



**The Forum of Complex Injury Solicitors  
(FOCIS)**

**Response to**

**Ministry of Justice CICA Consultation**

## About Us

FOCIS members act for seriously injured Claimants with complex personal injury and clinical negligence claims, including group actions. The objectives of FOCIS are to:-

1. Promote high standards of representation of Claimant personal injury and medical negligence clients,
2. Share knowledge and information among members of the Forum,
3. Further better understanding in the wider community of issues which arise for those who suffer serious injury,
4. Use members' expertise to promote improvements to the legal process and to inform debate,
5. Develop fellowship among members.

See further [www.focis.org.uk](http://www.focis.org.uk).

Membership of FOCIS is intended to be at the most senior level of the profession, currently standing at 22 members. The only formal requirement for membership of FOCIS is that members should have achieved a pre-eminence in their personal injury field. Seven of the past presidents of APIL are members or Emeritus members of FOCIS. Firms represented by FOCIS members include:

Anthony Gold	Hugh James
Atherton Godfrey	JMW
Ashtons	Irwin Mitchell
Balfour + Manson	Kingsley Napley
Bolt Burdon Kemp	Leigh Day
Dean Wilson	Osbornes
Digby Brown	Potter Rees Dolan
Fieldfisher	Prince Evans
Fletchers	Rix & Kay
Freeths	Stewarts
Hodge Jones & Allen	Thompsons NI

FOCIS members act for seriously injured Claimants with complex personal injury and clinical negligence claims. In line with the remit of our organisation, we restrict our responses relating to our members' experience, practices and procedures relating to complex injury claims only. We will defer to others to respond on the impact relating to other classes of case.

FOCIS welcomes the opportunity to comment in response to the Call for Evidence on the Ministry of Justice's 2020 Review.

### **General comments**

FOCIS members act for a significant number of very seriously injured CICA Applicants often who have suffered acquired brain injury ('abi') through an assault. The number of these applications is small relative to the total number of CICA Applicants, but they disproportionately represent those who receive the largest or maximum CICA awards.

Generally, our experience of acting for such individuals is that the processing of claims by the CICA is poor. In this context, we note the conclusion by Baroness Newlove in her January 2019 review that there exists a significant number of longstanding cases which the CICA has been unable to process expeditiously.

In our experience, the processing of these more complex claims by the CICA almost invariably causes considerable Applicant concern and often complaint:

- a. The claims take too long to resolve and 5 or 6 years or more is not at all uncommon. Applicants have the dual disadvantage of delay in their receipt of awards and unnecessarily high legal costs;
- b. The reluctance by the CICA to obtain proper and relevant medical evidence promptly in such cases. Too often, our Applicants are met with the comment that it is the Applicant's responsibility to obtain medical evidence, but that disregards the need for the CICA to assess claims properly. In abi cases, it is hard to see how there can be a proper assessment without medical evidence from a Neuropsychologist and Neurologist and in this respect, we agree the CICA's determination to obtain proper medical evidence from a Psychologist for those with a mental illness [paragraph 132 of the Consultation];
- c. There is too often an unrealistically low assessment by the Senior Decision Maker which then gives rise to further delays and prolonged appeals;
- d. There is generally a lack of understanding of the future role of the Court of Protection in those cases where an Applicant lacks capacity. This is illustrated within the Consultation itself at paragraph 208 in which it is stated incorrectly that Applicants should invoke Trusts where they lack financial capacity. Such a Trust can only be viably used within the context of an overarching Order from the Court of Protection;
- e. It is clear that the Consultation anticipates that any revised Scheme will be subject to current financial constraints (it is disappointing that loss of earnings claim are thus likely to be continuously seriously limited because of the continuation of the 2012 criteria for assessment).

However, we consider that the existing Scheme can be markedly improved for this cohort of Applicants by the CICA adopting some straightforward procedures which we outline below. We doubt this will increase expenditure and indeed there is likely to be a saving of CICA resources, for example through our suggested open and better liaison with Applicants Solicitors which should precipitate more realistic offers in settlement and reduce the number of appeals. There will be benefits to Applicants through better evidence gathering as well quicker resolutions.

We would invite consideration of the following procedures for the very seriously injured cohort:

#### 1. Eligibility

- a. We recognise that in many cases lengthy Police investigations delay any clear indication by the CICA as to eligibility. However, as soon as possible, Applicants should be given that clear indication of the likely view of the CICA. This will inform Applicants' decisions about a number of things, including obtaining medical evidence and approaching the Court of Protection and would not 'tie the hands' of the CICA if there were a subsequent development material to eligibility;
- b. Wherever the CICA had evidence as to eligibility to justify rejection or reduction of the claim that should be automatically provided to the Applicant's Solicitors. Unhappily, delays are routinely introduced by the CICA not providing the evidence without any reasonable explanation and in our experience, there are rarely circumstances where this would be justified allowing for redaction for example;
- c. Where an Applicant commits a crime subsequent to the eligibility indication, it should normally be open to the Applicant where appropriate to submit medical evidence addressing the commission of that crime to the injuries suffered in the assault, for example a brain injured individual who suffered mental illness or personality disorder as a consequence.

#### 2. Quantum

There are within the CICA, Senior Decision Makers well versed with cases involving abi. We have found that their involvement can substantially reduce time taken to resolve applications. Unhappily, such individuals are rare and so we recognise that allocating all abi cases to those Senior Decision Makers may not be practicable. However, we would commend as early as possible following the eligibility indication by the CICA, there being a signposting discussion between the CICA and the Applicant's Solicitors to plot the progress of the claim and so as to work as collaboratively as possible. Such an approach would address:

- a. Obtaining and collating the Applicant's medical records;
- b. Obtaining suitable medical and other expert evidence and consideration of joint instruction of experts where possible;
- c. Indication by the Applicant's Solicitor of likely Witness Statements to be available;
- d. Timetable for exchange of Schedules;
- e. Discussions in relation to Local Authority support, for example following a Section 47 Needs Assessment and impact upon special expenses claims;
- f. Without prejudice discussions.

In this context, we welcome the recognition [paragraph 207 of the Consultation] that the multiplier tables are under review.

### 3. Capacity

Currently there is an unhelpful practice of the CICA to require Applicants to furnish evidence as to capacity before the application can be dealt with. In our experience, often the Applicant is required to approach his/her GP for a proforma report. This is unhelpful not least because a GP's assessment is unlikely to be comprehensive. We would propose:

- a. The issue of the Applicant's capacity be considered as part of the overall provision of medical evidence at a signposting discussion as referred to above;
- b. There be a proper assessment of likely Court of Protection costs (which may involve the setting up a Trust supra) in the light of proper medical evidence, for example from a Practitioner independent of the Applicant's Solicitors and who should be jointly instructed.

We set out our replies to the 17 questions posed below. We restrict our responses to those questions which specifically address those Applicants with abi (and not for example victims of sexual abuse):

#### ***Question 6/7: Injury awards – mental injury***

***6: What are your views on revising the dividing line from 2 – 3 years?***

***7: What are your views on merging Bands A7 and A9 which combined with the proposal above would mean any disabling mental injury with a prognosis for recovery of over 3 years would be categorised together?***

This is probably not of particularly relevance to Applicants with acquired brain injury. It would be helpful to see the evidence referred to within the Consultation.

#### ***Question 8: Simplification of the tariff of injuries***

***8): What are your views on the proposed approaches to Part A (please give reasons for your responses):***

***8.5) overhauling the way brain injury is represented.***

We consider there must be in cases of brain injury, relevant and comprehensive medical evidence to establish the appropriate tariff and would usually be from a Neurologist and Neuropsychologist. Subject to this, we understand the need for better descriptions of the tariffs applicable for brain injuries. We are disappointed that the tariffs are to be significantly reduced for those with very serious brain damage and moderately severe brain damage and would argue that these should be increased substantially to reflect lifelong effect and the limited availability of special expenses award – supra.

Dated this 7<sup>th</sup> day of October 2020