

Northern Ireland Law Commission

Consultation on First Programme of Law Reform



A response by the Association of Personal Injury Lawyers

November 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 4,500 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 of Personal Injury Lawyers (APIL) 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:

Stephen Gray	Executive Committee Member	APIL
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Executive Summary

APIL believes that the law relating to damages recoverable in respect of deaths caused by personal injury and the damages recoverable by relatives of the deceased should be considered for reform.

APIL believes that extensive consultation with stakeholders should be undertaken concerning the introduction of a Pre-Action Protocol for Personal Injury Litigation in both the High Court and the County Court in Northern Ireland. Whilst we are aware of the introduction on the 1st April 2008 of a Pre-Action Protocol for Personal Injury Litigation in the High Court, we are concerned that this was introduced without consultation with stakeholders and must reserve judgment on its effectiveness at this stage. We believe that it is important for there to be consistency across all personal injury claims.

APIL believes that the litigation procedure in the county court should be amended to require defendants to state their case clearly prior to the trial, since the existing practice does not require them to do so and is contrary to the principles of proportionality and equal footing of parties.

APIL strongly promotes the use of rehabilitation in the compensation process to ensure that the injured person makes the best and quickest possible recovery from his injuries. APIL believes that a Rehabilitation Code of Best Practice, similar to the Code of Best Practice annexed to the Pre-Action Protocol in England and Wales, should be introduced in Northern Ireland.

APIL believes that the common practice by insurers of 'Third Party Capture' (TPC) should be prohibited. TPC is the practice whereby the insurer of a policyholder makes direct contact with an injured victim, who has been injured by the actions of the

policyholder. TPC fundamentally undermines a citizen's rights to be able to obtain independent legal advice and/or their freedom of choice of solicitor.

APIL firmly believes that reform of these areas of law has the potential to benefit all injured victims and provide real improvements for the rights of the individual.

Introduction

APIL welcomes the opportunity to respond to the Northern Ireland Law Commission's Consultation Paper on the First Programme of Law Reform.

APIL's primary concern is for people who have been injured as a result of another person's negligence or breach of statutory duty. We believe in the polluter pays principle, namely, that it is right and proper that a negligent party should make recompense for that negligence.

APIL will not specifically comment upon the proposals for the programme already outlined in the consultation paper but wishes to highlight to the Northern Ireland Law Commission (the 'Commission') some other topics that are suitable for inclusion within the programme. We have not, at this stage, provided detailed suggestions for reform but, instead, have provided brief details of areas where reform should be considered.

In completing this response, APIL is aware of the Commission's Management Statement¹ which indicates at Annex A that the Commission was established to keep under review the criminal and civil law of Northern Ireland, including procedure and practice. Our response therefore is not limited to substantive law issues but includes procedural and practical issues.

¹ <http://www.nilawcommission.gov.uk/index/publications/management-statement.htm>

Wrongful Death

The Law Commission in England and Wales has previously considered and suggested reform in wrongful death claims.¹ This included a recommendation that the list of people entitled to bereavement damages should be extended to include, for example, parents, children and siblings.² Whilst, unfortunately, those recommendations have not been implemented in England and Wales, reform in Scotland³ has allowed an expanded list of relatives, including children and siblings, to claim damages for grief and sorrow.

The current law in Northern Ireland relating to wrongful death claims is contained within the Fatal Accidents (Northern Ireland) Order 1977. By section 3A⁴ the categories that can claim bereavement damages are the same as those in England and Wales, namely a spouse (or civil partner) or the parent(s) of a deceased minor who was unmarried (or a civil partner).

APIL believes that the area of wrongful death claims should be considered by the Commission as an area of law reform to be included within the First Programme of Law Reform because it is an area where, in our view, the current law is unsatisfactory and reform will be of real benefit to bereaved individuals.

Pre-Action Protocols and Litigation Procedure

The Pre-Action Protocol for Personal Injury Claims in England and Wales has been in force since 1999 and applies to all personal injury claims with a value of up to £15,000 with express provision that the courts expect the parties to follow the spirit of the

¹ <http://www.lawcom.gov.uk/docs/cp148.pdf>

² <http://www.lawcom.gov.uk/docs/lc263.pdf>, paragraph 6.31

³ Scotland (Damages) Act 1976, s. 1(4), as amended by Scotland (Damages) Act 1993, s.1(1)

⁴ Inserted by Administration of Justice Act 1982, Schedule 6, paragraph 4

protocol in all personal injury claims. The protocol promotes each party being aware of the case against them and therefore being able to prepare fully in answering the case. APIL believes that a similar mechanism, with appropriate sanctions for non-compliance, needs to be introduced for all personal injury claims in Northern Ireland and would contribute to the efficient management and disposal of litigation.

Lord Woolf's analysis of the civil justice system in England and Wales identified five fundamental weaknesses: excessive delay; excessive cost; undue complexity; uncertainty regarding time and expense; and unfairness due to the exploitation of the financially weak by the financially strong. Although the scale of litigation in Northern Ireland is significantly different to England and Wales, those principles are still of considerable relevance to Northern Ireland and we believe that any attempt to improve weaknesses in the system, such as those identified above, is a positive move.

On the 1st April 2008 in the High Court of Justice of Northern Ireland, Queens' Bench Division, Mr. Justice Coghlin (Senior Queens' Bench Judge) and Master C. J. McCorry (Queens' Bench and Appeals) introduced a Pre-Action Protocol (PAP) for personal injury litigation in High Court actions. Whilst APIL welcomes and supports any initiative to reform the pre-action process to improve the weaknesses identified above, we are concerned that the High Court PAP was introduced without any extensive consultation with stakeholders. We must, therefore, reserve judgment on its effectiveness at this stage, particularly as it is still early days since its introduction.

APIL believes that a PAP for personal injury litigation should be introduced into the County Court to ensure that all personal injury cases are dealt with swiftly and consistently. However, as the County Court is the major civil venue for personal injury actions, APIL believes that extensive consultation must be undertaken with stakeholders and all interested parties on the detailed content of any such PAP before it is introduced and this should also encompass consideration and review of the High

Court PAP. APIL and its members have considerable experience in the field of personal injury litigation and would be more than happy to assist in such a consultation.

In conjunction with the introduction of a personal injury pre-action protocol, APIL believes that the litigation process itself needs to be addressed as the current system in the County Court unfairly advantages defendants. The 'cards on the table' approach encourages early exchange of information but, in the County Court, the defendant is simply required to indicate whether or not the claim will be defended. The claimant then provides particulars, but at no point in the proceedings is the defendant required to state why the action is being defended. This puts pressure on claimants since they are not aware of the case against them until the day of trial, whereas the defendant has had the benefit of preparing a full and informed defence.

APIL believes that defendants should have to state their case clearly prior to the trial, since the existing practice is contrary to the principles of proportionality and equal footing of parties.

Rehabilitation

APIL strongly promotes the use of rehabilitation in the compensation process to ensure that the injured person makes the best and quickest possible medical, social and psychological recovery from his injuries.

In England and Wales there is a Code of Best Practice on Rehabilitation that was introduced in 1999 and now forms part of the Personal Injury Pre-Action Protocol. This provides that the parties shall consider as early as possible whether the claimant has reasonable needs that could be met by rehabilitation treatment or other measures.

APIL believes that a Rehabilitation Code of Best Practice should be introduced in Northern Ireland and should be annexed to the Pre-Action Protocol in a similar way.

Third Party Capture (TPC)

TPC is the process by which an insurer approaches a person knowing that they have been involved in an accident with their insured and in the knowledge that they could be injured and may want to make a claim for personal injury. The insurer then offers a sum of money to settle the claim immediately or offers to refer the claim to the insurer's panel firm of solicitors. The insurer thereby 'captures' the claim to deal with it, generally before independent legal representation can be obtained.

APIL believes that the law is unsatisfactory and unfair in this area as the practice of TPC fundamentally undermines a citizen's rights to be able to obtain independent legal advice and/or their freedom of choice of solicitor. The injured victim has no protection of the law in such circumstances and is being approached at an extremely vulnerable time, often within hours or days of their accident.

APIL believes that Financial Services Authority (FSA) regulations should be reviewed to prohibit the practice of TPC.

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