LEGAL SERVICES COMMISSION CONSULTATION

DRAFT GUIDANCE ON ADR IN CLINICAL NEGLIGENCE DISPUTES

A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS

1 MARCH 2001

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1. The Association of Personal Injury Lawyers (APIL) was formed in 1990 and represents around 5000 solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants. The aims of the association are:

- To promote full and prompt compensation for all types of personal injury;
- To improve access to our legal system by all means including education, the exchange of information and the enhancement of law reform;
- To promote health and safety
- To alert the public to dangers in society such as harmful products and dangerous drugs;
- To provide a communication network exchanging views formally and informally.

2. APIL welcomes the opportunity to respond to this consultation document regarding draft guidance for ADR in clinical negligence disputes. Our response concentrates on mediation, the most likely form of ADR to be successful in such disputes. In summary, whilst APIL supports the Commission's encouragement of mediation, it is not believed that the draft guidance will, in fact, increase the use of mediation in clinical negligence disputes and believes that it will lead to unnecessary expense and delay. For this reason, it is believed that an alternative approach is necessary, details of which are given below. In addition, APIL is extremely concerned about the use and encouragement of early neutral evaluation.

MEDIATION

3. APIL fully supports the use of mediation in clinical negligence disputes, where it is appropriate, and the Commission's attempts to encourage wider use of it. APIL members view mediation as "managed" negotiation between the parties. Such negotiation through a neutral party can, very desirably, assist in equalising the negotiating and bargaining positions of the parties. APIL has no objections, in principle, therefore, to certificates being restricted to the progression of mediation, if a funded victim has unreasonably rejected mediation.

4. It must be ensured that any guidance issued by the Commission achieves its' objectives. Placing requirements on the solicitors of funded victims to consider and discuss the use of mediation at six stages in a claim, to record the reasons for not pursuing mediation on file and to report those reasons to the Commission when an application is made to extend a certificate, are unlikely to result in the greater use of mediation. In APIL's view, this requirement will merely cause unnecessary expense and delay in many cases. This is for the following reason.

5. Mediation is likely to be futile unless both parties are willing to attempt to reach a settlement. The experience of some APIL members is that NHS Trusts, the NHSLA and their representatives often respond to an injured victims' letter of claim with a blank refusal of liability and a denial of the allegations made. To require a solicitor of a funded victim, at six stages in a claim, to consider and discuss the possibility of mediation and record and/ or report the reasons for not doing so, would be pointless in such a situation, where an NHS Trust, the NHSLA, or its representatives, are clearly not willing to consider reaching a mediated settlement. It would require the solicitor to take futile action at six stages of a claim and so would lead to unnecessary expense and delay, neither of which can be in the best interests of the Commission or the public, or indeed be in the "spirit of Woolf".

6. Each side must take responsibility for encouraging the use of mediation and APIL is glad to read in the draft guidance that the NHSLA is now actively encouraging its solicitors to try mediation and hope that NHS Trusts are equally committed. If the Commission is funding a claim it is likely to be relatively strong because funding is only provided after rigorous assessment of the claim's merits. In funded claims, the scope for mediating a settlement in a particular case lies, therefore, largely with the relevant NHS Trust, the NHSLA or its representatives. Applying pressure on funded victims, therefore, to pursue mediation, is unlikely to increase the use of mediation in clinical negligence disputes.

7. APIL believes that the following approach will ensure that funded victims pursue mediation when it is appropriate without causing unnecessary delay and expense. The solicitor of the funded victim should be required to write to the NHS Trust or the NHSLA, or its representative:

   - seeking genuine willingness to negotiate or mediate a settlement once all steps required by the pre-action protocol have been taken; and
   - inviting the NHS Trust/ NHSLA or representatives to notify the funded victim, at any point in the claim, of such willingness.

8. The Commission should not begin to scrutinise the reasonableness of funded clients' actions in respect of mediation, or place requirements on their solicitors, unless and until the NHS Trust or the NHSLA, and/ or its representatives, have shown a **genuine willingness** to seek a mediated settlement in an appropriate case. A genuine willingness would be shown, for example, by confirming, on request, that the NHS Trust's or NHSLA's representatives will attend the mediation with authority to settle or be accompanied by someone who has authority to settle, and will meet the costs of the mediation. Once the other side has shown a genuine willingness to mediate, the Commission could then justifiably investigate whether any refusals to mediate by the funded victim were reasonable. If a refusal were not reasonable the Commission, as now, would have the power to restrict the

certificate of funding. This would assist in ensuring that a personal injury victim's access to justice was restricted only when it was reasonable to do so in compliance with the right to a fair trial under article 6 of the Convention for the Protection of Human Rights.

9. Once the parties have agreed that mediation should take place, the parties should be required to appoint a mediator within a fixed time (for example, 4-6 weeks). In addition, it may also be advantageous to allow or require the mediator to set the agenda of the mediation. Such measures could prevent unnecessary delay and, also, unnecessary expense to the Commission as a result of any delay.

10. This approach would assist in ensuring that funded victims pursue mediation only when it is appropriate and would prevent expensive and time consuming efforts being made to mediate when no prospects of mediation with the NHSLA or NHS Trust exist. It would also prevent defendant abuse of this stage as a mechanism for driving up costs and threatening breach of the cost benefit test now required by the Commission.

11. APIL broadly agrees with the Commission in its analysis of the situations in which a claim is likely to suitable for mediation. The fairness of the draft guidance will depend upon its implementation in practice.

EARLY NEUTRAL EVALUATION

12. APIL is extremely concerned about the use and encouragement of early neutral evaluation. This is because it is unlikely to deliver access to justice. Cases or certain issues will be decided by a single joint expert whether the person appointed is a lawyer or a medical professional. The appropriate role of an expert, however, is to guide and advise on issues within a claim that are in dispute. Experts should not have a role in deciding cases. For this reason, early neutral evaluation should have no place within clinical negligence

disputes. Alternatively, its role should be restricted to cases where the claim is minor.

13. APIL is also concerned about the compilation of a list of senior lawyers prepared to provide early neutral evaluation. Such a compilation would give rise to many difficult issues such as access to, and removal from, the list and the way in which the list should be used in practice.

1 March 2001