



Northern Ireland  
Assembly

Committee for Finance and Personnel

# OFFICIAL REPORT (Hansard)

Law of Damages/Claims for Wrongful Death  
Consultation: DFP Briefing

26 September 2012

# NORTHERN IRELAND ASSEMBLY

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Law of Damages/Claims for Wrongful Death Consultation: DFP Briefing

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**Members present for all or part of the proceedings:**

Mr Daithí McKay (Chairperson)  
Mr Dominic Bradley (Deputy Chairperson)  
Mr Roy Beggs  
Mrs Judith Cochrane  
Mr Leslie Cree  
Ms Megan Fearon  
Mr Paul Girvan  
Mr William Humphrey  
Mr Mitchel McLaughlin  
Mr Adrian McQuillan

**Witnesses:**

Ms Laura McPolin	Department of Finance and Personnel
Mr Oswyn Paulin	Department of Finance and Personnel

**The Chairperson:** I remind members and witnesses that this session is being recorded by Hansard, and, therefore, all electronic devices must be turned off completely. I welcome Oswyn Paulin, head of legal services in the Department of Finance and Personnel (DFP) and Laura McPolin from the Departmental Solicitor's Office. Oswyn, perhaps you will give us a brief overview.

**Mr Oswyn Paulin (Department of Finance and Personnel):** Chairman, I think that we are here to discuss two issues: the consultation on the law of damages; and common European sales law. Do you want us to deal with both at once or in turn?

**The Chairperson:** How do members feel?

**Mr McQuillan:** We should deal with them separately.

**The Chairperson:** Oswyn, could we start with the law of damages?

**Mr Paulin:** Certainly. The Committee requested an update on the recent consultation on damages. The Committee may recall that this was considered an appropriate time to explore that area of the law, bearing in mind the work that was recently done in England and Wales.

As the briefing paper before the Committee explains, the consultation paper raised three issues: claims for damages for wrongful death; bereavement damages; and damages for gratuitous care. Each of those issues is important in its own right. The consultation exercise ran from 23 April to 10

August, and we extended the period of consultation by three weeks to enable further responses to be made. We hoped that the consultation would spark an informed and dynamic debate and allow us to assess whether the law on damages in Northern Ireland is well targeted or in need of reform in those particular areas. In the event, those hopes were not met, as we received only eight responses to the consultation. Although we would like to place on record our sincere gratitude to all those who took the time to respond, we have to concede that we have not secured enough information to allow us to move to the critical assessment stage.

It is difficult to know why the response rate was so low. People often talk about "consultation fatigue" and suggest that there are too many consultations, and it is possible that that was a factor. However, the law on damages is by no means a peripheral issue, particularly for lawyers, and we would have expected a much better return. The only other possible factor that we can conceive of is that law firms in Northern Ireland tend to be small and perhaps individual practitioners felt that they could not spare the time required to prepare a written response. It is particularly disappointing that neither of the professional bodies for lawyers responded. We had previously spoken to the Law Society and raised with it the fact that the consultation provided an opportunity for lawyers in private practice to influence legislation.

The responses that were received raised several points that were worth noting or following up on, and those are highlighted in your briefing paper. Mrs McPolin and I are happy to elaborate on those points if the Committee so wishes.

As to the next steps, we will consider the points that were made in the consultation and by the Committee and undertake any required follow-up investigations. However, that is unlikely to take us to where we want to be, and we may have to consider additional approaches, perhaps along the lines of direct engagement with the professional bodies and the judiciary. Such engagement is resource-intensive, so, given our other business commitments, it is unlikely to be undertaken in the short to medium term. We will, however, keep the Committee informed of progress. If members have any questions, we will try to answer them.

**The Chairperson:** Thanks for your presentation. On your last point, instead of moving to direct engagement, have you considered going out to consultation again?

**Mr Paulin:** We have not considered re-consulting. We extended the consultation period, but we do not see that sending the consultation paper out again will produce anything. We could target it specifically at the professional bodies. However, I am not sure whether that should be done by sending them what we have already sent them or whether there is a different method.

**The Chairperson:** I am curious whether there is anything in the consultation process that could be improved upon to guarantee a better response.

**Mr Paulin:** The consultation process is designed to give people an opportunity; it provides them with all the information and gives them questions to answer. They do not necessarily need to answer those questions; they can put in other things if they want. It is rather like shouting down a telephone with no one listening at the other end. You can only do it so many times.

**The Chairperson:** Can you break down the consultation? Was it published in newspapers? Were those organisations contacted by letter or e-mail?

**Mr Paulin:** Yes; there were large numbers.

**Ms Laura McPolin (Department of Finance and Personnel):** The consultation paper was distributed to a wide range of people: it went to MLAs, the judiciary, professional bodies, solicitors' associations and local councils. We have an extensive consultation list. It is not just this Department; many Departments have difficulties in drawing responses. However, as Ossie said, in this area in particular — an important area for the legal profession — one would assume that they would have plenty to say, but that just did not come through.

As we already said, Ossie has recorded our thanks to the people who did take the time, and we are grateful to them for doing so. They gave informed responses to the questions and expressed their views. However, the sample is so small that it is difficult to work with and to draw anything meaningful from it about where policy should go or what the consensus is.

**Mr Humphrey:** Thank you very much for your presentation. I have to say, Mr Paulin, that I absolutely agree with you about what you called consultation fatigue. There is absolutely no merit in going out for another consultation. The consultation was from April to July and was then extended by three more weeks, and eight people responded.

I have to say that if that is the best use of resources and taxpayers' money in this era of economic difficulty, I do not know. The cost of producing, publishing and posting consultations is an issue. Our party's view is clear: this needs to be reviewed. When new institutions are established, it is right and important that people be consulted, because trust needs to be built up.

I worked in the private sector for more than 20 years, and I know that people in that sector do not have the time to fill in such things, especially when companies are downsizing. I have many friends who are solicitors whose firms have, unfortunately, had to pay off or reduce solicitors' hours. People in that profession do not have the time to fill in consultation papers. I would hazard a guess that that is why there has been such a poor response. We need to look not just at this consultation but at consultations more broadly, because they are not the best use of taxpayers' money, and, as a result, we are not providing value for money for the Northern Ireland taxpayer.

**Mr Beggs:** I concur with some of what William said. Change should occur when there is a need and desire for it. Rightly or wrongly, it does not appear as though there is a pressing need for change in this area. Members of the public certainly have not said that. There is concern about focusing on the legal profession, because there is a danger of adopting its view. From sitting on the Public Accounts Committee, I am aware of the criminal damage compensation, etc, and the fact that levels of compensation and payments to solicitors were changed. Those making the decisions were largely linked to those involved in law, and so had a degree of self-interest. I want to make changes that the public wants and which are driven by the public when there is demand by them to make best use of public money and to meet a need in society. Therefore, I have some concern about solely consulting the legal profession.

**Mr Paulin:** I can see that in certain areas. However, what we were consulting on here is not something that actually benefits the legal profession in any particular way. Take bereavement damages: they are available for people who are bereaved in certain circumstances, but they are limited in respect of who they go to. What tends to happen with what you might call technical areas of the law is that when a case arises, everybody suddenly says, "Isn't it disgraceful that that person did not get damages?". However, the law is as made by Parliament. Suddenly, there is an outcry, and everybody says that it needs to be changed. This is trying to do it in a more ordered way, by trying to look at where the potential problem areas are and trying to bring a bit of logic into the process. If there is no interest or demand, we just wait until someone becomes very exercised about the outcome of what the law is.

**Mr Beggs:** I accept what you say, but will you illustrate where such instances have occurred and why there is reason to do what you propose? Have instances been drawn to your attention, either before the consultation process or during it?

**Ms McPolin:** Can I say two things? First, I want to give an assurance in relation to the legal profession. Although we would have liked responses from people in the legal profession — because, as Ossie said, they give insight into particular cases — it is important to emphasise that the consultation process did not just focus on legal people. It was across the board and with a whole range of organisations, including those that represent victims and people who would be affected by changes to the law on damages. However, nothing came back. In fact, the only response that you could say was outside the normal format of statutory bodies or pressure or lobby groups was from the Northern Ireland Women's Forum. That was the only response that was from an ordinary body of people, as it were. It is very difficult to get engagement. Occasionally you do, because it is a big issue, as Ossie said, and people want to have their view heard.

There is pressure for changes to the law. This work started because of research by the Law Commission in England and Wales that looked at all those areas because people were saying that the way in which the law is framed at the moment is unfair because it excludes some people from making a claim for damages. Therefore, as a society, we should look at our legislative framework and ask ourselves whether it is well targeted and whether it meets the needs of those whose needs it should meet. The Law Commission looked at it and made recommendations and suggestions as to whether the statutory list of people who can make claims in relation to fatal accidents should be expanded. It

was right and proper that it did that. We also need to look at our law in Northern Ireland to see whether amendments are required to take account of the changes in society and the make-up of society. Is it right still to focus on bereavement damages just for spouses or just for parents of children, or do we need to have a wider group? It is right to have that debate, but the difficulty is actually reaching people and getting an informed opinion. It is a very difficult, complex area of law, but that does not necessarily mean that it is closed off to ordinary men and women. They can still make their views known.

**Mr Paulin:** You asked for an example of external pressure for a change in law. Of course, the pleural plaques issue is a prime example. A decision was made by the court, and then there was quite a lot of pressure.

**Mr Beggs:** The question was whether you can give an illustration of where public concern has come to prominence in the media that the current regulation is not deemed suitable?

**Mr Paulin:** No; I am not aware of any in Northern Ireland, but there certainly have been representations made across the water.

**The Chairperson:** What have the representations —

**Mr Paulin:** That has led to the Law Commission —

**The Chairperson:** Will you illustrate some of those?

**Mr Paulin:** It may not be the best example, but take the case of an uncle who looks after a nephew who lives with him as part of the family: if the nephew dies, the uncle does not fall within the list of people who can claim for bereavement damages. Those are the sorts of issues that can suddenly spark a headline, and people would feel very unhappy. I think that an uncle actually could claim, but there would be family situations —

**Ms McPolin:** The consultation asked whether you should be able to claim if you were wholly or partially maintained by the deceased or if, in the future, you would have been wholly or partially maintained. At the previous Committee session, we spoke about people who were engaged to be married and the fiancée was expecting a child. The expectation was that they would get married and that the father would look after the child. However, if the father were to die before the marriage, who would look after the child? The child could not claim in their own right under the current statutory framework. Hard cases like that prompted the Law Commission to look at the issue again. As a society, we want to ensure that our law properly meets the needs of the people whom it serves.

**Mr McQuillan:** There is no doubt in my mind that Mr Paulin and Ms McPolin are coming at this issue with the best intentions, but, judging by the lack of responses to the consultation, there does not seem to be a big outcry for it. It may be a case of "If it's not broke, don't fix it." We should keep it on the long finger, and if there is an outcry over something, we can look at it again. However, at the moment, it is not the best use of taxpayers' money to take this any further. However, that is just my opinion.

**Mr Mitchel McLaughlin:** I was interested in your analogy of the telephone call. We have all been in that position, especially with mobiles when a signal drops and it turns out that you are talking to yourself. I wonder whether timing is a factor in the broad process of consultation, of which we are avid practitioners. Was its timing just before the summer holidays a factor in the low response? Should that inform our follow-up? Could a stakeholders' conference bridge the gap between the two without breaking the bank?

**Mr Paulin:** That is a possibility, although 23 April is not late in the year. There is still the whole of May and June.

**Mr Mitchel McLaughlin:** In theory, we had an eight-week run into the summer holidays. I do not know when Easter was this year, but we had a spring bank holiday. Is it a good time to go to consultation or could it be missed?

**Mr Paulin:** If we were to say that we should start all consultations at specific times, such as September when everybody is back, there would be an avalanche of consultations. You have to

spread them throughout the year. If you start to consult in July, with an end period of the end of August, you could understand why that might be affected by absences, and you might not get many responses.

**Mr Mitchel McLaughlin:** I understand the difficulty. You have a stakeholders' register that you use regularly for these purposes, and the indications are that it is quite extensive and representative, which does not surprise me. In offering the opportunity for people to give us their opinion on an issue that has been consulted on, do we record a nil return if people do not send in a submission, so that people become aware that you respond and put your ideas out or you will be recorded as not having a particular interest in this consultation?

**Mr Paulin:** No, we do not, but we stock in the back of our minds responses from legal professional bodies in particular. We have raised with the Law Society the general lack of responses to consultations, but I do not think we have raised it with the Bar Council .

**Mr Mitchel McLaughlin:** I am of the view that it was time for reform, but I am dismayed at the level of response. Therefore, the conclusion that I have to draw is that I may be wrong . Perhaps it is not as important as I thought it would be.

**Mr Paulin:** I suspect that if we do nothing, one of those situations will arise. Someone will ask why the Department did nothing about it, and we could say that we went to the Committee and it told us not to do anything. *[Laughter.]*

**Ms McPolin:** There is also a big issue about reactive and proactive law reform. As Ossie said, if you are in a tight situation where a legal case has been brought and people are really unhappy, it is a difficult arena in which to undertake consultation and have an informed debate; whereas if you are having it with a bit of space around you as a proactive law reform project, you can have a much more dynamic debate if you can get people engaged. The issue with engagement is not just happening to us; many Departments are facing it. It is just unfortunate. It is a brilliant opportunity for people to offer input, and it is good for us as well because we are not omniscient: we also rely on people's expertise. Garnering that can lead to other things, and it is just difficult in that you do not get that dynamic going.

**Mr Mitchel McLaughlin:** Did other places consult, and did they get a better response?

**Ms McPolin:** Much of my work links into work in England and Wales, and I have to say that I am always disappointed with the level of responses generally in Northern Ireland in comparison with England and Wales and even Scotland. I look on with great envy.

**Mr Mitchel McLaughlin:** In view of your comments, I might propose that we do something and let the DUP vote it down so that people will know. I am only kidding. *[Laughter.]* You have to decide whether addressing the issues that sparked people's interest in the first instance would provoke a better response than what might be regarded by some as a dry academic exercise — "Oh, not another consultation." If you mapped out a draft proposition, would that give us a better engagement?

**Mr Paulin:** We attempted to be open in the consultation rather than saying, "This is what we want to do; what do you think?" Instead, we said, "These are the areas; what are your answers to these questions?" However, some people might say that they do not want to answer those questions but would rather express their general view. Obviously, we will accept and use that. The alternative is to set out what we propose to do. We would have liked a bit more feedback on the questions before moving to that stage, and I think that we can get that by engaging with some of those organisations directly. However, it is not the ideal or the most efficient way of doing it; it is also an expensive way of doing it. Unfortunately, there are many other areas in relation to law reform.

**Mr Mitchel McLaughlin:** There might be merit in not asking people to respond to a series of questions but to put a draft before them and ask what they think.

**Mr Paulin:** That raises the question of whether you put a draft Bill before them. Normally, we ask them the general questions, and we have legislation drafted on the basis of the responses. Drafting legislation is an expensive and time-consuming business; we do not want to draft legislation and then not present it to the Assembly in due course.

**Mr Mitchel McLaughlin:** OK. Perhaps I am making the assumption that consultation exercises are pretty mediocre in their ability to engage people. The question that arises is whether they are value for money or whether you do something different if we really want to take the temperature of public opinion.

**Mr Paulin:** There is a legal argument about how to carry out consultations. You could get into difficulty if you do not consult — including legal difficulty. However, the counter argument is that since the Assembly is a representative organ of the legislature, is there a need to consult when we have the Assembly through which people can present their views through their MLAs? That is the alternative. However, I do not think that that works with law reform, because law reform is not generally about issues that are in the forefront of anybody's mind. They need to be encouraged to think about that.

**Mr Mitchel McLaughlin:** People sit up and pay attention to the collateral effects of a change. OK. I have not helped at all, but I was just trying to figure out how we deal with this. *[Laughter.]*

**The Chairperson:** Oswyn, the Medical Protection Society (MPS) and the Association of Personal Injury Lawyers (APIL) made reference to Scotland. In answer to question 7, MPS commented:

*"It noted that the law in Scotland had, since 1976, allowed the court discretion in the damages for loss of society, 'unlimited in amount and to a wider class of claimants'. It suggested that such an approach was 'possibly fairer than the award of standardised bereavement damages' but it also felt that that approach could lead to a 'significant increase in the volume and cost of litigation, due to the uncertainty that would be promoted'."*

In how much detail has the Department looked at that? How seriously are you taking aspects of that legislation in respect of an application here?

**Ms McPolin:** That is one of the points that we need to follow up on. Our legislation follows England and Wales on the bereavement side in that you have a very narrow class of people — spouses, civil partners and parents of a deceased child — who are entitled to bereavement damages. Scotland has the concept of loss of society; it is for the court to look at it and assess the impact, and damages are awarded accordingly. That is a separate approach.

The Law Commission toyed with the idea of having a more open-ended process in England and Wales. That is one of the things that we will have to look at. We have undertaken to look at it in the analysis of responses. The Scottish approach is much broader, though. APIL has recognised that it is an open-ended group; you stake your claim for loss of society and the court assesses that claim. It is a different dynamic. In Scotland, you do not have a statutory list with an established amount of compensation. In this jurisdiction, that compensation is £11,800, which is divided between the parties. If you have two parents, it will be divided between them. In Scotland, you go in your own right; the court assesses your claim for loss of society and makes its award. That is one of the things that we have noted for follow-up consideration.

**The Chairperson:** Before 1976, was the Scottish set-up more or less parallel to here and England and Wales? Is there an assessment of how the volume of litigation increased after the legislation was introduced?

**Mr Paulin:** I could be wrong, but my understanding is that, in Scotland, it is what we call common law. It had been the law in Scotland for a very long time. The Administration of Justice Act came into force in England and Wales in either 1976 or 1979.

**Ms McPolin:** Nineteen eighty-two.

**Mr Paulin:** Nineteen eighty-two. It came in as new legislation under which you got compensation for bereavement. Until then, common law in England and Wales and Northern Ireland stated that if a relative of yours is killed — for example, if your child is killed as the result of an accident that was somebody else's fault — you can get compensation for any financial loss but you cannot get compensation for grief. If your wife was killed by a car, you could not get compensation for grief; you could only get compensation for financial loss. There was often a difficulty in those days because, at that time, it was generally the man who provided the financial input to the family, so there was a major problem if a wife died.

Several things were changed by statute, one of which was the introduction of bereavement awards. That was a change made in England and Wales and then Northern Ireland that brought us more in line with what they were doing in Scotland but on a different basis. There was a view that that was something for which we should not be awarding damages. The legislation represented a compromise between those who thought that there should be compensation for loss of society and those who thought that there should not. It was narrowly defined in both money and who should receive it.

That is a brief overview of how the two systems relate to each other.

**Ms McPolin:** We will have to assess the impact on how the Scottish courts operate. As you will know, the Scottish system is quite different in many respects from England and Wales and our jurisdiction. One of the aspects that we will look at is how it is handled in Scotland and whether it presents difficulties in respect of manageability. As Ossie says, our current law is a compromise; it is fairly well structured and kept quite tight. Insurance companies do not want to move away from that. The Scottish system is far more open, but it does not seem to present any difficulties. It exists and it is operating. We will want to tease that out with colleagues in the Scottish Government.

**Mr Cree:** One of the most interesting points is that the two professional bodies did not respond. What follow-up you have done with them? I would be interested to hear what reason was given. One would think that they are involved with this issue practically every day and have the most experience of it. The other point that intrigued me was that the Legal Services Commission did not respond in detail to your questions but made a wonderful statement that the law of damages should:

*"meet the legal needs of the people in Northern Ireland."*

Could you translate that for me?

I also want to ask Oswyn about the pleural plaques case. I would be interested to hear the rest of the example that you were going to quote because we have an interest in pleural plaques from earlier legislation that we dealt with.

**Mr Paulin:** I was giving the case of pleural plaques as an example of where there was public pressure for change in the law as a result of a court decision. The House of Lords decided that compensation was no longer available for people who suffered asymptomatic pleural plaques. The result was a considerable volume of correspondence. In DFP, we got a great deal of correspondence from MLAs. It was the same across the UK.

That is an example of a court deciding something to which there is a response. What I was trying to say is that we could find any one of those situations arising in the various examples that we have put in the consultation paper. Suddenly, interest is sparked because of a court decision, and everyone says that it is all totally wrong and asks why the law is like that. That leads to pressure for change. That has happened throughout the history of legislation in relation to damages. The law on damages is generally developed by the courts, but, on occasion, Parliament has intervened and changed the courts' decisions or has brought in new approaches.

The other two questions —

**Mr Cree:** Sorry. Before you leave that point, is it not also true that most law, or certainly a large proportion of the law — and, indeed, regulation — comes about as a result of incidents and pressure following particular occurrences or cases?

**Mr Paulin:** Each court decision in relation to a particular case is as a result of an incident. Often, people try to push or develop the law in a particular direction. That is true particularly of court decisions. Similarly, with legislation: something occurs that people are not happy with, and they want it changed through legislation.

As far as the professional bodies are concerned, we have not gone back to them to ask why they have not responded. We raised it with the Law Society. In fact, the Minister raised it with the society a while ago in relation, generally, to responses to consultations. The society expressed a desire to become more involved in the consultation process. I think that we will go back to them and say that there are opportunities that they seem to have missed, and here is an example of something that we thought might have interested the two bodies. We will see whether the society can —



**Mr Cree:** You are very temperate in that example.

**Mr Paulin:** Sorry?

**Mr Cree:** This is a clear case where the society did not respond to something that, you would think, would be a bread-and-butter issue for it.

**Mr Paulin:** Well, yes. I could not disagree with that.

**Mr Cree:** What about the Legal Services Commission?

**Mr Paulin:** I think that I would like to look at what it says in the context, and we could comment later on it.

**Ms McPolin:** That is something that we would need to discuss with the commission as well. My interpretation is that the commission wants the law to be well targeted. Obviously, we can explore that and then report to the Committee.

**Mr Cree:** It is interesting to hear that. Without simplifying the matter, if the commission is saying that the law should meet the legal requirements of the people, and the commission does not respond, obviously the law is adequate. Anyway —

**Mr Paulin:** Or the commission may feel that it is not for it to comment on that particular area at the moment; that it is too political a matter or something. I do not know.

**Mr Cree:** That is interesting. Thank you.

**Mr Beggs:** The question of how you prioritise your work arises. You are two highly qualified legal professionals; there are others in the office, and there is the cost of going to consultation. You had a lead from the Law Commission in England, and there is no harm in following that up. However, at some point, you have to prioritise your work in the Department, and it does not seem that this is an issue of concern at the minute. Are there other pressures in your office to which your time and effort are directed?

**Mr Paulin:** Absolutely. Laura is fully engaged with civil law reform. That takes only a relatively small part of my time, but I have many other responsibilities in my role. I provide legal advice to Departments and to the Executive, and we undertake legal transactions, conveyancing, and so on, on behalf of Departments. We also undertake litigation on behalf of all the Departments. We have a wide range of responsibilities in the Departmental Solicitor's Office. Civil law reform is very unusual because it is a policy responsibility, and it was certainly new to me when I came to this post. We also have a policy responsibility for regulation of the legal profession and solicitor profession.

There is plenty to do in law reform; there is no doubt about that. It is a question of working out priorities and pressures. However, once you start to work on something, you do not like to abandon it because it becomes lost work. We will look very carefully at what we do next on those issues.

**The Chairperson:** OK, members, we will move on.