Department of Justice

Management of Minors' and Patients' Funds

A response by the Association of Personal Injury Lawyers

May 2019

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 around 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.

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

Alice Taylor

Legal Policy Officer

APIL
3, Alder Court, Rennie Hogg Road, Nottingham, NG2 1RX

Tel: 0115 9435428; Fax: 0115 958 0885

e-mail: alice.taylor@apil.org.uk

Introduction

APIL welcomes the opportunity to respond to the Department of Justice consultation on managing funds for patients and minors. We are concerned about the motivation for this consultation. It appears that the driver behind the reform is the idea that if a child receives a "small amount" of compensation, this is not deemed worthy of protection by the court. The option to provide compensation directly to the child's parents or guardians flies in the face of the recognition by the courts that the protection of children is of the utmost importance to the justice system.

There is no logical reason to change the way that children's damages are protected until they reach 18.

Q1) Do you believe that the protection provided by the court to funds held on behalf of children and patients is important?

It is vital that the Court Funds Office (CFO) continues to protect the funds held on behalf of children and patients. It is clear that the courts believe that the protection provided by the CFO to funds held on behalf of children is necessary. The suggestion that the CFO does not need to hold funds for children is completely at odds with how the court handles, for example, applications for payments out of the fund. There is recognition by the Judiciary that the funds should be protected until the minor reaches the age of majority and payments out of court funds to the child are only permitted in extremely limited circumstances.

The importance of the court's role in protecting minors is echoed in the Review Group's Report on Civil Justice, which was chaired by Lord Justice Gillen. At paragraph 7.56 of the review, the group noted with grave concern that, according to data obtained from the Compensation Recovery Unit through a Freedom of Information request, between 2011 and 2014, there were between 174 and 213 plaintiffs per year under the age of 18 who had resolved their road traffic cases without legal representation. As such, there was no court approval of the figures agreed or the sums invested for these minors. It was the view of the review group that serious consideration be given to introducing legislation to make court approval of legal settlements of financial cases involving minors mandatory.

Any attempt to remove the protection of court funds to the minor's damages would create a dilution of this well-established principle.

Q2) In relation to holding funds in court, which of the following options do you think is most appropriate?

- **Approach 1 – maintain the status quo;**

We believe that the status quo must be maintained. We highlight below the difficulties and dangers of removing the court's protection of minors' damages. The examples set out are of cases under the MIB untraced drivers' scheme, which does not allow court approval of settlements for minors, and therefore under the scheme there is no provision for monies to be lodged in court, and invested via the CFO. The examples demonstrate the reality of the issues that would be faced if the minors' funds were no longer held in the CFO.

Example 1

A twelve-year-old child was injured alongside her siblings in a road traffic accident in 2013. Despite extensive communication, the representative for the child did not set up the prescribed bank account, and the solicitors in the case had no option but to release the

money, despite the account not having the preferred protection. No guarantee could be made to the child in these circumstances that their money would be protected.

Example 2

A two-year-old child suffered an adjustment disorder following a hit and run. The solicitor attempted to ensure that the child's compensation was placed in court funds, but this was refused. The MIB advised that the monies should be placed on trust. The MIB eventually made a contribution of £250 – the cost of setting up the PI trust. The whole process following the award was onerous and has a cost which is unlikely to be followed through by the parents where this step is not mandatory, even if the cost is covered by defendants.

- **Approach 2 – only retain funds in court exceptionally;**

The overriding issue is that the funds of children and patients need to be properly protected. The courts have made clear that they recognise this. The CFO provides a fundamental protection to children, and this protection should not be removed – particularly in the absence of proper reasoning.

We question why the considerations for whether there is someone suitable to look after the money would be any different for minors and patients. At paragraph 3.13 of the consultation document, there is a comment that the most important consideration in a patient's case would be whether a suitable family member or other person is available to act as Controller of the patient's fund. If the proposal is to remove some or all children's damages out of the CFO and into the control of family members, it is clear that whether there is a suitable person to hold the damages should also be the most important consideration in these cases, too.

Aside from the obvious risk that there may be parents who intend to take the child's money for themselves or treat it as money for the whole family rather than to address the child's needs, children also need protection as it may simply be the case that the parents – while best intentioned - do not know how best to invest the money and ensure that it is protected for the child. The proposals suggest that it would be more costly for an individual to invest privately - a estimated cost of around 50% more than the current cost, because the individual cannot secure by virtue of scale what the CFO has secured. The other issue is that investment firms may also be reluctant to take on a child's investment if it is a "low" amount, so parents may struggle to invest, even if they decide that this would be the best option.

The suggestion that the risk of parents making poor investment decisions, "squandering" the money, or acting otherwise than in the child's best interests, could be mitigated through the production of an annual report is unworkable. Firstly, by the time the annual report is produced, the money will already have been spent, so it will not prevent poor choices being made. Secondly, one of the main problems is that parents will not have the necessary expertise and knowledge to make sensible investments. Most will simply not know where to start when asked to produce an annual report. It is nonsensical to suggest that parents should do this.

Again, the focus of the court has evolved over the years, to ensure that the money is protected for the child until they are of a maturity to deal with it, rather than being frittered away on day to day expenses. Any move from the status quo will fly in the face of the message that has continually and with good cause, conveyed by the courts, that the funds of minors must be protected.

- **Approach 3 – set a financial threshold limit above which funds would be held in court**

As above, we believe that the status quo must be maintained. The suggestion that funds below £10,000 are not worthy of the protection of the court is abhorrent. £10,000 may not appear significant to some, but to a child at 18, this could be a life-changing amount. Any amount of money will be significant to the child who has been injured, otherwise it would not have been awarded in the first place.

We disagree with paragraph 3.18 of the consultation that “the key question is whether [the children] continue to require the court’s protection even where relatively small amounts are involved”. The protection of the child should not be linked to the value of the compensation awarded.

If you believe a limit should be set, what level do you think is appropriate?

As above, we do not believe that a limit should be set.

Q3) Which of the following options do you believe would improve the operation of the Court Funds Office?

- **The power to delegate the Accountant General’s functions to a third party, such as an investment manager (para 4.2)**
- **The introduction of nominee accounts for investment holdings (para 4.3)**
- **Extending the list of authorised investment types (4.6)**
- **Making improvements to oversight arrangements (para 4.8)**
- **Providing for discretionary investment decisions (para 4.12)**
- **Enabling the surrender of long-standing unclaimed funds (para 4.15)**
- **Amending the allowable methods of payment (para 4.18)**

Please give reasons for your answer

The consultation indicates that one of the drivers behind the proposal to take children’s funds out of court is the lack of investment options available through the CFO. We accept that the approach needs modernising. We support improvements to the way the CFO handles funds, and the broadening of authorised investment types.

As above, the CFO provides a vital role in the protection of minors’ damages, and this protection should not be removed. Instead, the focus should be on improving and modernising the Court Funds Office administration and approach.

In relation to paragraph 4.18 on amending the allowable methods of payment, it must be acknowledged that faster payments online bring a risk of cybercrime. There must be protections in place to prevent fraudsters from taking advantage of vulnerable people, and ensuring that the system is protected.

Q4) Is there anything else that you think we should consider in order to improve the service that is offered by the CFO?

It is accepted that it is important to ensure that the CFO is as efficient and cost effective as possible in continuing to discharge its functions in the interests of patients and children. The administration needs work and the outdated approach must be modernised.

We also note that there is now a levy to hold funds in the CFO. This is currently paid by the plaintiff out of their award – which is simply unjust. While it may be easier for the court to simply collect the levy by deducting the amount from the funds they are holding for the

plaintiff, this ultimately deprives the plaintiff of the full amount that they are entitled to, simply because they are in a category of plaintiff that requires the protection of the court. There is currently an opening fee of £20, and a closing fee of £40. There is also a yearly administration fee based on the amount held in the funds, ranging from £20 - £500. The plaintiff should not be responsible for paying this levy – it should be the responsibility of the defendant. We suggest that the Court of Judicature Fees (Amendment) Order (Northern Ireland) 2016 should be amended to state that the levy is paid by the defendant, and not taken out of the funds in court.