Changes to the Criminal Injuries Scheme

The Government is introducing a new tariff and scheme this Autumn. **Georgina Hirsch,** Devereux Chambers, London, looks at what is in store for victims of violent crime.

Readers of PI Focus will be familiar with the Criminal Injuries Compensation Scheme, which has been operating in different forms since 1964 when it was based on common law damages, and on a statutory footing with a tariff of damages introduced by the Criminal Injuries Compensation Act in 1995 (amended in 2001 and 2008). The Government received over 350 responses to its 2012 consultation '*Getting it right for victims and witnesses*', and aims to bring the revised Scheme in to force for all claims lodged on or after 30 September 2012 . This article aims to examine the key changes to the Scheme, and offer predictions as to what these changes might foreshadow for tort claims for personal injury.

Policy and funding background

The purpose of the Scheme is to compensate "*victims of violent crime in recognition of a sense of public sympathy for the pain and suffering of the victim*" and the revised scheme is stated in the government response, to aim to "*ensure that where payments are made they are to blameless victims of serious crimes, who fully co-operate with the justice process, and to close bereaved relatives of victims who lose their lives as a result of violent crime*."

The Scheme has hitherto been demand driven; regularly exceeding its budget and in May 2012 said by the Government to have liabilities of around £532million, rising by about £200 million per year under the 2008 Scheme, and having paid out £449 million last year, although these figures are disputed; the average annual cost to the MoJ of existing tariffs according to Baroness Royall during the House of Lords debate in July is said to be £192million.

The Government documents repeatedly speak of the need to ensure that the Scheme is "sustainable" in the future. The Government response to the consultation states an intention to deliver savings of around £50 million per year as a result of the changes to the Scheme. Impact Assessment MOJ161 states that it is "*more sensible and beneficial for victims with less serious injuries to receive immediate practical and emotional support, rather than financial compensation*" without explaining why the two need be mutually exclusive (in contrast to the position prior to the new Scheme).

Impact Assessment MOJ156 states an intention to "*move from a culture of compensation funded by the tax payer to one of reparation funded by offenders*." Accordingly, associated changes also aim to reduce government spend on victims by increasing existing victim surcharges on convicted criminals, as well as extending the sentences to which such charges may be attached, and creating new levies, such as on road traffic offenders.

Positive changes

Delivering a promise by the previous Government following the Bali bombings, the new Scheme covers UK victims of terrorism overseas. (There is now also an ex-gratia scheme to provide compensation victims of overseas terrorism between 1 January 2002 and 16 October 2012, on which date that scheme will close to new claims).

If it becomes apparent on the filing of an appeal that the claims officer has made an error on review, the CICA will be able to, with the agreement of the applicant, withdraw the decision and issue a fresh decision without the need for an appeal hearing on the original decision.

The prohibition on making an award where it might be deemed to be against the applicant's interests has been removed, following consultation responses which suggested alternative ways of dealing with the problem (e.g. of the risk of the damages being taken by an abusive parent) by putting the compensation in the hands of a trustee to manage, or putting it in trust until the applicant reaches an age determined by the CICA claims officer.

The discount rate has been reduced from 4.5 per cent to 2.5 per cent, and the life expectancy tables have been updated to better reflect current trends (the previous tables having been based on data from 1996).

One piece of good news for child victims is that new provision is made so that those under 18 years old can be given compensation in situations where it would previously have been deemed to be against their interest.

Procedural changes

In addition to the points covered in more detail below, the 2012 Scheme includes procedural alterations which: (1) increase the onus on applicants to provide evidence for their case; (2) reduce the period for applicants to accept or request a review of their application (from 90 to 56 days); and (3) extend the circumstances where the applicant can be required to repay part or all of the award if they are thought not to have fully cooperated in bringing the assailant to justice or to have deliberately misled the claims officer in making their application.

Compensation under the tariff

The Government has stated that levels one to five of the 2008 Scheme have been removed and bands 6–12 have been reduced.

In some cases, conditions which had been defined within bands one to five are arguably within the definitions under the 2012 Scheme, for example under the 2008 Scheme a "*moderately disabling medically recognised illness/condition – not mental illness*" lasting for up to 28 weeks was level five (£2,000), but may be covered under the 2012 Scheme "*Disabling mental injury, confirmed by diagnosis or prognosis of psychiatrist or clinical psychologist lasting six weeks or more up to 28 weeks*" at level one (£1,000).

Former level one to five injuries which are no longer compensable included multiple minor injuries; "minor" permanent sensory nerve damage; "minor" disfigurement to the head/face/neck/limbs, including burns and scarring; one perforated ear drum; partial deafness/blurred/double vision lasting more than 13 weeks but not permanent; hyphaema requiring an operation on one eye; loss of a tooth (unless it is at the front); tongue injury causing slightly impaired speech; various nasal fractures/displacement; a fractured hand or dislocated shoulder from which there has been a substantial recovery, and many other temporary and permanent injuries.

The reduction in the damages for levels 6-12 means that injuries attracting compensation of £2,500 to £8,200 under the 2008 Scheme will only be compensated in the range £1,000 to £6,200 (assuming rough equivalence between 2008 Scheme levels 6-12, and 2012 Scheme levels 1-7).

Tariff awards for fatal cases, sexual offences, patterns of physical abuse and loss of a foetus resulting from an attack on the mother are protected whatever their current tariff level.

Some of the payments for degree of paralysis have been broken down with the intention of avoiding over and under-compensation in such cases.

The 1996 cap on damages of £500,000 remains in place, despite APIL's consultation response which argued for an increase, and pointed out that that if the cap had been uprated for inflation it would now be almost £800,000.

Loss of earnings and fatal/dependency claims

Under the 2008 Scheme loss of earnings were capped at 1.5 x the median gross weekly earnings, but under the new Scheme this loss will only be compensated at a flat rate of Statutory Sick Pay (SSP) (currently £85.85 per week), and only payable to those no longer able to work or with only a very limited capacity to do so. There is also a requirement (with limited exceptions) that the victim must have been in regular paid work for at least three years prior to the incident in which they were injured.

The Government justifies the removal of a loss of earnings award to those still in work on the grounds that the State already compensates them. Perhaps the wish to sustain this argument was part of the reason (in addition to cost) for ignoring the National Minimum Wage (NMW) as a basis for the loss of earnings flat rate (the adult NMW equivalent for a 37 hour week would be £229.03 from 1 October 2012).

Dependency payments in fatal cases will also now be paid on the SSP basis.

'Reasonable' funeral expenses will be payable up to £5,000, but £2,500 may now be paid up front to the deceased's estate.

Special expenses for health care

Special expenses will no longer be payable for private health care. In relation to other expenses they are only to be payable where similar provision is not available free of charge from another source, and when the cost is "reasonable" (in relation to which no criteria are stated for judging reasonableness). Social security and insurance entitlements will be offset against special expenses claims and where the need for special equipment is likely to continue, a deduction will be made for the amount for which the

claims officer believes that the applicant's existing equipment could be sold on each occasion.

Exclusion from entitlements under previous schemes and the meaning of *crime of violence*

Some categories of claim are newly explicitly excluded: railway employees who suffer mental injury as a result of witnessing or being involved in the immediate aftermath of offences connected with trespass on the railway, including suicide or attempted suicide; third parties injured as a result of a suicide (actual or attempted), and victims of crime where consent was given in fact, even if not in law (although it appears from the tariff that sexual assaults on children under the age of 18 or mentally incapable of giving consent are still covered).

Railway workers will be affected by this change in huge numbers, although the majority of pay outs to them do not exceed £1,000. Consultation responses covering such cases had explained that, not only do drivers see a suicide some way off before impact and have to apply the brakes knowing that it is futile, but also have to leave their stationary vehicle to check whether the victim needs medical attention. Unsurprisingly they often have nightmares and flash backs for the rest of their lives and some are unable to work again.

Under the Guide to the 2008 Scheme (but not within the Scheme itself) animal attacks were specifically included in the definition of *crime of violence* when the animal was deliberately set on the victim with the intention to cause harm, but there was no explicit exclusion where such deliberate intent was not proven. There is explicit exclusion under the 2012 Scheme (despite lobbying by the Communication Workers Union and others).

The policy on third party victims of suicides on rail and on road has been considered in a previous PI Focus article following the case of *Regina (Jones) v First-tier Tribunal (Social Entitlement Chamber)* [2011] EWCA 400, which the CICA has appealed to the Supreme Court and is expected to be heard in late March 2013. A *crime of violence* is now defined under Annex B of the new Scheme and means that the Supreme Court decision in *Jones* will only apply to claims under the 2008 Scheme or before.

The definition of *crime of violence* includes arson, but (unlike previous schemes) does not explicitly include poisoning.

Death of a foetus due to the mother willingly ingesting harmful drugs with the direct or reckless intent to injure the foetus is not a *crime of violence* under the 2012 Scheme.

Eligibility: residence and other provisions

Ordinary residence in the UK becomes an essential requirement for eligibility under the Scheme, although there are a number of exceptions.

There is a requirement to report to the police, rather than another body (e.g. employer where attacked at work), as soon as possible.

The exclusions for those with unspent criminal convictions have been extended.

Applicant's contribution to cost of medical evidence

The CICA will only meet the cost of medical evidence when it is satisfied that the applicant cannot afford to obtain it or the cost exceeds £50. Where the CICA has met the cost of obtaining medical evidence it may deduct up to £50 from the applicant's damages to offset that cost.

The involvement of personal injury lawyers

Impact Assessment MOJ156 notes that removing minor injuries from the Scheme "may reduce demand for assistance from personal injury lawyers…".

A footnote identifies that "approximately 25 per cent of applicants have legal representation, and these claims receive 35-40 per cent of awards by value." This statistic is not mentioned in the Government's response to the consultation, although that response does explicitly rule out the CICA meeting the cost of any legal representation.

The impact assessment anticipates that the new Scheme might reduce the number of legally represented claims by a third to a half.

Conclusion

As Lord Davies of Coity said during the 27 July 2012 House of Lords debate, "the proposed cuts in the draft Criminal Injuries Compensation Scheme 2012 are another example of the most vulnerable people in our society being expected to make the greatest sacrifices."

Objections to the changes were moved by Baroness Royall during that debate, and in doing so she quoted APIL in asserting that the changes would exclude 43 per cent of innocent victims of crime and cut financial compensation for approximately 92 per cent of such victims.

The complete removal of the lower tiers of the tariff appears to reflect a lack of appreciation that compensation of a thousand pounds or more can make a huge difference to applicants on low or median incomes (and who are also statistically more likely to be victims of crime than wealthy applicants). This attitude is in line with the logic of the Jackson reforms in relation to PI court claims, but some of the reforms to the Scheme go even further than the Jackson consultation and recommendations.

Now that the Government has set a precedent for not paying for treatment which might otherwise be obtained via the NHS, it may be that the insurance lobby will seek a similar change to how special damages are awarded in tort claims. An attempt to reduce loss of earnings to SSP rates in line with the new Scheme might be a step too far, but might also be a useful lobbying 'Aunt Sally' which could be sacrificed in return for the 'smaller win' on private health care compensation.

The consultation's title of 'Getting it right for victims…', and the Government's appropriation from the environmental movement of the rhetoric of "sustainability", might be viewed as a case study in Orwellian Doublespeak. ■