Ministry of Justice

Consultation Paper CP18/09

Legal Aid: Funding Reforms

A response by the Association of Personal Injury Lawyers

November 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:
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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. If the injured person does not have access to a legal representative or an expert of their choice, then their access to justice is ultimately limited.

We are not placed as an organisation to answer or provide comment on each question. Our remit only extends to personal injury cases. We have, therefore, only provided general comments on those questions laid out in Part Three: Experts' Fees.

Executive Summary

APIL welcomes the opportunity to respond to the Ministry of Justice's (MoJ's) consultation regarding the proposed funding reforms of legal aid.

- We believe that selection of the right expert with the relevant technical knowledge is critical to the outcome of the claim and that the quality of the expert evidence is essential for the effective running of the civil justice system. For example when dealing with a child abuse case, not just any psychologist will be suitable; it may be that a psychologist with experience of dealing specifically with children who have been abused is necessary. APIL believes that these are objective reasons for a difference in the expense of experts within the criminal justice system and civil litigation.

- We believe that if the claimant is unable to employ the right expert they require, due to limitations placed on fees, an inequality of arms will result between the injured person and the defendant. The defendant may be an individual person, or it may be an insured body, or a large company or public body. The defendant is not subject to any restriction on expert fees and, therefore, can afford to pay whatever is necessary for them to get the expert evidence they wish. This seems especially unjust in cost bearing cases such as personal injury and clinical

negligence where, if the claimant is successful, the cost of pursuing the claim will be borne by the defendant and there will be no loss to the Legal Services Commission (LSC).

- We believe that the hourly rate must be relative to the expertise of the expert; and to them fulfilling their role to an expected standard. The argument is that, where you have two experts of the same experience: one dealing with complex issues of causation; and one dealing with more straightforward work, you may have the instance that one has been under remunerated for undertaking complex work and one has been over remunerated for undertaking relatively straightforward work.

- We believe that restricting the funding of experts in this way could have the unintended consequences of experts being less likely to accept instructions on more contentious cases on the basis of fixed court attendance costs or fixed fees when they can receive the same pay for work on a non-contentious case.

- There is also no evidence within the consultation paper that these figures, produced in Annex B, have accounted for indexation, which means that there is no mechanism for future increases and that the figures will become worth even less.

Inequality of Arms

The evidence that an expert provides in a case can significantly alter the outcome. The MoJ acknowledges that the expert market is complex; that selection of the right expert is critical to the outcome; and that quality expert evidence is essential to the effective running of the civil justice system[1]. In the consultation paper, the MoJ states that the LSC are *currently paying different amounts for the same work by different experts and across categories, which means it cannot demonstrate that it obtains best value for money.*[2] APIL rejects this suggestion because when acquiring expert evidence, there can be a big

[1] *Legal Aid: Funding Reforms*, Consultation Paper CP 18/09, Ministry of Justice, 20 August 2009, page 16 paragraph 1.
[2] *Legal Aid: Funding Reforms*, Consultation Paper CP 18/09, Ministry of Justice, 20 August 2009, page 16 paragraph 7.

difference between presenting a standard quantum report and experts providing complex evidence on issues of liability and causation in different categories of law.

APIL also disputes the logic of the final paragraph on page 17 of the consultation paper where it states that expert fees are paid at higher rates in civil cases than in criminal cases and that the LSC can see no objective reason for this[3]. APIL argues that there are objective reasons for this difference, the principal reason being the difference which lies within the burden of proof. In civil litigation, the burden of proof lies with the claimant. A defendant within the criminal justice system has to prove that there is enough doubt that they didn't commit the crime. A claimant in a civil claim is put to strict proof on every element of their claim; they have to prove that there is a duty of care, there has been a breach of that duty and that they have suffered damage as a result. In civil litigation, claimants are also working against principles like the Bolam[4] principle, which lays down the appropriate standard of reasonable care in negligence cases involving skilled professionals. The Bolam test expects standards which must be in accordance with a reasonable body of opinion, even if others differ in opinion.

If the claimant is unable to employ the expert they require, due to limitations placed on fees, this could create an inequality of arms between the injured person and the defendant. The defendant may be an individual person, or it may be an insured body, or a large company or public body. The defendant is not subject to any restriction on expert fees and, therefore, can afford to pay whatever is necessary for them to get the expert evidence they wish. This seems especially unjust in cost bearing cases such as personal injury and clinical negligence where, if the claimant is successful, the cost of pursuing the claim will be borne by the defendant and there will be no loss to the LSC. Contrast this with the defendant, who will be able to select any expert he wishes and, should they win, charge the claimant for the privilege. APIL believes that where there is the chance of

[3] *Legal Aid: Funding Reforms*, Consultation Paper CP 18/09, Ministry of Justice, 20 August 2009, page 17 paragraph 7.
[4] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 583.

recovering legal aid costs from the other side, the legal aid fund should expect to pay the market rate for getting the right evidence from the right expert.

Also, when considering that, in the instance of clinical negligence cases, there is already an inequality of arms because the claimant will be pursuing a claim against a defendant who is medically qualified, or at the very least will have easy access to a team of medical experts. The defendant, in these circumstances can gain expert evidence simply by speaking to the treating clinician or risk managers within their own internal structures.

Fixed Hourly Rates

In Annex B, the proposed fees are grouped together with the proposal that all experts will be paid the same, no matter what category of law they work within. This seems especially unjust in cost bearing cases such as personal injury and clinical negligence where, if the claimant is successful, the cost of pursuing the claim will be borne by the defendant and there will be no loss to the LSC (as laid out above). In these cases, any funds that have been provided in advance by the Legal Aid Fund to allow the claimant to pursue his claim will be paid back to the LSC by the defendant through the costs order. However, when considering criminal and family cases there is no chance of recovering costs back; this can be starkly contrasted with civil cases where the claimant may recover costs from the defendant should they win.

Looking at the figures provided in Annex B of the consultation paper, the hourly rates can easily be misconceived unless you actually break them down and look at what the expert is required to do for that figure. The figures can be misconceived because some of the report types listed in Annex B can be more complicated than others. APIL believes that the hourly rate must be relative to the expertise of the expert; and to them doing the role to an expected standard.

The majority of cases within the scope of publicly funded personal injury work that require experts are clinical negligence and child abuse cases. These types of cases are much more complicated because for clinical negligence and child abuse cases the claimant will need

an expert to deal with issues of causation, liability, limitation and quantum. The MoJ, in the paper, have not provided any clear indication of where the figures in Annex B have been collated from. APIL would argue that on the basis of the figures provided in Annex B, there is not a chance of securing a decent clinical negligence or child abuse expert. The figures propose a maximum of £500 for a day in court – expected to be five hours. There may be only five hours of court time in a court day but an expert is expected to be at court for the whole of the day, including a pre-trial conference. Further, an expert will charge by reference to what they could earn if they were not at court i.e. a full working day of work. It is anticipated that experts will refuse to accept the cases on the basis of these figures.

APIL can argue further that the figures are not the market rate when considering the expertise required. If there is a case dealing with a particular point of law which is very specialised, and there are only one or two experts within the country, or even the world that can provide suitable evidence, market forces mean that they can charge more than these fixed rates; and if they can, they will do. Providing expert evidence is the expert's opportunity to earn more money and, it is therefore expected, that they will make the best of this opportunity and not limit themselves to an aggregate hourly rate.

APIL would argue that it would be impossible to settle upon a single rate as there will be a certain number of available specialists within the scope of a case. There could be a mass of experts who deal with the majority of cases, however, there may then be a case where a specific expert is needed, and no-one else is suitable. In these instances, it is difficult to set a range of hourly rates for providing the evidence, when the complexity of the case may dictate the rate which is deserved.

This is especially true when considering that some parts of a case may be straightforward and some may be extremely complex. The experts providing these two separate pieces of evidence are not likely to go to the same lengths. APIL would also argue that the facts of the case can sometimes be complicated. It may, therefore, be necessary to request one or two top tier experts for this part of the evidence; however on the simpler facts, it may be completely appropriate to request the expertise of a cheaper expert with less experience.

The claimant adviser must look at all the options which are available to them in order to provide a full review of all parts of the claim.

In Annex B, it is proposed to group all experts of the same level together, for example General Practitioners (GPs). It could be argued that a claimant instructing a GP to provide a report on quantum is completely different to instructing a GP to prepare a report on another GP's alleged negligence. To group such reports together within a broad category of provider will undermine the system. The proposals within the consultation paper have the potential to drive away decent experts when, as stated on page 16 of the paper, there have been pressing concerns about the current quality and volume of supply of experts[5].

Also, when considering standard road traffic accidents (RTAs) where there are no unusual circumstances or facts, an expert with less experience may be sufficient. However, when dealing with clinical negligence and child abuse cases the supply of experts is a much narrower field. APIL's argument is that there are lots of types of experts and that grouping them together, and to state that they are doing the same work, is unreasonable on those at the top end of their profession. Across all categories of law, like for like experts cannot be compared as they do not exist.

To be almost crude about the proposals, it is not likely that a GP would accept a case, which required attendance at court for a fixed fee of £500, unless they were dealing with points of diagnosis and prognosis. The proposed rates are simply too low; do not reflect the current market; and do not account for different levels of experience within a profession.

APIL would also argue that the more robust opinion the expert has, the least likely the case is to run indefinitely. With an expert providing a specific conclusion (which can sometimes come with experience, or at a higher price) the claimant would be in a stronger position to bring the case to an end more quickly.

[5] *Legal Aid: Funding Reforms*, Consultation Paper CP 18/09, Ministry of Justice, 20 August 2009, page16 paragraph 3.

Fixed Fees for Reports

In the consultation paper, the MoJ asks if there are any circumstances where fixed fees would be appropriate, for example GP reports[6]. It could be expected that experts will certainly be less likely to take on more contentious cases on the basis of fixed costs when they can receive the same pay for work on a non-contentious case. The argument is that, where you have two experts of the same experience: one dealing with complex issues of causation; and one dealing with some straightforward work, you will have the instance where one has been under remunerated for undertaking complex work and one has been over remunerated for undertaking relatively straightforward work. Therefore, providing one rate would be unfair to those in the profession as well as limiting access to justice for the claimant.

Other Fixed Fees

The proposals in the *Civil Bid Rounds for 2010 Contract – A Consultation Response*[7] also provide for a fixed cap on travel expenses of £40. If an expert practises in Edinburgh and is instructed on a case in London, they will be expected to make the round-trip at a loss. APIL believes this prevents freedom to choose an expert and thus creates unfair access to justice. The expert is unlikely to accept the case if they will be insufficiently remunerated. Legal aid is available to provide fair access to justice, and yet this proposal completely limits it. When considering civil legal aid, it should also be noted that the experts' fees could be subject to a reduction of costs on a legal aid assessment of costs. Therefore, the solicitor cannot simply instruct any expert at a fee for which the LSC is automatically liable; if the expert is charging too much they will be penalised by a costs reduction, and either the expert will have to accept lower fees or the solicitor will be required to pay the excess. This principle can provide added protection for the legal aid fund in that the solicitor will be conscious of how much the expert's fees are in the first place.

[6] *Legal Aid: Funding Reforms*, Consultation Paper CP 18/09, Ministry of Justice, 20 August 2009, page19 question 11.
[7] *Civil Bid Rounds for 2010 Contracts – A Consultation Response*, Legal Services Commission, 30 June 2009.

There is also no evidence within the consultation paper that these figures have accounted for indexation, which means in a year or two the figures will be worth even less. APIL is unable to comment on the impact assessments as neither of them provided relate to Part Three: Expert's Fees section of the paper.

Conclusion

APIL believes there is truth in the old adage "you get what you pay for". Best value for money does not necessarily mean the cheapest. If the LSC is not willing to pay more for experts with the Legal Aid Fund, they are less likely to win cases; they will, therefore, recover fewer costs; and will have a charge on the legal aid fund for the defendant's costs. This means that the claimant may need to request a more expensive expert to win the case and recover their costs, but if the claimant does win this will effectively costs the legal aid fund nothing as the cost of the expert will be recoverable from the defendant.

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