWP) in developing practical proposals for rehabilitation. An early return to work can greatly reduce damages.

The insurance industry has made some considerable progress in delivering rehabilitation following serious motor accident injuries. This needs to be extended to other injuries and illnesses. There is growing evidence that early interventions make a considerable difference to the amount of time that a person is absent from work, or even whether or not they ever return to work, where they have a musculoskeletal disorder or a stress related mental health condition.

The TUC hopes that much greater access to rehabilitation can be developed for occupational injuries and illnesses. This would have a major impact in reducing the level of damages payable following personal injury and illness, in particular in respect of claims for lost earnings. We support the call from the ABI for greater provision of rehabilitation, a transparent accreditation system and changes to the tax regime.

The TUC is also concerned that many personal injury claims include payments for compensation following dismissal by the employer. The insurance industry and government should ensure that better procedures are in place to protect workers from those employers who take precipitative action to dismiss those who are injured.

5. Prevention

The greatest gains in reducing the number of personal injury claims can be made

through preventing such injuries happening.

The Health and Safety Commission (HSC) and the Government have jointly developed a revitalising strategy aimed at reducing the amount of absence caused by occupational injury and sickness by 30% over a 10-year period. This strategy has the support of all stakeholders.

The TUC believes that there is a case for much closer linkage between current accident and injury rates within a particular employer and insurance premiums. At present very good employers, who do take prevention seriously, often have almost the same employers' liability compulsory insurance rates as those who flaunt health and safety rules and regulations.

Greater use of "no claims bonuses", health and safety audit tools such as CHAPSI and lower insurance rates for those who consult with their employees and recognise trade unions, will all provide much greater incentive for employers to prevent injuries happening.

At present the only incentive for employers, apart from the moral imperative, is the fear of prosecution. Given that the average employer gets a visit from the enforcing authorities once every eight to twenty years, the deterrent factor is minimal.

In addition to the role played by insurers, changes can also be made to the personal injury system to encourage prevention. The TUC recommends that the Government looks at developing systems to penalise employers who persistently injure their employees. This could include automatic increases in damages awarded by the courts where allegations of previous similar accidents and complaints can be proven.

Such a "penalty" on employers who repeatedly breach health and safety legislation, or who do not act to prevent accident or injuries reoccurring, would act as an incentive to prevent injury and reduce claims. It would compliment the work of the HSC without adding to its burden.

In addition those employers who do not comply with the statutory obligation to conduct a risk assessment could also be penalised to the same effect, thereby encouraging compliance with good health and safety practice and the law.

Conclusions

The TUC, and the trade unions, are eager to work with the DCA, insurers, employers, lawyers and others to improve the current system.

However most of the current "problems" that have been identified are not with the actual compensation system itself but by the way in which procedures are

abused or ignored. The first priority must be to ensure that the current system works more effectively. We believe this should be the top priority of the DCA and that they should make greater effort to ensure that the pre-action protocols are adhered to.

We are proposing changes intended to reward those who adopt a robust approach on both prevention and rehabilitation and we are keen to work with both insurers and employers on this. We hope all stakeholders will agree to work together to take these proposals forward.

We think the proposals outlined above can be monitored and the benefits assessed over an appropriate period.

We are confident that they will not only reduce costs but will also increase the speed with which those injured through work can claim their just compensation without damaging their ability to do so.