

JUSTICE 1 COMMITTEE

SCOTTISH PARLIAMENT

REPORT ON LEGAL AID INQUIRY

(SP PAPER 437)

**SUBMISSIONS OF THE ASSOCIATION OF PERSONAL INJURY
LAWYERS**

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The executive committee would like to acknowledge the assistance of the following for assisting with the preparation of these submissions:

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REPORT ON LEGAL AID INQUIRY

1. The Association of Personal Injury Lawyers (APIL) was formed in 1990 and represents over 5000 solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants. We currently have 106 members in Scotland who, in all likelihood, act for the majority of personal injury victims in the jurisdiction. 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. In summary, APIL welcomes the Justice 1 Committee's in-depth analysis of the problems within, and resulting from, the current legal aid system. As we have previously noted in a press release, issued in November 2001, we are concerned that recent amendments proposed by the Scottish Legal Aid Board (the Board) and the Scottish Executive have amounted to little more than "tinkering" with a system that is in need of wide-reaching reform.

Financial Eligibility Criteria and the Level of Contributions

3. APIL's prime concern in relation to legal aid is that both the low financial eligibility criteria and the level of contributions required have led to the denial of access to justice for the poorer members of Scottish society. We are extremely concerned about the fall in the uptake of civil legal aid and welcome the fact that research is to be commissioned into the reasons why this

has occurred. We strongly believe that it relates largely to the fact that the financial eligibility criteria are so low, so that only a small fraction of those who need financial assistance to pursue a claim can actually gain access to that assistance. We are also concerned that the level of contributions required to be made by those in receipt of legal aid acts as a deterrent. Recent proposals to extend repayment periods for these contributions are likely to reduce this deterrent effect and make life a little easier for those who are already eligible for legal aid. They will not, however, do anything to help those who are not eligible but who cannot afford to pursue their claims privately.

4. At the very least, the financial eligibility criteria should be increased in line with inflation as a matter of urgency, and on an annual basis thereafter, and we welcome the committee's recommendation in this respect. We further agree, however, that the eligibility criteria and contributions should be reconsidered following the Board's research into:

- The reasons behind the fall in the uptake of civil legal aid;
- The structure and collection of contributions;
- Whether the extension of the repayment period has resulted in an increase in the uptake of offers of civil legal aid.

Collective Actions

5. It is not uncommon for events to occur that injure several people at the same time or in similar circumstances. This can result in several pursuers wishing to claim compensation as a result of the same act or omission at the same time, and such claims can involve issues of public importance. In these situations, in the interests of the administration of justice and efficiency, it is preferable for those claims to be dealt with by way of collective actions. We agree with Professor Paterson that the legal aid system finds it hard to cope with collective actions, and we agree with the Faculty of Advocates, which submitted that it would be useful to allow legal aid for representative bodies

in, for example, judicial review proceedings. We believe, therefore, that there is a case for extending the scope of legal aid to incorporate collective action, organisations and representative bodies and welcome the committee's recommendation that the Executive should examine how legal aid could be available in such circumstances.

Extending Legal Aid to Tribunals and Panels

6. APIL welcomes the recommendation that the Executive should examine how access to legal aid could be made available to support a wider range of tribunals and panels. We are particularly interested in the extension of legal aid to applicants appearing before the social security appeal tribunals and the criminal injuries compensation appeal tribunal. It is vital that injured victims are able to secure access to, and representation in front of, these tribunals so that they can gain the compensation or benefits to which they are entitled and which they need to cope with their injuries.

Small Claims

7. APIL agrees with the Scottish Sheriff Court Users Group that the unavailability of legal aid in small claims actions, above basic advice and assistance, excludes some from gaining access to justice through the small claims court. Even low value personal injury claims can involve complex legal issues. We welcome, therefore, the committee's recommendation that the Executive should examine how legal aid could be made available to support such actions.

Treatment of Benefits

8. APIL shares the committee's concern about inconsistencies in the treatment of benefits and welcomes the recommendation that, as a matter of urgency, the Executive should examine this matter with the aim of seeking to simplify the system and harmonise the treatment of benefits for eligibility to all elements of legal aid. We are particularly concerned that the receipt of Disability Living Allowance is taken into account in computing financial eligibility for legal aid. In view of the mobility and attendance requirements for this benefit, many injured victims are likely to be in receipt of it. It should be recognised that whilst this benefit represents an increase in income, it does not represent disposable income, in that it is necessary to meet the extra needs and expenses caused by injury.

Merits Testing

9. APIL also fears that there is a lack of coherence in the approach to merits testing in legal aid applications for personal injury actions. Section 14(1) of the Legal Aid (Scotland) Act 1986 provides:

“Civil legal aid shall be available to a person if, on an application made to the Board:

- (a) the Board is satisfied that he has a *probabilis causa litigandi*; and
- (b) it appears to the Board that it is reasonable in the particular circumstances of the case that he should receive legal aid.”

This test was considered in the case of McTear v Scottish Legal Aid Board [1997] SLT 108. The Board's counsel accepted in that case:

“The purpose of s.14(1)(a) is to weed out hopeless cases.”

10. The Board's statistics, however, demonstrate that around 25 per cent of civil legal aid applications are refused on the merits. Some of our members fear that some reporters dealing with applications do not understand the relevant merits test fully and do not appear to be fully conversant with legal developments in personal injury law, especially in the area of employers' liability and causation. For example, one of members has told us that legal aid certificates were refused for his three clients who had suffered moderate hearing loss on the grounds that it was unreasonable in the circumstances for them to receive legal aid. This decision was, however, reversed after their local MP, Brian Wilson, wrote to the Board. Such events do not inspire confidence that the scheme in place is being consistently and fairly administered.

11. Whilst we welcome the recommendation that the merits test should be reviewed, we also submit that the training for those applying the merits test should be improved in the area of personal injury law. We further agree that the current "probable cause" test applied after a fatal accident inquiry can cause unfairness and strongly believe that this should be examined.

The Identification of Lawyers with Expertise

12. It is noted that the committee is concerned that the public has no means of knowing how much experience or expertise a solicitor has and APIL has had similar concerns for some time. Personal injury has developed into a very complex area of the law and it is important that injured victims are advised and represented by adequately experienced and knowledgeable practitioners to ensure that their compensation claims are properly handled. This is especially important in view of the existence of unqualified advisers in the field of personal injury – an issue on which APIL has made submissions to the Justice 2 Committee. These concerns led APIL to establish the College of Personal Injury Law, which provides members of the college with education and training in personal injury law and seeks to ensure that members are fully up-to-date on relevant legal developments. All APIL members are able to join the

college and are admitted at five different levels to reflect their experience and expertise: associate, member, litigator, fellow, senior fellow. The initiative is designed to help injured victims find a suitable lawyer to deal with a claim and has been supported by the Lord Chancellor, the Law Society of England and Wales and the National Consumer Council. In a similar vein, we agree that a mechanism should be developed to enable the quality of work delivered to clients through the legal aid system to be monitored and assessed. The college is now open to APIL's Scottish members.

Sanctions for Experts

13. Our members are also concerned about the effects of the current system for obtaining sanctions for experts. A solicitor in need of an expert's report in a personal injury claim will approach an expert and ask for an estimated fee for producing such a report. The solicitor will then approach the Board to seek sanction for this amount. Quite frequently, however, it transpires that the expert's report will, in fact, cost more than the initial estimate and the sanction. This results in the solicitor having to meet the extra cost. Another example of where a solicitor is required to meet the costs of part of a claim is where sanction is given for the cost of an expert to attend court for one day but is, in fact, required for two days.

14. Our members are also experiencing difficulty with the Board who expect ordinary steps of process to be sanctioned in advance, for example, the Board seems to expect that a simple recovery of documents is a step which requires sanction, but it is standard in every personal injury action. One of our members was granted a legal aid certificate to appeal but was then refused payment for the extension of the shorthand notes necessary to proceed with the appeal. This would seem to indicate an ignorance of basic procedure in personal injury cases.

Civil Justice Review

15. APIL notes the committee's recommendation that the Executive should examine the need for a review of the civil justice system. Insofar as such a review would relate to personal injury actions, we do not believe that a review is necessary. This is especially in view of the fact that the recommendations made by a working party on Court of Session procedure, chaired by Lord Coulsfield, in 1998 have not yet been implemented.

Other Issues Not Raised in Report

16. Our members' experience is that frequently legal aid certificates are now being restricted to the Sheriff Court only. We would urge the Committee to recommend that there be transparency in the decision making process so that practitioners know what general level of damages or complexity are considered appropriate for Court of Session certificates.

17. Our members have also reported problems in relation to the obtaining of medical reports in personal injury actions. Where legal advice and assistance has been granted, the claim can only be progressed if a medical report is obtained from a suitably qualified practitioner. Our members have informed us that in recent months the Board is refusing sanction for reports by consultants and only sanctioning GP reports. A GP's report, however, is only appropriate for the most minor of injuries and cannot adequately address complex issues of causation, prognosis or the effect of a pre-existing injury. Requiring legally aided pursuers to rely upon GP reports can, therefore, disadvantage them in their claim. This is especially in view of the fact that defenders in personal injury actions, usually insurance companies, have the resources to seek the assistance of consultants and medical specialists. In addition, our members have reported that the Board sometimes refuse sanction for any medical report at all until the insurers indicate their position on liability. This can result in a tactical advantage to defenders who can seek to delay the progress of a claim.