

Criminal injuries and victim compensation



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*The Professional Affairs Board recently called for an authoritative account of the revision of the Criminal Injuries Compensation Scheme. **Tom McMillan and Stephen Ireland** take up this challenge.*

MANY if not most of us know someone who has been the victim of a violent assault, and can understand that the neurological and psychological consequences in particular can be devastating. Reality is too often very far removed from the facade presented in fiction where the hero, struck down in a glorious pursuit, rises after a beating or even from a coma with little more than a black eye and a cut lip. Applied psychologists are not uncommonly involved in the assessment and treatment of victims of crime and recent changes in the Criminal Injuries Compensation Scheme will have implications for the resources available to their clients. Recent changes to the scheme have raised concerns about its limitations for claimants.

In 1964 the Government introduced an *ex gratia* arrangement (a non-statutory scheme) to compensate blameless victims of violent crimes. The scheme was also open to relatives or dependants. It did not require a criminal conviction, but required a prosecution if the assailant lived with the victim and/or was a family member. The individual had to apply within three years of the crime and the scheme did not extend to road traffic accidents (unless there was a deliberate attempt to run down) or to claims that would pay less than £550. This minimum was increased to £1,000 in 1992. It did however extend to compensation for pain and suffering, loss of earnings and expenses, after taking into account state benefits and pensions and any other compensations received.

A member of the Criminal Injuries Compensation Board (a lawyer) would decide if a claim were likely to have merit and the Board would then obtain information and commission independent reports of damage or disablement. If necessary, there would be a private hearing which the claimant and their

witnesses and a legal representative could attend. Payment would usually be by a lump sum and would be assessed in the same way that civil courts assessed compensation. Very substantial sums could be paid.

Statutory basis

The scheme had no statutory basis until an Act of Parliament in 1988 (the Criminal Justice Act). The legislation stated that entitlement to compensation would become a statutory right, with rights of appeal against decisions made by the Board. However, those parts of this Act which dealt with criminal injuries claims were never implemented in law.

In April 1994 a White Paper was introduced by the Government, acting against advice it had received from the Board, the Association of Personal Injury Lawyers, victim support groups and others, bringing in a substantially revised scheme. A year later the House of Lords held that the Home Secretary had acted unlawfully in introducing the revised scheme without reference to Parliament and without repealing the relevant provisions of the 1988 Act.

The response of the Government was the Criminal Injuries Compensation Act which went into the statute book in November 1995. This Act gave the Government the legal framework that it needed to introduce a revised scheme. A draft was laid before Parliament in November 1995 and the new scheme was made law in December 1995 and took effect for claims made from 1 April 1996. Claims made before 1 April 1996 continue to be dealt with under the old scheme. From this time the Criminal Injuries Compensation Board was retitled the Criminal Injuries Compensation Authority (CICA).

Ostensibly, the revisions to the Criminal Injuries Compensation Scheme

were to allow a more rapid and a more efficient processing of claims and to reduce administrative costs in judging claims. The latter was to be effected partly by a tariff scheme, whereby there would be set payments for specific injuries and hence greater predictability of outcome and reduced administration.

A major change was the exclusion of loss of earnings as one basic factor in calculating claims, where the loss has *not* lasted longer than 28 full weeks from the date of injury or from the date of admission to hospital (where the applicant returned to work immediately following the injury, but was later admitted to hospital for treatment). The 28-week period was chosen because it coincides with the period of time for which statutory sick pay (SSP) is payable. However, hardship is likely to be experienced by those applicants whose employers do not 'top up' their SSP entitlement with contractual sick pay provisions, and by the self-employed who do not receive SSP at all.

After 28 weeks, an applicant's loss of earnings will be paid, but the award will not be backdated. The calculation of loss will be based on the applicant's earnings subject to a maximum of 1.5 times the gross average earnings. Where the applicant was unemployed at the date of the injury, but had a job offer which he/she was unable to take up because of it, then the calculation will be based on what the applicant would have earned during the period of loss. Social security benefits and insurance payments are deducted from awards, and the award itself continues to be treated as capital and this can affect the right to such benefits.

Furthermore, care/treatment costs are only recoverable where the applicant has either sustained, or is likely to sustain, 28 full weeks' loss of earnings or, in the case of someone unemployed or retired, is likely to be incapacitated for more than 28 weeks (i.e. prevented from working or following a normal lifestyle to a significant extent). The cost of 'private health treatment' is recoverable where the treatment and/or cost is reasonable (e.g. private treatment to correct facial scarring or cosmetic dental work).

As before, applicants may be denied compensation on the grounds of their previous character (e.g. if they have a criminal conviction even if this is not related to the claim), and their conduct before, during or after the events giving rise to the claim (e.g. if they provoked their assailant). Applicants must also report the circumstances of their injury to the police (or other appropriate body) at the earliest possible opportunity, and then co-operate with the police in bringing the offender to justice, noting that it is still unnecessary for an offender to have been convicted before an award is made.

The time limit for applications for a claim has been reduced from three to two years, with any extension of the new limit

Brain Damage	
Moderate impairment of social/intellectual functions	£15,000
Serious impairment of social/intellectual functions	£40,000
Extremely serious (no effective control of functions)	£250,000
Epilepsy	
Partially controlled	£12,500
Uncontrolled	£40,000
Shock (i.e. psychological, includes post traumatic stress disorder)	
Disabling, but temporary, mental anxiety medically verified	£1,000
Disabling mental disorder confirmed by psychiatric diagnosis lasting up to 28 weeks	£2,500
Lasting over 28 weeks to one year	£4,000
Lasting over one year but not permanent	£7,500
Permanent mental disorder confirmed by psychiatric prognosis	£20,000

Box 1: Examples of the new tariff scheme

being discretionary 'in exceptional cases'. However, this may exclude a number of just claims. For example, after a closed head injury where physical recovery is often rapid and psychological recovery may also seem to be so to both patient and relative, subtle yet debilitating personality change may not be evident within two years of the accident. But it is well known to psychologists that the impact socially and at work may only become obvious after this time and the need for compensation may only then become evident (Brooks, 1991).

Examples of the new tariff scheme are given in Box 1. In addition to brain injury and serious shock, the Scheme extends to sexual abuse, rape, buggery, indecent assault and physical injury (Criminal Injuries Compensation Authority, 1994).

Definitions

For the purpose of this article, an attempt was made to determine the definition of some of these brief descriptions in more detail. The CICA, which administers the scheme, could not provide us with further details and referred us to the white paper (HMSO, 1993). The white paper gives information about *how* the tariffs were set (taking the median of payments previously made in almost 20,000 claims who had 200 different injuries, with severity of injury ranked according to the amount paid), but it does not explain how the conditions associated with the tariffs are *defined* (e.g. moderate versus serious impairment). It is a common belief among personal injury lawyers that the definitions used are based upon *Guidelines for the Assessment of General Damages in Personal Injury Cases*, written by the Judicial Studies Board (1994). For example, according to this Board,

'extremely severe' brain damage was defined as (persistent) vegetative state, where 24 hours' nursing care would be required and there is 'no meaningful response to environment'; somewhat bizarrely, 'considerations affecting the level of award' include 'insight'. Toward the opposite extreme, 'moderate' brain damage is defined as follows: 'Concentration and memory are affected, the ability to work is reduced and there is a risk of epilepsy.' The definition for epilepsy itself is difficult to fathom. The case of Jones and Griffiths 1969 is cited, where the level of damages was set as follows: 'If there was a virtual certainty of attacks occurring, at more than twice the value of the loss of a limb and nearly four times the value of the loss of an eye.' However, it did not regard 'epilepsy as so serious as paraplegia'.

Note that, although the CICA could not state the basis for or give details about its definitions, it did give a view that these definitions were not based on those of the Judicial Studies Board. The matter remains unclear despite several approaches by telephone and in correspondence with CICA. If the terms used by CICA are based on definitions similar to those used by the Board, or have no scientific or clinical basis, then there is cause for great concern because the terms in the tariff scheme as it exists are likely to be misused and can misrepresent the severity of disablement in individual cases.

It is important to note that, in the case of multiple injuries, CICA will not value separately the individual elements and aggregate the figures achieved. Instead the scheme provides that the applicant will receive the full tariff amount for the highest rated injury, plus 10 per cent of the second highest rated injury and 5 per cent of the third highest rated injury with nothing after that.

The maximum tariff payment is £250,000, and the scheme imposes an overall limit of £500,000 payable in respect of a claim (HMSO, 1993).

The revised scheme has potential advantages which are:

- more efficiently administered claims and more rapid payment;
- reduced costs to the Government.

Difficulties

There are however several potential difficulties with the scheme as it stands, some of which are highlighted by the case examples in Box 2.

The incidence of serious head injury is high, especially so in young men who then often face a lifetime of disablement (often 50 years or more). Hence these will not be isolated examples, although most claimants to the Criminal Injuries Compensation Scheme after head injury are likely to be less seriously injured (McMillan & Greenwood, 1993). Given life expectancy and the persistence and

severity of disablement, a large sum may provide only a small income, even if wisely invested.

In summary, the disadvantages of the revised scheme would seem to be:

- imprecise/inappropriate definition of terms;
- limited allowance for loss of earnings, with many individuals dependent on SSP if their loss has not exceeded 28 weeks, with no account taken of pre-injury lifestyle and the expectations of the individual;
- a relatively short period of time to initiate a claim, especially in cases of serious shock and brain damage where significant and persisting psychological effects and their long-term implications may not be appreciated by relatives or victims in the short term;
- inadequate tariff awards for very serious conditions such as traumatic head injury where, more often than not, life-span is unaffected, and no account is taken of the differences between individual claimants' life

expectancy. Each applicant is different and the tariff scheme fails to take account of the effect of the injury on that person and his/her life;

- inadequate awards for multiple injuries. This means that the applicant with two serious but independent injuries to different parts of the body from the same incident may not be adequately compensated;
- a maximum award of £500,000 which will be inadequate for seriously disabling injuries following acquired brain damage. This means that the right of choice and the client's quality of life will inevitably be restricted in such cases as the money will not be available to provide care, suitable accommodation or fund/replace aids and equipment in the long term.

The purpose of this article has been to inform readers of the potential consequences of the new scheme for their clients. Should readers wish to support or complain about the revised scheme, they are urged to write to their MP.

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Example 1

A young person sustained a serious brain injury following an assault. As a result they had severe anterograde amnesia, with little recall of new information a few minutes after its presentation. They also suffered personality change, including apathy, irritability and aggressiveness. They suffered from damage to their endocrine system, which affected satiety and resulted in weight gain. Their expected life-span was not significantly affected by the head injury. They were unable to pursue their developing career as a supermarket manager and in fact were unable to sustain employment of any kind. After a few years their marriage ended because the relationship was damaged by the changes in personality which were caused by the head injury. They had to move to live with their parents on whom they are dependent. Typical of patients with anterior brain damage, this person will make plans, but is poorly organized and lacks drive and initiative to the extent that, if left to their own devices, they would lie in bed or sit in a chair all day. They are not able to live independently for this reason.

The Criminal Injuries Board made a total award in excess of £500,000 prior to the change in legislation. A substantial component in evaluating the value placed upon the claim was loss of earnings and provision for care in the community in the future. The individual's right of choice with regard to their future placement when their parents are no longer able to help would be significantly diminished without this award, and they would inevitably become dependent on whatever local social services might offer (typically a nursing home for the elderly or supervised hostel, probably for psychiatric patients).

Given the new tariff scheme they would not have qualified as being 'extremely serious' brain-injured as they have control over many basic functions, and in fact during brief conversation with a casual observer, they may not obviously seem to be brain-injured. This person would most likely be described as having a 'serious impairment' which is band 20 of the tariff scheme and provides an award of only £40,000. The maximum award of damages they would have been entitled to is £500,000.

Example 2

An applicant suffered a right-sided haematoma of the brain, with evidence of cerebral contusion. This resulted in persisting epilepsy, headaches and tinnitus, a tendency to become depressed and irritable requiring attendance at a psychiatric hospital, speech incapacity and marital breakdown. An award of £50,000 was made by the Criminal Injuries Board under the old scheme for the injury that had been sustained.

Under the multiple injury rule which is now part of the new tariff based scheme, the applicant would probably have been described as having 'moderate impairment' which provides an award of £15,000 plus only 10 per cent of £12,500 for the epilepsy and five per cent of £7,500 for the tinnitus: a total award of £16,625.

Box 2: Case examples