COMMITTEE ON COURT PRACTICE AND PROCEDURE

REVIEW OF PRACTICE AND PROCEDURE IN RELATION TO PERSONAL INJURIES LITIGATION

THE SUBMISSIONS OF THE ASSOCIATION OF PERSONAL INJURY LAWYERS

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The Association of Personal Injury Lawyers (APIL) was formed in 1990 by plaintiff lawyers with a view to representing the interests of personal injury victims. APIL currently has over 5100 members in the UK and abroad. There are 76 members in APIL Ireland. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured plaintiffs. APIL does not generate business on behalf of its members.

EXECUTIVE SUMMARY

APIL Ireland calls for:

- **A radical overhaul of the culture of personal injury litigation;**
- **The introduction of a pre-action protocol for personal injury cases;**
- **A requirement for the parties to submit detailed and meaningful pleadings;**
- **A requirement for the parties to exchange witness statements before trial;**
- **A designated and specialised civil judiciary;**
- **The introduction of reverse lodgements;**
- **The development of guidelines for the assessment of general damages.**

CHANGING THE NATURE OF PERSONAL INJURY LITIGATION

Every year, thousands of accidents and occurrences in the Republic of Ireland result in death or injury. Many of these accidents are avoidable and are caused, not by the injured victims, but by other parties. Suffering a personal injury is, of course, traumatic, but it can also be expensive. Many injured victims are unable to work as a result of their injuries and consequently suffer loss of earnings and many also require frequent, if not constant, nursing care, which can be extremely expensive. In certain circumstances, the law allows such victims to recover compensation from the responsible party or parties to meet these losses and expenses.

In claiming personal injury compensation, injured victims have the burden of proving on the balance of probabilities:

- That the relevant person or company was negligent or in breach of a statutory duty;
- That the alleged negligence or breach of statutory duty caused the injury suffered;
- The extent of their loss, i.e. the amount of compensation to which they are entitled.

This is a major task which should not be underestimated. Many people do not see, however, the human element to personal injury litigation. They see greedy plaintiffs trying to claim compensation fraudulently from insurance companies, with the result that insurance premiums keep increasing. It should be remembered, however, that personal injury claims are not all about money. They are also about achieving accountability, where it would otherwise not be achieved, and about deterring people and companies from careless behaviour which allows the same accidents to keep happening again and again. Personal injury litigation is, therefore, in the public as well as the private interest.

The Need for Fairness and Efficiency

The importance of personal injury litigation does not detract, however, from the need for it to be conducted as efficiently as possible by the relevant parties. Efficient personal injury litigation is in the interest of injured victims, defendants and, more widely, society. It is vital, for example, that injured victims recover any compensation to which they are entitled as soon as possible so that they are able to meet the losses and expenses of their injuries. In addition, the litigation process must on no account delay the recovery of a victim.

Personal injury litigation also obviously involves costs and many of these costs are reasonable, but some of which are not. Each side will, for example, have to investigate the claim, which can be costly. Litigation can often drag on for lengthy periods and if settlement is reached, this is often at the very last minute, at the door of the court. It is this excessive cost which is often perceived to cause soaring insurance premiums. Delays can also, however, be used as a tactical advantage by both parties. Court time is also wasted on cases which could otherwise have settled and this is against the public interest.

The aim of the civil justice system should be to allow the potential parties to dispose of a claim fairly and as soon as is practicably possible. Victims may not always know whether they have a valid claim and defendants will not always know whether they have a valid defence. Each side needs to communicate with each other to establish whether an agreement can be reached on any or all of the issues. If the parties cannot agree, then the court should adjudicate on the matter. The problem at the moment is that the court is adjudicating on matters without such negotiations by the parties.

A Change in Culture

Personal injury litigation is, of course, adversarial and it will always be difficult for parties on opposing sides to communicate. The current procedure rules are frequently ignored and they fail to encourage the parties to communicate. In acting in the best interests of their clients, lawyers often fail to communicate due to a fear that they will

give something away which the other side can use against them. It is not going too far to say that a culture has emerged whereby each side feels it has more to gain tactically by not communicating with the other party than by communicating with them. This is because the rules do not support the parties in reaching a fair conclusion to the matter on an equal footing. In too many cases, cases are taken to court even though the other side does not know what the opposition's case is.

APIL Ireland now calls, therefore, for a radical overhaul of the culture of personal injury litigation. Without a change in culture we do not believe that the system can run more fairly and efficiently. This can, in APIL Ireland's view, only be achieved by:

- changing the way in which parties deal with each other before the issue of proceedings;
- amending and enforcing the civil procedure rules;
- introducing technical devices such as reverse lodgements and provisional damages to make the system more efficient.

This cultural change must be achieved by lawyers representing the interests of both potential and actual plaintiffs, defendants, insurance companies and the courts.

Pre-Action Approach to Personal Injury Claims

As noted above, it is in the interests of all for a potential claim to be investigated, and its strengths and weaknesses assessed, at the earliest possible stage. If the matter can be fairly disposed of without the need to issue proceedings, then this should be achieved. For this to be achieved, at the outset of a claim, the parties must:

- communicate effectively; and
- have access to the information necessary to both assess liability and to evaluate compensation.

At the moment there is very little, if any, official guidance on how parties should approach a claim before the issue of proceedings. The usual approach of lawyers appears to be that established over the years. Little, if any, information is exchanged and the parties cannot negotiate with each other when they do not know what they are negotiating about.

The plaintiff solicitor will usually issue a letter of claim to the defendant but this letter usually only notifies the other side of a potential claim and lacks any real details about the circumstances of the accident, the events leading to the injury, the allegations of negligence or breach of statutory duty or the damage caused. This naturally makes it difficult for the defendant to respond to the claim in a substantive manner and the defendant will usually be unable to say whether the allegations have any grounding. Even if, however, the defendant suspects that the plaintiff has a good case against him, defendants do not usually believe it to be in their interests to admit liability at any early stage or to make any factual concessions. As identified by the Irish Insurance Federation, there is a view that an early concession on liability is not the best tactic because liability arguments are often the only means of having any control on the potential damages. Defendants often respond to initial letters of claim, therefore, with blank denials of liability. The plaintiff will not at that stage, therefore, have any knowledge of the grounds on which the defendant may defend his claim. The presumption is that it will have to be fought on all grounds – liability, causation and the level of compensation to be recovered from the responsible party. On the rare occasions that defendants do respond substantively to an initial letter of claim, plaintiff lawyers are reluctant to negotiate. To do so, would be to give away too much information without any guarantees of reciprocal behaviour and without any protection. Information revealed during negotiations could easily be used against the plaintiff at a later stage. There are not only tactical advantages to a closed approach. Legal costs are not recoverable for pre-action conduct. There is, therefore, an in-built incentive within the system which encourages lawyers to issue proceedings, rather than seek to achieve an efficient and fair settlement without the need for resorting to litigation.

It is clear to see that there are currently several missed opportunities for reaching a fair and efficient settlement. The pre-action stage is, in APIL Ireland's view, the most

important stage of a claim. It is at this stage that the pace of litigation and the parties' attitudes towards the case are set. APIL Ireland calls for a pre-action protocol for personal injury cases which would provide guidance to parties on both sides on how to deal with both the claim, and each other, at the pre-action stage. Such a protocol exists in England and Wales and has been extremely successful in reducing the number of litigated personal injury claims. A copy of this pre-action protocol is attached at annex A. It would not, of course, be possible to simply introduce the pre-action protocol in place in England and Wales into the Republic of Ireland. The protocol should instead be developed to suit the jurisdiction after consultation with the relevant parties.

To be successful, the protocol should, however, encourage the following approach:

- The plaintiff should send the defendant a detailed letter of claim, containing a clear summary of the facts on which the claim is based, together with an indication of the nature of any injuries suffered and financial loss incurred. Essentially, sufficient information should be provided to enable the defendant's insurers/solicitor to commence investigations and put a broad valuation on the risk.

- Upon receipt of this letter, the defendant should be allowed a reasonable period, for example, three months, to investigate the claim and within that time reply stating whether liability is denied or not.

- If liability is denied, the defendant should provide further details and reasons and not simply a blank denial. In addition, at that stage the defendant should also be required to provide the claimant with the documents in his possession which are material to the issues between the parties and the protocol could provide a non-exhaustive list of these documents, as in England and Wales.

- The defendant should also explain any allegations of contributory negligence, to which the plaintiff should respond in detail. If the defendant

fails to provide the relevant documents, the plaintiff should be entitled to apply to the court for an order of pre-action disclosure with costs.

- The plaintiff should seek to obtain his medical records at the earliest possible stage and this may require some amendment to the rules relating to access to health records.

- The plaintiff should also send the defendant a list of special damages with supporting documents at the earliest possible stage, particularly where liability has been admitted.

The protocol in England and Wales also provides for the joint selection of an expert witness and APIL Ireland advocates the inclusion of such provision in an equivalent Irish protocol. Lord Woolf, who reviewed the civil justice system in England and Wales during the 1990s, found that parties over-used experts and there appears to be a similar position in the Republic of Ireland. This leads not only to great expense, but also to delays. Experts may also proffer opinions on issues which were not really in issue. To avoid these problems, the protocol promotes the joint selection of experts. It should be noted that these are not 'joint' experts. Essentially, if the parties agree on an expert who is suitable to instruct on a particular issue, the plaintiff will instruct him. Either party may test what the expert's report says by sending written questions. Once the parties have jointly selected an expert, they are only entitled to instruct another expert within that speciality if the other party agrees or the court so directs. This proposal is in accordance with recent trends to prevent the frequent and unnecessary attendance of medical witnesses in court and would lead to reduced expense and delay.

Many are dubious as to how such a protocol changes pre-action behaviour and changes the culture of personal injury litigation. In one sense it works because it allows both parties to act and react on an equal footing. Each side is required to put a positive case and a positive defence forward. In another sense it works because it actually provides some guidance on how to act. It can only really work, however, if there are incentives within the civil procedure rules, i.e. that compliance and non-

compliance with the protocol at the pre-action stage is taken into account at the post-action stage. This is usually in relation to costs. In addition, APIL Ireland later suggests that the judiciary should take much more note of the parties' conduct and should require them to follow a court timetable with severe consequences, such as striking out, if they do not. There is, therefore, an incentive to achieve as much as possible and as quickly as possible.

In addition, the introduction of a pre-action protocol, which seeks to encourage the parties to work together consensually, is preferable to the introduction of strict rules obliging the parties to act in a particular way during the pre-action stage. Obliging the parties to follow a strict timetable, for example, is only likely to lead to applications to the court for extensions where there are difficulties with compliance. This would not be an effective use of court resources. The consensual approach of the protocol seeks to change the culture of personal injury litigation. It is only if the parties fail to reach a settlement and proceedings must be issued that the courts should become directly involved in the claim and the enforcement of the civil procedure rules.

Improving pre-action conduct and contact between the parties not only increases the chances of settlement of all or part of the issues but it also increases the chances of settlement at an earlier stage. The litigation system would, therefore, become more efficient. This is in the interests of the injured victim who can concentrate on adjusting to injured life. Increased efficiency should lead to increased cost effectiveness, which is in the interests of insurance companies and in the public interest, as this should lead to a reduction in premiums.

It will not always be possible, however, to reach a settlement and the parties will in some circumstances have to resort to litigation. Using a protocol as suggested will, however, at least help the parties to define the issues between them. They will have a clearer idea of the basis of the claim and the defence and of any quantum issues. This will increase the efficiency and cost effectiveness of the system as both the parties and the court will concentrate on only those points that are actually in issue. At the moment, the parties usually litigate on all points as, due to low levels of disclosure and communication between the parties and there is a trial by ambush. Alternatively, they prepare to fight the case on all points but settle at the door of the court. APIL

Ireland makes some suggestions below as to how claims could be dealt with more efficiently once proceedings have been issued.

The committee also seeks views on pre-litigation mediation. Mediation is essentially "managed" negotiation between the parties with the assistance of a neutral third party. Mediation can, therefore, assist in equalising the negotiating and bargaining positions of the parties, which, in turn, can assist the parties in reaching a settlement. Mediation must, however, remain a voluntary process, as it is likely to be futile unless both parties are willing to attempt to reach a settlement. For this reason, APIL Ireland does not believe that pre-litigation mediation should be mandatory.

Amending the Civil Procedure Rules

As noted above, APIL Ireland believes that the area in most need of attention is the pre-action stage. We do not believe that current court practice and procedure rules require complete revision. They are likely, however, to benefit from some amendment, as outlined below, particularly in relation to increased case management and increased enforcement of the rules both by the courts and by the parties. As described below, however, the use of a protocol to improve pre-action behaviour will also have a significant impact post-issue and have an impact on the operation of the rules. We would note, however, that the current rules, i.e. different procedures in each court, are complex and would benefit from simplification wherever possible.

(i) Pleadings

A plaintiff is required to serve a written statement of his or her case and in the Circuit and High Courts the other side must plead a defence. These pleadings, however, often contain minimal information. The defences often contain bare denials of the allegations and an assertion of contributory negligence without any explanation. Parties can seek to obtain further details through notices for particulars, but these should only be necessary to clarify issues, rather than to obtain detailed information on them. Pleadings are submitted, therefore, to progress the case procedurally rather

than substantively. In the current culture of litigation, there continue to be tactical advantages to submitting minimal pleadings. The introduction of a pre-action protocol would minimise the advantages of this approach. As parties would already have investigated the claim or the potential defences at an earlier stage and been required to disclose certain information under the protocol, the contents of many of the pleadings are unlikely to come as much of a surprise in the pleadings.

This should not, however, be left to chance. APIL Ireland calls for a requirement that the parties submit meaningful and detailed pleadings, i.e. substantive rather than procedural issues. Efficient personal injury litigation means that every step taken in the case should progress the case. Pleadings are essential in defining the issues between the parties and a requirement to make the pleadings detailed should help to ensure that they are helpful rather than obstructive. They should essentially define the areas of dispute between the parties and focus the parties on what they will actually have to prove at trial. Pleadings should be required to state the facts on which they rely succinctly. APIL Ireland also believes that there is greater room for judicial scrutiny of pleadings, which is dealt with below.

In addition, APIL Ireland believes that plaintiffs and defendants should sign their pleadings with a statement of truth, that is, that plaintiff or defendant believes the facts stated in the relevant document to be true. This would ensure that plaintiffs and defendants actually read the pleadings made on their behalf before they are exchanged with the other side. This, again, should help to allay fears of fraudulent or unmeritorious claims or defences advancing.

(ii) Exchange of factual witness statements

APIL Ireland believes that factual witness statements should be exchanged before trial. At the moment, each side only becomes aware of the other side's witness evidence at trial. Disclosing factual witness statements before the trial ensures that both parties are fully aware before the trial of the strengths and weaknesses of the case which they have to meet, which would improve efficiency and increase the chances of settlement.

(iii) Case management and greater enforcement of the rules

As noted above, personal injury litigation is adversarial and APIL Ireland's submissions concentrate on reforms that would allow each side to continue to act in their client's best interests but still seek to cooperate at an earlier stage to promote the chances of settlement. We do believe, however, that it would be beneficial for the judiciary to have increased case management powers. Essentially, judicial case management allows an independent third party to ensure that the parties are proceeding as fairly and efficiently as possible within the adversarial system.

At the moment, the way in which a claim progresses is determined by the parties. Whilst the rules outline how each party should advance the claim or the defence, these rules are frequently ignored without consequence. Defendants can currently obtain tactical advantages by seeking to delay the progress of a claim. It can be used to intimidate the plaintiff and to produce a resolution of the claim which is either unfair or achieved at disproportionate cost.

The main objective of judicial case management would be to ensure that the parties proceeded with the claim in accordance with the rules. The judiciary could effectively manage cases by holding case management conferences at appropriates times during a claim. These conferences, with all relevant parties attending, would allow the judge to examine how well the parties are progressing with the claim and to identify the issues for adjudication at the trial. This would ensure that claims were conducted both fairly and efficiently and would ensure that court resources are effectively deployed. To achieve this, however, the judiciary would have to have a range of sanctions at their disposal to deal proportionately with any breaches of the rules and could range from costs sanctions to being able to strike out weak pleadings. It may also be beneficial for the judiciary to become involved in determining the issues that actually needed to be resolved by the parties and to determine what factual and expert evidence the parties should adduce at trial.

It should be noted, however, that judicial case management could only be successful if the judiciary was fully trained and the courts were sufficiently resourced. It would

certainly be advantageous in this respect to have a designated and specialised civil judiciary.

Lodgements and Reverse Lodgements

With greater case management by the courts and enforcement of the rules, APIL Ireland submits that parties are much more likely to adhere to both the pre- and post-action rules and deal with the issues as efficiently as possible. Instead of using adversarial litigation tactics, the focus will be on a more open and cooperative process. This does not mean that lawyers should not have tools in their armoury at their disposal to seek to influence the other's side's conduct of a claim, provided it is in the interests of settlement.

At the moment, defendants can make lodgements. This means that a defendant can make a payment into court some time before trial which the defendant calculates is sufficient to meet the plaintiff's claim. If the plaintiff does not accept the lodgement but is not awarded more than the lodgement at the end of the case, the plaintiff becomes liable for the costs of the action from the date of the lodgement to trial. This is a serious tool which is currently underused by defendants. The costs incurred between the date of lodgement and trial can be considerable and refusing a lodgement could have serious financial consequences for the plaintiff. As noted by the Law Society, where there is any doubt about whether a defendant is liable, defendants have preferred not to make a lodgement, as making a lodgement could be regarded as a sign of weakness. Hopefully, this kind of reasoning would cease with a change in the culture of personal injury litigation achieved with the introduction of a pre-action protocol for personal injury cases.

It is unfair for such a useful tool to be available for defendants only. APIL Ireland calls for the introduction of 'reverse lodgements', which would reflect the 'Part 36' system in operation in England and Wales. This allows a plaintiff to make an offer to settle, which if unreasonably refused by the defendant, could have cost consequences. Both plaintiffs and defendants should be able to make lodgements and reverse lodgements both before and during proceedings. Part 36 is regarded as one of the

most successful aspects of the Woolf reforms in England and Wales because it helps to speed up the settlement process. A copy of Part 36 is attached at annex B.

Guidelines for the Assessment of Damages for Pain, Suffering and Loss of Amenity

One of the most common tasks of a judge is to assess damages for pain, suffering and loss of amenity. These damages cannot be assessed by a process of calculation as money cannot really compensate for these aspects of an injury. In the interests of justice, however, it is important that similar cases should receive similar damages for pain, suffering and loss of amenity, although it must be recognised that no two cases are ever the same. Damages awarded in previous cases are, therefore, used as guidelines for future cases. This is difficult, however, as case reports appear in several different publications and often do not go into much detail. For this reason, APIL Ireland would welcome the development of guidelines for the assessment of general damages in personal injury cases, as developed by the Judicial Studies Board in England and Wales. The guidelines identify various personal injuries and suggest that damages are awarded within a specified range, for example, between £15,000 to £25,000, in accordance with the severity of the particular injury. The guidelines, therefore, do not accord with a fixed tariff of damages, as the guidelines provide flexibility. The Judicial Studies Board explains that the guidelines "distil the conventional wisdom contained in the reported cases…and to present the result in a convenient, logical and coherent form". This would allow both lawyers and the courts to approach the calculation of damages more efficiently. We should stress, however, that guidelines should only be introduced in respect of damages for pain, suffering and loss of amenity. It would not be appropriate to introduce a tariff for the compensation of financial losses, as these should be calculated in accordance with the plaintiff's actual losses and expenses. It is established that plaintiffs are entitled to be fully compensated for losses and expenses incurred as a result of negligent behaviour and this must continue to be the case.

Conclusion

It is in the interests of plaintiffs, defendants and society more generally for personal injury litigation to be conducted fairly, efficiently and cost-effectively. The current procedure rules for personal injury litigation fail on all of these points and APIL Ireland calls for a change in the culture of personal injury litigation. This would primarily involve introducing a pre-action protocol for personal injury cases, to encourage settlement between the parties at the earliest possible stage, greater use of lodgements and the introduction of reverse lodgements. Whilst the civil procedure rules do not need to be radically overhauled, they would benefit from greater enforcement through judicial case management. Minor amendments to the rules to require, for example, substantive pleadings would also be useful.

ANNEX A

PRE-ACTION PROTOCOL FOR PERSONAL INJURY CLAIMS IN OPERATION IN ENGLAND AND WALES

ANNEX B

PART 36 OF THE CIVIL PROCEDURE RULES IN ENGLAND AND WALES