

Civil justice—some problems and possible solutions

Based on The Samuel Gee lecture 1993

Justice does not come cheap. With rising crime rates, and the increased readiness of the public to have recourse to the civil courts, the expenditure needed to provide adequate judicial resources and proper access to the courts is likely to go on increasing as we pass through the 1990s.

Reducing the burden

High Court judges

The recent announcement of 10 judicial appointments is a welcome recognition that the provision of justice should not be ruled by consideration of costs. However, to make the best use of these judicial resources, High Court judges concentrate on the cases they are best fitted to try, devolving elsewhere the classes of case which can equally well be tried in other courts. The High Court would become the venue for the more complex civil cases, including Commercial Court cases, and would be better able to handle the burgeoning flow of judicial review work which is at present subject to the worst delays.

County Courts in their turn would become the venue for the general run of ordinary civil cases, irrespective of the amount claimed, but relieved of a significant proportion of the smaller work through the expansion of the Small Claims Courts.

Legal aid

Legal aid has become an ever increasing burden on the public purse both in the civil and the criminal courts, and is destined to increase substantially during the 1990s, despite the recent controversial economies through the reduction of eligibility for legal aid and the introduction of standard charges for some classes of work.

One serious burden on the legal aid system is the huge cost of the very heavy cases, both civil and criminal. I have long advocated that the legal aid authorities should insist in such cases on an advance budget, well ahead of the trial, which they can scrutinise, and if

necessary prune and then cap. It is far easier to control costs in advance than afterwards. The introduction of a scheme for conditional fees, similar to that operating in Scotland, would allow an uplift of fees up to a maximum permitted percentage in successful cases, with no fees payable if the claim is unsuccessful. This will also encourage lawyers to take up work outside the legal aid system, with particular benefit to those who, though not eligible for legal aid, cannot afford the costs of litigation. The proposed scheme is on nothing like the scale of contingency fees in the USA, which often amount to upwards of 40% of the damages in successful cases, making the lawyers major shareholders in the action. At that level and on that basis I consider contingency fees are a potential source of abuse.

A contingency legal aid fund would also benefit those who are just outside the eligibility limits. Under this scheme a central fund would be established to finance plaintiffs' claims (subject of course to a proper assessment of the strengths of the individual case) on terms that a percentage of any damages recovered would be retained by the fund. This would require an initial injection of capital from the government, but should eventually be self financing, and could also provide for a sinking fund for the repayment over a period of years of the original capital sum invested.

I regret to say that the control of on-going costs in legally aided cases is not always adequate. Recently, the Court of Appeal was concerned with a family case which was admittedly of grave consequence, in which the cost to the public funds was no less than £2 million. Even for so sensitive and important a case this seemed both to the trial judge and to the Court of Appeal grossly inordinate, and both commented on the profligacy of the expenditure.

At the other end of the spectrum, extra revenue could be raised if the proposal by the Commercial Court Users Committee were accepted, for significantly higher court fees to be charged in the Commercial Court which mainly handles a wide range of international work involving banking, shipping, insurance and financial instruments of all kinds.

Appeals

The Court of Appeal also has an ever increasing work load, both civil and criminal, with growing back-logs. At present the majority of the appeals are brought

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without leave. Since I became a Lord Justice of Appeal, I have been most struck by the wide range of appellate work, and especially impressed by the extent to which small cases, of great importance to the ordinary citizen, involving for example social security, housing or other welfare matters, come before the Court of Appeal. This I would not wish to change in principle, indeed it seems to me to exemplify the strength of our system that such cases can be carried to so high a level within the court system. However, I think there is a strong case for greatly extending the scope of leave to appeal, which would weed out at an early stage a number of hopeless appeals, with the great advantage that the waiting time for the more meritorious appeals would be reduced.

The 1990 Act confers power for such an extension, which could either be made across the board, or related to specified classes of case. In any event it would be very important to put in place a machinery to ensure that no arguable appeal was stifled under this process.

No fault insurance

A national system of no fault insurance, funded by compulsory contributions, such as is in force in New Zealand, would enable claimants who suffered personal injury at the hands of another to recover damages from the fund without the need to establish negligence or other legal fault. Such a scheme has its advocates in this country too, and undoubtedly has superficial attraction both to potential plaintiffs and potential defendants. The former are spared the risk that their case will be dismissed and their injury or loss uncompensated through failure to establish negligence or other fault on the part of the defendant; and the latter are spared the anxiety of court proceedings. If introduced, it would of course apply across the board, not only to the ordinary run of road and factory accidents, but also to cases of alleged medical negligence.

However, such a scheme also has considerable drawbacks. It is expensive, not only because it has to fund the compensation payments, but also because it involves considerable overheads and administrative costs in scrutinising claims, thus adding a significant extra item to the burden of tax on the ordinary tax payer. Moreover, in order to keep expenditure within bounds, the levels of compensation are usually modest and tend to be seen as unduly miserly by plaintiffs, especially when contrasted with the level of damages awarded presently in litigation.

Nor do all defendants welcome the idea once they appreciate that the cases are determined administratively, and that they will have no opportunity to defend themselves from allegations of negligence or other misconduct, and may fear, with some justification, that some stigma will attach to their professional reputation. I believe that the disadvantages of a no fault scheme outweigh the advantages.

Litigation procedures

What then is to be done to improve the handling of litigation generally, and in particular medical litigation, ie claims for negligence against general practitioners, surgeons, anaesthetists and other specialists and hospital authorities? I leave aside for later consideration the big pharmaceutical cases such as those involving Opren, and, more recently, a number of tranquillisers.

The problem falls into two parts, first the need to improve the efficiency of the trial process, so that it is both expeditious and conducive to settlements; second to improve modes of assessment of the level of damages.

Trials

The key to streamlining the trial process has been to make the whole process much more open than hitherto, with cards on the table from the earliest possible stage. Perhaps the most important reform is the introduction of the exchange of written witness statements, both factual and expert, well in advance of the trial. This reform has a number of beneficial effects. It considerably reduces the areas of controversy, which, in my experience, usually turn out to be much more narrow than is apparent when the case first starts. Furthermore, each side's strengths and weaknesses are demonstrated at an early stage, which fosters compromise. If the case goes to trial, substantial time is saved, not only because a number of witnesses are eliminated altogether once the areas of controversy are clearly delimited, but also because there is no need to spend much time on a witness's evidence-in-chief, since the written statement will stand for that purpose.

There is now power to extend this process to all High Court cases, and I hope it will be generally applied in future to medical cases where it would be particularly appropriate. More often than not there is little if any controversy as to what exactly happened, and the main controversy centres on why it happened, whether it should have happened, and whether it could have been prevented or avoided. These are the questions to which expert evidence is directed. By ensuring early exchange of experts' reports there is sufficient scope for supplementary reports from either side after the first exchange, so that the real bones of contention are exposed and the strengths and weaknesses of either side's case demonstrated. Moreover, the process of discovery of documents, which is of course a time honoured process in litigation, is much more fruitful when coupled with the witness's explanation, or lack of explanation, in his or her statement of what the documents reveal as to contemporaneous events.

As a result, the scope for settlement well before trial is greatly enhanced, and if the case does come to trial, the court and the parties are in the best position to focus on the real issues; they are also aided nowadays

by the standard procedure of exchange in advance of outline arguments prepared by counsel, in which the parties' contentions on the facts and the law are summarised. This also results in a significant saving of time and costs.

Coupled with these improved procedures, a much greater degree of judicial intervention in the conduct of cases is now becoming acceptable and even seen as desirable in the interests of economy and efficient case management. In past days the 'hands-off' approach was normal, leaving it to the parties to conduct their respective cases as they thought best. This is no longer acceptable, particularly when so much of the cost of litigation falls on the public purse.

Damages

Everybody must feel concern at the scale of some of the awards nowadays, particularly in the cases of injuries of the utmost seriousness, though they are quite modest when contrasted with comparable awards in the USA. One of the main reasons for this contrast is that civil actions, which would almost invariably be tried here by a judge sitting alone, are in the USA tried by jury. This right to jury trial is embedded in the US constitution, and could only be changed by constitutional amendment, even in the event that public opinion in the US favoured such a change.

In the UK there is a considerable degree of misconception of how damages in these cases are calculated, particularly as to the quantum awarded as general damages for pain, suffering and loss of amenity. I shall illustrate this by two actual examples from civil cases. In 1987 I tried an appallingly serious case in which a teenager of great promise underwent a routine operation which left him with grave brain damage and a mental age of about two. The hospital admitted liability for negligence so the case was limited to the assessment of damages. They attracted considerable attention at the time because it was the first case where the total award topped £1 million. Of this, however, only £85,000 was for pain, suffering and loss of amenity, the balance being almost entirely for his maintenance throughout the remainder of his life, for which the expectation, as agreed by the medical experts on both sides, was 65 years of age. There was also the need to provide the funds for an expensive specialist rehabilitation course to make the plaintiff more amenable to the management of his day-to-day life. However, the important point is that under 10% of the award constituted compensation for pain, suffering and loss of amenity, the balance being dependent on his long expectation of life, and his needs over that estimated period of nearly 40 years. In a more recent case involving a six year old child, who as a result of admitted negligence had been asphyxiated at birth and consequently suffered severe disabilities, the plaintiff was awarded just over £600,000 on a life expectancy up to 30 years of age. Of this £105,000 (only just over one

sixth of the damages) were awarded as general damages for pain, suffering and loss of amenity, the great bulk of the remainder being in respect of past and future care, special housing needs, and miscellaneous medical equipment and aids.

In each of these cases there was also included an award for anticipated loss of earnings, but in neither did this amount to more than a modest proportion of the total.

When analysed like this, the figures are not so exorbitant as they may seem at first sight. The great drawback, however, is that, save by consent, the damages have to be awarded on a once-and-for-all lump sum basis: this is calculated, using life tables, with the aim that both the capital and the income should last up to, but not beyond, the plaintiff's expectation of life, which is the key factor in the calculation. If the plaintiff dies earlier, his or her family will receive a windfall. If, on the other hand, he or she lives beyond the expected span, the money should, if the calculation is correct, have run out well before death. Of course all this assumes that the fund is not dissipated, as has unfortunately occurred in a number of cases with dire results.

Nevertheless insurers have hitherto favoured once-and-for-all lump sum awards, as they provide for accountancy purposes a firm figure finally quantified at the time of the disposal of the case.

Structured settlements

There is now a greatly increased interest in structured settlements, which were first pioneered in the US and Canada. A structured settlement usually consists of an initial lump-sum payment plus an annuity, or, in some cases, a series of annuities with the rate varying periodically to fit in with the plaintiff's anticipated needs as they change from time to time. A contingency fund is also often built in. In the UK a number of cases have been settled by consent on this basis though the court has at present no power to make such an award without consent. Settlements in this form reduce the previously described pitfalls, though there still remains a significant element of forecasting, so the system is not foolproof. These settlements also have tax advantages, since the Revenue has approved a number of model agreements under which the annuity is tax free.

A valuable and interesting consideration of all aspects of structured settlements is to be found in the recent Law Commission's Consultation Paper No. 125 dated October 1992. One important aspect of the debate is whether the court should be given power to impose a structured award irrespective of the consent of both parties.

One regrettable feature of these structured settlements has been that media publicity has tended to focus on the potential total payments to the plaintiff over a full lifetime rather than over the estimated life expectation, and to ignore the actual level of compen-

sation. The Law Commission gives a graphic example. In 1991 there was a structured settlement, apparently the first involving a health authority, in the case of a six year old girl who was paralysed as a result of hospital negligence at birth. The actual compensation paid out was £1.6 million, of which about two-thirds was used to purchase annuities to provide for her for the rest of her life. However, the headlines reporting the case were in such terms as 'The £100 million kid', '£100 million for the love of Rebecca' and in a similar vein elsewhere; in fact she would have had to live to old age to receive the £100 million suggested, though her actual life expectancy was only into her thirties, and the real cost of the annuity was no more than £1 million. If such schemes are to succeed, therefore, it will be necessary to educate the media and the general public as well as the lawyers and other people directly involved.

Defamation

Defamation claims for libel and slander constitute the one area of civil justice where actions are usually tried by juries, and the size of a number of recent awards of damages has led to considerable controversy. In summing up in such cases the trial judge is not, at present, permitted to refer to comparisons with damages for pain, suffering and loss of amenity in personal injuries cases. It is more than likely that juries are influenced by the global figures they have seen awarded in such cases, without appreciating how small a part of the total award is attributable to general damages for pain, suffering, and loss of amenity, which is the only comparable item to general damages in defamation cases.

There is, however, one important recent reform which is likely to have beneficial effects. Hitherto, on appeal, whenever the Court of Appeal considered an award of damages by a jury in a defamation case to be either excessive or inadequate, the Court's only power was to order a new trial; now in such circumstances the court is empowered by the 1990 Act to substitute for the sum awarded by the jury such sum as appears to the Court of Appeal to be proper. In the recent case of *Esther Rantzen - v - Mirror Group Newspapers*, where there was undoubtedly a serious libel, the Court of Appeal nevertheless reduced the amount of £250,000 damages awarded by the jury to £110,000. In reaching that conclusion the Court took into account the safeguards for the right of freedom of expression laid down in Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; and they held it should now be incumbent on the trial judge to give fuller guidance to the jury than hitherto. Thus, for example, the judge could refer to other decisions of the Court of Appeal as establishing an appropriate standard or norm, and should in particular ask the jury to ensure that any award they made was proportionate to the damage which the plaintiff had suffered, and was a sum which

was necessary to provide adequate compensation and to re-establish the plaintiff's reputation.

Medicinal damage

Pharmaceutical cases, which usually involve hundreds and sometimes even thousands of plaintiffs, pose a challenge to judicial administration; they call for innovative ideas and an unusual degree of judicial intervention. Given this kind of treatment, even these very complex cases can, I believe, be efficiently handled without any need for elaborate changes in the existing procedural rules.

Opren

I was the judge in charge of the *Opren* litigation for several years up to and including the settlement of the main group of cases. There were about 1,600 individual plaintiffs represented by 262 different firms of solicitors whose work was channelled through six lead firms.

The trial centred on what is called the generic issue, namely whether the drug in question was correctly manufactured, whether it was effective to treat the illness it was intended to ameliorate or cure, and (the key question in *Opren*), whether any known side-effects were adequately warned against.

Of course, even if the generic action had established negligence against the manufacturer in one or more of these respects, it would still have been incumbent on each individual plaintiff to establish that his or her complaint stemmed from that breach of duty, and, as was apparent in *Opren*, the more serious the alleged injury the more controversial became the second stage.

The generic litigation was streamlined to the maximum extent possible. Only one full set of pleadings covered all 1,600 cases, each individual plaintiff's claim being confined to a short schedule setting out his or her own personal details, together with a description of the alleged side-effect suffered, based on a medical report from the general practitioner. Only one discovery process covered all 1,600 cases, albeit on a vast scale.

There was also a completely innovative order for cost sharing between the plaintiffs: this was an essential prerequisite for the choice of lead cases for trial as it would have been most unfair for just a few plaintiffs to shoulder the entire burden of the generic litigation on behalf of the general body of litigants; it was also necessary to ensure that the burden of costs as a whole was evenly distributed between legally-aided and non-legally-aided plaintiffs.

The case then proceeded towards the selection of a small number of lead cases for trial on the generic issue, typifying the various main categories of case. I firmly believe that this would have resulted in a manageable trial, though I emphasise that the outcome

was an open question. However, at this juncture the whole case was settled, without admission of liability by the manufacturers, on payment of a global sum to be allocated by the six lead firms between the plaintiffs, with a fall-back arrangement for arbitration by me if any individual plaintiff was dissatisfied with his or her allotted amount. Eventually I undertook about 45 arbitrations on the damages.

The main and most usual complaint was photosensitivity and other allied symptoms, and eye trouble. In some such cases I increased the award, usually on the footing that the plaintiff in question was exposed in his or her work to an unusual degree of sunlight. However, a number of more serious side-effects was alleged such as liver and kidney complaints. Each of these plaintiffs had been examined not only by one of the doctors on the Opren panel, but also by one or more independent specialists, but in each case the medical evidence fell short of establishing any connection between Opren and the serious condition which the plaintiff had suffered. In accordance with the procedures agreed by all sides, I gave judgement in open court on the outcome of these arbitrations without, of course, identifying individual cases. But in contrast to all earlier judgements in the cases, this was virtually ignored by the media, thus showing a sad lack of proportion in their approach to cases of this kind.

Tranquillisers

The tranquilliser cases are on a much larger scale. In one of these alone, according to figures published recently in *The Times*, over 10,000 claims were notified against one defendant manufacturer; over 2,000 of these cases resulted in proceedings, the vast majority supported by legal aid, though it has recently been reported that in a large proportion of these cases the

legal aid certificates have been suspended. This led to a controversial exchange of articles in *The Times*. On one side, a solicitor who is the senior partner of one of the principal firms representing manufacturers, suggested that there is a serious waste of public money in these cases, with considerable savings in prospect if they were concentrated in the hands of a much smaller group of solicitors; and also that more attention should be paid at the early stages to the merits of the individual case rather than concentrating on generic issues, since (he suggested) once the evidence has been scrutinised the weakness of a number of individual cases frequently becomes apparent.

On the other side, a partner in one of the firms handling a lot of plaintiffs' cases suggested that costs could be substantially reduced if there was more cooperation from the defendant manufacturers, and that if the latter had their way, a large number of *bona fide* claims of this kind would never see the light of day.

These and other suggestions on both sides are worthy of consideration, and will become increasingly relevant if there is further proliferation of this class of litigation.

I might add that doctors are also closely involved. It will be on the strength of the individual doctor's report that a patient will become a potential plaintiff in this class of case, and a grave responsibility rests upon the doctor to give each case careful scrutiny so as to ensure not only that meritorious claims are supported, but also that the unmeritorious ones are not.

Indeed I should like in the future to see an increasingly regular exchange of ideas between the medical and legal professions concerning all classes of medical litigation.

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