MINISTRY OF DEFENCE

JOINT COMPENSATION REVIEW

A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS

AUGUST 2001

The executive committee would like to acknowledge the assistance of the following people who contributed to the preparation of this response:

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JOINT COMPENSATION REVIEW

1. The Association of Personal Injury Lawyers (APIL) was formed in 1990 and represents more than 5000 solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants. The aims of the association are:

- To promote full and prompt compensation for all types of personal injury;
- To improve access to our legal system by all means including education, the exchange of information and the enhancement of law reform;
- To alert the public to dangers in society such as harmful products and dangerous drugs;
- To provide a communication network exchanging views formally and informally.

2. APIL welcomes the opportunity to participate in this review of the no-fault compensation scheme for injured service personnel. Our response predominantly addresses our concerns for those who have been negligently injured by the MOD.

3. In summary, whilst we can see the virtue of simplifying the currently complex system of no-fault compensation available, we are extremely concerned about the fact that the proposal aims, amongst other things, to reduce the number of service personnel seeking redress through the courts. We believe it is essential that:

   - The no-fault scheme should operate in addition to the civil negligence system (as proposed)
   - Service personnel should not have to choose between making a claim for limited compensation under the no-fault scheme and making a claim for full compensation in the civil courts (as proposed)

- Service personnel should have access to:

    - information relating to the different procedures for, and compensation available under, both the no-fault scheme and civil claims for compensation
    - adequate legal advice about the merits of a potential negligence claim

- Service personnel should not be discouraged, in practice, from investigating or pursuing a potential claim in the courts for the full compensation to which they may be entitled at common law.

In addition to the more fundamental concerns outlined above, we have several concerns about the detail of the proposed scheme.

The proposed single scheme

4. The current arrangements for compensating injured service personnel on a no-fault basis are extremely complex and difficult to understand. We believe, therefore, that it would be advantageous to simplify it and replace it with a single scheme, provided that the single scheme is fair and does not lead to either:

- fewer service personnel receiving compensation; or
- service personnel receiving less compensation;

than they would receive under the current scheme.

The relationship between the proposed single scheme and civil claims for full compensation

5. We are extremely concerned that the proposed single scheme aims to reduce the number of service personnel seeking redress in the civil courts. The MOD provides no-fault compensation to injured service personnel to maintain and increase morale and to fulfil a moral responsibility to its employees, in view of the kind of work undertaken. This means that the MOD is not required to provide injured service personnel with full compensation, but rather compensation that is fair and reasonable under the circumstances.

6. The common law, however, seeks to encourage people to take reasonable care by holding those that do not take reasonable care accountable for the consequences. It entitles those who have been negligently injured to full compensation, to put them in the position they would have been in had the negligence not occurred.

7. The two systems have, therefore, very different functions and should not be confused. Service personnel must not be discouraged, either in principle or in practice, from pursuing the full compensation, to which they may be entitled, at common law.

8. For this reason it is imperative that that the no-fault and fault-based system operate alongside each other, rather than in competition with each other. We are concerned, however, that service personnel would be discouraged in practice from pursuing claims for full compensation to which they may be entitled and settling for the limited compensation available under the no-fault scheme only. For this reason, we also think it is imperative that service personnel should have access to information relating to the compensation available under each scheme and independent legal advice about the merits of any potential negligence claim. Injured service personnel can then make an informed decision.

Administration of the scheme

9. In paragraph 1.3 it is stated that it would be "sensible for the new scheme to be run by the MOD" but no reasoning is provided. We strongly believe that the scheme should be administered by an independent agency. This is because, in accordance with the natural rules of justice, it does not seem appropriate that those paying out compensation should also decide whether that compensation is payable – there is a potential conflict of interest. Whilst, therefore, we agree that there should be an independent, human-rights compliant appeals process, we strongly believe that there should be an independent, human-rights compliant initial claims process also.

Eligibility

10. We agree with the eligibility criteria outlined in paragraph 8.4. We believe, however, that service personnel injured in any conflict after May 1987 should be eligible to claim compensation under the scheme. This is the date on which s.12 Crown Proceedings Act 1947 was repealed by s.1 Crown Proceedings Armed Forces Act 1987 so that claims for negligence against the Government were permitted for the first time.

Burden of proof

11. In paragraph 1.3 it is stated that the scheme would cover illnesses, injuries or death attributable to service where the cause occurred on or after the date of implementation of the scheme. It is proposed "that the legal test of proof for claims would be the usual civil law test of balance of probabilities". We are extremely concerned about this proposal as no reference is made to the provision of legal representation, which is available on a "no win, no fee" basis to claimants pursuing claims in common law who must satisfy the same burden of proof.

12. It will undoubtedly be extremely difficult for service personnel, not used to legal issues, to prove, on the balance of probabilities, that injury or death has been attributable to service, especially if it is alleged that the injury was attributable to the MOD's negligence. Claims against the MOD can be medically and factually complex and relevant information can be difficult to obtain. For this reason we believe that either:

   - Access should be provided to free and independent legal advice to assist service personnel discharge the burden of proof; or
   - The burden of proof should be reduced.

13. We are concerned that otherwise the new scheme, with the civil burden of proof, will lead to fewer service personnel receiving no-fault compensation than under the current scheme. Whilst, as noted in paragraph 1.3, the civil burden of proof is applied under the current AFPS scheme, it is not applied to war pensions. It is vital that any legal advice provided is free to prevent service personnel having to use compensation provided for their injury to meet legal costs.

Limitation

14. It is proposed that claims should normally be excluded after the expiry of three years but that there should be a list comprising exceptions, i.e. those injuries it is known emerge only years after the service causing the injury. We are glad to see that asbestos-related diseases would be recognised in this list. It is stated, "if new supporting medical evidence emerges in the future, other conditions might be added to the excepted list."

15. We cannot support this proposal as we believe it is far too rigid and restrictive and would lead to unfairness in many circumstances. There may be several, perfectly justifiable reasons why injured service personnel may delay submitting a claim. Suffering an injury can be extremely traumatic and it can

take a substantial amount of time to adjust to new circumstances. In addition, we fear that injuries that should be added to the list of exceptions would not actually be added to the list or that delay would occur in doing so. This could prevent many injured service personnel from receiving the compensation they deserve. If the proposed list of exceptions is introduced, however, it must be regularly reviewed to ensure that it remains up-to-date with medical knowledge.

16. It is stated that three years is the qualifying period used in civil claims, but this is slightly misleading, as the limitation period in civil claims is much more flexible. The limitation period begins on either the date on which the injury occurred or the date on which the victim became aware of the injury and that it was in some way attributable to the defendant. If the victim fails to issue a claim within the primary limitation period, the court has discretion whether to allow the claim to proceed in view of the circumstances, having regard to factors such as the reasons for the claimant's delay, the effect of delay on the cogency of the evidence and the conduct of the defendant. Whilst we fully understand the necessity for limitation periods, we do not believe there is a need for the limitation period to be as restrictive as proposed. Our concerns apply also to the proposed limitation on claims made over one year after medical diagnosis.

17. We suggest that limitation rules similar to, and as flexible as, those contained within the Limitation Act 1980 in respect of personal injury claims should be adopted. If not, we would stress that it is imperative that injured service personnel are aware of the very restrictive time limits upon them to submit claims to avoid unfairness.

The proposed tariff scheme and lump sums

18. In the field of civil litigation we fully support the principle of full compensation and we would, in that arena, oppose the introduction of a tariff. We understand, as outlined in paragraph 5, that the no-fault scheme has a very

different nature and for this reason do not oppose the introduction of a tariff scheme in this field. We do not believe we can comment, however, on the adequacy of the tariff figures as they are stated to include an element for medical expenses and housing costs. As we are unable to see the breakdown of the expenses included, however, we do not feel able to assess their adequacy. We would question, however, whether the tariff adequately compensates someone with multiple injuries as no mechanism for such a circumstance appears within the tariff.

19. To ensure that the tariff is up to date and operates fairly, it must be increased annually to allow for inflation and must be reviewed at least every five years.

No-fault compensation in lump sums

20. The tariff scheme would deliver compensation in a "lump sum". We agree that many injured people have difficulty meeting the immediate expenses of an injury, such as the costs of housing adaptations or equipment. From this point of view, lump sum compensation appears attractive. They require, however, careful handling and investment. There is a serious risk that service personnel, not used to handling large amounts of money, would manage the sum badly and be left with little or no money to deal with the extra costs of their injury. We suggest that the virtue of providing compensation in a lump sum should be reconsidered. Financial difficulties raised by immediate expenses due to injury could be met through an initial lump sum payment, which need not be the total lump sum figure to which the injured person is entitled. If lump sums are provided, we suggest that financial and investment advice should be available to encourage prudent management.

Guaranteed Income Stream

21. Following our concerns about the provision of lump sums outlined above, we were initially attracted by the idea of a guaranteed income stream, which

would be up rated annually in line with inflation. We do not, however, believe we have sufficient information to respond to the proposed GIS in any depth, which is regrettable as it is an extremely important issue. In paragraph 6.7 it is stated:

"We concluded that a formula could be devised, based on the tariff level of disablement and differing percentages of the salary in payment at the time of retirement, multiplied by the number of years left until normal retirement age for the Armed Forces Pension Scheme of 55. A similar approach would be adopted to calculate the loss of pension rights. Our economists and statisticians have designed a formula which they believe will provide a reasonable approximation for lifetime earnings (taking into account normal promotion and career patterns)."

As we have not been provided with any details of the formula, however, we cannot comment upon the adequacy of it.

Focus of scheme on the most disabled

22. We are extremely concerned that the scheme will be focussing on the most severely disabled. We understand that it is only at the higher levels of the tariff that injured service personnel would receive the GIS to cover loss of earnings. It is only fair that all injured in service should be treated equally, especially if they have lost earnings as a result. Every person and injury is different and what may seem a minor injury to one could have devastating effects on another, both financially and emotionally.

MOD service personnel suffering from asbestos related diseases

23. APIL has, for some time, expressed concern for the plight of service personnel injured in the MOD, though our concerns have related more to the fault-based system of compensation rather than the no-fault system under consideration in

this review. These concerns range from access to information relating to a claim, to the fear or reluctance of MOD service personnel to investigate or pursue a claim in negligence against the MOD. We are predominantly concerned, however, about the plight of those suffering asbestos-related diseases following exposure to asbestos in service. Claims against the MOD for asbestos-related diseases are effectively barred because the claimant has to establish that the date of exposure was after 8 December 1986. We do not believe this restriction is justifiable and we call for MOD service personnel to be provided with the same rights of compensation for asbestos-related diseases as civilian employees.

Conclusion

24. In conclusion, we are extremely concerned that service personnel will believe that the no-fault scheme, under consideration in this review, is the only compensation scheme open to them in the event of injury. For this reason, we would stress that all service personnel should have access to information relating to both the fault and no-fault schemes of compensation. This will ensure that they are fully aware of their legal rights upon injury and will allow them to make informed decisions at a difficult time in their lives.