COMPENSATION CULTURE: SPECIFIC REFORMS

Introduction

Lord Young published a review into Britain's compensation culture on 15th October in a report entitled Common Sense Common Safety. It made a number of proposals which were well received but were concerned rather more with changing the underlying culture rather than reducing the size and scope of claims actually made. Our experience is that there are specific areas where reform could achieve both savings and ,to use the word of the moment ,fairness. This short paper identifies a number those areas where we suggest the law could be reformed with the effect of curbing compensation culture, encouraging self-reliance and enabling a fairer distribution of scarce resources. The views expressed are those of the authors and we put them forward with the aim of doing no more than highlighting areas which we believe deserve close scrutiny as part of a general examination of compensation culture.

- **Reverse Parry v Cleaver [1970] A.C.1**

- It is not uncommon for employees to receive an ill-health pension if they are medically retired. Such pensions are awarded on a no-fault basis.

- In *Parry v Cleaver* the House of Lords held that sums received under such pensions cannot be set off against claims for compensation for loss of earnings. This is so even if the claim for loss of earnings is being made against the employer

- eThis leads to double compensation where an injured employee is able to point to
  some fault on the part of his employer: he collects his ill-health pension which he would not have received but for the injury, but also recovers compensation for lost earnings. In effect, he is paid twice. This outcome encourages litigation and is bad for the morale of the employee's former colleagues. It may also act as a disincentive against rehabilitation and a return to the work force, particularly in cases where rehabilitation ought otherwise to be a serious possibility (for instance, where the injury is a psychological one caused by occupational stress).

- **Reverse Peters v East Midlands Strategic Health Authority [2009] EWCA Civ 145**

- The welfare state in this country rightly makes provision for those who are seriously incapacitated or ill. Levels of need are assessed and assistance provided to the infirm and those who care for them.

- However, in *Peters* the Court of Appeal has held that an injured claimant is entitled to put in place a private care regime at a tortfeasor's expense rather than rely upon statutory entitlements. Such a regime may be considerably more expensive than what is available from the state, but unless it can be established that the claimant is acting unreasonably (which is difficult to establish) he will recover the cost of it as compensation.

- This result might be unobjectionable if it led to no more than a private tortfeasor paying what the state would otherwise have to pay. But often the tortfeasor is in fact an agency of the state (most usually a health trust or local authority) and it can lead to that organisation having to pay out vast sums to an individual for care which might have been provided more efficiently and cost-effectively from the state's own provision. Money which might otherwise be available for the assistance of all is transferred to benefit the few. The family of child who is born, without fault, with a cerebral palsy must rely upon their statutory entitlements for a share of the general welfare budget. On other hand, the family of a child born with a cerebral palsy who can point to some fault on the part of a clinician can recover (through a negligence action) a larger share of that budget to fund a more extensive care regime. Yet in both cases, the injury and needs of the child are the same.

- Reverse **Phelps v London Borough of Hillingdon**

- In this decision the House of Lords held that state schools and education authorities could be sued for educational negligence. In doing so, they permitted a cause of action in the United Kingdom which the American jurisdictions had by and large declined to countenance.

- The decision in *Phelps* has been described (extra judicially) by Lord Hoffmann as a "disaster" (Forward to Local Authority Liability, Morrell and Foster, 5th edition), it having led to large numbers of claims against schools for alleged "failure to educate" which have benefited few except lawyers. Claims for compensation have been made not only by those with allegedly undiagnosed dyslexia, but those with emotional and behavioural difficulties and other conditions who allege that their life might have turned out better if their education had been different. Although few claims have succeeded, they have been very expensive for schools and education authorities to defend and have led to defensive practices in terms of more record keeping (bureaucracy) and record storage. It seems likely too that the possibility of obtaining some compensation from their school may disincentivise some litigant from moving forward with their lives and remediating such conditions that they suffer.

- **Look at the issue of psychiatric injury claims generally.**

- Traditionally the courts had a restrictive approach to the types of psychiatric injury for which compensation could be awarded. Reasons included the difficulty in establishing whether such an injury existed, the fact that the causation of such injuries is often multi-factorial and the potential for a flood of such claims. The courts looked for evidence of a "positively recognised" psychiatric illness.

- However, recent years have seen the psychiatric profession classify as illnesses and disorders large numbers of behaviours and conditions (e.g. "oppositional defiance disorder"; "conduct disorder"; "anxiety disorders"). In turn, the courts have used these classifications to consider whether a claimant has a "recognised" psychiatric injury. The trend for an increasingly wider number of conditions to qualify as compensable seems set to continue with the publication of DSM V, which has already attracted controversy within the psychiatric profession for "medicalising" more behaviours and emotional responses.

- It is suggested that the entire subject matter of when psychiatric conditions should be capable of attracting compensation awards is one which merits a comprehensive review. There is a danger that at least in some cases the possibility of compensation and the litigation process itself may hinder recovery from psychological conditions and encourage the development of a "victim" mentality.

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