



The Work of a Legal Services Commission Adjudicator

A short talk by Malcolm Johnson of Malcolm Johnson & Co Solicitors for
the Association of Personal Injury Lawyers Child Abuse Special Interest
Group

26th February 2009

Agenda

- Introduction
- The work of an Independent Funding Adjudicator
- Issues for practitioners
- The Law and Regulations relating to public funding
- The Costs/Benefits Test
- Other criteria

The Work of an Independent Funding Adjudicator

- “Appeals Manual”
- National Review Panel
- Assessors (or Costs Committees)
- Majority of decisions made on paper
- Cases dealt with
- Decisions made within a month

Issues for Practitioners

- Presentation
- Read the rules
- Set out the costs in detail
- Counsel's advice
- Be realistic
- Quantum
- Ensure that you believe your client's case

Issues for practitioners

Presentation

- Easier to read if typewritten
- Standard ranges from good to poor
- Crucial information missing
- Unexpected delays
- Important to be economical with papers

Issues for practitioners

Read the rules

- No regard to the rules and guidance set out in Funding Code
- “wider public interest” - reference must be made to Code
- Should not be assumed that the Legal Services Commission have applied correct criteria

Issues for practitioners

Set out costs in detail

- Great unwillingness to address the issue of costs
- Part C section 4.6 Page 109 of the Legal Services Commission Manual, Volume 1- how costs are to be calculated
- Section 4.6.3 states;
 - *" costs must be kept under review throughout a case so that cost benefit Criteria can be reapplied at all key stages"*
- CLSAPP1 details of costs incurred in the pasts, costs incurred to settlement and costs incurred to trial
- Issue of costs to be dealt with in client care letter and during life of case

Issues for practitioners

Counsel's Advice

- Often required for an extension to a certificate
- In large or important cases, advices are crucial
- No reason why counsel should not be directed to issue of costs/benefits

Issues for practitioners

Be realistic

- Weak cases fail
- Difficult to bring cases on the issue of s11, 14 and 33 Limitation Act 1980
- Lord Brown in **A v Hoare [2008] UKHL 6**

“if a complaint has been made and recorded and more obviously still if the accused has been convicted of the abuse complained of, that will be one thing; if, however, a complaint comes out of the blue with no apparent support for it (other than that the alleged abuser has been accused or even convicted of similar abuse in the past) that would be quite a different thing”

Issues for practitioners

Quantum

- Cases have to be worthy enough to satisfy costs benefits
- No. of child abuse cases exist where quantum has been comprehensively determined by the courts
- Some applications do not address quantum or make reference to case law in support of the damages assessment
- In some cases costs/benefits criteria are relaxed (such as those against a public authority)
- “Guide to Compensation Awards” provides a quick and easy way of demonstrating how cases are valued

Issues for practitioners

Ensure that you believe in your client's case

- Adjudicator likely to be practitioner with direct experience in this area or similar area
- Will develop “feel” for what is being presented and the prospects of the case – ongoing process of risk assessment
- If solicitor making application does not truly believe that the case fits within the necessary criteria – this becomes apparent
- Child Abuse compensation claims are truly problematic
- If they are carefully planned and driven forward = major success

The Law & Regulations relating to public funding

The Manual

- Legal Services Commission's Manual consists of 4 volumes, each separated into different
- Part A contains the **Funding Code: Criteria**, Part B the **Funding Code: Procedures** and Part C contains the **Funding Code: Guidance**
- The statutory basis for the public funding of child abuse compensation claims
- Part 1- Legal Help and Help at Court...
- Part 2- Legal representation
- Case categories
- Public interest cases

The Law & Regulations relating to public funding

Funding Code Categories – Investigative Help & Full Representation

- Means by which LSC calculates whether case goes forward, based on prospect of success, the costs and benefits it is likely to accrue
- Important sections for funding involving child abuse cases –
 - Part A of the Funding Code pages 9 and 20 under Section 5.6 “ Criteria for Investigative Help
 - Section 5.7 “ Criteria for Full Representation”
- CLSAPP1 asks whether the application is for investigative help or full representation

The Law & Regulations relating to public funding

Investigative Help

- Allows the solicitor to investigate the case further before coming back and applying for full representation.
- Section 5.6.2 of Part A
- Section 5.6.3
- Section 5.6.4
- Section 10.4 of Part C page 150
- Section 10.2 Part C
- Section 10.2.3
- Paragraph 10.3.4 & Section 4.4.3

The Law & Regulations relating to public funding

Full Representation

- If CFA suitable and is accepted by client full representation will be refused
- No of insurance policies that will cover child abuse compensation claims
- Guidance is provided by Section 11.2 of Part C pages 153 to 154
- Section 5.7.2 of Part A – different prospects of success
- Section 5.7.3 sets out the strict costs benefit ratio
- Section 6 to 14 – “very expensive cases” and “judicial review”

The Costs/Benefits Test

Section 8 Test

- The test for proportionality is
 - *“Legal representation may be refused unless the likely benefits are proportionate to the likely benefits of the proceedings, having regard to the prospects of success and all other circumstances”* Section 8.3.3 of Part A page 25

Section 5 Test

- Section 5 of Part A (General Funding Code)
- 80% or more prospects of success, likely damages must exceed costs
- 60% to 80%- Likely damages must exceed likely costs by a ration of 2:1
- 50% to 60%- Likely damages must exceed likely costs by a ration of 4:1

The Costs/Benefits Test

Likely costs and damages

- Likely costs means an estimate of the likely total gross costs to disposal of proceedings
- Costs should be calculated by reference to standard or prescribed rates
- Damages – a realistic estimate of the size of any money award the client would receive if substantially successful at trial or final hearing

The Costs/Benefits Test

Claims against public authorities

- Crucial question – is quantum of case going to satisfy cost/benefit analysis
- Child abuse cases are no subject to the strict ratio test under the General Funding Code
- Part C Section 17.3.3 page 216

The Costs/Benefits Test

Failure to take into care cases

- Comes under the stricter Section 5 of the General Funding Code
- Part C Section 17 describes the nature of “Claims against public authorities” and makes it clear this only covers a limited range of cases
 - *“Claims for damages against a local authority by persons alleging child abuse while in local authority care also come within section 8. the case should be considered under section 8 of the Code if it involves abuse of position or power by a public servant, even though the public authority itself is merely alleged to have been negligent*

The Costs/Benefits Test

Costs/benefits criteria for Section 8

- Full representation will be refused if
 - (1) Prospects of success are unclear
 - (2) Prospects of success are borderline and the case does not appear to have a significant wider public interest, to be of overwhelming importance to the client or to raise significant human rights issues

The Costs/Benefits Test

Claims against individuals

- Strict ratio under General Funding Code Section 5.7.3 of Part A does apply
- Section 17.3.3 of Part C page 216 which states-

“if the defendant is not a public authority, the case will be considered under the general funding code”

Other Criteria

Prospects of Success- the First Step

- “who what when where” and the effect
- Good direct and corroborative evidence to confirm the allegations of abuse
- Evidence of significant harm and potential value of claim
- Limitation

Assessing Cost- Benefit

Prospects of Success – The Second Step

- Quantum
- Causation- consider causation and competing causation when assessing value
- Cost of disposal