

LEGAL SERVICES COMMISSION (LSC)

CIVIL SPECIFICATION CONSULTATION

A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS

APRIL 2007

The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers with a view to representing the interests of personal injury victims. APIL currently has around 5,000 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.

The objectives 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;
- 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 welcomes the opportunity to be able to respond to the latest LSC consultation about civil legal aid and the specification for the unified contract. We have addressed below issues which are of concern to personal injury lawyers, and in particular, clinical negligence practitioners. There are necessarily comments below which overlap with the contract itself, rather than just the specification, as the documents all form part of the same agreement.

The boundary between controlled work and licensed work

The specification says, at paragraph 6.3, that “subject to the availability of Investigative Help, Legal Help is normally the appropriate level to carry out initial investigative work”. We assume that this means the LSC will expect practitioners to start a number of cases on a legal help basis.

APIL submits that if this is enforced in the case of clinical negligence practitioners, this will cost the LSC more money than the system does at present.

Some members have told us that they currently carry out much initial investigation without applying for legal help. Instead, they do this on a non-fee charging basis. This is because obtaining legal help is not thought to be economical, because the administration necessary to obtain this for clients can cost more than the rates available for doing the work. The introduction of fixed fees will not improve recovery rates.

Enforcing this provision will therefore mean more administration for clinical negligence practitioners. Whilst this is frustrating for practitioners, they will carry it out if necessary and receive fixed fees for the work they do. This will, however, mean that the Legal Services Commission’s expenditure will increase, as it will be paying out for legal help which in the past, has in effect been provided free of charge.

Applications for licensed work and key performance indicators

Clinical negligence practitioners generally make their applications for legal representation (particularly applications for investigative help, where appropriate) after the completion of initial investigative work but before the commissioning of an expert's report. An application is made if the initial work has shown that there are genuine questions to be asked about the standard of clinical care a client has received. It is, however, often only after the receipt of this initial expert report that practitioners are able to assess accurately whether there is a meritorious claim for the client to pursue.

This practice of making an application for a full certificate before commissioning an expert's report is in line with paragraph 6.6 of the specification, which says "we do not generally require experts' reports to be obtained before an application is made for Legal Representation or Investigative Help". Despite this recognition that it is appropriate to obtain a full funding certificate before obtaining an expert's report, and thus before properly assessing a case, the contract puts pressure on practitioners to do otherwise.

This pressure comes from Annex G to the contract, which sets out the key performance indicators. These show that practitioners have a target of providing a "substantive benefit to clients" in 40 per cent of cases.

APIL is concerned that specialist clinical negligence practitioners will not be able to meet this target. As explained above, it is not possible to assess whether a case is going to be successful until receipt of the expert's report, which is necessarily received after an application for public funding has been made. This is different from many other areas of law, where a practitioner can often make a judgment on whether a case is likely to succeed on the basis of the facts presented to them by their clients.

As an example, in the case of a child with cerebral palsy, there may be questions surrounding the circumstances of the birth but it is impossible to tell whether the injuries have been caused as a result of negligence without a report from an expert.

If practitioners choose to act for the client, apply for funding on the client's behalf, and investigate the circumstances of the child's birth and injuries, they run the risk of harming their performance rating if the injuries were not negligently caused, and the client has no case.

This situation could lead to practitioners 'cherry picking' the cases most likely to succeed, leaving injured people, including children, without solicitors willing to consider their claims.

We therefore urge the LSC to consider either lowering the 40 per cent success rate for clinical negligence cases, or perhaps making an exception when the number of cases a firm takes on includes a large number of very serious or catastrophic injury cases.

Alternatively, rather than just assessing performance on the basis of money received by the client, we suggest that in cases where solicitors can recover money for the LSC, their performance and value may be assessed in relation to this as well.

We do not support the running of cases where there is no basis for the client to make a claim. There are, however, serious problems with the 40 per cent substantive benefit to client target, which could prove counter productive: if practitioners are unable to take on cases because they fear it would damage their performance rating and therefore lose their legal aid contract, injured clients will not benefit at all.

Recoupment of payments on account after three years

Clause 18.5 of the standard terms of the contract states that payments on account become repayable after three years have lapsed since the issue of the funding certificate. Clause 18.8 states that before seeking repayment under clause 18.5, the LSC will give practitioners an opportunity to state why it should not be repaid, and that if a good reason is given, repayments will not be sought. There is, however, no guidance in the contract, annexes or specification as to what may constitute a 'good reason' for the purposes of this clause.

Clinical negligence cases may last longer than three years, due to the nature of the injuries suffered by the client. Payments on account are a valuable tool, which allow practitioners to run cases they would not otherwise be able to, if they had to wait until the end of the case for payment.

Some clinical negligence cases simply cannot be completed within three years, because of the nature of the case. Allowances ought to be made for this, in the form of an exception for particular types of injury, or the introduction of guidelines as to what would constitute a “good reason” for not repaying monies received on account.

Peer review

APIL continues to support the principle that the quality of suppliers’ work should be monitored. We are, however, concerned that review of clinical negligence files uses up considerable resources, requiring a substantial amount of time to be spent in reviewing other practitioners’ files. Reviewers need to be allowed to spend enough time necessary to carry out proper reviews, rather than just have a cursory glance at files. We therefore hope that the LSC uses its limited team of clinical negligence practitioners to good effect, by focussing on firms which are causing concern.