



## **The Small Claims Limit Argument**

This is an article that first appeared in the “Personal Injury Law Journal” in April 2006

### **“Small Claims – Big Deal”**

#### **The DCA small claims review and ConAffCom**

There is a review going on by the Department for Constitutional Affairs (DCA), looking at a possible rise in the small claims limit for personal injury cases.

A report published on 6 December 2005 by the Constitutional Affairs Select Committee (or ConAffCom – as they like to be called) concluded that there could be an increase in the small claims limit for personal injury cases from £1,000 to £2,500, "without unduly disadvantaging claimants".

This is simply wrong. It would have a serious and substantial damaging effect on access to justice by claimants. ConAffCom neither sought nor heard any evidence from the trade unions. Why should they? Let me explain.

To be fair to ConAffCom, they heard evidence from, among others the Association of District Judges who said there is “an undoubted argument on inflation grounds alone for saying the figures have got to be increased”. To be fair to the Association of District Judges, they also argued proportionality as costs are too high, especially including premiums and success fees. (But, obviously, they would not agree that the way to deal with high costs is to deny people a realistic opportunity to claim their entitlement to damages.)

ConAffCom also heard from Citizens Advice, which “supports the principles behind a wide small claims jurisdiction – a system that is consumer friendly

and does not require expensive legal professionals to service.” They agree (they said) “there is a strong argument that more cases could be dealt with through this process, possibly by raising the £2,000 (sic) threshold for personal injury cases to £5,000.” (But, obviously, they emphasise the need for accessibility “to appropriate remedies and solutions” and they would surely not expect litigants in person always to face professionals and more often than not, “expensive legal professionals” on the side of the insured defendants).

ConAffCom heard too from the insurance industry who are, obviously, in favour of a raise in the small claims limit. They want to see it go up to £5,000, although the Association of British Insurers (ABI), think that a small claims limit of £25,000 is about right and that 90% of those who suffer personal injury do not need legal representation. The insurer will always guide the unsophisticated injured through the process, admitting fault or volunteering that they had, say, breached the Provision and Use of Work Equipment Regulations, whenever appropriate, nor would they raise contributory negligence to an unnecessary extent and they would value all heads of damages, to pay the right amount as soon as practicable, obviously.

The insurers also told ConAffCom that an inflationary increase would require a rise to about £2,500. In fact, to quote Norwich Union, one of the biggest players: “Looking at inflation generally since 1991, the figure of £1,000 should now be in the band £2,500-£3,000. For future inflation proofing beyond 2005, a figure of £4,000-£5,000 would be more pragmatic.”

We’ll come back to that.

### **How small is small?**

First let us consider why we should bother, if these are just small claims. One thousand pounds is a lot of money to large numbers of people on modest incomes. It over a month’s pay to one working full time on the minimum wage – over three months pay if the limit is raised by another £1,500. Claiming lost wages is crucial to those, often not in unions, who rely on Statutory Sick Pay.

And the small claims limit applies to general damages, so that claims can be classed as small, even though the amount awarded is significantly more than £1,000.

Currently one of the biggest classes of cases brought before the small claims court are for personal injury.

### **How many cases are affected?**

The number that would be caught by a rise is huge. It is also disproportionate, in the sense that a significant number of those cases currently taken before the small claims court would be abandoned.

The TUC affiliated unions have 6.5 million members. Amicus, like most other unions, (and including all the big ones) provides support to members and their families for personal injuries wherever they arise. That is on the basis of a scheme, which is “no fee: win or lose” rather than “no win – no fee”. (Lawyers should advise potential clients accordingly). TUC affiliated unions began 64,000 new cases last year.

However, 38% of Amicus’ successful cases are settled for under £2,500 total damages [including for the injury and losses, like pay, expenses, like travel and medical and damage, like to a car]. For the T&GWU that figure is nearer 50%. We have no figure for those cases that concluded for less than £2,500 general damages [for the injury alone], but it is enough to know that half our cases would fall in the small claims track if the limit went up by £1,500.

At present we and our lawyers absorb the cost of those cases in the small claims track. If the limit went up, the cost of representation would simply be prohibitive. We would no longer be able to provide representation.

I am not being insular by referring to the union position. It has perhaps the biggest “block” impact and it shows how others, who do not have the benefit of union legal services can be affected. Indeed representations on behalf of the unions in this debate are made with access to justice for all very much in mind.

Tens of thousands annually would be left without the support or representation they have now. Access to justice would suffer enormously.

APIL (the Association of Personal Injury Lawyers) reckon about a third of the cases they deal with would fall into the small claims track and they are, of course against a rise.

Those left without being able to recover costs, might be able to seek some representation at the cost of their damages and in some cases more. Many, we know, will not bother.

Meanwhile, the defendants will continue, as now with expert representation. Defendants in personal injury cases are invariably insured, the vast majority as a result of road traffic and employers' liability compulsory insurance, some others by public liability insurance, as an adjunct to a house or motor insurance policy, or "self insurance" in the case of some local authorities. The ABI were asked recently at a public presentation of their cause, if the insurers would give up being legally represented, if they believed that it was so easy for the inexperienced to pursue a personal injury case using the small claims track, they had to admit that they would not. This is a long way from "equality of arms" as a desirable aim in relation to access to justice.

### **The Inflation Argument**

So the insurers say applying inflation to the thousand pound limit set in 1991, gives a figure of £2,500 to £3,000.

However, applying RPI gives less than £1,500. But hold on – is it right that the limit was set in 1991 and has not changed since? No. In fact the limit set in 1991 was for a figure inclusive of all heads of damage. In 1999, the new rules and in particular CPR 26.6 (1) and (2), set the limit at general damages only. We'd be guessing, but you could say that this represented a rise of at least 25% at that time.

And we have not yet touched on "damages inflation".

## **A rise in damages**

The issue of inflation should surely be considered in light of comments from the Judicial Studies Board which suggested that the Law Commission Report on 15th December 1998 (LC 257) recommended that awards of general damages less than £3,000 should be increased *by a factor up to 1.5*. In addition, if the recommended increases were not implemented until over a year after the publication of the report, it recommended that the increases should take into account any change in the value of money following publication. The recommendations of the report were not actioned.

The case for an increase on inflationary grounds is fundamentally flawed. The low level of general damages also impacts significantly on the proportionality argument, of course.

## **The Civil Justice Council**

The Civil Justice Council are against a rise. At an even hosted by them on 28 February to 3 March, all were able to put their case. I am pleased to say, that the representatives of the Association of District Judges, after the debate, were brave enough to say they were persuaded there should be no rise. Anthony Clarke, the Master of the Rolls, also said there should be no rise, without a careful study of the impact.

## **Personal Injuries as a Special Case**

Personal Injury cases are different to other claims. That is why the small claims limit is set at £1,000 (which is an arbitrary limit incapable of logical justification). Some of the reasons are considered above, but some of the remainder follow.

Damages are a significantly more complex issue than in other cases.

Claimant's require advice to seek appropriate medical opinion and as to the correct level of damages. They need guidance regarding claims other than for injury, such as services claims.

The link with a breach of duty and damages can be difficult to establish and is often in dispute.

The other major difference between personal injury cases (especially in employment cases) and many other civil compensation cases is that there are more issues about liability.

There are a whole raft of statutory duties that an employee or a worker can look to rely on to establish liability. There are others that apply to local authorities and elsewhere. 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.

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.

There is evidence that, where offers are made with legal advice, they are around 50% higher than when no legal advice is received.

## **The Future**

The debate goes on. There has not been space here to cover all the arguments. Instead I hope this is a good reasoned and readable account of important aspects of the debate, particularly a response to the insurance lead call for a rise and consideration of the impact on the consumer, including the those with union support, which had been underestimated, or even ignored. I think we are now winning this crucial argument.

Let us hope that the Lord Chancellor and the DCA consider the matter carefully, take account of the impact and in the interests of access to justice resist the calls for a rise.