

Northern Ireland Office

Proposed Northern Ireland Criminal Injuries Compensation Scheme 2009



A response by the Association of Personal Injury Lawyers

June 2008

The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers with a view to representing the interests of personal injury victims. APIL currently has around 5,000 members in the UK and abroad. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants.

The aims of the association are:

- To promote full and just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise;
- To provide a communication network for members.

APIL's executive committee would like to acknowledge the assistance of the following members in preparing this response:

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Executive Summary

- APIL does not agree with the proposal to harmonise tariff levels in Northern Ireland with levels in Great Britain. It would be wrong to award victims of crime less in damages simply because victims receive less in Great Britain.
- The tariff levels under the proposed Criminal Injuries Compensation Scheme 2009 in Northern Ireland should be raised in line with common law damages.
- Victims of violent crime will receive significantly less by way of compensation under the proposed scheme than they are presently entitled to.
- There should be no cap on compensation payments and we welcome the proposal for this arrangement to be retained.
- The application of the multiple injury formula will in many cases under compensate the victim. We believe that this element of the scheme should be more flexible to take into account circumstances where multiple injuries give rise to an overall disability for the victim.
- Out-of-time abuse claims should be permitted and we welcome proposals to retain the current arrangements that allow for such claims to be made.
- We agree with putting awards for victims under the age of 18 into trusts, ensuring compensation is spent according to the purposes for which it was given.

- We would like to see the introduction of an award for temporary mental anxiety to compensate those victims who have an unrecognised psychiatric condition.
- APIL believes that the tariff system needs to include an element of subjectivity and flexibility for it to properly compensate victims. Such an approach would recognise that each victim can react differently to crimes of violence.
- The awards for mental injury under the proposed scheme are inadequate. We submit that the requirement that victims must suffer from a mental illness which is worth more or equal to the physical injury sustained in order to enable them to be considered for an award for a mental injury should be removed.
- There is evidence from our members that there is no uniform access to psychiatric services in Northern Ireland and we would call for this to be addressed.
- We believe that the limitation period for bringing criminal injury compensation applications should be raised from two years to three, in line with the common law.
- We believe applicants to the proposed scheme should be entitled to recover the costs of legal representation.
- We believe that appeals should be made to a court of law and not to a panel.

Introduction

We believe that someone injured as a result of a violent crime should have the same rights as someone who is compensated for injuries caused by negligence and APIL has consistently campaigned for fair payments which are comparable to awards made through the civil courts.

We believe compensation for criminal injuries should be paid for by the state in recognition of the failures of society to protect victims of violent crime. Compensating victims of violent crime should not simply be a token gesture of goodwill, awards of compensation should, as far as money can, put the victim back in the position they would have been in had the injury not occurred. The schemes should be designed first and foremost to fully compensate the victim. APIL contends that the proposed 2009 scheme in Northern Ireland will not meet victims' needs, offering them substantially less than they are currently entitled to receive under the present arrangements.

It would be APIL's suggestion that any reform of the current scheme in Northern Ireland should be to keep tariff levels in line with common law damages. Instead, the Northern Ireland Office (NIO) has decided to reduce the compensation given to victims of violent crime in Northern Ireland.

1. Do you agree that compensation levels should be the same throughout the United Kingdom? If not, can you indicate why they should vary and suggest what factors should be taken into account in setting them for Northern Ireland?

We do not agree that compensation levels in Northern Ireland should be the same as levels in Great Britain. Northern Ireland has its own particular jurisdiction, with its own system of common law damages, and its citizens are fully entitled to receive the best level of compensation the jurisdiction can offer. The tariff system at present is a result of the way the legal system in Northern Ireland has evolved. The NIO provides a number of reasons to justify the proposed changes, one of which is that the “security and political situations have significantly improved and the need for special measures has, in the main, ended.”¹ We do not consider this a strong enough argument for reducing the levels of compensation awarded to each victim of violent crime. Furthermore, while the political situation may have stabilised over recent years, figures released by the Police Service of Northern Ireland (PSNI) show the number of recorded violent crime has actually increased over the past ten years with a nine per cent rise since the tariff scheme was introduced in 2001-2002.² This means there may be an increasing number of victims of violent crime in Northern Ireland and, therefore, the need for adequate levels of criminal injuries compensation can only be greater.

Furthermore, we do not feel that the Criminal Injuries Compensation Scheme 2001 in Great Britain is currently an appropriate model on which to base reforms in Northern Ireland. In December 2007 the National Audit Office (NAO) published a report of the Criminal Injuries Compensation Authority (CICA) in which it concluded, “the Authority’s performance has declined since our report in 2000 and neither the

¹ The Northern Ireland Office: *Proposed Northern Ireland Criminal Injuries Compensation Scheme 2009 consultation document*, March 2008, para. 4.2.

² Police Service of Northern Ireland: *Crime Statistics Archive*.

Authority nor the Panel have consistently met their targets over the years.”³ It found that the average time to resolve a tariff case at first decision increased by 46 per cent since 1998-99 and commented that “waiting a long time for a decision can exacerbate psychological injuries and increase financial hardship...”⁴ In a report to the NAO by Atkins Management Consultants, it was said that: “On average three applications for compensation were made to CICA for every 100 crimes of violence recorded by the police in England and Wales but only 50 per cent of these applicants receive full compensation awards.”⁵

We agree that there is a need to revise the current tariff levels in Northern Ireland but it is our contention that the levels should be increased to bring them in line with common law damages. Our members in Northern Ireland have explained how tariff levels were loosely linked to common law damages at the time the tariff scheme was introduced in 2002. Since then, however, common law damages have increased and the 2008 edition of the Guidelines for the Assessment of General Damages in Personal Injury Cases in Northern Ireland – the ‘green book’ - reveals the growing disparity between damages in common law and awards under the 2002 scheme.⁶

The proposed 2009 scheme will significantly reduce the level of compensation awards. To illustrate our concerns, under the present tariff system in Northern Ireland a victim of a violent crime who has lost the sight in both eyes – total blindness – may be entitled to receive £175,000 by way of compensation. This is significantly less than under the common law of damages in Northern Ireland, which places a guide of between £195,000 and £330,000 for total blindness. The proposed scheme will, however, reduce the tariff level for this injury to just £110,000. This disparity between

³ National Audit Office: *Compensating victims of violent crime*, December 2007, page 5, para. 3.

⁴ *Ibid.* page 20, para. 3.2.

⁵ Atkins Management Consultants: *Characteristics of victims of violent crime applying for compensation*, December 2007, page 2, para. 4.

⁶ The Judicial Studies Board for Northern Ireland: *Guidelines for the Assessment of General Damages in Personal Injury Cases in Northern Ireland*, 3rd ed. 2008.

the common law and the Criminal Injuries Compensation Scheme in compensating injured people is entirely unjust.

Further, awards for victims of sexual assault will also be significantly lowered under the proposed 2009 scheme. A victim sexually assaulted by one attacker will have their compensation halved from £22,500 under the present scheme to £11,000 under the proposed scheme; by two or more attackers reduced from £30,000 to £13,500; and for an attack that results in serious internal bodily injuries the compensation will be reduced from £40,000 to just £22,000. The reduction in compensation awards proposed under the new scheme is not limited to these examples and awards for nearly all types of injury will be reduced.

It is our recommendation, therefore, that the scheme should not be brought in line with Great Britain for the reasons given above and that a revision of the tariff scheme is needed to bring it in line with common law damages.

2. What are your views on capping compensation payments? Should a new scheme limit payments to £500,000, regardless of the extent of any injury, or should the Northern Ireland scheme retain it's no cap status?

We do not agree with imposing a cap on compensation and we welcome the proposal not to do so. It is rare for awards to reach £500,000 but for those victims with injuries of such severity that an award does exceed this level it would be unjust to restrict the amount of the award despite the victims needs being far greater. For example, in cases where an attack has rendered a victim tetraplegic, caused brain damage and disfigurement, then these injuries alone may exceed £500,000. This illustrates how a victim could be left under-compensated if a cap is imposed.

3. How do you feel about how compensation is paid for multiple injuries in Northern Ireland? Should payments cover fourth and subsequent injuries?

We object to imposing a rigid multiple injury formula to reduce the level of awards made for violent attacks which result in more than one injury. Our members in Northern Ireland have expressed how it is difficult to manage the expectations of victims of violent crime who are seeking compensation but who can't understand why their injuries are divided up for assessment and why they are not compensated in full for the injuries they receive. A victim might suffer a number of serious injuries which, when applying the multiple injuries formula, would mean they would be left severely under compensated. For example, if we apply the multiple injury formula using the proposed 2009 scheme to a hypothetical case where a victim has suffered the loss of a leg below the knee (100 per cent of £33,000), a severe burn to the face (30 per cent of £27,000, leaving £8,100), the loss of sight in one eye (15 per cent of £22,000, leaving £3,300), a disabling neck injury (10 per cent of £11,000, leaving £1,100), and a fractured upper arm (10 per cent of £3,300, leaving £330), we see how the victim is left with just £45,830 from a total of £96,300 if each injury was to be awarded what it is worth individually. We would suggest that it would be difficult to explain to this victim why if a severe burn to the face is considered to be so serious to be worth £27,000, he is only receiving £8,100 for it.

Further we would suggest that the overall effect a violent crime has on a victim should be recognised if the extent of their injuries is to be properly compensated. There will be some cases where separate injuries will contribute to an overall physical condition that warrants a higher award than if the injuries were assessed separately. The proposed scheme does not introduce any greater flexibility to allow assessors to do this. For example, if a victim lost one leg below the knee and the other was paralysed, the proposed tariff scheme will award the victim according to each separate injury,

£33,000 plus £8,100 (30 per cent of £27,000), even though the victim has effectively lost the use of both legs, which carries a £110,000 tariff. The effect on his mobility and quality of life will be the same as someone who has lost both legs but he will be denied the same level of compensation.

The case of Stephen Menary, in Great Britain, who was blinded in a criminal attack in 2001, further reveals the inequity of a rigid tariff system and illustrates the inequity of ignoring the real physical outcome an injury has for a victim. The incident, in addition to causing other serious injuries, left Stephen totally blind. This was because he was already blind in one eye from a childhood cancer and the attack removed the sight in his other eye. The CICA assessed this particular injury as though he had lost the sight in one eye only awarding him £22,000 for it. Had it taken into account the overall affect this injury had on Stephen, namely rendering him blind, he could have been awarded £110,000, which would have substantially increased his final settlement. Why should one person who has lost their sight be compensated £110,000 and another be awarded £22,000? There is enormous inequity within the tariff system that needs to be addressed.

If the current method of assessing multiple injuries is to be retained then APIL would argue that a provision must be included to allow the Compensation Agency to depart from applying the multiple injuries formula in cases where it is clear the resulting award will be insufficient and to enable it to make a discretionary award that takes into consideration the overall physical effect of the injuries.

4. Do you think that Northern Ireland should retain its unique arrangements for out-of-time minor abuse claims?

APIL agrees with the proposal to retain the present arrangements for out-of-time minor abuse claims. The arrangements will affect only a minority of claims. We believe it is important to allow children who are victims of abuse to be able to come forward to make claims even if they are out-of-time.

5. How do you think claims from minors should be treated? Is putting awards for victims under 18 into trusts, pending their eighteenth birthday, justified?

APIL agrees with retaining this arrangement. It will safeguard compensation paid to minors ensuring that it is spent according to the child's needs and for the purposes it was given. If advanced payments are to be allowed, we believe the current conditions that stipulate such payments can only be made solely for the advancement, education or long-term benefit of the minor should be retained.

6. How do you feel about how claims for compensation for temporary mental anxiety are treated in Northern Ireland? Should claims be supported in this area or are you in agreement that funds should be focused on more serious cases, for example covering the cost of uncapped awards?

APIL is disappointed that the NIO has not taken advantage of the opportunity to include an award for temporary mental anxiety in the new scheme. The stress caused by a violent attack will not always be a medically recognised condition, but that does not mean the psychological effect on the individual will not in some cases be equally

serious. It is important not to undervalue the distress caused by minor criminal incidents, such as being mugged in the street, and the effect such a crime may have on victims in vulnerable positions. A nurse who is assaulted by a patient, for example, may be left feeling particularly exposed, affecting her ability to work with future patients. An award for temporary mental anxiety would act as a small token of sympathy, but more importantly, it is recognition of the mental anxiety suffered by the nurse, which may help her move on from the trauma caused by the attack.

We note that a similar award was provided for before the 2002 tariff scheme was introduced in Northern Ireland under the Criminal Injuries (Compensation) (Northern Ireland) Order 1988 which permitted awards for serious and disabling mental disorders assessed at a value of at least £1,000, later rising to £2,500. Our members in Northern Ireland have expressed how this award was in practice extremely useful and it was very unfortunate an equivalent was not included in the 2002 tariff scheme. The payment of an award for mental anxiety would be a gesture that can help the victim feel their psychological trauma following an attack is believed and recognised by others. This is of particular significance when there is no associated physical injury.

7: Are there any other areas where different rates of compensation for criminal injuries should apply? Please explain why.

We believe in a flexible approach towards compensating victims of violent crime and all rates of compensation should reflect the true nature of the injury and the victim's loss.

8: Do you have any other comments about the provision of criminal injuries compensation in Northern Ireland?

We would like to raise a number of concerns about the continuation of the tariff system used under the Criminal Injuries Compensation Scheme in Northern Ireland.

The need for a flexible and subjective approach

The tariff system should be designed to be more flexible to allow a more subjective approach in assessing the victim's injury. The rigidity of the tariff system, which will continue under the proposed 2009 scheme, does not properly take into account that each victim of violent crime suffers individually and reacts in different ways. An injury for one person may not be as significant as the same injury to another. We refer to Northern Ireland's 'green book' on damages which states quite rightly that the calculation of damages should be based upon "a tentative valuation reached after a careful consideration of how particular injuries affect a particular individual."⁷ It goes on: "A meaningful valuation of general damages depends upon many variables such as age, sex, pre-accident health and so on." The inability of a fixed tariff system to take such factors into account leaves victims of violent crime open to gross under compensation.

The example of facial scarring particularly illustrates this point. Notwithstanding the reduction of the award for serious facial disfigurement under the proposed scheme from £30,000 to just £11,000, there remains only one tariff for this level of serious injury. A serious scar to the face will affect every victim in a different way. It is likely a young fair skinned female would suffer from a facial scar to a greater extent than an elderly male. Subjective factors such as an ability to hide the scar or the victim's own

⁷ The Judicial Studies Board for Northern Ireland: *Guidelines for the Assessment of General Damages in Personal Injury Cases in Northern Ireland*, 3rd ed. 2008. Introduction to the first edition by The Right Honourable Lord Justice MacDermott.

importance they place on attractiveness, for example, are incredibly important in determining the affect such an injury will have on the person. The tariff levels do not take into account the victim's individual circumstances, or physical or character traits pertaining to the injury. By way of comparison, the common law 'green book' of damages specifically makes reference to the subjective approach in determining awards for facial disfigurement. It says, "This is an extremely difficult area for generalisation. In this class of case the distinction between male and female and the subjective approach are of particular significance." The guidelines recommend higher awards for females, and provide greater emphasis on the psychological effects of the injury. We strongly suggest the tariff system in Northern Ireland should import the same emphasis on the need to take a subjective approach.

Psychiatric damage

The tariff system fails to adequately compensate psychiatric damage caused to the victim. The proposed scheme will retain the condition that an award for a mental injury will not be made if compensation is paid for a physical injury, unless the compensation for the mental injury is the same as or higher than the award for the physical injury. We submit that this requirement should be removed. The awards for mental illness under the proposed scheme, of which the maximum is £27,000, are significantly less than common law damages, and will in many cases be less than the tariff award for serious physical injury. A victim who has lost a leg, for example, would not be able to claim an award for any associated mental disorder, even if the condition was confirmed by a psychiatric diagnosis, because the tariff award for the loss of one leg is higher than the maximum award for mental illness. This is justified under the scheme by the tariff levels already including an element of compensation for mental injury. We believe this is wholly inadequate as the awards for the physical elements of injury alone are so low.

Psychiatric referrals

Victims of violent crime who suffer from psychological problems associated with the attack will only be considered for an award where their condition has been diagnosed by a psychiatrist. For this to happen, the victim will first of all need to see a GP willing to make the referral to a psychiatrist but not all GP's are equally willing to make such referrals and many victims will be only referred to a counsellor. This GP 'lottery' system is entirely unfair. For many people, their mental injury will go uncompensated because of the type of treatment received. APIL feels that this is an issue that needs to be addressed.

Limitation

We have concerns about the retention of the two year limitation period. We recommend raising it to three bringing it in line with limitation limits under the common law. We do not believe that the two year time period is sufficiently fair for victims to lodge their applications on time especially where they have been victims of sexual abuse or psychological injury.

Legal advice for people on low incomes

We believe that applicants to the Criminal Injuries Compensation Scheme in Northern Ireland should be entitled to recover the costs of legal representation. It is therefore unfortunate that under the proposed 2009 scheme legal costs will continue to not be met by the state and we have concerns that victims of violent crime on lower incomes, who may live in impoverished areas with higher crime rates, will not be able to afford legal advice to help with the application process. We recognise that the tariff system is designed to be 'lawyer-free,' but in practice applicants need advice to help them understand the tariff system and the multiple injuries formula, and to also enable applicants to obtain proper medical evidence for their physical and mental injuries. The

compensation process can be extremely confusing to applicants who are unfamiliar with such matters. For traumatised victims of violent crime, to navigate the process alone will be particularly difficult. It is incredibly important that victims receive the support from lawyers who are qualified and trained to deal with criminal injuries compensation process so that they do not go under compensated.

Appeals

We have concerns about the appeals process administered by the Criminal Injuries Compensation Appeals Panel of Northern Ireland (CICAPNI) and we submit that it would be fairer for the victim to be given the right to appeal to a civil court. The informality of proceedings under the Panel, as opposed to the formal structure of an appeal to the courts, can expose the victim to uncontrolled questioning from a number of panel members which can be particularly stressful for an already traumatised victim who is unrepresented. It is unfair to expect victims to convince panel members their injury is worth compensating in such an environment which they could feel is extremely intimidating. Furthermore, victims without the means to pay for legal representation, or those who have difficulties with the English language, would be placed at a severe disadvantage. A right of appeal to the civil courts would ensure equality at hearings and presents the best option to achieve justice with the least amount of stress for the victim.

9: Have you any views on the impact of the proposed changes on the different Section 75 groups? Please indicate whether you have any particular concerns regarding any differential affects that the proposals may have, or on the outcome of the proposal's Equality Screening.

We do not have any additional comments about the equality impact assessment.