

**Northern Ireland Courts and Tribunals Service**

**Review of Access to Justice**

**The Report**



**A response by the Association of Personal Injury Lawyers**

**13 December 2011**

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 approximately 4,800 members in the UK and abroad, 100 of which in Northern Ireland, 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:

David Bott – APIL President;

Martin Hanna – APIL Northern Ireland Executive Committee Member;

Peter Jack – Co-ordinator APIL Northern Ireland Regional Group; and

Lois Sullivan – Secretary APIL Northern Ireland Regional Group.

Any enquiries in respect of this response should be addressed, in the first instance, to:

Katherine Elliott, Legal Policy Officer

APIL

Unit 3 Alder Court

Rennie Hogg Road

Nottingham NG2 1RX

Tel: 0115 958 0585; Fax: 0115 958 0885 E-mail: [Katherine.elliott@apil.org.uk](mailto:Katherine.elliott@apil.org.uk)

## **Introduction**

APIL fully supports a pledge to provide full and fair access to justice but the proposals and recommendations within the review teams' report fail to deliver this for injured people.

These are additional comments to our previous submissions and should be read in conjunction with those.

## **Executive Summary**

APIL welcomes the opportunity to provide further input to the Northern Ireland Courts and Tribunals Service (NICTS) on their Review of Access to Justice. APIL understands that financial resources within civil legal aid are limited and appreciates that the NICTS want to prioritise the most vulnerable but money damages cases can yield financial resources back into the legal aid fund in successful cases. APIL continues to campaign against the introduction of Lord Justice Jackson's recommendations in England and Wales and the reasons for this will be included within this response.

## **Consultation Response**

This response deals with each of the recommendations in the Access to Justice final report and provides our further comments.

- The review team propose that the Department of Justice should take steps to heighten awareness of the potential role of Legal Expenses Insurance (LEI) in Northern Ireland.

APIL supports the provision and use of legal expenses insurance provided accident victims are not denied access to a solicitor of their choice and are not penalised for choosing their own solicitor from the outset of their claim.

The association is also keen to ensure that the level of indemnity is sufficient to cover the costs of investigating and pursuing any claim. There must be total transparency in

many LEI products. Premiums are often unrealistically set and do not fully underwrite the potential outlay of investigating a case and pursuing it to trial. Arrangements between the legal expenses insurer and solicitor should not be so restrictive that they prevent the solicitor from properly pursuing the claim on behalf of the accident victim. It is also essential that the policy should explain very clearly what is covered (for example plaintiff's costs and, subject to indemnity, defendant's costs as well as others).

- The review team recommend the removal of most money damages cases, except for the more complex clinical negligence cases, from the scope of legal aid.

In deciding to propose the removal of money damages cases from the scope of legal aid, the review team has ignored APIL's and others' submissions that money damages claims only result in a cost to the legal aid fund when the case is lost. In successful claims costs are recovered from the other side through the polluter pays principle. The monies recovered in these cases far exceeds the £2 million cost to the legal aid fund as stated by the review team in its previous Discussion Document.

*The Compensation Recovery Unit (CRU) has a legal right to recover social security benefits and National Health Service (NHS) costs from compensators<sup>1</sup> 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.<sup>2</sup>*

As the statistics from the initial discussion paper show, the cost to the legal aid fund of money damages cases is very little and a fraction of the cost of other types of cases. This is because the costs in money damages cases are ultimately paid by the losing party, or are recovered elsewhere (as shown above) and, therefore; do not act as a drain on the legal aid fund.

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<sup>1</sup> A compensator is a person, company or agent paying compensation to an injured person.

<sup>2</sup> *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 opposes the majority of money damages cases being removed from the scope of legal aid and a limited provision only being reserved for complex clinical negligence cases. It is important to remember that two separately injured people could be suffering from the same life changing injuries but have received these injuries in different ways. One may have been catastrophically injured through medical negligence and one catastrophically injured in a road traffic accident. For example, the baby who is born inside the hospital that develops cerebral palsy and the man crossing the road outside the hospital that is knocked down in a road traffic collision. The same type of medical reports and preparation may be required of the legal professional running the cases but the mechanisms available to fund these two cases will be different. By removing personal injury cases from the scope of legal aid, NICTS is denying access to justice for certain categories of injured victims, purely on the grounds of how their injuries were received. We have highlighted in earlier submissions the income that money damages cases can generate, which supports the retention of legal aid for money damages cases.

- The review team believe that the introduction of conditional fees in Northern Ireland through commencement of Article 38 of the Access to Justice Order (NI) 2003, together with implementation of the relevant recommendations in Lord Justice Jackson's Review of Civil Litigation Costs, would offer a sound basis for securing and improving access to justice in money damages cases.

APIL has provided input into Lord Justice Jackson's Review of Civil Litigation Costs. Our responses have been published on our website. We fundamentally disagree with Lord Justice Jackson's proposal that the plaintiff should be forced to take a financial interest in the claim. Their damages should not be eroded to pay for their legal costs. All injured people should have access to justice and be able to preserve their damages. The current regime in England and Wales allows legal practitioners to act for personal injury plaintiffs whilst offering to ensure that they receive 100 per cent of any compensation received. We cannot support a system where an injured person has to contribute to a success fee out of their damages.

- The review team recommends that further consultation should be conducted on an insurance based solution.

APIL agrees that further consultation should be conducted on this to see if an alternative can be achieved. The insurance based solution proposed involves the injured person paying some costs from damages and we are fundamentally opposed to eroding damages in this way.

- The existing ban on referral fees should be kept.

Our members report that the ban on referral fees in Northern Ireland is toothless. It is not enforced and anecdotal evidence is that the referral market remains all but in name. Our concern has always been that referral fees or 'administrative expenses' should be transparent and that an injured person should know if their claim is being sold on. For any ban to be meaningful, it must be enforced.

- Clinical negligence cases in the High Court should remain within the scope of legal aid.

All clinical negligence cases should remain within the scope of legal aid. Removing clinical negligence cases from the scope of legal aid will result in the Health and Social Care Trusts in Northern Ireland becoming less accountable to those injured through its negligence. Investigation and disbursement funding for these types of case is always problematic. Legal aid for clinical negligence is mostly granted to children and those who lack capacity as a result of injury. By virtue of this, legal aid supports the vast majority of birth injury claims brought against the Health and Social Care Trusts, and in that respect is the key factor in enabling lifetime care support to be put in place for the most vulnerable citizens.

Removing clinical negligence cases with a value below £30,000 creates an unjust two-tier system. Injured victims with claims less than £30,000 will be denied legal aid and would be expected to pay a success fee for the solicitor to pursue their claim under these proposals, when you consider this recommendation in conjunction with the conditional fees as above. However, those injured victims with claims over £30,000 would be entitled to pursue a claim with legal aid, and be able to recoup their damages in full. Denying lower value clinical negligence claims access to legal aid creates a real and unfair access to justice issue for those that have been injured through medical

negligence. Any clinical negligence claim can be extremely difficult to run and expensive from the outset, regardless of the claims end value. Removing these claims from the scope of legal aid could make solicitors reluctant to take on claims that they may have done previously using legal aid and thus will deny those victims access to justice. It is important to remember that injured victims with clinical negligence claims with a value of less than £30,000 are just as entitled to pursue that claim as those whose claim is worth in excess of this.

- A panel of solicitors needs to be established and suitably accredited to take carriage of legally aided cases that arise in clinical negligence.

Clinical negligence cases should only be run by those who are suitably accredited and qualified. This could be evidenced through a legal professionals' CPD training completed in specific areas of personal injury law. APIL runs its own accreditation scheme and is currently developing this further to reflect areas of specialism such as clinical negligence. APIL's competency standards for clinical negligence claims will be launched in 2012.

- The DHSSPS establishes the practicability to Northern Ireland of Department of Health work in England and Wales to consider the changes to the NHS Redress Act 2006 and to improve the fact finding phase at the early stages of claims to facilitate early resolution where appropriate.

APIL has serious reservations about the NHS redress system implemented in Wales earlier this year, and we expressed this in our consultation responses to the Welsh Assembly Government when they were considering this. The concerns we expressed are:

- It is vital that any investigation into potential negligence must be independent from the body under scrutiny.
- There will be difficulties when dealing with cross border situations and independent providers.
- Any redress system such as that in Wales will make the injured people second class citizens to their English counterparts. The Regulations are so much more

restrictive for them than the current procedure available to their English neighbours across the border.

- It is important that cases such as fatal accidents and still births are excluded from any redress scheme like this altogether.
- APIL has always believed that, in terms of personal injury law, each case is different and each person is an individual, and therefore should be treated as such. Any kind of tariff on the amount of financial compensation to be offered will introduce inflexibility which is too restrictive and not appropriate in the circumstances.
- Independent legal assistance will not be available to the plaintiff unless the Welsh NHS body determines that a qualifying liability exists.
- Consideration must be given to case management tools in the county courts, processes to secure the early exchange of information between parties, appropriate details on civil bills and defence responses and the use of incentives to encourage the early settlement of cases where this is possible.

APIL supports the introduction of pre-action protocols to cases within the remit of the county courts of Northern Ireland. 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. This creates savings on costs, when compared against the current ‘trial by ambush’ process that we have now. APIL is keen for the Department of Justice (DoJ) to consider extending the pre-action protocol across personal injury and clinical negligence in the courts in Northern Ireland.

- The DoJ keeps in touch with the evaluation of the RTA personal injuries scheme being conducted by the Ministry of Justice to assess whether it contains lessons for Northern Ireland.

The RTA claims process is still very much in its infancy. Huge changes were brought about by the implementation of this new process and because of the timeframes imposed by the Ministry of Justice the problems have been many. Plaintiff and insurer



representatives are still working collectively to make the RTA portal reflect the rules. The first update at the end of March 2011 brought some improvements to the portal, but there are further changes planned to improve the portal and bring it further into line with the pre-action protocol and Civil Procedure Rules. We are currently expecting at least two further updates in 2012 to achieve this. There needs to be a full review of the system, once the problems have been remedied, before implementation is considered.

If any similar system were to be built in the future, it needs to take into account the following steps:

1. Setting of the foundations, such as the need for compulsory insurance, a database akin to askMID and a direct right of action against the insurer;
  2. Mapping out of a process;
  3. Development of the rules to reflect the process;
  4. Building of the IT solution;
  5. Testing of the IT system; and
  6. A pilot of the process.
- The DoJ should allocate a dedicated resource to the development and implementation of a strategy for securing expert witness evidence for the courts on a basis that secures value for money, consulting with stakeholders as appropriate.

Especially in clinical negligence cases, but in other types of personal injury cases too, legal professionals have to turn to expert witnesses in England and Wales as it can be difficult to obtain an expert in Northern Ireland that is willing to criticise another member of their profession in such close proximity, for example when a consultant in one hospital is asked to examine the work of a fellow consultant. This can work out to be very expensive. With this in mind, the DoJ should consider putting some kind of official mechanism in place that allows legal professionals to consider experts from outside of the Northern Ireland jurisdiction.

- While endorsing the objective of simplifying and harmonising the rules on financial eligibility for Northern Ireland, we believe it essential that resulting

changes should contribute towards the objective of bringing spend within budget and that this should be a key objective of the financial modelling. The review team recommends that the proposals within the Northern Ireland Legal Services Commission's (NILSC) Funding Code consultations in 2009 should be considered.

By adopting the NILSC's proposals within the Funding Code consultation from 2009, access to justice would be seriously limited for those on low and middle incomes. When suggesting its proposals, the NILSC was clearly aware of the effect its proposals would have on funding personal injury claims. The regulatory impact assessment said 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"*<sup>3</sup>. 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 criteria<sup>4</sup>. This is wholly unacceptable for victims injured through no fault of their own. Despite this, and the NILSC's apparent recognition at that time that there are no other suitable funding mechanisms in place<sup>5</sup> for many people in Northern Ireland, the NILSC proposed to cut funding for cases involving victims of accidents and to simply monitor the effects of this.

To plug this funding gap, the Review Team has recommended the introduction of conditional fees in Northern Ireland, but not as they currently operate in England and Wales. The Review Team proposes earlier in the final report that the conditional fees should be introduced with Lord Justice Jackson's recommendations, which means that plaintiffs will have to hand over a percentage of their damages to the solicitor to cover their legal fees. We have stated the reasons why we do not agree with these proposals above at page 6.

- The review team endorses the proposed funding code procedure whereby the solicitor and client will be notified of a refusal of legal aid together with a brief statement of the reasons and the process whereby representations can be made to the Commission to have the decision reviewed.

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<sup>3</sup> p.28, Regulatory Impact Assessment

<sup>4</sup> Figure 4.1, p.51 Regulatory Impact Assessment

<sup>5</sup> Criteria consultation paper , chapter 6: Money Damages Claims

APIL members have expressed concerns with the tight timescales that are currently in use for appeals when legal aid has been refused. Very often the solicitor can be given a period of 10 days to serve the notice of appeal and get the process started, which can be problematic for many reasons. For example, if annual leave is currently in place, the client is unavailable or to prepare a case to present to the committee when there may be numerous other commitments already in position on work schedules. Solicitors should be given the opportunity to be able to apply to delay the process where representations must be made to the committee if it is required for them to do so.

- If budgetary pressures mean that some other types of cases have to be taken out of the scope of legal aid, the review team have identified the following candidates:
  - Criminal injuries compensation.

Legal aid is currently unavailable for criminal injuries compensation cases due to the Northern Ireland Criminal Injuries Compensation Scheme 2009 (NICICS) that is in place. However, APIL submits that the scheme is not working as well for those seeking redress through the scheme as legal aid would. If a plaintiff wishes to appeal against a decision under the Scheme, they are required to seek a Review under Paragraph 61 of the NICICS. APIL members have complained of inconsistencies in the acquisition of specialist medical reports when they come across these types of cases. At the review stage it becomes evident that the sufficient ground work which is needed has not been conducted. It is essential that plaintiffs have access to representation from qualified legal professionals who have the qualifications to properly prepare for these hearings.

APIL would like to thank you for taking the time to consider our further input into the Review of Access to Justice being conducted on behalf of the Northern Ireland Courts and Tribunals Service and looks forward to hearing from you in the future.

- Ends -

## **Association of Personal Injury Lawyers**

▶ Unit 3 Alder Court, Rennie Hogg Road, Nottingham, NG2 1RX  
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● T: 0115 958 0585 ● W: [www.apil.org.uk](http://www.apil.org.uk) ● E: [mail@apil.org.uk](mailto:mail@apil.org.uk)