Ministry of Justice

Consultation Paper CP12/09

Legal Aid: Refocusing on Priority Cases

A response by the Association of Personal Injury Lawyers

September 2009

The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers with a view to representing the interests of personal injury victims. The association is dedicated to campaigning for improvements in the law to enable injured people to gain full access to justice, and promote their interests in all relevant political issues. Our members comprise principally practitioners who specialise in personal injury litigation and whose interests are predominantly on behalf of injured claimants. APIL currently has around 4,400 members in the UK and abroad who represent hundreds of thousands of injured people a year.

The aims of the Association of Personal Injury Lawyers (APIL) are:

- to promote full and just compensation for all types of personal injury;
- to promote and develop expertise in the practice of personal injury law;
- to promote wider redress for personal injury in the legal system;
- to campaign for improvements in personal injury law;
- to promote safety and alert the public to hazards wherever they arise; and
- to provide a communication network for members.

APIL's executive committee would like to acknowledge the assistance of the following members in preparing this response:
John McQuater – APIL President;
Jonathan Wheeler – APIL Executive Committee Member;
Stephanie Code – APIL member and Clinical Negligence Special Interest Group Co-ordinator;
Pauline Roberts – APIL member and Multi Party Special Interest Group Secretary; and
Jill Paterson – APIL member and Multi Party Special Interest Group Co-ordinator.

Any enquiries in respect of this response should be addressed, in the first instance, to:
Katherine Elliott, Legal Policy Officer
APIL
11 Castle Quay, Nottingham NG7 1FW
Tel: 0115 958 0585; Fax: 0115 958 0885 E-mail: Katherine.elliott@apil.org.uk

Introduction

APIL's long-standing position is that there should be full and fair access to justice. We believe some of the proposals, if implemented, would prevent this. Damages of up to £5,000 can be a lot of money to an individual when compared with the average annual income.

Executive Summary

APIL welcomes the opportunity to respond to the Ministry of Justice's (MoJ's) consultation regarding the refocusing of legal aid on priority cases.

- We believe that the strengthening of the definition of wider public interest could cause disadvantage to the victims of personal injury. The consultation paper does not state the principles by which the Legal Services Commission (LSC) will determine which cases genuinely represent the public interest. A further concern is that the LSC will take account of whether or not a different section of the public would have a disadvantage or would not support the outcome being sought. This, effectively, is granting the LSC the role of the court.

- APIL is concerned with the proposed special controls and budgeting for public interest and borderline cases. Four or five group actions could all be competing, along with borderline cases, for funding from the same financial pot; yet they may all merit receiving public funding.

- We are concerned that should the existing committee be replaced by a new committee which includes non-lawyers; there may not be full comprehension of the issues at stake or the merits of the case.

- The long-standing position of APIL is that £5,000 is a lot of money to an individual when compared to the average annual income. A relatively small sum of money to some can represent a significant amount of money to many people. Someone

working 35 hours per week and earning the minimum wage of £5.73 per hour would have to work for three months to receive just over £2,000, this sum cannot be said to be insignificant in this context. Damages of up to £5,000 can still make a difference to the lives of many people.

- Cases can still have a wider public interest where the monetary value is less than £5,000 per claimant.

- We would question the effectiveness of complaints procedures and ombudsman schemes.

- We have concerns that if the *inter partes* costs for the defendant are factored into the claimant's application for public funding for appeal, the claimant and defendant will not be starting on level ground.

- APIL is of the opinion that the referral criteria for the Special Cases Unit (SCU) case management is already difficult to work with; and that extending the criteria would make the process even more arduous.

- We believe that if the LSC were to seek representations before funding is granted, there would be clear and massive conflicts of interest. A defendant is likely to provide a biased opinion, as the defendant will know that if the claimant is not granted legal aid, the chances of them being able to fund a case against them privately will be nil.

- APIL believes that there should not be restrictions imposed on legal aid for non-residents as it would not be in the interest of justice.

Consultation Questions

As our remit only extends to personal injury cases, we have only answered those questions which relate to this field.

Q. 1 Do you agree that the definition of wider public interest should be strengthened to ensure that a case will only qualify if it is a good vehicle on its facts to deliver those benefits? Do you agree that disadvantages to the public from the proceedings should also be taken into account in assessing public interest? What safeguards are appropriate for claims brought by minority interests?

We believe that the strengthening of the definition of wider public interest could cause disadvantage to the victims of personal injury.

APIL is concerned that when taking account of contrary public interest, the new definition of wider public interest may become unworkable. The consultation paper does not state the principles by which the LSC will determine which cases genuinely represent the public interest. It could be argued that there is a risk that the defendant could always state that there will be disadvantage to the public. When considering multi party action (MPA) cases, for example a case involving an environmental claim, they will nearly always have competing public interests. If the definition of wider public interest is strengthened it could cause complications with multi party actions. By their very nature, MPAs are of wider public interest; and, therefore, strengthening the definition of wider public interest is not necessary.

A further concern is that the LSC will take into account whether or not a different section of the public would have a disadvantage or would not support the outcome being sought. This, effectively, is putting the LSC in the role of the court. A court should balance competing public interests in cases that have a public interest against the private interest of the claimant.

With regard to safeguards, the whole point of the process is that the court will be involved and will consider the merits of each case. We believe that this safeguard is sufficient.

Q. 2 Do you agree with the proposed special controls and budgeting for public interest and borderline cases as described above? Do you agree that the existing committees should be replaced by a new committee? Do you agree that the new committee should include non-lawyers? Are there other groups who should be represented on the new committee?

APIL is concerned with the proposed special controls and budgeting for public interest and borderline cases. Our concern is that, at any one point in time there could be few or no group actions, however at another point in time there could be four or five group actions which all require legal aid and have points of law which are in the public interest. Not all MPAs are borderline cases but most, by their very nature, will be in the public interest. MPAs already have to compete for funding from the same pot of money under the current system and this has caused problems. The problem is that four or five group actions could all be competing, along with borderline cases, for funding from the same financial pot; yet they may all merit receiving public funding.

In addition, there could be occasions when MPAs and other borderline cases could be competing for funding. Both cases may merit the receipt of public funding and yet a MPA, because of the wider public interest, may receive priority. The LSC is also proposing the introduction of a new committee to replace the current committee with no clear explanation as to why this is necessary. APIL is concerned that, perhaps, the current committee is not working as it should, although this is not clearly stated in the consultation paper. The consultation discusses the appointment of non-lawyers, which might suggest a reduction in the number of lawyers in the new committee; however, lawyers have a day-to-day knowledge of the working of these sorts of cases and, so we consider, are an important part of the process. We are concerned that should the committee be replaced by a new committee which includes non-lawyers; there may not be full comprehension of the facts of whether the case is likely to succeed or not. If non-lawyers were to be included within the committee, they would have to be truly independent of the LSC in order to avoid potential conflict.

Q. 3 Do you agree that we should refocus our resources on higher value damages claims and refuse funding for investigative help and representation where the damages are unlikely to exceed £5,000? Should we retain an exemption for low value cases which do attract significant wider public interest? Should we apply this to individual claims, MPAs or both types of claim?

The long-standing position of APIL is that £5,000 is a lot of money to an individual when compared to the average annual income. A relatively small sum of money can represent a significant amount of money to many people. Someone working 35 hours per week and earning the minimum wage of £5.73 per hour would have to work for three months to receive just over £2,000: this sum cannot be said to be insignificant in this context. Damages of up to £5,000 can still make a difference to the lives of many people.

APIL believes that these types of cases should continue to receive public funding. When considering multi party actions, it could be that each individual would receive anything up to £5,000, yet the total value of the claim could be worth much more. In this instance, the case may need public funding to get off the ground; and if the total value of the case is much more, surely it would be a matter of wider public interest that the claim received public funding to get started, regardless of the individual value of the claim. There are many MPAs where the individual receives less than £5,000, but where there are also many individual claimants. It could be that there are numerous claimants with relatively low value claims. APIL believes that the same test should apply to all claims whether it is a MPA or individual claim.

It should also be noted that in personal injury cases where damages are valued in excess of £1,000 (not £5,000) *inter partes* costs are recoverable. If the case otherwise meets the LSC's eligibility criteria for public funding, the risk to the legal aid fund is, therefore, minimal because in successful cases *inter partes* costs will be paid and the fund will be reimbursed.

Q. 4 Do you agree that where an out of scope matter is brought back into scope because there is significant wider public interest this should only be for damages cases where the damages are at least £5,000? Should we apply this to individual claims, MPAs or both types of claim?

As stated in response to question three, the long-standing position of APIL is that £5,000 is a lot of money to a person when compared to the average annual income. Damages of up to £5,000 can still make a difference to the lives of many people. Therefore, APIL believes that these types of cases should continue to receive public funding, regardless of whether significant public interest is present. APIL believes that the total value of the claim should be more relevant than the individual claim. Cases can still have a wider public interest where the monetary value is less than £5,000 per claimant, for example there might be a really important point of law that needs to be addressed. As it is, there aren't many MPAs which are completely public funded. In the instance of a MPA, some claimants have insurance, some claimants are not eligible to receive legal aid and some claimants need legal aid in order to pursue their claim. APIL's long-standing position is that there should be full and fair access to justice for all. It would be unfair to exclude those who are unable to afford to pursue their claim when those who can or who have insurance can proceed with theirs against the same defendant.

Q. 5 Do you agree that we should add a specific reference to the prison and probation complaints procedures and the Prisons and Probation Ombudsman in section 8 of the Funding Code? Are there other complaints systems or ombudsman schemes which should be explicitly mentioned?

From section 3.28 of the impact assessment, it would appear that any client wishing to bring a claim for damages against a public authority would have to first pursue the claim through a formal complaints procedure or ombudsman prior to commencing litigation.

We would question the effectiveness of complaints procedures and ombudsman schemes. One concern is that there are limitation issues, with all personal injury claims. Complaints procedures and ombudsman schemes can be time consuming, if an unsatisfactory outcome was reached following this route and a civil claim was still necessary a claim could have been compromised by evidence not being gathered sooner. We do not therefore believe that it would be practical to go through an ombudsman or complaints procedure first. Our second concern is that a complaints procedure or ombudsman scheme will not necessarily bring about the result which the injured person wanted. For example, the claimant may require care or some form of assistance and thus their claim necessitates financial compensation or an agreement which an ombudsman or complaints procedure cannot provide.

Q. 6 Do you agree that we should include a specific reference to potential *inter partes* costs in assessing the cost/benefit of appeals in section 8 public damages claims?

We have concerns that if the *inter partes* costs for the defendant are factored into the claimant's application for public funding for appeal, the claimant and defendant will not be starting on level ground. The claimant is an individual. There is already a David and Goliath struggle between the injured person and the commercial enterprises of modern insurers. The defendant is, therefore, already at an advantage to the claimant. If the LSC is to consider the *inter partes* costs of the defendant, then they will also need to factor in this for the claimant. If the LSC were to take into account the *inter partes* costs of the defendant only when assessing the cost or benefit of a claim in appeal, then the claim would be heavily weighted against the claimant. Therefore, we propose that the LSC: takes both the defendant's and the claimant's costs into account; or factors in the *inter partes* costs to date and also the cost of appeal for the claimant; or factors in no *inter partes* costs at all.

Q. 10 Do you agree with extending the referral criteria for SCU case management? If yes, which cases would benefit from SCU case management? If no, please give reasons.

APIL is of the opinion that the referral criteria for the Special Cases Unit (SCU) case management is already difficult to work with; and that extending the criteria would make the process even more arduous. We believe that the existing criteria are seen to be sufficient and do not need extending. The majority of stand alone child abuse or clinical negligence cases are unlikely to exceed £25,000 in costs on legal aid rates and, therefore, there would be no need to extend the criteria. An extension of the criteria would only require the SCU case management to be involved with every case, which we do not believe is necessary.

Q. 11 Do you agree that LSC should seek representations before funding is granted? Do you think the 14 day period is too long or too short? Should this be discretion for the LSC to seek representations in particular categories of law or specific financial circumstances of applicants? In which categories of law or circumstances would pre-grant representations be more or less useful?

If the LSC were to seek representations before funding is granted, there would be clear and massive conflicts of interest. A defendant is likely to provide a biased opinion, as the defendant will know that if the claimant is not granted legal aid, the chances of them being able to fund a case against them privately will be nil. When dealing with child abuse cases, notifying the defendant of the claimant's application for legal aid would give them advanced warning of a potential claim against them at a time when it may prejudice the claimant's case to do so, and may, for example in the case of a claim against an individual, lead to the defendant dissipating assets when there is nothing at that stage that the claimant can do to stop them. APIL believes revocation of a certificate is a sufficient enough tool for the LSC to use when it is required. Applicants are obliged to provide truthful answers on the means assessment and solicitors have an obligation to

provide the LSC with a balanced opinion. It is not certain in any event what information a defendant is likely to have as to an individual claimant's means, certainly before a claim has been intimated against them. If a defendant is being asked to comment on the merits of the case, the LSC needs to bear in mind that often the chances of success of an action can only be ascertained once investigative work is carried out, for example, to trace and interview witnesses, review records and documents, or following a medico-legal examination of the claimant. In order to carry out this work, public funding is required.

Q. 12 Do you agree that final determinations should be with the Special Cases Unit for the cases they manage? Should this change be limited to the Special Cases Unit?

APIL is of the opinion that applying for and getting public funding is a hard process as it is. The SCU is operating to budget constraints and is not independently monitored. It would appear that the proposal has been made in an attempt to reduce costs, which means that the merits of the case may not be fully assessed. This is where an independent expert (specialist lawyer) is required in order to ensure that the merits of the case are assessed appropriately. Solicitors, who run these types of cases on a day-to-day basis: know the system and how it works; can understand and analyse the facts; and give realistic prospects of success, are better suited to set final determinations. If the SCU has independent adjudicators that do not deal with the sort of cases they are presented with, there are many specialist lawyers who could be asked.

Q. 16 Do you agree that there should be restrictions on legal aid for non-residents? What exceptions or safeguards should apply? Do you agree that funding should continue to be available for the proceedings listed? Are there other areas of law for which funding should remain available?

APIL believes that there should not be restrictions imposed on legal aid for non-residents as it would not be in the interest of justice. Restricting legal aid for non-residents will allow negligent parties to escape valid claims simply because the claimant does not live

within the UK. Restricting legal aid for non-residents, we believe, would be completely unfair, especially as the claimant would be unable to bring proceedings in their country as the cause of action is within the UK's jurisdiction. APIL is of the opinion that if the event occurred within the UK's jurisdiction and the claimant is financially eligible; in order to allow fair access to justice they should be eligible to receive public funding. If restrictions were imposed on non-residents, there would only be more complexities if the party became a resident again as to whether they would be eligible or not. In addition, this could create complex administrative issues when eligibility is affected due to changes in international agreements.

Q. 17 Do you agree with the initial impact assessment? Do you have any evidence of impacts we have not considered?

The only comments APIL has to contribute at this stage are points which have been made throughout the consultation. It is not clear from section 3.28 of the impact assessment whether the proposal to use complaints procedures before litigation will be extended to include all ombudsman and all forms of complaints procedures for all claims against any public authority; or merely extended to include the prisons and probation complaints procedures and the Prisons and Probation Ombudsman.

Section 3.36 of the impact assessment refers to clients who will no longer receive funding because the LSC will consider *inter partes* costs when assessing the cost/benefit of appeals in section 8 public damages claims. Section 3.36 explains that the client could in the alternative: fund their own action; or find a solicitor willing to act on a contingency fee basis. The problem here is that at such a stage in the proceedings it is very unlikely that an 'after the event' insurer would be prepared to back the risk of an unsuccessful appeal. In addition, the very fact that a client is financially eligible for public funding at this stage clearly mitigates against the prospects of the client funding an appeal themselves. The section also suggests that the client could go to an ombudsman or through a formal complaints procedure, which at this stage will not help the client. In this instance, the

client needs public funding in order to argue a point of law, and to retain any judgment in their favour made by the lower court.

Section 5.4 of the impact assessment refers to the impact on human rights. APIL would suggest that: if foreign nationals will have restrictions put on them when applying for legal aid; or if cases unlikely to recover more than £5,000 in damages will not be eligible for legal aid; and there are more restrictions imposed on those who can apply for public funding, surely there are access to justice issues, which infringe on the public's human rights.

- Ends -

Association of Personal Injury Lawyers

▶ 11 Castle Quay, Nottingham, NG7 1FW ● T: 0115 958 0585

● W: www.apil.org.uk ● E: mail@apil.org.uk