

Scottish Government

Independent Review of the Regulation of Legal Services



A response by the Association of Personal Injury Lawyers

March 2018

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation with a history of over 25 years of working to help injured people gain access to justice they need and deserve. We have over 3,400 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.

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

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Introduction

APIL welcomes the opportunity to respond to the Independent Review of the Regulation of Legal Services in Scotland. We set out below our main areas of concern in relation to the regulation of legal services, from a personal injury perspective. It is important that those who need legal advice are able to access quality legal services providers who are regulated, and that people are fully informed about the quality of the providers they choose. There are several areas, as highlighted below, where members of the public may be misled or left vulnerable as a result of substandard advice, because they are not provided with the right information at the outset, to enable them to make an informed choice.

APIL:

- Welcomes the regulation of claims management companies in Scotland by the Financial Conduct Authority;
- Calls for a ban on cold calling for personal injury claims for both claims management companies and solicitors in Scotland;
- Calls for consumers of legal services to be given information about their choices for pursuing their claim. Pursuers should be given specific information about the consequences of using BTE insurance and direct offers from insurers;
- Believes that the term “lawyer” should be protected, and only those who are legally qualified should be permitted to use it;
- Believes that consumers should be provided with as much information about the quality of legal providers, to enable them to make a fully informed choice. Accreditation is the best way for firms to highlight specialism and competence in a particular area.

Claims Management Companies

Regulation

Currently, claims management companies are not regulated in Scotland. Anyone, regardless of qualification, can set up a claims management company. These companies are not required to meet any professional standards, and are not required to hold any professional indemnity insurance, should something go wrong. There are no regulations on what claims management companies can charge for their services, which will often include commoditised advice, which they may not even be qualified to give and which will not be on par with that offered by a qualified solicitor in a regulated firm.

We welcome that claims management companies in Scotland (as well as England and Wales) will become regulated by the Financial Conduct Authority through the introduction of the Financial Guidance and Claims Bill. We welcome the measures associated with this move, including that managers (those performing “controlled functions”) of claims management companies will become personally accountable for the actions of their business. Tough sanctions should also mean that those companies that are closed down for breach of the regulations will not simply be able to just change their name and re-open without repercussions – a behaviour which is currently found in England and Wales, where CMCs are regulated by the Claims Management Regulatory Unit at present. Robust regulation of the entire legal sector is vital, to ensure that injured people are properly protected against exploitation. The FCA will also review the fees charged by CMCs.

Cold calling

One particularly concerning behaviour perpetrated by some claims management companies is cold calling. APIL continues to campaign for a ban on cold calling for personal injury claims throughout the UK. The practice is distasteful and intrusive, and exploits vulnerable people. It also generates the false perception that it is easy to obtain compensation for a personal injury, even if that injury did not occur.

In England and Wales, solicitors are rightly banned from cold calling by the Solicitors' Regulation Authority Code of Conduct. In addition to a ban on cold calling for claims management companies, we support a ban on cold calling for solicitors in Scotland. We also suggest that if a client has come to the solicitor through cold calling by CMCs, there should be a duty on the solicitor to report that CMC to the Financial Conduct Authority.

Pursuers must be fully informed about their choices

BTE Insurance

Those seeking advice for their personal injury claim should be fully informed about the ways in which they can obtain this advice. Those who obtain advice through Before The Event (BTE) insurance, for example, do not have full freedom of choice as to who their solicitor can be. While BTE insurance is a perfectly legitimate way to fund a legal claim, we are concerned that those funding their case in this way are not being properly informed about the restrictions that come with this option, from the outset.

The Financial Ombudsman has recently published updated guidance to allow policyholders to choose their own solicitor from the point that legal services need to be started, where negotiations have broken down and it will be necessary to issue proceedings. Until that point, the person obtaining advice through the BTE insurer will not have a choice about the solicitor that they use – they will be provided with one by their insurer. There is a risk that the solicitor chosen by the insurer may attempt to avoid litigation to keep costs down, with a subsequent risk that the case will be settled for less than if the pursuer had had full freedom to choose their own solicitor.

Direct contact by third party insurers

Even where the person does not have BTE insurance, they will be at risk of being “captured” by the third party insurer following the accident, with the third party insurer making a direct offer to them to settle the claim. APIL has long campaigned against defendant insurers “capturing” claims in relation to personal injury. This practice results in great unfairness and denial of access to justice for the pursuer as the insurer has an interest in settling the claim as quickly and cheaply as possible. There will be lack of transparency and the injured person will not have access to independent legal advice. Literature available to injured people on the ABI website¹ provides a misleading picture of this practice, stating that people who deal directly with the other side’s insurer receive fair compensation faster when compared with those with legal representation. The guide goes on to say that “it is not in the insurer’s interest to offer you an unfair amount, and the process for valuing an injury claim is the

¹ <https://www.abi.org.uk/globalassets/sitecore/files/documents/publications/public/migrated/motor/third-party-assistance-claimant-guide.pdf>

same, whether you are legally represented or not". In reality, having no knowledge of how much their claim is worth, the innocent injured person will most likely be offered, and accept, a significantly lower amount of compensation than they require and deserve in the circumstances. In 2012, APIL carried out research with regard to direct contact by the at-fault insurer in road traffic accident cases^[1]. A survey of APIL members' last three cases found that on average, the involvement of a lawyer raised the value of the offer from around £4,000 to £27,000. If a solicitor had not been involved, therefore, the direct offer would have resulted in inadequate compensation for the victim, and a denial of access to justice. YouGov research commissioned by APIL in 2016 revealed that two thirds of people who have made a personal injury claim think that they would find it difficult to negotiate a fair settlement with a defendant, with just 6 per cent of adults confident that an insurer would offer them the correct amount of compensation if they did not have a lawyer helping them.

The issue of unrepresented litigants should not be ignored. Figures obtained² from the Compensation Recovery Unit (CRU) highlight that in 2014-15, 27 per cent of settlements involved clients who did not have the benefit of legal representation.

Consumers must be fully informed

The present situation is clearly unsatisfactory. The consumer must be provided with clear and concise information about their right to obtain independent legal advice, and their choice as to how they can obtain this advice following an accident. Once fully informed, they can choose how to handle their claim. We suggest that information should be provided to the consumer from the inception of the insurance policy through to the end of the claim. This should be available in both electronic and paper form, and should be available in the same terms in all formats to insurer consistency in the provision of information and easy accessibility. The information should provide detail about the different ways that legal claims can be funded, and the options available to the consumer, and the restrictions and limitations attached to each option.

The problem is particularly acute for non fault drivers following an accident. Aside from third party capture by the at fault insurer, the non fault driver is at risk of uninformed "capture" by their own insurers with restriction of choice of garages for repair and courtesy cars which are not like for like. The Competition and Markets Authority found, in its review of Private Motor Insurance in 2014, that consumers have a poor understanding of their legal entitlements following an accident. The CMA suggested that better information should be provided to consumers about their rights following an accident with the annual policy documentation and again at First Notice of Loss following an accident. The CMA ultimately did not pursue this remedy, but encouraged insurers, the Association of British Insurers, brokers, BIBA and others to continue with the process of seeking a standardised form of words and disclosure practice which will provide consumers with information on a timely basis. There does not appear to have been an increase in the information made available to consumers, and we suggest that the CMA should again call on insurers to provide better information to consumers about their choices.

^[1] <http://files.apil.org.uk/campaigns/the-whiplash-report-2012.pdf>

² Annex A below

Use of the term “lawyer”

APIL supports and recognises the need for the regulation of the use of the term “lawyer” in Scotland. Only those with recognised legal qualifications should be permitted to use this term. Consumers of legal services need to be fully informed about who they are engaging to provide those services. Not only do those using the term lawyer not need to have any recognised qualifications, they do not have to meet any professional standards at all. Someone who is convicted, of violent offences, or of financial crimes, is able to set themselves up as a “lawyer”, without any recourse. Equally, if someone has been struck off as a solicitor, for failing to adhere to the standards required of the profession, there is nothing preventing them from then setting up as a “lawyer”, and continuing to offer legal advice. There are several examples of ex-solicitors behaving in this way currently.

Of particular concern is that consumers may not be aware that there is a difference between lawyers and solicitors, so are likely to be misled by individuals who use the term lawyer but who are not legally qualified. The Law Society of Scotland carried out research in 2016, which demonstrated that 63 per cent of consumers did not recognise the difference between a solicitor and a lawyer. Most consumers believe that lawyers are legal professionals who are appropriately qualified, regulated, reputable and competent. Consumers should be able to make a fully informed choice when choosing their legal services provider, and this includes knowing whether the person they are considering is qualified to give advice, and whether they are covered by the necessary protections, such as insurance, which will protect the consumer should negligent advice be given.

Accreditation

APIL maintains that consumers of legal services should receive as much information as possible to help them ascertain the quality of the legal services offered. This includes people being able to identify whether the firm they are considering has specialism in the area that they would like advice on. Displaying individual accreditations is the best way to demonstrate this. For example, APIL offers individual practitioners the opportunity to become accredited in a wide range of areas of personal injury, including brain injuries, spinal injuries and clinical negligence claims. In order to be awarded these accreditations, practitioners must have met rigorous criteria demonstrating that they are competent in that area of the law. The Law Society of Scotland also offers an accreditation scheme for a whole range of areas across the legal spectrum. As above, the key is for the lay consumer to be able to make an informed choice about their legal services provider. Accreditation will reassure the consumer that they are instructing an individual who is specialist in that area.

Annex A

Volume of Settlements Recorded by the Compensation Recovery Unit (CRU) Between 1st April 2011 - 31st March 2015

Volume of Settlements		Liability Type						Total
Country	Financial Year	CLIN NEG	EMPLOYER	MOTOR	OTHER	PUBLIC	(blank)	
ENGLAND	2011 - 2012	8,003	54,095	579,395	2,059	46,632	258	690,442
	2012 - 2013	8,233	53,215	587,698	5,793	49,351	157	704,447
	2013 - 2014	9,578	54,110	580,531	8,556	50,360	154	703,289
	2014 - 2015	10,123	50,761	522,857	7,928	46,909	112	638,690
SCOTLAND	2011 - 2012	271	4,248	28,010	504	2,842	11	35,886
	2012 - 2013	268	4,482	28,383	785	2,990	10	36,918
	2013 - 2014	287	5,254	27,911	945	3,223	8	37,628
	2014 - 2015	352	4,856	28,434	614	3,059	6	37,321
WALES	2011 - 2012	416	3,942	30,867	123	3,246	9	38,603
	2012 - 2013	396	3,820	31,057	318	3,276	10	38,877
	2013 - 2014	535	3,953	30,029	476	3,314	16	38,323
	2014 - 2015	591	3,613	25,627	400	3,160	10	33,401

Volume of Settlements - Unrepresented Claimants		Liability Type						Total
Country	Financial Year	CLIN NEG	EMPLOYER	MOTOR	OTHER	PUBLIC	(blank)	
ENGLAND	2011 - 2012	556	4,635	186,732	377	8,844	38	201,182
	2012 - 2013	580	5,529	184,455	518	9,744	19	200,845
	2013 - 2014	676	5,785	161,206	497	10,069	24	178,257
	2014 - 2015	732	5,336	131,707	490	9,917	19	148,201
SCOTLAND	2011 - 2012	19	336	10,329	34	768	3	11,489
	2012 - 2013	14	471	10,629	54	808	4	11,980
	2013 - 2014	21	557	9,223	65	910	0	10,776
	2014 - 2015	31	455	8,633	65	851	3	10,038
WALES	2011 - 2012	18	328	9,844	15	466	1	10,672
	2012 - 2013	26	344	9,556	26	539	2	10,493
	2013 - 2014	55	381	8,412	17	555	2	9,422
	2014 - 2015	51	312	6,845	20	607	2	7,837

Volume of Settlements - Unrepresented Claimants Under the Age of 18		Liability Type						Total
Country	Financial Year	CLIN NEG	EMPLOYER	MOTOR	OTHER	PUBLIC	(blank)	
ENGLAND	2011 - 2012	39	35	10,478	22	768	2	11,344
	2012 - 2013	46	42	13,249	48	948	2	14,335
	2013 - 2014	34	57	13,581	40	1,034	1	14,747
	2014 - 2015	36	33	11,442	31	962	2	12,506
SCOTLAND	2011 - 2012	0	3	650	1	74	0	728
	2012 - 2013	1	3	767	1	94	0	866
	2013 - 2014	0	2	631	5	91	0	729
	2014 - 2015	2	3	694	6	93	0	798
WALES	2011 - 2012	2	1	542	0	57	0	602
	2012 - 2013	1	3	661	3	54	1	723
	2013 - 2014	1	4	707	1	66	0	779
	2014 - 2015	3	1	611	4	67	0	686