THE COMPENSATION CULTURE

According to a report on Radio 4 "Today" on 10/11/04, and no doubt elsewhere, the Lord Chancellor attributes the present day compensation culture to law firms taking on any cases in the hope of a settlement with the result that many organisations are now so risk averse that even the simplest of activities, such as school outings, are now longer being undertaken for fear of accident and litigation.

Whatever one may think of us lawyers, we do ***not*** take on no-hopers simply as the risk of non payment of our fees is too great. We have no illusions on that score!

Later reports appeared to qualify that blame attribution shifting it to claims management companies, rather than lawyers, and their aggressive advertising leading people to make claims who would not otherwise do so.

If they do not regulate themselves to curtail this rising tide of frivolous etc claims then the government will do so for them.

The simple truth of the matter is that these companies would not have sprung up all over the country were it not for government policy several years ago of introducing the "no win, no fee" representation in litigation.

Nowadays those who have suffered genuine accidents (which do happen!) and those who have not actually suffered anything at all are encouraged to have a go in the sure knowledge, according to the adverts, that it will cost them nothing.

True, in many damages cases the poor claimant is then told that he/she has to take out litigation fee insurance (which will shortly be regulated by FSA – yes, I am coming to financial services!) but the picture painted for the public by these claim companies is that they can claim compensation free from the risk of cost to them.

If you remove the risk of personal cost, there is absolutely nothing to be lost and everything to be gained by making a claim. A side effect of this, of course, is that those with genuine claims for genuine injuries are regarded in the same light.

What does that remind the average IFA of?

It should hardly come as any surprise even to the most obdurate politician that if you offer the average Joe Public an opportunity for a very substantial something for absolutely nothing then he will jump at it.

Claiming money from another person on false evidence is fraud and the indemnity insurers are not slow in pursuing fraudulent claims. They are not backward in going forward to the police.

However, in the surreal world of financial services regulation, where the rules of law and evidence are seemingly suspended, not only is the claimant actively encouraged to complain and claim but also those against whom the complaints and claims are lodged are prevented form defending themselves.

Even where the IFA produces evidence that the claim is founded on a lie the FOS and FSA will do nothing about reporting it to the police and the IFA is also told by FSA that he cannot do so.

FOS says 60% of the complaints against IFAs are rejected which they trumpet as evidence that the system works and to negate IFA claims of incompetence, ignorance and bias of adjudicators. But to any rational mind does a 60% rejection rate not indicate something fairly fundamentally wrong with the system? Does it not shout out that there must be a very high rate of real no-hoper complaints in the first place? And why is that?

How many IFAs have had letters of complaint in such formulaic terms that you could almost tell which website they came from?

When the complaint is lodged who pays the cost of it being processed? Not the complainer.

If and when the complaint is rejected, as 60% apparently are, who picks up the tab for the IFAs lost time and in some cases legal fees? Woe betide any IFA with the brass neck to claim the costs from the complainer – you will get FSA down about your ears.

When you think about the alarming lengths to which an adjudicator will go to uphold a complaint – and in one case I have the adjudicator has re-opened the complaint on grounds that the complainer did not raise! – I find it surprising that the rejection rate is as high as 60%. That only tells me that some of these complaints are so spurious that even FOS cannot support them.

Several years ago, the Legal Services Ombudsman in Scotland – who is an absolutely charming chap, now with an IFA, and whom I recently met in relation to a complaint to FOS – decided that in a dispute between a lawyer and a client that if the lawyers file did not contain a file-note supporting the lawyer's version of events then he would prefer the account given by the client even if it were unsupported by any documentation. The lawyer's head knowledge of the matter would count for nothing.

FOS seems to have made an art form of that. Even where there are file notes, and even where the client has clearly received reports, reasons-why letters and key features the IFA still has to overcome the hurdle placed before him by FOS – did the client understand them and the risks explained in them?

And this despite FOS itself not really understanding the concept of risk in the first place. Sadly, it appears that FOS assesses the risk of a product at the time it was sold not on the basis of the evidence, knowledge and circumstances prevailing at the time the complainer bought the policy, but by reference to how it actually performed.

Endowments, as we all know, are now all regarded as medium risk – if the market fails to recover in the long term then no doubt that will be re-assessed as high risk. But at the time the majority of these policies were sold they were regarded as low risk. Look at the training material available at the time which described them as low risk. That, however, is one of the circumstances prevailing at the time which is ignored by FOS.

One IFA client of mine has received an endowment complaint on the formulaic terms – you all know how it reads! Yes, the risk was explained. No, he was not guaranteed a lump sum. But YES, my client failed to tell the client that the policy would extend into his retirement. The simple reason for this failure? Well, as the client was 35 when he bought a 25 year policy he would still be working when the policy matures. So much for the facts.

When this claim will be rejected, as hopefully it will, who pays my client for his lost productive time and my fees? No-one.

Which brings me back to where I started.

If you remove the risks, and responsibilities, from someone making a claim then it can hardly come as any surprise that the number of claims will mushroom and will inevitably include not just the frivolous and vexatious but also the speculative and downright opportunistic.

Not only is this extremely damaging to the IFA profession, who will be forced to become risk averse to the detriment of the public as a whole, but it also means that those genuine claims – and any IFA will agree that in the 40% cases upheld there are genuine cases – may not be given the attention they deserve

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