apil association of personal injury lawyers

15 January 2007

The Commission Secretary
Northern Ireland Legal Services Commission
Waterfront Plaza
Mays Meadow
Belfast
BT1 3BN

By email: accesstojustice@nilsc.org.uk

Dear Sirs,

NI Funding Code – Consultation

Thank you for sending us the documents for consultation on the Northern Ireland Funding Code, in response to which we would like to comment as follows:

Interim arrangements for money damages cases

The paper states that until alternative ways of funding money damages cases have been finalised, “money damages cases will remain in scope and be covered by the General Funding Code” (7.3).

We note with great concern that this is now barely the case. The consultation paper proposes to refuse funding for money damages cases “unless a minimum threshold of £5,000 has been reached in respect of the claim’s level of damages” (9.6).

The threshold will effectively exclude 85 per cent of all county court claims from funding[1]. This is entirely iniquitous, and APIL would urge the LSC to retain public funding for all cases above £1,000.

[1] According to the Northern Ireland Court Service, only 15 per cent of Civil Bill Cases in 2005 were awarded over £5000. See Northern Ireland Court Service, Partial Regulatory Impact Assessment – County Court Scale Costs, July 2006, p. 9.

In addition, claims for exceptionally high awards will often also be very costly, and may hence be refused under section 6.4 of the funding code.

The current proposal therefore does not, as suggested, retain legal aid for money damages cases in the interim. Public funding for these cases has been abolished for all but a small minority of cases that fall within a narrow window of expected damages.

APIL's research has shown that, without access to legal representation, many victims will not bring their claim at all.[2] A £5,000 threshold would therefore deny access to justice to many injured people, whose claims fall below the threshold but may nevertheless be of great importance to the injured person.

Money damages cases long-term

APIL is disappointed to find that money damages cases have not been included among the priorities for funding.

We would reiterate our earlier warning that the abolition of legal aid for money damages cases may substantially reduce access to justice in Northern Ireland. We would equally like to highlight again that the funding of personal injury litigation produced uniquely high returns for comparatively very low legal aid expenditure, and in many cases benefited the wider public far beyond the individual litigant.

We fully agree that any regulation of legal aid must aim to ensure that "individuals of limited means can enforce their rights in the same manner as those who can afford to litigate privately using their own resources" (1.1). This principle is even more important in Northern Ireland, where earnings are often lower than in other parts of the UK, and the need for legal aid, therefore, is likely to be both higher and even more crucial in securing access to justice.

Unfortunately, proposed arrangements in relation to money damages cases fail to ensure that personal injury victims on lower incomes can afford to claim their rights.

This is particularly unfortunate in so far as compensation claims are often a means of securing an injured person's future in precisely those areas which the paper describes as a priority: while it is the objective of legal aid to reduce social exclusion, money damages claims which often protect injured clients from falling into poverty and exclusion are no longer funded. While debt is a priority area for funding, action to protect those who have suffered disabling injuries from having

[2] In England and Wales, in February 2005, a MORI poll commissioned by APIL found that 64 per cent of respondents said that they would be unlikely to pursue a personal injury claim without legal representation.

to go into debt through no fault of their own is not. While welfare benefits are a priority area, allowing the injured to secure their income from the tortfeasor rather than state benefits is not.

APIL would like to reiterate that money damages make up only a very small part of Northern Ireland's legal aid expenditure. While abolishing legal aid in this area may have serious effects on access to justice for vulnerable personal injury victims, it could not solve the problem of growing legal aid expenditure.

According to information provided to us by the NILSC, the types of money damages cases which are to be excluded from public funding in future[3] represented less than six per cent of the total spent on legal aid bills in 2005/06[4].

In comparison, 'divorce/ nullity' and 'children's orders' totalled 55 per cent[5], with 'maintenance/ other matrimonial' accounting for a further 6.9 per cent.

Furthermore, the average cost for a legally aided personal injury case is not as high as other publicly funded civil case types. In 2005/06 a civil legal aid bill was on average £2,078 for a personal injury case. This is over £1,000 less than divorce/nullity cases which average £3,128 per case, and less than a third of the average children's order case, costing £7,296.

Family litigation is undoubtedly the main driver of trends in legal aid expenditure. It is therefore contradictory that a code intended to control rising costs proposes not to apply the usual merits test to this area, with the consultation paper stating that cost-benefit and prospects of success criteria "should be easier to satisfy than other case-types" in family litigation (5.6).

Applying the usual cost-benefit and prospects of success requirements to family cases would clearly have the potential to save substantial amounts on cases of limited merit and limited public interest, and thus allow the legal aid budget to continue to meet real legal needs of vulnerable people in all areas of law.

Unlike other areas of public funding, money damages cases are of course often virtually cost-neutral, as cost can be recovered from unsuccessful defendants. For good reason, public funding for personal injury cases in England and Wales prior to its abolition in 1999 has been described as "the most efficient of all public services" with 80 per cent of the £220 million spent per annum recovered from the costs of unsuccessful defendants[6].

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[3] Including 'Assault / Battery / Trespass', 'Criminal Injury', 'Employers Liability', 'Negligence – General', and 'Negligence – Tripping'

[4] £1,153,599.50 out of a total of £19,405,298.34 spent on legal aid bills.

[5] £10,885,887.62 of £19,405,298.34

[6] 'Good, bad and awful' - Robert Marshall-Andrews QC - The Guardian Unlimited (23 March 1999).

In addition, where damages are awarded, other government departments will be able to recover the cost of welfare benefits and medical treatment the victim requires as a result of their injury. All of these forms of cost recovery, as well as VAT paid by solicitors, are likely to make publicly funded money damages claims a substantial net gain to the public purse overall.

APIL has previously warned that a number of factors have in recent months combined to make privately funded personal injury litigation increasingly less financially viable in Northern Ireland. If changes in solicitors' pay and outlays, and the imminent abolition of legal aid for money damages cases lead to a drop in successfully brought compensation claims, the overall losses to the public purse might, for the above reasons, be no smaller than the savings to the legal aid budget.

We further feel that the abolition of legal aid for money damages proceedings runs counter to other objectives set out in the paper.

The consultation paper indicates that cases "concerning intangible benefits such as health, safety and quality of life" for the wider public (10.2) are given a particularly high priority. APIL would contend that many negligence and personal injury cases promote these very benefits and thus serve the public interest. The possibility of compensation claims against negligent enterprises, employers, public authorities etc. can be an effective means of enforcing health and safety, and persuading institutions to take due care not to cause avoidable injuries or harm.

In this way, personal injury litigation helps protect others from injury, and closely matches the paper's definition of public interest. It therefore seems contradictory to abolish funding for such cases at the same time as identifying litigation to protect 'health, safety and quality of life' as a priority area.

Clinical negligence

APIL agrees with both the current and the previous consultation paper that clinical negligence "must be considered a specialist area" (15.1). This is why we do not understand, and strongly oppose plans not to restrict clinical negligence work to specialist practitioners (15.3).

We appreciate that fewer solicitors practice in Northern Ireland than in England and Wales, as a result of which practitioners may specialise less. Victims of clinical negligence, however, must be represented by experts in the field.

Clinical negligence is a highly technical and highly specialised area of personal injury law, in which non-specialist practitioners will often not be able to conduct cases satisfactorily.

When funding clinical negligence litigation, the LSC has, in our view, at least a moral obligation to ensure that the funded solicitors are sufficiently competent to offer the best possible advice and representation to their clients, and thus value for taxpayers' money. It cannot be acceptable to offer inadequate legal representation because qualified practitioners are few and far between.

Where vulnerable clients are concerned, practitioners with insufficient expertise may vastly undersettle clinical negligence claims because they do not fully understand the intricacies of this case type. This may leave some clients whose future quality of life depends on a claim (such as infants represented in wrongful birth cases) without the care or resources they need for life.

In terms of the legal aid fund, the use of non-specialist practitioners may prove very costly. The consultation paper wisely suggests that "experienced clinical negligence practitioners have a role to play at the Legal Help stage identifying poor cases before Investigative Help is applied for" (15.7). This would be a sensible and practicable way of targeting legal aid resources to meritorious cases by eliminating others at an early stage. As the paper recognises, it often takes "experienced clinical negligence practitioners" to correctly distinguish strong claims from the weak. If those who are not "experienced clinical negligence practitioners" are eligible to apply for and receive funding in clinical negligence cases, they may fail to identify poor cases at this point, and limited legal aid resources might be wasted on cases of little merit.

Opening up funding to practitioners without a recognised specialism in clinical negligence may thus often fail to meet the needs of vulnerable clients, as well as waste legal aid funds.

It is for these reasons, that APIL would ask the LSC to clarify what "special criteria" it intends to set "in respect of clinical negligence claims" (15.3), and to ensure that these reflect robust requirements of experience and expertise.

APIL would be happy for the LSC to use APIL's accreditation scheme, which has recently been extended to Northern Ireland, relying on our existing monitoring of experience, training and quality control at no cost to the LSC. Alternatively, APIL would be willing to work with the LSC in the development of a Northern Irish 'quality mark' for clinical negligence practitioners.

Whatever means of ensuring quality is selected, however, it is of paramount importance that only sufficiently qualified and experienced practitioners conduct clinical negligence cases, ensuring both quality advice for clients and value for taxpayers' money.

Claims against public authorities

APIL welcomes proposals to make claims against public authorities an area of priority, to which no minimum level of damages applies. This appears both appropriate and in line with the LSC's human rights obligations. Where abuse of power or violation of human rights are alleged, funding should clearly be available to claimants.

We note with surprise and concern, however, proposals to exclude funding of claims against police, prison service and armed forces from this principle.

This exception does not appear compatible with the principle that otherwise underlies the funding of claims against public authorities. The reasoning behind this restriction is not explained, and it is diametrically opposed to otherwise very similar provisions in the funding code for England and Wales, where funding of all claims against public authorities is considered a priority.

APIL would recommend that this exemption and its compatibility with human rights requirements be reconsidered.

I trust the above is self-explanatory, and hope you are able to address the points raised when designing the final funding arrangements under the code. If you would like to discuss any of our comments further, do give me a call 0115 9388710, or email me at almut.gadow@apil.com.

Yours faithfully

Almut Gadow
<u>Policy Research Officer</u>