APIL Child Abuse Special Interest Group Meeting

Ramada Manchester Piccadilly Hotel

Thursday 26 February 2009 between 6.00 p.m. and 8.00 p.m.

The meeting was chaired by Paul Durkin the coordinator of the group.

Paul set out how we had 5 speakers this evening the main speakers being Chris Gore from the Special Cases Unit in Brighton, Malcolm Johnson of Malcolm Johnson & Co and Sue Nash. We were also to hear from Jonathan Wheeler with an APIL EC update and Justin Levinson was going to speak on a recent successful case.

The meeting kicked off by an interesting presentation from Chris Gore. Chris is of the Special Cases Unit of the Legal Services Commission in Brighton and he set out how he wanted to talk about how he was now funding historic child abuse cases, and also on the failure to remove / local authority negligence cases. He also wanted to speak about franchises and contracts into the future.

Dealing first with historic abuse, Chris set out how this was a developing area since these types of cases began and that following A v Hoare, we were awaiting decisions on Section 33 and how the court was going to apply Section 33. Paul Durkin of Abney Garsden McDonald had been running the latest test cases and the Legal Services Commission were very much involved as a predominant funder for cases such as Lister, Bryn Alyn and 4 out of the 5 cases in A v Hoare. The Legal Services Commission was also funding St Aiden's and St Vincent's and most of the large group actions.

Chris set out how historic child abuse cases had been on a large scale basis following public enquiries in the 1990's in North and South Wales and in Manchester. 2005/06 was the height of group actions with over £5 million in damages being secured for Claimants. Largely the cases were based on criminal convictions and involved sexual and physical abuse but these kind of large scale police enquiries are now declining and the profile of the work is changing. We are now seeing much smaller group actions of 15 to 20 Claimants at most and a growing minority of stand alone cases. The selection criteria being exercised by solicitors and the LSC is much tighter and there appeared to be a sea change in the way that insurers are viewing these cases. Chris Gore said that he detected an air of frost from insurers about settling the cases. The LSC remained willing to fund cases but had to be really careful on case selections. In the early stages of this type of work, the Defendants were not so critical but now they are being much more selective about what cases they settle.

The LSC has funded 4,000 – 5,000 cases since the work's inception in the 1990's. It has been involved in lots of precedent setting cases and while Bryn Alyn had been overturned on limitation, Chris took the view that the tariff for damages still held good. The main battle ground remains limitation but we are all now concentrating on Section 33, not Section 14. Where one had an employee who was an abuser then we had vicarious liability but when foster carers were involved, we were still looking at systemic negligence.

Chris went on to discuss Paul Durkin's recent cases in the St Aiden's and St Vincent's group action. This was quite an old group with 4 lead cases which recently came before Irwin J. These cases taught us very little of general application about Section 33 and we still have to look at the cases on a case by case basis. What did emerge was that the more valuable the case and is the more serious the abuse is, the more likely the case is to go through on limitation. The Judge looked at the seriousness of the abuse and proportionality of costs against damages.

Claimants in group actions used to have the protection of the umbrella of the group. Defendants are now being much more selective and the general principle seems to be that if a client is sexually abused, it is easier to bring a late case and if a client is simply physically abused it is much more difficult. In the historic abuse cases, the courts are willing to look at the inhibiting effects of particularly sexual abuse and so sexual abuse cases are more likely to get through on limitation. This is not the case for less serious physical abuse.

Bryn Alan showed that damages for these kinds of cases were wide ranging from £12,000 - £60,000. The average damages was said to be £15,000 by Chris. Levels of damages vary significantly in these cases but in earlier groups there were quite a lot of low value cases. With litigation risks being at least a third and there being causation and limitation issues, it is accepted that a discount has to be applied. The picture is somewhat different now and there are a small number of high value settlements for example A v Archbishop of Birmingham which settled for half a million pounds.

The Legal Services Commission was looking closely at the Funding Code when granting certificates. The LSC wanted to see evidence of abuse for example a police investigation or similar fact evidence. At the very least the LSC wanted to see a statement from the abused Claimant. In a group action a conviction was not strictly necessary, but it was much more essential for a stand alone case. The LSC needed to know what kind of abuse was being alleged and the likely damages and any difficulties on causation. With regard to limitation, there are basically two limbs, the Claimant's delay and the Defendant's prejudice. With a conviction the Defendant is much less able to show prejudice. When looking at the Claimant's delay, one has to look at inhibiting factors and again sexual abuse carried more inhibiting factors than physical abuse. The LSC then looks at the costs benefit and whilst there are cases where serious wrongdoing by a public authority will attract a costs benefit of one to one, in failure to remove cases it is a different costs benefit all together. Difficulties arise with a stand alone case with low value. Where a person has been abused by a parent and the local authority had been negligent, we are really talking about a professional negligence case against a local authority. These cases are not like the historic cases where an employee has abused a child. These cases are subject to the Bolam test and the LSC is interested in the breach and duration of the breach, the length of the period of abuse and causation. These types of cases are documents driven.

Chris went on to mention the case of Jake Pierce which was a historic failure to remove case which was successful. Chris conceded that there were cases where professional negligence by social services could amount to serious wrongdoing by a public authority and so could be a Section 8 case. It is likely that the quantum for these cases could be higher and it helps if there is a sibling group to spread costs.

Chris then went on to mention the civil bids consultation paper of 2010 and how child abuse work fell into the low volume category.

The meeting then heard from Malcolm Johnson, the Principal of Malcolm Johnson & Co who also works as a Legal Services Commission adjudicator. Malcolm provided a very detailed handout and gave a powerpoint presentation, which is available on the APIL website.

Malcolm went through how to put together a successful legal aid application and how it was important for people to be familiar with the appeals manual which is available on the LSC website. He set out his own experience as an adjudicator and gave advice on how to put forward successful appeal. Malcolm advised that presentation was key as well as a detailed statement from the client. The costs need to be set out in detail and if necessary, counsel's opinion could also help. It was important to be realistic on quantum and to ensure that the paperwork displayed your own belief in your client's case.

We finally heard from Sue Nash a law costs draftsman at GLCS. Sue gave out 2 handouts mainly on group action costs which are available at the APIL office. Sue set out how group

actions were not run of the mill cases and how it was possible to make sure that the right rates of costs were claimed for these kinds of cases. Sue had had great success in ensuring that proportionality arguments did not come into the mix. She spoke about ways of maximising costs from the file and ensuring efficient time recording. Sue mentioned that in group actions, team meetings were recoverable but these had to be properly documented.

The meeting then heard from Jonathan Wheeler of Bolt Burdon who is on the APIL's EC. Jonathan set out how the public accounts committee had produced a damning report on the CICA but had been scathing about the involvement of lawyers. He also spoke on the multi-track code pilot and APIL's public awareness scheme. He also spoke about the claims process reform and various parliamentary lobbying being undertaken by APIL at the moment. He also spoke about Lord Justice Jackson's consultation and explained that Jackson was going to be a keynote speaker at the APIL conference. Mention was also made of APIL's training day which is being put on on the 22 May in partnership with ACAL.

Finally Justin Levinson a barrister at 1 Crown Office Row gave a brief presentation on the case of Thompson v the Archbishop of Liverpool. This case involved a Catholic boarding school where people had been abused in the 1970's. The case was pleaded in negligence and vicarious liability and the Defendants were Hill Dickinson. Hill Dickinson wanted limitation to be dealt with as a preliminary issue and they were relying on Lord Justice Auld in Bryn Alyn who stated that it was possible to do a preliminary issue hearing on limitation on pleadings, written witness statements and documents. This was opposed by the Claimants on the basis that Claimants should not have to give evidence twice and that the full story had to come out in order to have limitation dealt with properly. It was argued that post Hoare, Auld was not relevant and the Claimants were successful before Master Rose. Permission to appeal was granted and the case came before Mr Justice McKay who dismissed the Defendants appeal. Mr Justice McKay found that the Bryn Alyn guidelines were not rigid rules and that as a general issue, all issues should be tried together. In order to adjudicate on Section 33, the court had to hear all evidence including live evidence from the Claimant. It was not fair that the Claimant would have to give evidence twice and there would be little saving in time and expense when expert evidence is necessary. In a single issue case, there was rarely a saving of time and costs by having limitation dealt with as a preliminary issue.

Justin advised that where a Claimant had to give live evidence at a preliminary issue hearing, then it is easy to say that a preliminary issue would not result in a costs saving. It should be noted that Hill Dickinson as seeking permission to appeal this decision.

Tracey Storey
Secretary to the APIL Child Abuse SIG
17 March 2009