



THE LAW SOCIETY
of SCOTLAND
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Consultation Response

Consultation on Recommendations for No-Fault Compensation in Scotland for Injuries Resulting from Clinical Treatment

The Law Society of Scotland's response

November 2012

Introduction

The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

This response has been prepared on behalf of the Society by members of our Civil Justice Committee ('the committee'). The committee is comprised of senior and specialist lawyers who represent the interest of both pursuers and defenders.

General Comments

The Committee has had the opportunity of considering response to the consultation by the Association of Personal Injury Lawyers (APIL), the Forum if Insurance Lawyers (FOIL) and by the Faculty of Advocates.

Question 1: What, if any, steps do you feel are necessary or appropriate to ensure that when an error has occurred, patients receive a meaningful apology?

The Committee has no additional suggestions to ensure that patients receive a meaningful apology.

Question 2. Do you agree that the principles and criteria set out above are essential in a compensation system? .1 Are there any to which you would attach particular priority or importance? Are there any others you would add?

The Committee has been fortunate to have been afforded the opportunity to consider the response to the Consultation which was prepared by the Association of Personal Injury Lawyers (APIL). The Society agrees with the view expressed by APIL that an ideal system would comply with all of the criteria listed in paragraph 3.7.1. The Society agrees with APIL that the most important criteria for a scheme are –

- The scheme provides an appropriate level of compensation to the patient, their family or carers
- The scheme is easy to access and use, without unnecessary barriers, for example created by cost or the difficulty of getting advice or support
- Decisions about compensation are timely

It would not be desirable to have a no-fault scheme that will award lower compensation for clinical negligence than for other accidents where there is the same type of injury.

The proposed scheme is likely to be complex and difficult to navigate without the benefit of legal advice.

The Committee suggests that there requires to be clarification on recovery of costs, i.e. whether legal costs would be recoverable and if so to what extent.

There may be merit in introducing a fee structure similar to the one which accompanies the Law Society's Pre Action Protocol for Professional Negligence Cases.

<http://www.lawscot.org.uk/rules-and-guidance/section-f/division-d-court-work/advice-and-information/pre-action-protocol-in-professional-negligence-cases>

Question 3: Do you agree that these criteria are desirable in a compensation system?

Yes

3.1 Are there any others you think are desirable and should be included?

The Committee agrees that the outcomes mentioned are desirable in a compensation system.

There may be merit in introducing an initial pilot scheme based on the value of the claim. If the pilot is successful it could be extended to claims for all clinical treatments. A pilot could provide an opportunity to test assumptions about claims volumes and whether the desire for an apology, explanation and the prevention of future incidents is the primary aim of those injured by medical treatment.

Question 4: Do you have views or ideas on how a compensation scheme could more effectively contribute to the wider issues identified above?

It is possible, in line with the view expressed by APIL, that a no fault system could lead to a process which is both less accountable and in which less responsibility is taken. If compensation is awarded without attributing fault or blame the mistake may not be traced back to an individual and no-one will be held responsible. This is unlikely to prevent a similar failure in the future.

The Committee has been fortunate to have been afforded the opportunity to consider the response to the Consultation which was prepared by the Forum of Insurance Lawyers (FOIL). The Committee agrees with the view expressed by FOIL that if claims are to be excluded from the scheme where injury has been caused by a recognised risk (which the patient has accepted) it is possible that medical practitioners might give more attention to identifying every possible risk and obtaining patient consent. This is unlikely to improve patient care and may result in an excessively defensive approach on the part of health professionals.

Question 5: Based on the background information on the system in operation in Sweden given in [Annex A](#) would you support the approach suggested in Recommendation 1?

No

If not, why not and what alternative system would you suggest?

The scheme that is proposed is a no fault scheme rather than a no- causation scheme.

Causation is a very complex issue which plays a significant part in many current claims. Claimants using a no fault scheme will frequently require expert legal advice to navigate the issues in relation to causation.

The Committee suggests the introduction of a Clinical Disputes Protocol which could incorporate some of the main features of the existing Law Society of Scotland Protocols (which cover Professional Negligence, Personal Injury cases and Disease claims respectively). The protocol could include an early and detailed disclosure as to the basis of the claim, early disclosure of records, statements and treatment information, early identification of medical issues, timescale for resolution and an agreed scale of costs and expenses.

Question 6: Would you support the approach in Recommendation 2? This would mean for example that where treatment carries a known risk and the patient has given consent to that treatment it would not be eligible.

As stated above, the Committee does not support a no-fault scheme, but if one is to be introduced then the Committee agrees with APIL that eligibility for compensation should not

be based on the “avoidability test” because there should be a presumption that all injuries are eligible unless specifically excluded.

Injuries to be excluded would have to be re-considered on a regular basis as medical knowledge advances.

The Committee agrees with FOIL that exclusions based around known and accepted risks would draw distinctions between different patients which are hard to justify. As previously stated an over emphasis on known risks is unlikely to improve patient care and may result in an excessively defensive approach on the part of health professionals.

Question 7: Do you support the view that, if introduced, a no-fault scheme should cover all clinical treatment injuries (e.g. private healthcare and independent contractors) and all registered healthcare professionals and not just those directly employed by NHS Scotland?

The Committee considers that it is in the interests of justice for the scheme to cover other claims relating to medical treatment.

7.1 What, if any, difficulties do you foresee in including independent contractors (such as GPs, dentist etc) and private practice?

The Committee is concerned that if the proposed scheme is extended to cover other claims relating to medical treatment the number of claims and the cost of the scheme is likely to increase dramatically. The cost of Insurance will also be a significant factor. There is a need for clarity as to how the scheme would operate for GP's and other independent contractors outside the NHS. Clarity is also needed as to how independent contractors would participate in the scheme and how responsibility would be allocated between the NHS and others. There is also uncertainty as to how the insurance market would respond to the introduction of a scheme and whether indemnity arrangements which exist at present would still be available.

7.2 What are your views on how a scheme could be designed to address these issues?

The Committee agrees with FOIL that it is difficult to envisage how a scheme could address these issues. The Committee suggest that a further more detailed proposal is required.

Question 8: The intention is that if introduced the no-fault system will not be retrospective. However, consideration will need to be given to when and how we could transfer to a new system and how outstanding claims could be handled if/when a no-fault system was introduced. What are your views on how outstanding claims might be handled?

The Committee agrees that any no fault scheme, which may be introduced, should not be retrospective.

Question 9: Do you support the approach in Recommendation 5?

The Committee suggests that the scheme should compensate people who have suffered loss as a result of medical treatment. The scheme should aim to put people in the position in which they would have been had it not been for the incorrect medical treatment ie restitution. Having a tariff based approach would not achieve this aim.

9.1 What are your views on the assumption that the level of payments will be similar to those settled under the current system?

The Committee has had the opportunity of considering the response submitted by the Faculty of Advocates. The Committee agrees with the Faculty that under a scheme where there is no requirement to establish fault there will no longer be a need to consider discounted settlements. The new scheme will be likely to see an increased number of cases as well as an increase in the overall payments made to claimants.

Question 10: Do you support recommendations 6 - 9 as proposed by the Review Group?

The Committee supports retention of the right to litigate. The Committee notes that Recommendation 8 will ensure that there is not a risk of double compensation if people wish to use both routes to compensation.

Question 11: Do you agree with the Review Group's suggestions for improvements to the existing system?

As previously discussed the existing system could be improved by the introduction of a compulsory Clinical Disputes Protocol. Changes proposed in the Civil Courts Review are also likely to lead to improvements due to new case management procedures. The Committee agrees with FOIL's hope that the Taylor Review will identify funding models which make it easier for potential claimants to make claims.

Question 12: Would you support the establishment of a scheme specific to neurologically impaired infants if a general no-fault scheme is not introduced?

The Committee does not have sufficient information to answer this question

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