Northern Ireland Department of Finance and Personnel

Consultation on the Law on Damages

A response by the Association of Personal Injury Lawyers

18 July 2012

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 4,300 members in the UK and abroad, including around 80 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:
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Introduction

APIL welcomes the opportunity to provide input and submit feedback on the current law in Northern Ireland in connection with fatal accidents or claims for wrongful death. The Northern Ireland Department of Finance and Personnel (DFPNI) notes that the Ministry of Justice consulted on similar proposals in 2007 as well as the Scottish Government who examined its law in relation to claims for wrongful death more recently. APIL has previously submitted comments in both of those jurisdictions.

We remain concerned that not all of the Law Commission's recommendations have been implemented in England and Wales. The focus of this consultation must be the principle of full and fair compensation for the claimant or their bereaved families.

Consultation Questions

Q. 1. Do you agree that the Fatal Accidents (Northern Ireland) Order 1977 should be amended to include a residual category of claimant limited to an individual who was wholly or partly maintained by the deceased immediately before the deceased's death or the accident that led to the death?

We agree that a residual category should be added to the statutory list of those entitled to claim for financial loss because it is entirely appropriate that people who were actually dependent on the deceased should not suffer financial detriment simply because they are not on a statutory list. However, that list should not be limited to an individual who was wholly or partly maintained by the deceased immediately before the deceased's death or the accident that led to the death. (See Q. 2.)

Q. 2. Do you agree that the new residual category of dependant should include those whose dependency would have begun after the death?

Yes. Any new residual category should also be open to those who would have been partly or wholly maintained after the death. A typical situation in which an individual could be seriously disadvantaged if the restriction to before death is applied, is when a husband or partner dies during his wife or partner's pregnancy. Clearly, the child would have been maintained by the father, either wholly or partly, and so the suggested limitation would mean considerable hardship for the bereaved family. We appreciate and support the Department's concern to prevent unduly speculative litigation, but, in the experience of our members, the courts have in the past, and can be relied upon in the future, to ensure this does not happen.

Q. 3. Do you agree that, where a claimant is the spouse or civil partner or former spouse or civil partner of the deceased, the fact (but not the prospects) of his or her remarriage or new civil partnership should be taken into account in assessing damages under the 1977 Order?

No. We do not agree that the fact of a person's remarriage or entry into a civil partnership should be taken into account when assessing a claim for damages under the 1977 Order. The primary reason for this is that the obligation to support the bereaved spouse or civil partner would be passed from the tortfeasor to the new spouse or partner, which is wrong.

Q. 4. Do you agree that, where the claimant is a cohabiting dependant of the deceased, the fact (but not the prospects) of the claimant's new financially supportive cohabiting relationship (of at least two years duration) should be taken into account in the assessment of damages?

No. We do not consider that the fact of a person's financially supportive cohabitation of at least two years following the death should be taken into account, for the same reason outlined in our answer to Q. 3.

Q. 5. Do you agree that the courts should not take into account in the assessment of damages the prospect that the claimant's relationship with the deceased would have ended, unless either the deceased or claimant had prior to the death applied to the courts for divorce/dissolution of a civil partnership, judicial separation or nullity, or were no longer living together immediately before the death?

We do not agree that the courts should take into account the fact that the couple are no longer living together at the date of death as evidence that the marriage or partnership has irretrievably broken down. There are many reasons why a couple may not be living together, such as when one partner is working away from home for a significant length of time, or when one partner is in hospital or in full time care away from the home.

It would also be quite wrong to view a separation, which could be extremely brief, as a 'trigger' for the breakdown of a relationship, when brief separations are far from uncommon in generally successful, long-term partnerships. This would also encourage unnecessary intrusion by defendants into the private lives of the deceased and their partners.

If, however, one partner has petitioned for divorce, nullity or dissolution of the partnership, then this can be taken into account. This should not, however, be an automatic bar to making a claim, but something which the court would have to take into account when determining the extent of dependency.

Q. 6. Do you agree that:

(a) the 1977 Order should remain silent on the question of whether the surviving parent's new relationship should be taken into account in assessing damages payable to a dependant child;
(b) the 1977 Order should be amended to provide that the surviving parent's new relationship should not be taken into account in assessing damages payable to a dependant child; or
(c) the 1977 Order should be amended to provide that the courts may take into account the surviving parent's new relationship in assessing damages payable to a dependant child?

We agree with (b). We do not agree that remarriage, civil partnership or financially supportive cohabitation should be taken into account when assessing a claim for damages on the part of any eligible children. The current anomaly must be addressed by changing the position in relation to eligible children.

Q. 7. Do you consider that bereavement damages should be abolished, without replacement?

No. We do not believe that bereavement damages should be abolished without replacement. While it is self-evident that the level of pain and suffering following bereavement is different for all individuals and that loss of a loved one is a part of everyday life, it is important not to lose sight of the fact that, in the cases under discussion, a bereavement has occurred through the negligence of another party. As stated in the consultation paper, the Law Commission proposed that the function of bereavement damages should be explained more fully to the public as follows:

> *The function of bereavement damages is to compensate, in so far as a standardised award of money can, grief, sorrow and the loss of the non-pecuniary benefits of a deceased's care, guidance and society.*[1]

The fact that a loved one has died needlessly can only increase the sense of pain and loss of the bereaved and should be compensated for by the tortfeasor. To suggest that a death should not receive a token acknowledgement is socially and morally repugnant and would not serve to enhance public confidence in the civil justice system.

Q. 8. Do you agree that, if bereavement damages are to be retained in the law of Northern Ireland, the list of those eligible to claim such damages should be extended to include any parent of a minor child in relation to whom he or she has parental responsibility?

Yes. We believe that anyone exercising parental responsibility of a minor child should be entitled to claim bereavement damages for children aged under 18. Society views it as an unnatural sequence of events for a parent to witness the loss of a child as, in the natural order of things, parents should pre-decease their children. It is, surely, both distasteful and impossible to argue that a child over the age of 18 is any less of a loss than a younger child. Therefore, if bereavement damages are to be retained in Northern Ireland, the list of those eligible to claim such damages should be extended to include any parent of any child to whom he or she has parental responsibility.

We also believe that the statutory list should be extended to include parents of stillborn children. While parents in this situation can obtain damages through common law, this is not automatic. Case law is old and text books are unclear in this area and clarity would be welcomed.

[1] Law Commission Report No 263, paragraph 6.7.

Q. 9. Do you agree that cohabitants should remain ineligible to claim bereavement damages, pending a future review of the law relating to cohabitation?

No. The statutory list should be extended to include people who, although not married to the deceased, have lived with the deceased as husband and wife (or if of the same sex in an equivalent relationship) for not less than two years immediately prior to the accident.

Q. 10. Do you agree that minor children of the deceased should remain ineligible to claim bereavement damages?

No. Children of the deceased (including adoptive children) who are under 18 should be added to the statutory list, as should adult children. Feelings of pain and loss clearly do not cease once a child reaches the age of 18.
We do recognise, however, that it is reasonable to impose a limit on this and we suggest that it would be reasonable for children over the age of 18 to be excluded from the statutory list only once they have left the family home in order to start another family household either with a spouse or with a co-habiting partner.

While the loss will obviously still be keenly felt, the closeness of the relationship and nature of emotional dependency are different for a child over the age of 18 who may be temporarily living away from home at university, living alone, or living in the family home when a parent dies, compared with a child of the same age who has left home to marry or co-habit with a partner.

Q. 11. Do you agree that if bereavement damages are to continue to be available, the list of those eligible to make a claim should not be extended to include (a) step-parents in respect of their stepchildren, (b) siblings of

the deceased, (c) adult children of the deceased, (d) engaged couples and (e) parents in respect of their deceased adult children.

Bereavement damages must continue to be available and the list of those eligible to claim must be extended to include step-parents in respect of their step-children, siblings of the deceased, adult children of the deceased, engaged couples and parents in respect of their deceased children.

Much can be learnt here from the Damages (Scotland) Act 1976, which has been effective in dealing with bereavement damages (or 'loss of society' in Scotland for more than 30 years.

Under the terms of the Act[2], those relatives entitled to bereavement damages are:

- Any person who immediately before the deceased's death was the spouse or civil partner of the deceased or in a relationship which had the characteristics of the relationship between civil partners

- Any person, not being the spouse of the deceased, who was, immediately before the deceased's death, living with the deceased as husband or wife

- Any person who was a parent or child of the deceased

- Any person not a parent or child of the deceased who was accepted by the deceased as a child of his family

- Any person not a parent or child of the deceased who accepted the deceased as a child of his family

[2] Damages (Scotland) Act 1976, Schedule 1

- Any person who was the brother or sister of the deceased; or was brought up in the same household as the deceased and who was accepted as a child of the family in which the deceased was a child

- Any person who was a grandparent or grandchild of the deceased

Clearly, the law in Scotland has no difficulty in recognising the closeness between parents, children of all ages, grandparents, siblings and other people living with the deceased as part of the family. And we submit that the law in Northern Ireland should offer the bereaved in this jurisdiction no less comfort than their Scottish counterparts.

However, the Scottish Act does omit the category of fiancé. We agree with the Law Commission's proposals that it would be inconsistent to treat engaged couples in a different way from cohabiting couples and so the Northern Ireland list should be amended to include engaged couples.

Furthermore, all of those eligible to claim should be entitled to a separate payment without having to share the payment as if it were a syndicate lottery win. The principle of bereavement damages must be the same irrespective of the size of the deceased's family.

Q. 12. Do you agree that Article 6(1) of the Fatal Accidents (Northern Ireland) Order 1977 should remain in place?

Yes we agree that Article 6(1) of the Fatal Accidents (Northern Ireland) Order 1977 should remain in place.

Q. 13. Do you agree that a claimant should personally account to the carer for the damages received for gratuitous care?

The *Hunt v Severs* trust approach should be replaced by a personal obligation to account. It is distasteful that there is a financial incentive on a bereaved spouse to buy in care which can be recompensed, rather than provide it gratuitously, which cannot.

Q. 14. Do you agree that a claimant's obligation to account to the carer for the damages for gratuitous care should apply only to the damages received for care provided prior to the date of the trial?

We agree that a personal obligation to account should apply to damages for future as well as past gratuitous care.

Q. 15. Do you agree that damages should be recoverable for gratuitous care provided by the defendant tortfeasor both before the date of trial and in the future?

Yes we agree that damages should be recoverable for gratuitous care provided both before and after the trial.

Q. 16. Do you agree that a claimant in a fatal accidents case should be able to claim damages for gratuitous care provided by a third party and, if so, should–

- **the damages be recoverable for pre-trial and future gratuitous care when the third party carer providing services in place of the deceased is the tortfeasor; and**
- **the claimant's obligation to account for the damages for gratuitous care apply only to the damages received for care provided prior to the date of the trial?**

A personal obligation to account for damages for past gratuitous care, regardless of the identity of the carer, should apply generally except where the past gratuitous care is provided by the tortfeasor.

Payment of damages in these circumstances is an unnecessary and illogical transaction because the defendant will pay the money to the claimant, only for the claimant to immediately return it to the defendant.

We envisage that this is most likely to occur in domestic situations such as where a husband or wife has been injured after being a passenger in a car being driven negligently by the spouse.

Given the close tie of love and affection, and likely feelings of deep regret about the injury, it is natural that they would wish to provide gratuitous care and this should be encouraged. Our only concern would be that where the defendant is insured, he may conveniently avoid this rule by entering into a contractual agreement with the claimant for paid-for care, meaning that he receives money for care that would he would have otherwise provided gratuitously. As there is no clear solution to this problem, however, we suggest it is more a matter for the insurers to work out with defendants.

The rule is also helpful to defendants in that they save on the costs of care by providing the service themselves.

Finally, we would also question the payment of damages to defendants for future gratuitous care. This once again appears to be an unnecessary and illogical transaction because the money will be eventually repaid to the defendant. The only apparent advantage would be to the claimant where future gratuitous care is not actually provided, leaving him with sufficient funds to cover alternative care.

Q. 17. Do you agree that the law in Northern Ireland with regard to the recoverability of damages should, in principle, continue to mirror the law of England & Wales?

As an organisation APIL wants what is best for the claimant. There are aspects of the law on damages in England and Wales which APIL do not believe go far enough in support of a potential claimant's favour. Ensuring the law in Northern Ireland mirrors England and Wales in its entirety would not be in the interests of injured people.

A mirror image does not always fit well when dealing with different jurisdictions and in this instance APIL would support the DFPNI in looking also towards the Scottish jurisdiction and the differences it offers from England and Wales. We have already seen that the law has been successfully changed in Northern Ireland through the implementation of the Damages (Asbestos-Related Conditions) Act (Northern Ireland) 2011 introduced to compensate victims for pleural plaques. In some circumstances it is wholly appropriate for Northern Ireland to depart from the law in England and Wales where the outcome benefits those negligently injured or killed through no fault of their own.

Northern Ireland should not simply mirror the law in England and Wales but should do what is best for the claimant. This may involve borrowing from England and Wales and from Scotland or from other jurisdictions. It may involve Northern Ireland following its own course entirely.

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