

Civil Litigation Costs Review

Thompsons Solicitors response to the Interim Report

July 2009

APPENDIX 1

References to proportionality tend to focus on a simple equation applying the ratio of damages to costs or vice versa. This in itself is simplistic as is confirmed in CPR 1.1 (2) (c) which refers to:

c) dealing with the case in ways which are proportionate –

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv) to the financial position of each party;

But even focussing purely on proportionality as to damages must include consideration of the level of damages. The Law Commission Report number 257 *Damages For Non Pecuniary Loss* (1999) made recommendations that damages for non pecuniary loss for certain PI cases should be increased.

It did so on the basis that “*a constantly recurring theme which emerged across the range of responses was that the views of society as a whole should be taken into account in determining the level of damages in non pecuniary loss in PI cases. It was felt by a great many that this would require an increase in awards*” (paragraph 3.14).

The shortfall in the levels of awards were considered to be less significant for more minor injuries but in their consultation the commission found that “*at least 50% considered that damages for non pecuniary loss are too low across the board*” (paragraph 3.5). They considered that ‘serious’ personal injuries should be considered to be cases where damages for pain, suffering and loss of amenity for the injury alone would be more than £2,000.

They considered that awards of between £2,000 and £3,000 should be increased by a series of tapered increases by less than a factor of 1.5 (so that for example an award of £2,500 should be uplifted by around 25%, i.e. to £3125) (paragraph 3.110).

The commissions recommendations were considered by the Court of appeal in the case of *Heil –v– Rankin* [2000] 3 All ER 138. The Court of Appeal declined to follow the recommendations except to a limited extent and only to cases in excess of £10,000.

We endorse the position of the Law Commission and support an increase in damages as recommended including cases valued between £2,000 and £10,000. It would be adding insult to injury to fail to implement those recommendations, thereby keeping damages artificially low, and at the same time limit or eliminate recoverable costs in those cases on the grounds of proportionality.

We would refer to chapter 24 of the Review at paragraph 2.4 where, as part of the case put against an increase in the small claims limit, it is confirmed that “*by increasing the small claims limit to £5,000 many relatively severe and complex injuries would be brought within the scope of the small claims track*”. There is evidence that many such cases would be brought into the small claims limit at even lower levels.

The following are some of the current guidelines from the ninth edition of the Judicial Studies Board Guidelines and illustrate the extent to which even a modest increase of the current small claims limit would bring within its ambit many cases of significance and importance to those injured and also injuries of some complexity.

These show that many injuries with very substantial immediate effects are categorised as attracting only low level damages - if the effects are not permanent. Awards are made with the benefit of hindsight, once it is known that no permanent damage has been done. The injured person does not have that luxury at the time, and our experience is that these sort of temporary injuries are often accompanied by worries about the long term effects in the immediate aftermath of the injury. For example, people with eye injuries will frequently tell us that their first concern was that they might have lost their sight.

- In relation to psychiatric damage, minor psychiatric damage starts at £1,000 (*category 3 (A) (d)*). These are cases serious enough for people to have had difficulties with daily activities and effects on their sleep, albeit temporary.
- In the case of minor cases of post traumatic stress disorder, resulting from “a psychologically distressing event which causes intense fear, helplessness and horror”, affecting “*basic functions such as breathing, pulse rate and bowel and/or bladder control*”... *persistent re-experience of the relevant, difficulty in controlling temper, in concentrating in sleeping and exaggerated startle response*” are given a bracket of £2,500 to £5,250 where there has been a virtually full recovery made within 1 to 2 years. (*category 3 (B) (d)*)
- Cases of “*minor eye injuries, including cases where there has been temporary interference with vision*” are given a bracket of between £2,500 and £5,600. (*category 4 (A) (h)*)
- A chest injury leading to collapsed lungs but with a full recovery has a bracket of £1,400 to £3,450. (*category 5 (A) (f)*)
- Minor shoulder injuries with considerable pain for up to a year but almost complete recovery are given a bracket of “up to £2,750”. Even an injury of this sort which causes 2 years of considerable pain has a bracket of between £2,750 and £5,000, (*category 6 (C) (d)*)
- Undisplaced fractures of the nose have a bracket of £1,100 to £1,600, only very slightly above the current small claims limit (*category 7 (A) (c)(iv)*)
- Even fractures of the nose which are displaced and require manipulation but no more than this have a bracket of £1,600 to £2,000, which is not much further above the current small claims limit (*category 7 (A) (c)(iii)*)
- displaced fractures of the nose requiring surgery to ensure a complete recovery have a bracket of £2,500 to £3,250, (*category 7 (A) (c)(ii)*)

Amputation injuries to fingers (which are both serious and permanent) could be brought into the small claims limit if there were even a relatively modest increase.

- Loss of the terminal phalanx of the ring or middle fingers has a current bracket of only £2,500 to £5,000, 6 (I) (O) and an amputation injury which results in loss of part of the little finger has a bracket of £2,500 to £3,750, 6 (I) (Q); an award is likely to be even lower if the “remaining tip” is not sensitive.

Perhaps even more significantly, there are cases where there is a potential for complexity of causation which have similarly low levels of award

- Cases of lung disease, with all their complexity of causation, have brackets which are, at their lowest, only slightly above the current small claims limit, including temporary aggravation of bronchitis or other chest problems, which has a bracket of between £1,400 to £3,450. (*category 5 (D) (h)*)
- Damages for provisional awards for lung disease start at significantly below £5,000, with a bracket of £3,450 to £6,750. Such cases are relatively low in value but clearly complex. (*category 5 (B) (g)*)
- Even awards for asbestos related disease have a category which starts at below £5,000. This is for provisional awards for “*the least serious cases*” – but these include cases of “progressive symptoms of breathlessness” which start at £4250 (*category 5 (C) (e)*)
- Other cases which are inherently complex in their cause include cases of fertility in males and infertility in females where there is an expectation that the injured person would not have had children in any event. These attract awards in the region of £4,250 5 (*category 5 (E) (e)*) and (*F) (c) respectively*).
- Complex food poisoning cases sufficiently serious to have resulted in a hospital admission for some days, and with up to 2 years symptoms before complete recovery have a recommended bracket of between £2,500 to £6,150, (*category 5 (G) (b (iv))*)
- a lost spleen but without side effects has a bracket of £2,750 to £5,500, (*category 5 (K) (b)*)
- an uncomplicated hernia, including those needing hospital repair has a bracket of £2,150 to £4,750, (*category 5 (L) (c)*)

Many of the examples involve both cases of some complexity and significant symptoms, albeit temporary but some of considerable length. The relatively low levels of awards for pain, suffering and loss of amenity for many of these categories means that even a modest increase in the level of the small claim limit would take them into this category.

Back injuries are dealt with at chapter 6 of the JSB. Category (B) includes minor back injuries, including strains, sprains, disc prolapses and soft tissue injuries which have mostly resolved within 2 years, even those with some ongoing low level “nuisance” symptoms have a bracket of up to £5,000.

Back injury cases are notorious for the complexity of causation issues because of the prevalence of pre-existing symptoms (whether symptomatic or asymptomatic). They very frequently result in arguments about the extent of any acceleration of pre-existing symptoms and are cases where in practice medical reports are often obtained by both sides and can result in experts needing to attend Court.

Since it is not possible to have any idea as to the role and/or extent of acceleration in any back case it will be impossible for anyone, whether the injured person or their legal advisors to predict the potential value of the PSLA damages without appropriate medical evidence. Any significant increase in the level of the small claim limit could bring cases where there has been significant pain and suffering for an extended period of time into the small claims limit.

The above shows many significant but temporary (and some permanent) injuries attract very modest awards under the present system, following on from the lack of change in awards below £10,000 following "*Heil -v- Rankin*".

This change is exacerbated by the fact that, when adjusting the value of awards to take account of inflation, the retail price index is used. This tends to ensure only that an award has broadly the same purchasing power over time.

However, since the purpose of an award of damages in tort is to put the person in the position they would have been in had the tort not occurred, then damages for pain, suffering and loss of amenity (PSLA) are perhaps more appropriately considered in relation to wage inflation rather than the retail price index. This is because it is the significance of the award for PSLA to a person rather than its simple purchasing power which would put the person in the same position. The position is therefore not analogous to claims for purely financial losses

Retail price inflation has been lower than wage growth every year between 1995 and 2007. Since January 1991 the National Average Earnings Index has changed from 66.7 to 138.3. an increase of 207.3 % In the same period the RPI has changed from 130.2 to 212.8 an increase of 163.4 %¹

This means that, for most people, awards of compensation for PSLA in damages are now much less significant; their increased real earning power (which has also resulted in an increase in surplus income) has had the effect that an award of £1000 which was worth say a month's wages in 1991 is now worth less than 3 weeks wages, even if it has been adjusted to take account of RPI inflation. It is therefore perhaps not surprising that the instinctive reaction of those giving opinions to the Law commission was the damages for non pecuniary loss were too low.

¹ 1991 is taken because this is the earliest point at which we have figures which can be compared