

Legal aid and access to justice

By **Don Rennie**



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The articles and comments in *LawTalk* 868 (3 July 2015) highlight only some of the issues arising from Dame Margaret Bazley's controversial report "Transforming the Legal Aid System".

The report was intended to overhaul a system described as being open to "abuse by lawyers and defendants".

The government's transformation of the legal aid system by disestablishing the Legal Services Agency and rolling its services into the Ministry of Justice, was described by the Associate Justice Minister Simon Bridges as making changes to "ensure the quality of legal advice, and alter the way lawyers are paid to avoid any incentive to keep cases in the system for longer than necessary".

Although not covered in the Bazley report, the changes to legal aid have had a devastating consequence on legal representation of accident victims who have disputes with the ACC regarding their cover and/or entitlements.

Highly complex

ACC law is highly complex and complicated and only a few lawyers practise extensively in this field. As rightly observed by Liz Bulger: "Eligibility thresholds are so high that there are many in genuine need who simply do not fulfill the criteria required to be eligible for legal aid".

The result has been that without obtaining funding from legal aid, few lawyers practising in the field of ACC law can afford to undertake cases to ensure that accident victims receive their statutory rights and entitlements.

Simple and straight forward disputes are usually handled by the claimant themselves or by an advocate or friend but experienced lawyers are nearly always involved in more complicated cases like sensitive claims, treatment injuries (medical misadventure), claims for brain damage, long term incapacity, gradual process injuries, occupational diseases,

medical and vocational independence issues and other complex issues.

Only a few lawyers take on these cases on a pro bono basis and they do so at great personal cost. Those who do have significant success in overturning ACC decisions.

Claimants are often encouraged to believe that in challenging an ACC decision the review process is relatively simple and straightforward and provides an opportunity for the claimant to put his/her views and arguments before an independent reviewer who will decide the issues in dispute.

What is not understood is that preparation for a review hearing is extremely important. It means, at the very least, obtaining and reading a copy of the complete ACC claim file (which may be in electronic form or in papers filling a wine box or two), ensuring that there is agreement on the facts, reading the statutory provisions (including relevant regulations) so as to understand the basis of the ACC decision, reading the case law, obtaining evidence from relevant witnesses including up-to-date medical reports and usually, specialist medical evidence commenting on the ACC medical evidence and preparing and developing arguments in support of the disputed issues. The claimant may have to pay up to \$2,000 or more to obtain a specialist medical report.

Daunting task

Preparation for a review hearing is a daunting task for a lawyer let alone for an unrepresented accident victim who is likely to be suffering not only from the consequences of the injury, but also from frustration with, or lack of understanding of, the reasons for the decision made by the ACC leading to the need for the review application in the first place.

It is important that the case is properly prepared for the review hearing because

if the reviewer's decision is unfavourable and the claimant wishes to appeal to the District Court, without the leave of the Court the claimant has no right to put evidence before the Court on appeal if it was not presented to the reviewer at the review hearing.

Proper presentation of the case is also important because decisions of the District Court have legal precedent value and are followed by other Courts, the ACC, and lawyers, under the doctrine of stare decisis (the decision has authority until overturned by a higher Court).

With fewer lawyers being involved at the review or appeal stage in ACC cases, more and more claimants will be representing themselves without a knowledge of the law or the review and appeal process. Reviewers and District Court judges will therefore have a much more onerous task to ensure unrepresented claimants receive fair and just treatment.

Restricting legal aid for those who have a genuine need amounts, in my personal view, to a denial of access to justice. It would be made even worse by Cabinet proposals to abolish the right to appeal to the District Court from ACC review decisions and establish a new ACC Appeal Tribunal system. If that goes ahead, the right of appeal from a Tribunal decision, which has no legal precedent value, will be to the High Court but only on a question of law. Unrepresented claimants will therefore be further penalised.

The Ministry of Justice website has guidelines about how an unrepresented litigant can bring a case before the High Court but the High Court has less experience with dealing with unrepresented litigants, especially those suffering from injuries about which they want to address the Court but who can do so only on strict questions of law. ■

The convenor of the New Zealand Law Society's Accident Compensation Committee, **Don Rennie** is a retired lawyer who practised in personal injury and accident compensation law. Mr Rennie wrote the original textbook *ACC in New Zealand*, published by Brookers, and was one of the contributing authors to the Accident Compensation section of *Butterworths Laws of New Zealand* and to the Thomson Reuters-published *Personal Injury in New Zealand*.