

Northern Ireland Legal Services Commission

The Northern Ireland Funding Code: proposed procedures and criteria



A response by the Association of Personal Injury Lawyers

October 2009

The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers with a view to representing the interests of personal injury victims. The association is dedicated to campaigning for improvements in the law to enable injured people to gain full access to justice, and promote their interests in all relevant political issues. Our members comprise principally practitioners who specialise in personal injury litigation and whose interests are predominantly on behalf of injured claimants. APIL currently has over 80 members in Northern Ireland and around 4,400 members throughout the UK and abroad who represent hundreds of thousands of injured people a year.

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:

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Executive summary

APIL is concerned that the NILSC's proposals will deny injured people access to justice. The NILSC knows that its proposals to restrict funding would prevent approximately 30 per cent of current legal aid applicants from receiving legal aid to fund their case, and knows that suitable alternative funding is not available, yet despite this its only answer to this is to monitor the position once the changes have been made. We do not believe this position is acceptable. If legal aid is to be cut (and this instance may be followed by many more), there must be suitable alternative funding available, otherwise injured people will be prevented from obtaining representation and consequently the compensation they are entitled to.

Full response

APIL welcomes the opportunity to respond to the NILSC's consultation regarding the proposed procedures and criteria for the Funding Code.

Our response is limited to issues connected to damages for personal injury and clinical negligence and in particular the extremely significant proposal to introduce a cost benefit analysis in deciding whether a claim for damages should receive public funding.

The NILSC will not be surprised to hear of APIL's extreme concern that these proposals will deny injured people access to the legal representation they need in order to be able to obtain compensation from the person who caused their injuries.

The consultation paper stresses that public funding for legal aid must represent value for money. We have made representations in the past¹ about the low cost to the NILSC of personal injury claims, the fact that the majority of these costs are recovered from defendants, and about the advantages to society of personal injury victims receiving compensation from the tortfeasor as opposed to the state. The NILSC is aware of these arguments and so we will not go into further detail.

Despite saying that money damages claims will still be catered for even though they are not a priority, the NILSC is also clearly aware of the effect its proposals will have on the funding of these claims, the vast majority of which are claims in respect of personal injuries. The regulatory impact says the "availability of legal aid for money damages cases will reduce, and this raises the potential for unmet need among persons wishing to pursue such a claim"². In addition, the regulatory impact assessment shows that 29 per cent of people whose cases were funded in 2004/05 would not be funded under the new criteria³. Despite this, and the apparent recognition that there are no other suitable funding mechanisms in place⁴ for many people in Northern Ireland, the NILSC is proposing to cut funding for cases involving victims of accidents and to simply monitor the effects of this.

APIL believes that the NILSC's position is unacceptable. It knows it is cutting funding for legal aid for injured people; it knows that there is not a system in place which

¹ Letter to the NILSC, 15 January 2007, in response to the NILSC's consultation about the funding code, available at <http://files.apil.org.uk/pdf/ConsultationDocuments/890.pdf>

² p.28, Regulatory Impact Assessment

³ Figure 4.1, p.51 Regulatory Impact Assessment

⁴ Criteria consultation paper, chapter 6: Money Damages Claims

enables people on no, low or middle incomes to get legal representation, and it is simply going to monitor what happens. In other words, the NILSC knows many injured people will not be able to get legal representation to bring a claim but is not acting to change that. This is not right. We believe that legal aid funding should not be cut until the issue has been addressed and an alternative funding solution is available. Until a sensible solution is developed APIL would urge the LSC to retain public funding for all personal injury claims.

The NILSC is hoping that solicitors will pick up those cases which will not be eligible for legal aid. It is true that many personal injury lawyers in Northern Ireland run cases 'on spec' – i.e. on a speculative basis. When running a case 'on spec' a solicitor is offering to take the risk of litigating away from the claimant thus putting the solicitor at risk of paying the defendants' costs and disbursements, paying their own clients' disbursements, and not getting paid for the work he does. Solicitors are therefore only likely to take on those cases with a really good prospect of success. Solicitors in Northern Ireland are not currently able to run cases on a conditional fee agreement as it is champertous⁵.

This will leave many injured people without access to legal representation, resulting in them not bringing a claim⁶ or feeling they have to settle direct with insurance companies, many of which seek to under settle claims when dealing with unrepresented claimants. As a standard example of the latter, a well known insurance company offered a person injured in a road accident £2,500, without obtaining a medical report or the victims having legal advice. The victim rejected the offer and instructed solicitors resulting in the claimant receiving £6145.67 in damages.

⁵ It is considered unethical for the legal advisor to share in the proceeds of a claim with a claimant

⁶ In England and Wales, in February 2005, a MORI poll commissioned by APIL found that 64 per cent of respondents said that they would be unlikely to pursue a personal injury claim without legal representation.

When legal aid for personal injury cases was cut in England and Wales, the Government instead put in place a structure which allowed solicitors to take on cases which had a good prospect of success. Conditional Fee Agreements (CFAs) coupled with after the event insurance (which protects solicitors from having to pay the defendants' costs if the claimant loses) and success fees (which allows claimant solicitors to build up a pool of funding to cover not getting paid in future cases), both of which are recoverable from the defendant, ensured that in England and Wales, access to justice was maintained. The system and accompanying regulations were not without fault but the majority of problems have now been resolved, and the funding system works well. It allows access to justice for everybody, regardless of their means.

There is no such proposal to maintain access to justice for the people of Northern Ireland. Legal aid for personal injury claims should not be cut until this the access to justice issue is addressed. If this does not happen, injured people will lose out on compensation to pay for essential care, to replaced lost earnings, and for pain and suffering, all as a result of an injury that is no fault of their own.

We welcome the fact that the NILSC has recognised that it needs to look in to alternative funding mechanisms, and has been researching these. We acknowledge (although do not agree with) the NILSC's statement that "doing nothing" regarding legal aid for money damages is not an option. We would like to work with the NILSC to develop a funding mechanism that works to ensure injured people in Northern Ireland can continue to be legally represented in personal injury proceedings. Until such a mechanism has been put in place, however, cutting legal aid is not appropriate.

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