

THE DEPARTMENT OF CONSTITUTIONAL AFFAIRS (DCA)

**PROPOSED AMENDMENTS TO GUIDANCE ON THE PUBLIC FUNDING
OF LEGAL REPRESENTATION AT INQUESTS UNDER SECTION 6 (8) (B)
OF THE ACCESS TO JUSTICE ACT 1999**

**A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS
(APIL10/04)**

APRIL 2004

The Association of Personal Injury Lawyers (APIL) was formed in 1990 by claimant lawyers with a view to representing the interests of personal injury victims. APIL currently has over 5,400 members in the UK and abroad. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants. APIL does not generate business on behalf of its members.

The aims of the Association of Personal Injury Lawyers (APIL) 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 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;
- To promote health and safety.

APIL's executive committee would like to acknowledge the assistance of the following in preparing this response:

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FUNDING OF LEGAL REPRESENTATION AT INQUESTS

Introduction

1. APIL welcomes the opportunity to put forward its comments regarding the Department of Constitutional Affairs (DCA) proposed amendments to the guidance on public funding of legal representation at inquests. We have previously expressed our concerns on the funding of legal representation at inquests during the review of coroners services¹. In summary, APIL is disappointed that a number of its recommendations have not been implemented, potentially leaving the bereaved family without the adequate means for legal representation. For example, APIL has previously highlighted the restrictive nature of the term “agencies of the state”; we feel the stipulation that the investigated death needs to have involved “agencies of the state”² prior to any application being approved may fail to adequately incorporate deaths in Government contracted institutions, such as private hospitals.
2. In addition, APIL feels the proposed funding requirements for the bereaved relatives are onerous and restrictive, and allow for the unnecessary intrusion into the bereaved families’ financial resources. This concern is compounded by the lack of an efficient definition of ‘family’ within the proposed guidance. APIL also asserts that there needs to be a presumption that funding will be provided if an inquest is to be held, regardless of any previous investigations which may have taken place. APIL further considers that the application of a statutory charge to inquest proceedings - as well as litigation proceedings - and the lack of funding for preparatory work, are both wholly unfair to bereaved relatives.

¹ See APIL responses – ‘Review of Coroners Services’ (September 2002); ‘Certifying and investigating deaths in England, Wales and Northern Ireland’ (November 2002); and ‘Death certification and investigation in England, Wales and Northern Ireland: The report of a Fundamental Review 2003’ (September 2003).

² Draft Guidance – paragraph 7 (ii) “the death concerns agencies of the state and funded representation for the immediate family of the deceased is necessary to assist the coroner to carry out an effective investigation into the death, as required by Article 2 of ECHR”.

3. Finally, the guidance fails to provide for the awarding of external funding to bereaved relatives by the coroner. APIL considers that any recommendation for public funding by the coroner should be binding on the Legal Services Commission (LSC).

Agencies of the state

4. APIL is concerned that the use of the term “agencies of the state” will restrict exceptional funding to cases that involve public authorities and not include cases where the state may not be directly involved. Government departments are tending to use an increasing number of outside contractors to provide primary services, for example in custodial roles (Group 4) and medical treatment. We believe that the provision of legal representation at inquests should include all deaths which give rise to questions of State responsibility, either directly or indirectly. There should be no different standard depending on whether the death is within a directly run state institution or a Government contracted institution.
5. APIL fully endorses the recommendation of the recent coroners review, that *“there should be a more liberal interpretation of the criteria in cases where a public authority is represented”*³. We feel this recommendation should be detailed within the guidance document itself as it would help to clarify subsequent interpretations of “agencies of the state”.
6. In addition APIL would find it helpful if the guidance was re-worded so as to make it clearer that exceptional funding also covers deaths which occur where the client is not in police or prison custody. For example, if the death occurs in a state institution such as a hospital.

³ Recommendation 71 – ‘Death Certification and Investigation in England, Wales and Northern Ireland – The Report of a Fundamental Review 2003’ Cm 5831 (Published by the Home Office – June 2003) page 228

Prior Investigations

7. APIL is anxious that the consideration of “*whether other forms of investigation, including internal investigations by a public body, have taken place or are likely to take place*”⁴ should not materially effect whether funding is granted for representation. In *Khan v Secretary of State for Health [2003]*⁵ the Court of Appeal held that the more serious the event, the more intensive the process of scrutiny should be. The natural occasion for such a judicial inquiry, which Article 2 of the European Convention on Human Rights requires, will be a coroner’s inquest.
8. APIL admits that the nature and scope of the “other forms of investigation” may be sufficient to satisfy the Government’s Article 2 obligations. We would, however, want the views of the bereaved family to be considered fully. Furthermore, APIL believes that if an inquest is to take place there should be a presumption that the Government will comply with its Article 2 obligations by funding representation irrespective of any other investigation which may have gone before.

Financial Eligibility

9. APIL considers that the proposed funding requirements, which the bereaved family need to fulfil in order to qualify for exceptional funding, are particularly onerous and strict. The guidance states that the application will be judged as reasonable in relation to “*the applicant’s assessed disposable income and capital, other financial resources of the family, the estimated cost of providing representation, the history of the case and the nature of the allegations to be raised*”⁶. These

⁴ Draft guidance – Paragraph 8 (ii) “*whether other forms of investigation, including internal investigations by a public body, have taken place or are likely to take place and whether the family have or will be involved in such investigations*”.

⁵ *R (On the application of Mohammed Farooq Khan) v Secretary of State for Health [2003]* EWCA Civ 1129
The Court of Appeal held that in Khan, under Article 2 of the European Convention on Human Rights - the right to life - an inquest cannot be effective without the direct involvement of the deceased family. Furthermore, in order to discharge its obligations under article 2, the Government are required to provide reasonable funding for representation for the bereaved family at any inquest.

⁶ Draft Guidance – paragraph 10

requirements are considerably more stringent and restrictive than a normal application for legal aid.

10. In addition, these restrictive requirements negate any potential benefits provided by the Court of Appeal's ruling in *Khan*. The decision in *Khan* means that funding is available for bereaved families in inquests, but only in relation to representation; it does not cover other aspects of the case. This will inevitably mean that the bereaved family have to pay for certain legal expenses, such as case preparation prior to the inquest. The imposition of stringent funding requirements represents a further restriction on the ability of bereaved families to actively participate in inquests.

11. Furthermore, APIL is particularly concerned about the requirement to see financial information from "family members". APIL feels that 'family' is an extremely broad definition within the context of the guidance, and can potentially refer to any member of the client's extended family. This interpretation would allow the means of family members that are either estranged or have no direct interest in the inquest to be considered within any application for exceptional funding. Such consideration would be inconsistent with other categories of law, where it is only familial members who have a direct interest in the outcome of the case which are included within the definition of "family". APIL considers that it is this definition which should be adopted, and detailed, in the draft guidance.

12. APIL feels, however, that even with the above narrow definition of "family", the consideration of the bereaved family's financial resources to decide an application for exceptional funding should be used sparingly. It would be unfair to restrict access to representation, via denying funding, for bereaved relatives who genuinely deserve it.

Statutory Charge

13. APIL believes that it is oppressive and unfair that, within the current situation, the costs of inquest representation will be taken out of any subsequent compensation damages which the bereaved family may win in a separate legal action. Legal Aid, or similar Government funding, is currently granted to claimants with the provision that a portion of it will be repaid via any subsequent award for damages. In the majority of cases the amount to be reclaimed – known as the statutory charge – will only cover the proceedings of the case. Currently, however, the statutory charge will also be applied to inquest funding, unless there has been an admission of liability prior to the inquest.

14. APIL considers this situation as wholly inequitable, as the later the defendant admits responsibility the more he can recover in costs from those bereaved as a result of his negligence. Indeed this may encourage delays in the admission of liability by the defendants. There is a direct conflict between the state body as funder and the state body as defendant. In order to resolve this anomaly, APIL proposes that the costs involved in the inquest should be waived completely. Another possible solution would be for the state defendant to be responsible for the payment of the inquest costs as a special damage, or for costs to be payable by the loser (i.e. inter-partes) in the subsequent proceedings.

Funding for preparatory work

15. Although there is limited funding for preparatory work under Legal Help it is generally inadequate for all the necessary preparatory work involved in a full inquest, thus APIL supports the extension of exceptional funding to include preparatory work as well as representations. In order to comply with human rights obligations bereaved families and their representatives must be in a position to

participate actively in the inquiry. For example, it is often the bereaved family's solicitor who identifies appropriate witnesses, which allows the inquest properly to determine issues of fact. In order for this to be achieved there needs to be preparation and research. All other interested parties are usually funded by the state, and will have this facility, so it is only fair that the relatives should also.

Power of coroner to award public funding

16. APIL believes that the independent coroner is in the best position to consider the needs of the inquest, and whether it can be an effective inquiry without the needs of the bereaved relatives being represented. As such we feel that the power to award public funding for bereaved relatives should lie with the coroner, following application to the coroner from the bereaved. At the very least the coroner should have the power to recommend representation for the bereaved family. We are, therefore, disappointed to note that the views of the coroner are only one of four factors which are to be taken into account prior to the awarding of funding⁷, and that there is not even a requirement to seek the coroner's views before determining an application.

17. The experience of APIL members is that provision of exceptional funding is very limited and that many 'borderline' cases are denied funding which leaves bereaved relatives in an intolerable position. So any recommendations for funding from the coroner should be binding on the LSC.

18. In cases of wider public interest⁸, APIL feels there should be a presumption that funding will automatically be available (and not subject to means testing) to allow equality of arms between bereaved relatives and other parties, who will inevitably have the benefit of legal

⁷ Draft guidance - paragraph 8 (iv) "any views expressed by the coroner. There is however no requirement to seek the coroner's views before determining an application".

⁸ Draft Guidance – paragraph 7 (i) "there is a significant wider public interest in the applicant being legally represented at the inquest".

representation. This is particularly true of hospital deaths, where all doctors who give evidence at the inquest are able to call on the services of their defence union which will supply an advocate for the hearing.

19. Similarly, hospital trust staff, such as nurses, midwives etc, can call on the Trust's solicitors automatically to represent their interests at an inquest. The only party who does not have immediate access to automatic representation is the bereaved family in these cases. This lack of access to representation for the bereaved relatives defeats the purpose of holding an inquiry and leads all too easily to an impression of a cover-up by the state.