

Northern Ireland Courts and Tribunals Service

Review of Access to Justice



A response by the Association of Personal Injury Lawyers

31 January 2011

The Association of Personal Injury Lawyers (APIL) was formed by plaintiff 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 plaintiffs. APIL currently has around 4,800 members in 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; and
- 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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Introduction

APIL's long-standing position is that there should be full and fair access to justice. We understand that the Northern Ireland Courts and Tribunals Service (NICTS) wishes to improve access to justice and we fully support this. In our proposals, we have fully taken account of the civil legal aid budget and how improvements can be made to sustain funds and increase these for the future. As our remit only extends to personal injury law, we have only responded to the review in relation to this field.

Executive Summary

APIL welcomes the opportunity to respond to the NICTSs consultation regarding the review of access to justice. APIL understands that there are increasing economic and political pressures to ensure that legal aid funds will stretch as far as possible whilst promising to secure access to justice for all. Throughout this paper we hope to encourage the NICTS to retain legal aid for personal injury and clinical negligence cases in the civil legal aid budget, and to suggest proposals for a radical new way of operating the fund in future to ensure its sustainability and growth.

The review team, at paragraph 4.28,¹ states that they,

are aware of concerns about a litigation culture but also note that the ability to take effective action in personal injury cases may have contributed to health and safety improvements that in turn have reduced the number of accidents and complaints.

APIL would agree that as a nation we have become increasingly aware of health and safety practice and have, as a result, reduced the number of accidents and complaints.

¹ *Access to Justice Review Northern Ireland, The Discussion Paper*, Northern Ireland Courts and Tribunals Service, November 2010, Para 4.28 page 21.

Lord Young of Graffham was recently commissioned to conduct a review of the operation of health and safety laws and the growth of the compensation culture. APIL agrees with Lord Young's comments in his Foreword² where he describes the compensation (or litigation) culture as a perception created by ubiquitous media reports. We therefore support the review team's assumption that effective action in personal injury cases may have contributed to health and safety improvements.

The Legal Aid Budget

When looking at paragraph 4.2 of the Discussion Paper³, personal injury receives only a small amount of the total legal aid budget. In 2009/10 £33.4 million was spent on civil legal aid, of which 65 per cent was devoted to family and Children Order cases, which leaves 35 per cent (or £11.7 million) to be spent on other civil cases including personal injury and clinical negligence, of which an unspecified amount is allocated to the running costs of the Northern Ireland Legal Services Commission (NILSC). The total legal aid budget for 2009/10 was £104 million, therefore civil cases (excluding family) accounted for only 11.25 per cent of that total budget. The total costs of family legal aid⁴ is double that of other civil cases⁵.

Any reduction in the amount of legal aid available for personal injury law would have a significant and detrimental effect on access to justice for injured people. Civil legal aid exists to ensure that ordinary people can access justice; reducing the fund further will mean that many people will not be able to access the justice system because there is no suitable alternative. At paragraph 4.21 of the Discussion Paper⁶, the review team states that money damage claims only result in a cost to the legal aid fund when the

² *Common Sense, Common Safety*, Lord Young of Graffham, October 2010.

³ *Access to Justice Review Northern Ireland, The Discussion Paper*, Northern Ireland Courts and Tribunals Service, November 2010, Para 4.2 page 13.

⁴ £16.7 million for 2,842 bills at *Access to Justice Review Northern Ireland, The Discussion Paper*, Northern Ireland Courts and Tribunals Service, November 2010, Annex B Table B Page 45.

⁵ £8.86 million for 3,425 bills at *Access to Justice Review Northern Ireland, The Discussion Paper*, Northern Ireland Courts and Tribunals Service, November 2010, Annex B Table B Page 45.

⁶ *Access to Justice Review Northern Ireland, The Discussion Paper*, Northern Ireland Courts and Tribunals Service, November 2010, Para 4.21 page 19.

case is lost because in successful claims costs are recovered from the other side through the polluter pays method. The review team goes on to say that those cases that do result in a charge to the fund cost the legal aid fund nearly £2 million in 2009/10. However, compare this £2 million cost to the fund for personal injury and clinical negligence cases with the recovery in successful cases of benefit payments and NHS costs to the Exchequer.

The Compensation Recovery Unit (CRU) has a legal right to recover social security benefits and National Health Service (NHS) costs from compensators⁷ in cases where a personal injury claim has been successful, for example, following a road traffic accident or injury at work. Between 2002-03 and 2009-10, the CRU recovered £101 million from compensators. In 2009-10, it recovered a total of £13.6 million, comprising £5.4 million of benefit payments and £8.2 million of NHS costs, relating to approximately 20,300 cases.⁸

In every case where an injured party has attended hospital, £505.00 is returned to the Exchequer in respect of treatment at an A&E unit. There is also a financial recovery for those injured persons who require to be taken to hospital by ambulance. Where a plaintiff has been in receipt of welfare benefits following an injury and a successful claim has been pursued defendants are also accountable to the Exchequer for any recoverable benefits. If legal aid is to be reduced and an adequate funding method is not put in its place, the revenue to the Exchequer will inevitably be substantially reduced.

The Funding Code

⁷ A compensator is a person, company or agent paying compensation to an injured person.

⁸ *Compensation Recovery Unit – Maximising the Recovery of Social Security Benefits and Health Service Costs from Compensators*, Northern Ireland Audit Office, Report by the Comptroller and Auditor General 26 January 2011, Executive Summary Page 2 Paragraph 2.

APIL previously responded to the NILSC's consultation on the Funding Code⁹ and provided comments on the proposals discussed at paragraph 4.22 and 4.23 of the Discussion Paper¹⁰. We stated,

The consultation paper stresses that public funding for legal aid must represent value for money. We have made representations in the past¹¹ 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"¹². 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 criteria¹³. Despite this, and the apparent recognition that there are no other suitable funding mechanisms in place¹⁴ 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.

⁹ *The Northern Ireland Funding Code*, Northern Ireland Legal Services Commission, June 2009.

¹⁰ *Access to Justice Review Northern Ireland, The Discussion Paper*, Northern Ireland Courts and Tribunals Service, November 2010, Para 4.22-4.23 pages 19-20.

¹¹ 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>

¹² *The Northern Ireland Funding Code Regulatory Impact Assessment*, Northern Ireland Legal Services Commission, June 2009 p.28.

¹³ *The Northern Ireland Funding Code Regulator Impact Assessment*, Northern Ireland Legal Services Commission, June 2009 Figure 4.1, p.51.

¹⁴ *The Northern Ireland Funding Code Criteria Consultation Paper*, Northern Ireland Legal Services Commission, June 2009, chapter 6: Money Damages Claims.

The Funding Code also proposed that grants for investigative help would only be available in some cases to establish the prospects for success where damages were likely to exceed £5,000. The majority of personal injury awards in Northern Ireland (in excess of 80 per cent) are for damages of £5,000 or less. If the Funding Code is adopted as proposed, the overwhelming majority of personal injury cases currently eligible for legal aid will not qualify for funding. £5,000 is a lot of money to an individual when compared to the average annual income. Someone working 35 hours per week and earning the minimum wage of £5.93 per hour would have to work for three months to receive just over £2,000. Damages of less than £5,000 can still make a difference to the lives of many people. For these reasons APIL continues to argue that legal aid for personal injury and clinical negligence must not be cut or restricted further.

Conditional Fee Arrangements

We understand that the review team are assessing the benefits of access to justice through conditional fee arrangements (CFAs) and After the Event Insurance (ATE) as they operate in England and Wales¹⁵. CFAs and damages based agreements (DBAs) are still under consultation by the Ministry of Justice (MoJ) following Lord Justice Jackson's Final Report¹⁶. The primary proposals in respect of CFAs suggest an end to recoverability of success fees and ATE. Instead of ATE, there would be qualified one-way costs shifting whereby the plaintiff would not be liable for the other sides' costs where the case was unsuccessful. There are two caveats to this and qualified one-way costs shifting would be removed if:

1. the plaintiff's conduct was unreasonable; or
2. the plaintiff was sufficiently wealthy that they are easily able to pay the defendant's legal costs.

¹⁵ *Access to Justice Review Northern Ireland, The Discussion Paper*, Northern Ireland Courts and Tribunals Service, November 2010, Para 4.25-4.27 pages 20-21.

¹⁶ *Review of Civil Litigation Costs: Final Report*, Lord Justice Jackson, Published January 2010.

APIL has reservations about these proposals. In principle we are opposed to damages being reduced to pay for legal costs. Under the current regime in England and Wales, legal practitioners are able to act for personal injury plaintiffs whilst offering to ensure that they receive 100% of any compensation received. Furthermore, solicitors are able to do this whilst acting for a client under the terms of a Conditional Fee Agreement together with the benefit and protection of After the Event Insurance (ATE). Other clients may be members of trade unions, whose legal services also provide for full recovery of compensation for the client. Whilst not all personal injury clients will be aware of what all solicitors' firms offer, there is a general market expectation that an injured person will receive full damages for personal injury. APIL believes that it is not in the interests of justice or fairness for costs which have arisen from the negligence of the wrongdoer to be paid by the innocent victim. There are also additional hurdles to consider such as a lack of ATE premium providers within Northern Ireland. The Government would need to consider how they will try to introduce ATE providers into the market. For all of these reasons, APIL suggests that it may not be appropriate at this stage to introduce a conditional fee and contingency fee regime into Northern Ireland.

Northern Ireland Alternative Legal Aid Scheme

At paragraph 4.24 of the Discussion Paper¹⁷, the review team explains that previous consideration has been given to establishing a Northern Ireland Alternative Legal Aid Scheme (NIALAS) for money damages cases. The review team states that the operation of the fund would rely upon lawyers not "cherry-picking" those cases with the best prospect of success, and progressing them outside of the scheme. However, at paragraph 4.22¹⁸, the review team explains that the Funding Code proposals would work on the basis of the prospects of success of a case. The proposals were that cases

¹⁷ *Access to Justice Review Northern Ireland, The Discussion Paper*, Northern Ireland Courts and Tribunals Service, November 2010, Para 4.24 page 20.

¹⁸ *Access to Justice Review Northern Ireland, The Discussion Paper*, Northern Ireland Courts and Tribunals Service, November 2010, Para 4.22 page 20.

with a prospect of success in excess of 80 per cent would receive legal aid provided that damages were likely to exceed projected costs, and those cases with a prospect of success of 50-60 per cent would only receive legal aid if the damages were likely to exceed costs by at least a factor of 4.

APIL is concerned that the NILSC's proposals, as discussed at paragraph 4.22, will deny injured people access to justice. The NILSC knows that its proposals to restrict funding would prevent approximately 30 per cent¹⁹ of current legal aid applicants from receiving legal aid to fund their case. Despite this, and the apparent recognition that there are no other suitable funding mechanisms in place²⁰ 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 would also suggest the proposals for the new criteria for the Funding Code where cases are to be assessed on the basis of prospects of success is exactly the same "cherry picking" method the review team have criticised lawyers for potentially adopting if a NIALAS were to be introduced.

APIL would agree to further consideration being given to the NILSC's proposal of other forms of risk sharing whereby legal representatives would accept reduced fees from the Commission in cases lost. APIL believes that this may encourage solicitors to be more risk aware when spending legal aid funds.

APIL Alternative to the NIALAS

APIL members have suggested an adapted version of a Contingent Legal Aid Fund (CLAF) and Supplementary Legal Aid Scheme (SLAS) that could operate in Northern Ireland. APIL's version would adapt the principle of a CLAF or SLAS with the added

¹⁹ *The Northern Ireland Funding Code Regulatory Impact Assessment*, published October 2008, Paragraph 4.4 Figure 4.1, p.51.

²⁰ *The Northern Ireland Funding Code Consultation Paper on the Proposed Criteria*, Northern Ireland Legal Services Commission, chapter 6: Money Damages Claims, Page 22

benefit of **recoverable** success fees should the plaintiff win their case. The fund could be established using the existing legal aid fund and adapted for its future operation. Applicants would apply to the legal aid fund as they do now and plaintiff lawyers, having advised the other side that the case is supported by the Legal Aid Fund, would be able to charge a success fee to the defendant if they win. The success fee element in successful claims would be paid directly back into the legal aid fund not to the legal practitioner. This could result in a scheme which is cost neutral.

This option would allow personal injury cases to continue to increase the level of legal aid funds available as and when cases are won and thus help to provide sustainability and growth for the fund in future. We also propose that these success fees could be fixed and staged to reflect the risk at the particular stage of a case and adopted across all areas of personal injury litigation and clinical negligence. Many of our specialist clinical negligence practitioners in England and Wales already operate a staged success fee framework based on in-house models. These models offer defendants clear incentives to settle cases early, rewarding good behaviour and penalising bad. Fixing percentages by industry agreement would save the defendants money and create certainty. Any framework for fixing success fees would need to be modelled on sound data. Cases settling early would attract little or no success fee, with cases that are most risky and proceeding to trial attracting 100 per cent.

Personal Injuries Assessment Board

At paragraph 4.29 of the Discussion Paper²¹, the review team states that they will examine the workings of the Personal Injuries Assessment Board (PIAB) whereby all claims for personal injury other than those concerned with clinical negligence are processed by PIAB for a fee of 50 Euros chargeable to the plaintiff. APIL does not support this position that attempts to simplify the processing of personal injury cases,

²¹ *Access to Justice Review Northern Ireland, The Discussion Paper*, Northern Ireland Courts and Tribunals Service, November 2010, Para 4.29 page 22.

which are, on the whole, extremely complex to the lay client who are usually one-time users of the system.

Clinical Negligence

The Review team, at paragraph 4.30 of the Discussion Paper²², state that they will consider treating high value clinical negligence cases separately because of their complexity. APIL would agree with this decision; however, we would also suggest that clinical negligence as a whole, and other relatively low value claims such as disease cases, should be treated separately as they too can be extremely complex even when relatively low in value. Investigation and disbursement funding for these types of cases is always problematic. There are other ways of reducing costs by limiting court hearing time. One way of doing this is through the introduction of pre-action protocols. Many of the judges in the High Court have previously expressed an enthusiasm for the introduction of a pre-action protocol, similar to the one in England and Wales, across the whole of civil litigation. The pre-action protocol promotes a “cards on the table” approach and forces parties to confer and respond to each other and, therefore, create savings on costs. APIL is keen for the review team to consider extending the pre-action protocol across civil litigation in the courts in Northern Ireland.

Other issues for Review

The review team suggests, at paragraph 4.43²³, that the panel to where appeals are sent is changed to a three person panel. APIL supports this as it believes that this will make the running of the appeal process more cost effective. Especially if it can be

²² *Access to Justice Review Northern Ireland, The Discussion Paper*, Northern Ireland Courts and Tribunals Service, November 2010, Para 4.30 page 22.

²³ *Access to Justice Review Northern Ireland, The Discussion Paper*, Northern Ireland Courts and Tribunals Service, November 2010, Para 4.43 page 25.

assumed that the appeal panel counts for a portion of the £2.5 million annual spend in non-staff costs as shown in Table 3²⁴.

Experts

There can be problems for practitioners and plaintiffs while the necessary authority for an expert is sought from the Legal Services Commission, however we do not feel that increased use of single joint experts is appropriate in personal injury and clinical negligence cases. The evidence that an expert provides in a case can significantly alter the outcome. The expert market is complex, selection of the right expert is critical to the outcome and that quality expert evidence is essential to the effective running of the civil justice system.

If the plaintiff is unable to employ the expert they require, due to limitations placed on fees, this could create an inequality of arms between the injured person and the defendant. The defendant may be an individual person, or it may be an insured body, or a large company or public body. The defendant is not subject to any restriction on expert fees and, therefore, can afford to pay whatever is necessary for them to get the expert evidence they wish. This seems especially unjust in cost bearing cases such as personal injury and clinical negligence where, if the plaintiff is successful, the cost of pursuing the claim will be borne by the defendant and there will be no loss to the NILSC. Contrast this with the defendant, who will be able to select any expert he wishes and, should they win, charge the plaintiff for the privilege. APIL believes that where there is the chance of recovering legal aid costs from the other side, the legal aid fund should expect to pay the market rate for getting the right evidence from the right expert.

In clinical negligence cases, there is already an inequality of arms because the plaintiff will be pursuing a claim against a defendant who is medically qualified, or at the very

²⁴ *Access to Justice Review Northern Ireland, The Discussion Paper*, Northern Ireland Courts and Tribunals Service, November 2010, Para 6.5 page 33.

least will have easy access to a team of medical experts. The defendant, in these circumstances can gain expert evidence simply by speaking to the treating clinician or risk managers within their own internal structures.

Service Providers, Quality and Regulation

The review team has assessed several ways in which the NILSC might satisfy itself in relation to the assessment of the technical quality of the service provided. The APIL accreditation scheme was established in 1999 by the College of Personal Injury Law (CPIL). In 2005 the successful activities of the College were integrated into the APIL membership structure in order to provide a clear single identifiable kitemark to members of the public seeking a suitably qualified lawyer to handle their case.

APIL strongly believes in the accreditation process and, therefore, supports the option of accreditation in specialist areas, especially in personal injury and clinical negligence cases where the detail can be extremely complex to the lay client. It would also ensure a review of those practitioners who are consistently drawing on the fund. APIL is able to provide further detail of its accreditation process or help with this if it is needed.

Structures for administering legal aid and developing policy on access to justice

At paragraph 6.5 of the Discussion Paper²⁵ the review team states that they will be considering improvements that can be made to IT. APIL supports the use of technology in order to progress cases effectively, especially in courts. Increased use of e-mail and telephone conferencing can and generally does make communication more efficient and cuts out unnecessary travel time and can, therefore, create savings on costs. We agree with the NILSC's proposal to provide online submission of applications for legal aid, which could reduce running costs in the long term. Online applications have been mentioned in the past and are seen by our members as a

²⁵ *Access to Justice Review Northern Ireland, The Discussion Paper*, Northern Ireland Courts and Tribunals Service, November 2010, Para 6.5 page 33.

necessary step. Software which ensures that all fields on the form are completed before it is accepted will prevent unnecessary back and forth discussions between the Commission and practitioners, and delays in processing.

Options for making further budgetary savings

At paragraph 7.6 of the Discussion Paper²⁶, the review team suggests one method to make future savings could be to reduce the proportion of the population able to take up legal aid by lowering financial eligibility limits and/or requiring greater contributions on the part of those who do qualify. APIL does not agree with the reduction in availability of legal aid as we believe this seriously restricts access to justice for those on a low income that currently qualify for legal aid. It is also necessary to consider the knock on effect of reducing the number of personal injury cases that are pursued. Cases return money to the welfare budget by recovering social security payments and hospital attendance fees. They also return wages to the public and private sector as discussed above.

At paragraph 7.8 of the Discussion Paper²⁷, the review team also suggests that the running costs of the NILSC could be reduced. APIL would agree that this is possible through the relocation to an alternative property.

APIL also agrees with the review team at paragraph 7.12²⁸ where it suggests that contributions from other financial institutions could be used to cover the cost of advice, assistance and representation in re-possession and debt cases. We would suggest that for these types of cases it may be appropriate for the initial funding to be provided by an alternative source within public funds. Services such as the Citizen's Advice Bureau could obtain their funding from a more appropriate source such as the

²⁶ *Access to Justice Review Northern Ireland, The Discussion Paper*, Northern Ireland Courts and Tribunals Service, November 2010, Para 7.6 page 40.

²⁷ *Access to Justice Review Northern Ireland, The Discussion Paper*, Northern Ireland Courts and Tribunals Service, November 2010, Para 7.8 page 40.

²⁸ *Access to Justice Review Northern Ireland, The Discussion Paper*, Northern Ireland Courts and Tribunals Service, November 2010, Para 4.2 page 13.

Department of Finance and Personnel or the Department for Social Development. Alternatively, as a registered charity, these types of organisations would be eligible to apply for grants and funding from private organisations. This would create savings within the legal aid fund without necessarily removing any of the services that are currently provided.

Conclusion

Throughout the document there are references to cost-effective access to justice and a legal aid fund that offers value for money. From the perspective of the injured person, the Discussion Paper does not offer a position that equates to access to justice or which offers an equality of arms position, one of the guiding principles. Much of the legal aid funding leans in favour of other areas of law yet there are proposals to reduce the level of legal aid available for personal injury and, therefore, those eligible to apply will become fewer. We understand there is increasing pressure to stretch the legal aid budget as far as possible yet we have also provided good reasons in this paper for the retention of the current levels of legal aid available in personal injury law and clinical negligence. We also believe due to the low level of the legal aid budget available for personal injury and clinical negligence cases that any reduction in this would not produce any significant savings towards the £25 million needed in the next four years. With the suggestions included throughout this paper, such as the recoverability of success fees to be paid back into the legal aid fund, the NILSC can promote a sustainable legal aid fund for the future that can then become self-funding in the longer-term.

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