

LEGAL SERVICES COMMISSION CONSULTATION

PROPOSED AMENDMENTS TO COMMISSION DOCUMENTATION

A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS

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The executive committee would like to acknowledge the assistance of the following people who contributed to the preparation of this response:

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PROPOSED AMENDMENTS TO COMMISSION DOCUMENTATION

1. The Association of Personal Injury Lawyers (APIL) was formed in 1990 and represents more than 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 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's response to the Commission's consultation concerns the few issues raised relating to the public funding of personal injury cases.

Support funding for personal injury cases: is there a need for this form of funding to continue and, if so, should the existing criteria be changed?

3. APIL strongly believes that support funding for personal injury cases should continue and shall deal with investigative support and litigation support in turn.

Investigative Support

4. It is imperative that investigative support is available to the poorer victims of personal injury who have complex claims requiring early and detailed investigation. If investigative support is not provided, there is a severe risk that such victims will not be able to pursue their cases at all and so not achieve access to justice.

5. In our response to a Legal Aid Board consultation on the Funding Code in November 1999, we submitted that the proposed criteria for investigative support should be amended to ensure that those who needed it would actually be able to qualify for it. Our submissions were, unfortunately, ignored and so our concerns remain the same.

6. In that earlier response we expressed our concern that the profit costs threshold for investigative support was far too high. It immediately excludes the vast majority of personal injury cases, as only a handful of cases require the degree of preliminary investigation required to meet the threshold. Secondly, payments for investigative support are only made insofar as costs actually exceed the requisite threshold, i.e. the Commission will only provide payment by way of topping up part of the costs of the case. As a result, there is a severe risk that solicitors, in the knowledge that they may be unable to recover substantial costs incurred at the investigation stage, will be far less inclined to undertake preliminary investigations in more difficult, yet potentially meritorious claims. This problem is exacerbated by the fact that the Commission considers applications for investigative support when the threshold has been or is just about to be reached.

7. To prevent the continuation of the above problems we believe that:
 - The Commission should deal with applications for investigative support at an early stage;
 - Payments for investigative support should be made for all reasonable costs incurred (rather than on a top-up basis);
 - The profit costs qualification should be amended so that investigative support is available for those cases in which it appears investigations exceeding 15 hours will be necessary. This would equate to a profit costs threshold of around £1,000;
 - The disbursements criteria should be reduced.

We do not believe that this will result in an undue financial burden since we predict that this will still exclude the vast majority of personal injury cases

Litigation Support

8. Despite the fact that only two certificates were issued for litigation support between April 2000 and January 2001, APIL strongly believes that it should remain available. The low number of certificates is likely to relate to the highly restrictive eligibility criteria requiring likely profit costs and counsel's fees to exceed £20,000. Figure 58 in the Legal Aid Board Research Unit's publication entitled "Testing the Code" (October 1999) noted that only about 1% of personal injury cases have gross costs of £20,000 or more calculated at legal aid prescribed rates. As previously submitted, we believe that the profit costs threshold should instead be set at £10,000 which as figure 58 in the same document would still only relate to about 4% of personal injury cases. Such a reduction is imperative if access to justice is to be achieved.
9. The low number of certificates issued may also, however, relate to the fact that support funding has only been available for a short period of time and few cases for which it will be appropriate will yet reached the stage at which such support is necessary. For this reason, litigation support should remain available and no conclusions should be drawn from the fact that little litigation support has been provided to date.

CFA availability: in what categories of case should the Commission have power to refuse funding on the grounds of the availability of conditional fee agreements or other private funding alternatives and what approach should be adopted in our guidance?

10. We are aware that the Lord Chancellor's Department is monitoring the success of solicitor's firms in using conditional fee agreements in clinical negligence cases and the use and development of other private funding and insurance

products. We strongly believe, however, that no changes should be made to the availability of funding for clinical negligence claims at this stage.

11. Premiums in relation to clinical negligence cases are extremely expensive. In addition, the after-the-event insurance market, as recognised recently by the Court of Appeal in *Callery v Gray*, is still immature and needs time to settle and develop. Some companies have already raised their premiums for after-the-event insurance in reaction to that Court of Appeal decision. Litigation Protection has, for example, recently raised its premiums for clinical negligence cases. For an indemnity of £25,000, the premium is £3,000, but for an indemnity above £25,000 the premium is 13½ per cent of the level of the indemnity required. Obtaining after-the-event insurance cover with an indemnity of £100,000 would, therefore, cost £13,500.
12. For the reasons noted above the Commission should not yet consider refusing funding in clinical negligence cases on the grounds that CFAs with after-the-event insurance is a viable alternative.

Proposed amendments to the Actions against the Police etc. franchise category

13. APIL supports the proposal to extend the “Actions against the Police etc.” franchise category to proceedings concerning an allegation of deliberate abuse whilst in the care of a public authority or institution. This is because such proceedings are likely to involve extremely vulnerable members of our society.
14. Proceedings can arise, however, in which both deliberate abuse and negligent injury are alleged. It may, for example, also be alleged that public authorities or institutions were negligent in failing to prevent the deliberate abuse from taking place or continuing. As such cases would still be likely to involve extremely vulnerable people, we see no justification for excluding cases in which both deliberate abuse and negligent injury are alleged from the relevant franchise category.

