Department of Justice for Northern Ireland

Court approval of minor settlements

A response by the Association of Personal Injury Lawyers

September 2021

Introduction

APIL welcomes the opportunity to respond to this consultation. It is disappointing to note, however, that the Department of Justice's starting point is to pose the question whether all minor settlements should be approved. This is a backwards step given the clear acknowledgement in recent years that approval of all settlements is necessary. Following evidence received as part of his review of civil justice, Lord Justice Gillen recommended that all minor settlements should require court approval. Subsequently, the Lord Chief Justice accepted this recommendation. We are also concerned that, as was the case in the Department of Justice's 2019 consultation on minor settlements held by the Court Funds Office, there is a theme within the proposals that if a child receives a "small" amount of compensation, it is not deemed worthy of protection by the court. The Department of Justice fails to acknowledge the importance of wholesale protection of damages for children, suggesting instead that it would be too difficult to enforce any duty to seek approval, and that the process would be too much of a "hassle" for parents. Any damages received by a child should be protected by the court, and we would argue that the process of enforcing such a duty would be low-cost and straight forward. If children's damages are not protected via court approval, they are at risk of under-compensation, and of their damages being spent by their parents/guardians before they turn eighteen.

There are several inaccuracies throughout the paper, set out in detail in answer to question 6. Further, the Department's dismissal of figures provided to illustrate the scale of the issue of minor settlements going unprotected is also extremely disappointing. Regardless of how the figures are interpreted, the fact remains that between 2017 - 2019, 6,891 cases were resolved i.e., registered. There were only 4,857 approvals in this same timeframe, meaning that there were 30 per cent fewer approvals than cases registered. There is clearly an issue here to be resolved.

1. **Should Government legislate to compel court approval of settlements of compensation for children in cases in which legal proceedings have not issued?**

It is vital that the Government legislates to compel court approval of settlements of compensation for children in cases in which legal proceedings have not issued. We would suggest that to not do so is a breach of Article 4 United Nations Convention on the Rights of a Child, which requires that "States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, states shall undertake such measures to the maximum extent of their available resources".

The funds of children need to be properly protected. Aside from the obvious risk that there may be parents who intend to take the child's money for themselves, or treat the money as if it is for the whole family rather than to address the child's needs, it may simply be the case

that the parents – while best intentioned – do not know how to properly invest the money and ensure that it is protected for the child. It is already common knowledge that parents will be unable to secure the same investments or returns on those investments that the Court Funds Office can. Additionally, most will not have the necessary expertise and knowledge to make sensible investments. There is also a risk, if parents settle directly with an insurance company and do not seek court approval of that settlement, that the child will be undercompensated.

It is disappointing that throughout the consultation, a lack of court approval for settlements is justified because the process of approval would be too much hassle for parents, and because most awards are for "small" sums of money. Paragraph 2.2. of the consultation states "In such cases, the parent may prefer to reach a quick settlement without the 'hassle factor' of obtaining a medical examination of the child, attending court and perhaps engaging a solicitor; and may also prefer to have the money paid directly and immediately to them, rather than have it placed under the protection of the court until the child reaches adulthood". The client in these cases is the child, not the parents – convenience for the parents should not factor into the decision about whether court approval should be sought.

The DoJ also sets out at Paragraph 2.7 that "we expect that these types of settlements are most likely to be for relatively small sums of compensation for relatively minor injuries…" The amount of money awarded is irrelevant – any award should be protected for the child. Even a couple of thousands of pounds could have a huge impact on a child's life, and should not be permitted to be spent by the parents without very careful consideration and scrutiny by the courts. 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. Indeed, it could even be argued that the smaller the award, the more important court approval and protection of the award is – a smaller sum of money may need to be more skilfully invested, and there may be a greater temptation to some to fritter it away on day-to-day expenses, rather than save it until the child turns 18.

The suggestion that at least some children's awards do not need court approval flies in the face of the recognition by the courts that the protection of children is the utmost importance to the justice system. Members report that when judges hear an infant approval application, they will often be concerned if counsel has not been involved in the case – particularly if the solicitor involved in the case is less experienced. The judiciary clearly believes that the approval of infant awards is an important issue, that must be handled carefully by knowledgeable practitioners. The importance that the judiciary puts on approval and protection of infant awards is also evident in the way that infant awards are now handled. Previously, successful applications would be made to the fund to purchase computers, to pay for activities for the child, or to pay for family holidays. It is increasingly difficult for parents to obtain payments from the fund, with the goal being that the child's damages are preserved and protected until they reach 18. Payments out of court funds are only permitted in extremely limited circumstances.

2)a) Should legislation place a duty to obtain court approval (in cases in which legal proceedings have not issued) on one of the parties (a compensator or parent) and invalidate compensation paid to a child without court approval?

There should be a duty on the compensator, enshrined in legislation, to obtain court approval of any compensation paid to a child, regardless of whether proceedings have been issued. In cases where the parent settles directly with the insurance company, the insurance company should then issue a minor petition to get the award approved by the court. The parent is likely a one-time user of the system, and the insurer is far more knowledgeable

about what their obligations are – it is right that the duty should be on the compensator. The child should subsequently have a right to bring an action against the compensator if they do not seek approval from the court and the award is subsequently spent before the child reaches 18.

b) How should the duty be enforced?

We do not accept that it would be difficult to enforce the duty or compel the compensator to comply with a duty to seek court approval in cases of minor settlement. Compensators are already under a duty to report to the Compensation Recovery Unit, so it would be straight forward to compel them, in a similar way, to seek court approval of awards based on the date of birth of the child.

The regulators of solicitors and insurers also have a key part to play in enforcement of this duty. The Financial Conduct Authority should place sanctions on insurers who are not seeking court approval of the settlements of children. Solicitors' conduct is subject to regulation by the Law Society of Northern Ireland, so the Law Society would also have a role to play in enforcement.

(c) Should such legislation apply to all such settlements or only those above a financial threshold? Please give reasons for your answer.

It is abhorrent to suggest that only those cases that are valued above a certain amount should be worthy of court protection. As above, the amount of money in question is completely irrelevant.

There is also a concern that if there is a financial threshold under which court approval is not sought, more cases will be settled below this threshold by the insurers because they will want to avoid having to apply for court approval. Putting in place a financial threshold will therefore likely lead to greater under-settlement of cases. There should simply not be a situation where the insurer can decide the value of the claim, and then avoid scrutiny by valuing the claim below the threshold for such scrutiny.

Ultimately, the judiciary should decide whether an amount of compensation is suitable for a particular child's needs, and this should apply in every case. As above, the judiciary take this issue very seriously as evidenced by their insistence on the need for counsel in infant approval cases. It should not be for an insurer to determine what a suitable amount for an injured child is, particularly if the regulation around court approval encourages them to settle for a smaller amount to avoid scrutiny.

(d) If there were to be a financial threshold, at what level should it be set?

We do not believe that there should be a financial threshold, for the reasons set out at 2(c).

(e) Would a new paper-based procedure for seeking court approval for settlements encourage more court approvals? Should such a procedure be introduced?

There is no evidence that minor approvals are currently a burden to parties. As an organisation, APIL does not believe that it is appropriate for minor approvals to be dealt with on paper and not through an in-person hearing. In person hearings are important to ensure that the judge can properly form a view in relation to the appropriateness of the award for the child.

(f) If so, what should be the parameters of such a procedure (e.g. should it be restricted to cases where liability is admitted, cases below a financial threshold, cases involving only certain types of injury, etc.)?

As above, hearings in court should take place if there is scarring or any ongoing issues.

5) Do you agree with the outcome of the initial regulatory impact assessment? If not, please provide comments.

There are minimal costs involved in obtaining court approval for children's damages. We question where the figures for the regulatory impact assessment have come from. There does not appear to be any evidential basis for the figures that are used to calculate the costs of each different approach. The county court system is an efficiently run, low cost process, and the approval of children's damages is no exception.

The way that the figures are presented within section 4 is also misleading. It is stated that the estimated total cost of minor settlements to compensators at present is £3,625,195. This will also include the compensation paid out to the minors, not only the professional costs and fees.

Further, the impact assessment is one-sided. There is no assessment of the risk/cost to minors of not having their cases approved. We would suggest that there is a substantial risk and cost to minors where their cases are not approved – a child whose compensation is not properly protected or subject to court approval could be undercompensated, or even end up with no money at all left for them when they turn 18.

6) Please provide any other comments you have in relation to this consultation

Dismissal of the figures provided to illustrate the scale of the issue of minor settlements going unprotected is extremely disappointing. Regardless of how the figures are interpreted, the fact remains that between 2017 - 2019, 6,891 cases were resolved i.e., registered. There were only 4,857 approvals in this same timeframe, meaning that there were 30 per cent fewer approvals than cases registered. There is clearly an issue here to be resolved.

The consultation is fundamentally flawed on principle, and there are a number of inaccuracies – at paragraph 2.7 it is stated that "An approval hearing takes place in open court or in chambers". This is incorrect – approval hearings do not take place in open court and in any case are currently being dealt with via written submissions.

At paragraph 2.9, the consultation's description of what happens in other jurisdictions is inaccurate. In England and Wales, all settlements for children must be approved by the court, as per the Civil Procedure Rules Part 21. This is not voluntary. Part 21.10 provides that "Where a claim is made (a) by or on behalf of a child or protected party; or (b) against a child or protected party, no settlement, compromise or payment (including any voluntary interim payment) and no acceptance of money paid into court shall be valid, so far as it relates to the claim by, on behalf of or against the child or protected party, without the approval of the court." If a settlement for a child is reached before proceedings are issued, Part 8 proceedings must be commenced to obtain court approval of the award. As is the case in Northern Ireland, the judiciary takes court approval of infant settlements very seriously, and requires thorough evidence, witness statements and advice from counsel to be obtained to support the settlement reached. In some cases, the court may insist that the child themselves attends the hearing.

"Third party capture", or direct settlement between the insurer and plaintiff, is a murky and unregulated practice that fuels the perception of easy money and deals to be done. APIL believes that the practice should be banned. This consultation, however, appears to actively encourage it. Paragraph 3.7, which refers to direct settlement with an insurance company without court approval as "a relatively quick and straightforward process that does not

necessarily require a medical examination of the child)…" flies in the face of the principle in the Guidelines for the Assessment of General Damages in Personal Injury Cases in Northern Ireland (The Green Book). The Green Book states that "the assessment of damages for whiplash injuries requires particular care. Allegations of such injuries are easily made and not easily disproved…the evidence relating to such a claim requires careful scrutiny". To suggest that children who are injured do not necessarily require a medical examination in order to receive damages goes directly against this principle and the importance of gathering and scrutinizing evidence. This paragraph seems to suggest that the money paid out is not compensation for injuries, but simply money for "being involved in an accident". Surely insurers too, would like the claims process to be as robust as possible to avoid fraudulent claims. Instead, paragraph 3.7 indicates that people can claim for injuries without providing any evidence of such injury. Further, denying the child a medical examination to assess the extent of their injuries also risks the settlement being insufficient to properly compensate the child.

We challenge the view at paragraph 3.7 that parents can and should be trusted to manage compensation for the benefit of the child and that it is ultimately the parent's decision about whether to proceed with a settlement directly with the insurer or not having balanced the pros and cons of each approach. Whether the process is "quick and straight forward" should not factor into the decision about whether court approval should be sought. Further, anecdotally, parents request funds out of the court funds office for holidays, household items etc, which indicates that even if well intentioned, parents may not make decisions which are in the best interests of the child. If they have free reign over the compensation, they may well spend the money unwisely, leaving the child with nothing when they turn 18.

We also object to the numerous references throughout the consultation that obtaining court approval for a minor's settlement is a "hassle". The decision of whether a child gets awarded full compensation that is subsequently protected for them until they are 18 should not be made on whether parents will be "hassled" by arranging for court approval of an award. Indeed, if a parent is making the decision not to obtain court approval because they do not want the "hassle", this begs the question whether the parent does in fact have the child's best interests at heart.

In the first instance, any questions about this response should be directed to:

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