Judicial Studies Board/Northern Ireland Court Service

Review Group Draft Report on Civil Justice

A response by the Association of Personal Injury Lawyers

December 2016

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation with a 20-year history of working to help injured people gain access to justice they need and deserve. We have over 3,500 members committed to supporting the association's aims and all of which sign up to APIL's code of conduct and consumer charter. Membership comprises mostly solicitors, along with barristers, legal executives and academics.

APIL has a long history of liaison with other stakeholders, consumer representatives, governments and devolved assemblies across the UK with a view to achieving the association's aims, which 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.

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Introduction

APIL welcomes many of Lord Justice Gillen's recommendations, in particular the amendments to the Pre-action Protocol for Personal Injury Litigation and Damage-only Road Traffic Accident Claims to improve efficiencies in the claims process. A move towards paperless or at the very least "paper light" courts, and greater opportunities for virtual hearings are also welcomed. We are concerned however, that personal injury claims should not be included in pilots for platforms specifically to deal with small claims, including the online court and compulsory mediation.

Executive summary

- APIL welcomes the move towards paperless courts, as this will result in efficiencies in the claims process.
- Increased use of virtual hearings, email and telephone conference hearings is also to be welcomed.
- Personal injury claims in Northern Ireland should be kept out of the proposed online court and compulsory mediation pilots. These claims are dealt with in a just and proportionate manner through the county courts.
- Costs budgeting and proportionality are not required in Northern Ireland. Introducing these concepts will cause confusion and add complexity, and are solutions to a problem that Northern Ireland does not have. These concepts were introduced in England and Wales to address the perception of spiralling litigation costs.
- If fixed fees are introduced in the High Court, there should be full consultation beforehand to ensure that the fees are set at the right level and are reflective of the work carried out. There should also be a commitment that the fees are subject to an annual inflationary increase and that they are reviewed every three years to ensure that they continue to be set at the right level
- APIL is pleased with the suggested amendments to the County Court Pre-action Protocol for Personal Injury and amendments to the Practice Directions
- APIL welcomes the recommendation that plaintiffs should be permitted to make lodgements.
- The county court jurisdiction should not be increased to £75,000, but the civil justice centres will provide an opportunity for greater specialism for county court judges and this opportunity should not be wasted.

Comments on Recommendations

The current dominance of paper based systems to be replaced by a commitment to paperless courts and digitalisation.

We agree that there should be a move towards paperless courts. We also acknowledge that the necessary reforms to the system to enable a paperless system will be costly. It is extremely important that the costs arising from these reforms are borne by the court service and not passed on to the user through extortionate court fee rises. We believe that once the necessary investment has taken place, costs would be saved in the long term.

We also welcome the proposals for electronic bundles for full applications to lead to applications being determined without the need for any party to attend for an oral hearing in

cases such as interlocutory applications, second reviews, and unopposed applications in all Divisions of the High Court, and in the county court. Hearings could take place via video conference or email. We agree that there is no good reason why certain hearings such as straight forward case management hearings, some interlocutories, date fixing and reviews cannot be conducted on paper (email) or conducted virtually. We agree that well prepared papers could be filed and the decision ultimately left to the judge to exercise on papers or on, for example, telephonic or Skype communication. Currently, there is a lack of efficiency, with APIL members reporting that in certain courts, they are required to wait for half a day to be seen by a judge to simply say that the case is still going ahead. Case reviews could easily be done instead via email or telephone conference.

A voluntary pilot scheme for Online Dispute Resolution as an alternative to court in certain types of low value money damages cases of under £5,000 excluding personal injuries over the value of £1,000

We do not believe that personal injury claims should be included in the pilot for online dispute resolution. ODR may be of assistance and an alternative for small claims, where a person is trying to conduct a claim without legal representation. With personal injury claims being excluded from the small claims court in Northern Ireland, however, and being dealt with in an efficient manner through the county court, there is no need for personal injury claims to be included in the pilot for an online court. We agree with Lord Justice Gillen at paragraph 16.75 that personal injury cases are best dealt with by our county courts which provide a speedy and just environment to resolve what can often be complex cases at a very modest cost to the “at fault” party.

A fresh approach to costs

Costs management and costs budgeting

We agree with the report’s assertion that comparing costs regimes in England and Wales with Northern Ireland is comparing apples and oranges. The perceived problem of disproportionate costs in England and Wales which the Jackson reforms sought to address simply does not exist in Northern Ireland. We agree that the task of costs management/costs budgeting as it applies in England and Wales should not be rolled out in Northern Ireland, particularly as the task is complex and uncertain.

Summary assessment of costs

Greater clarity in this area would be welcomed.

Fixed fees in the High Court

We would not oppose fixed fees in the High Court in order to create more certainty, but there must be a full review to ensure that fees are set at the right level. As the consultation document states, there is arguably already a high degree of predictability in respect of legal costs in personal injury actions before the High Court. The fixing of fees in the High Court should simply be a way to solidify the rates that are already calculated (between the insurers’ scale and the Belfast Solicitors Association Scale), ensuring that the fees are proportionate and set at the right level for the amount of work carried out. Once set, the fees should be subject to regular inflationary increases. There should also be a requirement to

carry out a full review of fees every three years. The requirement for inflationary increases and for regular reviews of fees should be enshrined in statute.

While the scale costs system in the county court works well, we also reiterate the need for a full review of scale costs, which is long overdue. In real terms, scale costs have only been increased by 4 per cent in 7 years. If a system of fixed fees was to be introduced in the High Court, it would be timely to carry out a full review of the level of scale costs, also.

Alternative methods of funding money damages claims

We reiterate our position that the introduction of conditional fee agreements with success fees recoverable from the defendant, would be welcomed as an alternative funding mechanism if legal aid is removed for money damages claims. CFAs with recoverable success fees will ensure access to justice across the board, not just for those with low incomes.

Recoverable success fees are by far the best option to replace legal aid, as the system is based on polluter pays, and the successful plaintiff will be sure to retain 100 per cent of their damages, damages which have been awarded for the purpose of putting them back, as closely as possible, to the position they were in before the negligence. The perceived issues in England and Wales which led to the Jackson review and a funding model with success fees taken from the claimant's damages, were unique to that jurisdiction. Disproportionate legal costs are not an issue in Northern Ireland, because of the scale costs system. Scale costs are essentially fixed, and ensure that legal costs never go beyond damages awarded. Further, as a small jurisdiction, recoverable success fees would be the only way to get an alternative method of funding off the ground.

Given that the ATE market is not yet properly developed, however, a system of qualified one way costs shifting, which is then supplemented by ATE insurance, may be the better option. ATE premiums should be recoverable, or at the very least legal aid should remain for those who cannot afford to pay an ATE premium. In England and Wales, qualified one way costs shifting operates by providing that, if a claimant is unsuccessful with their claim, they will not be ordered to pay the defendant's costs. A defendant will, however, still be ordered to pay a successful claimant's costs. This is "qualified", because the claimant loses this protection if they fail to beat the defendant's Part 36 offer to settle; the claim is found on the balance of probabilities to be "fundamentally dishonest"; or the claim is struck out as disclosing no reasonable grounds for bringing the proceedings, or as an abuse of process, or for conduct likely to obstruct the just disposal of the proceedings.

A system of qualified one way costs shifting implemented in Northern Ireland must be robust and must not lead to uncertainty or satellite litigation. There are a number of pitfalls in the QOCS rules in place in England and Wales, and these should not be transferred to any model adopted in Northern Ireland.

The main issue with QOCS in England and Wales is the uncertainty surrounding fundamental dishonesty. Part 44.16(1) CPR provides that orders for costs against a claimant may be enforced, to the full extent of such orders with the permission of the court, where the claim is found on the balance of probabilities to be fundamentally dishonest. Lord Justice Jackson's original proposal was for there to be an exception to QOCS based on fraud by the

claimant. When CPR was amended to implement this proposal, the provisions on QOCS included an exception where the court found there had been fundamental dishonesty by the claimant. The Civil Justice Council of England and Wales (CJC) made recommendations on fundamental dishonesty, and suggested that the claimant should lose the benefit of QOCS if fraud was proven on a civil standard.

The CJC recommended that the definition in *Brighton and Hove Bus v Brooks*[1] should form the basis of any definition of fraud to be used. In *Brighton*, the criteria required to be present for fraud were that the fraud must be pleaded by the defendant: statements and representations must have been made that were false: the statements must have been likely to interfere with the course of justice in some material respect; and at the time they were made, the maker had no honest belief in their truth and knew they were likely to interfere with the course of justice. The CJC explicitly rejected the suggestion that anything short of fraud, such as exaggeration, should lead to the loss of QOCS protection. Unfortunately, the Government did not take on board this recommendation, and the term "fundamentally dishonest" was included in the Civil Procedure Rules.

This has created uncertainty for both claimants and defendants, with case law being left to determine exactly what fundamental dishonesty is. County Court cases so far have indicated that fundamental dishonesty is a lower threshold than fraud. For example, certain cases appear to equate an adverse finding of fact with a finding of dishonesty – *Creech v Severn Valley Railway*[2]. In this case, a man attempted to sue Severn Valley Railway after he tripped on matting left behind after an ice rink, which had been set up at the station to entertain people whilst a track was closed, was subsequently removed. The judge in this case accepted the railway's evidence that the ice rink was still on the concourse at the time that the accident was meant to have occurred, and so the claimant was deemed fundamentally dishonest and lost QOCS protection. He was ordered to pay £11,000 in defendant's costs. However, it is clear that just because a witness has misremembered, or has been found not to be credible, this does not equate to them being dishonest.

A further issue highlighted in several County Court decisions is that defendants appear to be allowed to make an application informally at the end of the trial, without formally pleading the allegation of fundamental dishonesty, as was the case in *Oana v O'Duinn*[3].

The implementation of QOCS in Northern Ireland would provide an opportunity to rectify these issues and create greater certainty.

Court fees

Full costs recovery should not be a main aim when setting court fees. The whole of society benefits from the functions of the court, not just the direct users. For example, most people go to work safe in the knowledge that if they are negligently injured in the course of their employment they are protected by both the law and the impartiality of the court system which enforces the law. Furthermore, it is often the threat of court proceedings – and the possible sanctions which can accompany them – which will encourage observance of the law, and if

[1] [2011] EWHC 2504 (Admin)
[2] Unreported, 2015
[3] Unreported, 2015

necessary, voluntary payment from negligent defendants. An ordinary person should not be barred from using the courts because they cannot afford the necessary fees, especially if they have already contributed to the running of the system through the payment of taxes.

Users of hospitals and schools do not have to pay to access those facilities, as they are funded through taxation, and the courts, as another public service, should be similarly funded.

CPR Part 44

We do not agree that CPR Part 44 should be introduced into the Northern Ireland rules. Firstly, it is wholly unnecessary for proportionality provisions to be introduced into the Northern Ireland jurisdiction. Costs in the county court are already fixed via scales, and as the consultation acknowledges, High Court costs are already largely predictable, being calculated using the insurers' scale and the Belfast Solicitors Association Scale. A system cannot have both proportionality and fixed fees – if fees are fixed, they are fixed at a proportionate level in the first place. Further, feedback from England and Wales indicates that it is still unclear how the proportionality provisions work. There is simply no point in introducing unnecessary rules that would introduce complexity and confusion.

A greater emphasis on pre-action protocols and case management, with effective sanctions for non-compliance

Pre-action protocols

We welcome the suggested amendments to the county court pre-action protocol for personal injury claims. The recommendation at 7.12 that the pre-action protocol for the Queen's Bench Division should provide that a detailed letter of claim should be accompanied by a police report or health and safety report, is unworkable. It would be simply impossible to obtain a police report before a letter of claim needs to be sent and would result in huge delays to getting the claim off the ground. In the England and Wales pre-action protocol, a police report is not required before the letter of claim is sent, instead the draft letter of claim annexed to the protocol states: "We are obtaining a police report and will let you have a copy of the same upon…"[4]

Practice Directions

We welcome the proposed refinement and co-ordination of Practice Directions. APIL suggests that there should be consideration of standard directions for the progression of court matters, which should be applied uniformly in all County Courts. Penalties should be given to those who do not comply with the direction.

Part 36/lodgements

We welcome the recommendation that the rules should be amended to allow the plaintiff to make an offer of settlement within the same timescale as the present lodgement system. The Part 36 provisions in England and Wales have demonstrated benefits in terms of settlement rates, and have helped keep cases out of court and prevent the eating up of court

[4] Annex B: https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_pic

resources. We believe that allowing plaintiffs to make an offer of settlement will provide similar benefits.

Alternative Dispute Resolution

As with the online court, we believe that personal injury claims should be excluded from the compulsory mediation pilot, and that it should involve only those claims in the small claims court. The consultation states that "at present, the very type of case which most needs a less costly alternative to the courts - that is, low value cases, does not have such a system. Small claims are a natural area for consideration of mediation as a more proportionate means of dispute resolution". Personal injury claims are already dealt with in a proportionate manner through the system of scale costs in the County Court.

Additionally, APIL believes that while practitioners should be aware of ADR and its benefits for injured people, it should not be forced upon unwilling parties.

A new, narrower approach to disclosure

We welcome a narrower approach to disclosure and in particular welcome the recommendation to provide for automatic pre-proceedings disclosure of relevant documents. We suggest that a form mirroring the N265 form for standard disclosure should be completed by the defendant, as this directs them to their duties under the standard disclosure provisions.

Feedback from England and Wales is that the duty of continuing disclosure (CPR 31.11) needs to be tightened, as it is frequently abused by defendants.

Expert evidence

Joint selection of experts

APIL agrees with the review at 11.20, that the plaintiff should ultimately be free to instruct an expert of their choice. If the rules/protocol must refer to joint selection/instruction/appointment of experts, it should be on the basis of joint selection of an expert, and not joint instruction of an expert. Further, the rules/protocol should provide for joint selection, but should not insist on it.

A rule to provide for written questions to experts to mirror CPR Part 35.6

We are pleased that the review group is aware of the potential pitfalls of introducing CPR Part 35.6 into the Northern Ireland jurisdiction[5]. Practitioners in England and Wales report that this provision is currently open to abuse by defendants. Part 35.6.1(2)(b) requires that a party may put written questions about an expert's report to the expert, but that they must be put within 28 days of service of the expert's report and must be for the purposes only of clarification of the report. In practice, defendants frequently flout the 28 day rule, and then seek permission to ask questions at a later date from the court. This permission is usually granted.

Questions also frequently go beyond the remit of "clarification of the report", and again, these broader questions are often permitted by the court. Even if the claimant were to

[5] Paragraph 11.31 of the review

challenge this, the court usually continues to allow the questions, as however obtained, the answers are useful to the trial judge.

A further concerning trend is that defendants tend to say that they require disclosure of all the clients' medical records before they can ask questions under Part 35.6. This is not a rule in law, as the medical expert will already have seen the relevant documents, and there is no duty to disclose, as confirmed in the case of *Bennett v Compass Group.* Here, Lord Justice Clark stated that "… assuming there was jurisdiction to make an order of this kind, such an order should only be made in exceptional circumstances because in principle a patient should retain control over his or her own medical records. I entirely agree that a judge should think long and hard before making such an order because a defendant should only be allowed to see a claimant's medical records in carefully defined circumstances." He further stated that "Moreover, the rules plainly contemplate that parties should have the advice of their own solicitor in relation to disclosure. For example, CPR 31.3(2) provides that a party is not required to permit inspection of documents where: "... a party considers that it would be disproportionate to the issues in the case to permit inspection of documents ..."'

New methods of appeal to the Court of Appeal

In relation to appeals from the High Court on interlocutory matters as well as substantive appeals by way of a "re-hearing", the review group's proposal is not only to require leave in all cases under the leave to appeal process, but that there should also be a raised threshold for appeal to "real prospect of success" or "some other compelling reason" for the Court of Appeal to hear the appeal. These concepts are vague. If a potential appellant's rights are going to be restricted, the position needs to be clear. Practitioners in England and Wales report that the "real prospect of success" test means that there is room to interpret the test laxly or stringently (some judges having a tendency to do so one way or the other, at present).

Increase in jurisdiction of county court to £75,000

APIL is opposed to an increase in the county court jurisdiction to £75,000. We are concerned that a further increase in the jurisdiction of the county court will lead to under compensation, as county court judges will shy away from awarding compensation towards the top end of the jurisdictional limit. Cases up to this level are complex, and require specialist knowledge from the judge to decide the case correctly. The consultation document itself acknowledges that there is a perceived or actual problem of personal injury claims in the county court attracting lower awards than if pursued in the High Court. We also question how the vast increase in workload would be addressed – additional judges would be required and even then it is likely that there would be delays and backlogs in the county court.

We welcome the decision to keep the majority of clinical negligence claims within the High Court. There are many other types of claim however, such as disease claims, that are relatively low in value but that involve extremely complex issues which would be far better suited to the High Court.

APIL has called on numerous occasions for a system of ticketing, and a greater degree of specialism for county court judges. There is an opportunity to introduce greater specialism in the county court judiciary through the newly established civil court centres. At present, the system is set up to give judges the freedom to hear cases at whichever court they wish to,

with parties travelling to that court. Instead, where the case is heard and which judge hears the case should be determined by the background and specialism of the judge. The civil justice centres are a real opportunity to ensure that cases are heard by the right judge to ensure a fair outcome. Justice should remain local, but with the move to establish a number of civil justice centres throughout Northern Ireland, this is an opportunity to establish a system of ticketing, with personal injury cases being heard only by specialist personal injury judges. We envisage a system similar to that established in Scotland, through the Personal Injury Court.

Increase in District Judge jurisdiction

We believe that even if the financial limit of the county court is increased, the financial jurisdictional limit of the District Judges court should not be increased. District Judges are often put under immense pressure from listing departments to deal with cases in the shortest amount of time. District Judge cases, even of low value, are not necessarily legally straight forward as they often involve complex arguments on apportionment or causation, and medical evidence can often involve exacerbation injuries or pre-existing conditions. Only specialist judges who have been ticketed should hear PI cases.

Pre-action Protocol Amendments

We welcome all of the amendments to the county court pre-action protocol recommended by Lord Justice Gillen at paragraphs 16.57 – 16.65 of the consultation document. We are concerned however, that at least some of the amendments to the protocol appear contingent on the county court jurisdictional limit being raised to £75,000 – paragraph 16.40 states "I consider that *if there is an increase in the jurisdiction* in the county courts, this question of adequate notice of defences must be addressed [emphasis added]". For the reasons above, we do not believe that the county court jurisdiction should be increased to £75,000, and the amendments to the protocol need to go ahead regardless of this, to ensure an efficient county court process.

Clinical negligence reforms

Paper-light court bundles

As above, we agree that there should be a move towards paper-light and paperless courts to improve efficiency.

Interlocutories and reviews on the phone/via email

As above, we agree that there should be greater use of telephone conferencing, virtual hearings and email.

ADR

As above, APIL believes that while practitioners should be aware of ADR and its benefits for injured people, it should not be forced upon unwilling parties. It may be beneficial for parties to have the opportunity to consider whether the case can be disposed of by way of negotiation, discussion or mediation, but alternative dispute resolution should not be compulsory.

Experts

If the rules/protocol must refer to joint selection/instruction/appointment of experts, it should be on the basis of joint selection of an expert, and not joint instruction of an expert. Further, the rules/protocol should provide for joint selection, but should not insist on it. We agree that the court should not have the power to order the use of a single joint expert unless agreed by the parties.

Small claims jurisdiction

We welcome the review group's recommendation to keep personal injury and road traffic cases out of the small claims court.

Lord Justice Gillen also mentions at 16.77 that he is encouraged that the Northern Ireland County Court Rules Committee is looking at introducing a lower scale costs band for awards of £0-500. We point out, however, that as well as catering for "insurance excess" cases, some employers' liability cases will also fall within this bracket. An employers' liability case that settles for £500 will often require the same amount of work as an employers' liability case that settles for £2,500 – disputed cases require the same amount of work regardless of value and the amount of damages awarded should not be the overriding consideration. If a lower band of scale costs is introduced for cases below £500, the solicitor will simply not be remunerated properly for the work that they are carrying out, or may not be able to carry out the work necessary due to time/money constraints. The injured person will then either be under-compensated, or not compensated at all. The same amount of work goes into establishing liability in disputed cases regardless of value – the amount of damages should not be the overriding consideration.