Public Funding for representation at inquests: AvMA response

AvMA is pleased to have the opportunity to contribute to the consultation on the proposed amendments to the Lord Chancellor's guidance on public funding. While AvMA contributed to the response formulated by the Law Society, as a charity often advising bereaved relatives following a medical accident we feel that the issues peculiar to medical accidents have not been adequately taken into account either in the formulation or wording of the proposed guidance and welcome the opportunity of responding independently. We also acknowledge the assistance of Jonathan Glasson and Stephen Irwin QC of Doughty Street chambers who advised in relation to public funding of clinical negligence fatal cases.

We would be glad to amplify suggestions and concerns raised within this response at any time if it would be helpful.

Exceptional Funding

AvMA would like specific reference made in the guidance to cover deaths that occur in hospitals/medical institutions as well as prisons and police custody. See **Sieminski v Poland** (Application no.37602/97-29 march 2001):

"2.…*the aforementioned positive obligations therefore require States to make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of patient's lives. They also require an effective independent judicial system to be set up so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector can be determined and those responsible made accountable."*

Therefore, a positive duty is assumed by the state whenever an individual becomes a hospital patient or is otherwise cared for by the state (residential care

home for example) with a corresponding duty to investigate in circumstances where an individual dies so as to determine liability as well as the cause of death. Article 2 applies in clinical cases where the state through a hospital, nursing home or GP has assumed a positive obligation to an individual. The definition is important because of the horizontal application of the Human Rights Act obligations where state institutions or employees may not be directly involved. In a climate in which the NHS' commissioning role is increasingly expanding to purchase services from non-NHS contractors the current definition of "agencies of the state" needs to specifically encompass this concept.

Financial Eligibility

AvMA welcomes the extension of funding for representation at inquests. The Legal Services Commission (LSC) is a public body for the purposes of section 6(1) of the HRA and is therefore required not to act in a way that is not compatible with a convention right subject to section 6(2). The LSC must therefore determine whether article 2 is engaged in applications for public funding in fatal cases. It is AvMA's view that in most but not all cases consideration must be given for the family to receive funding to make good their article 2 rights to include funding for an inquest. In many cases not to provide funding so as to enable the family's participation in the article 2 investigation may amount to an article 2 violation. Following the Khan decision of the court of Appeal the Community Legal Service (Financial)(Amendment No.2) Regulations came into force on 1st December 2003.The LSC has the power to request the secretary of state to dis-apply the financial limits for eligibility and to waive the contribution in relation to an application for the funding of legal representation to provide advocacy at an inquest into the death of a member of the immediate family of the client where it considers it "equitable to do so." We have major reservations about such discretion vesting with the state and believe that guidelines need to be established so that the circumstances can be predicted and client's advised upon whether waiver of contribution is likely to take effect. Perhaps it needs to be emphasised that bereaved relatives who lose a loved one

whilst in the hands of the state need to be assured that investigative procedures are transparent and follow fully devised protocols. This expectation should be no less important in relation to the funding of the investigation as to the inquiry into the cause of death itself.

For the avoidance of doubt, however, AvMA remain fully opposed to family members of the bereaved having to contribute to the cost of representation at an inquest at all. The necessity for an inquiry has only been brought about by the circumstances in which a loved one died at the hands of the state. The family ask only that the circumstances be fully investigated and in a manner in which they can effectively participate; especially so when the very state agents comprising the object of an inquest come fully flanked with protection by way of representation, legal or otherwise of their own.

Statutory Charge

It has been of concern to AvMA for some time now that in circumstances where public funding may be granted for representation at the inquest the statutory charge may be imposed by the LSC in the event that a claimant successfully goes on to pursue a civil claim in clinical negligence. Similarly if a contribution is required in order to fund an inquest we oppose any imposition of the statutory charge if damages are recovered. We believe that such costs ought to be recovered as part of the special damages claim from the defence or, in the alternative as inter-partes costs. However, we know such claims are routinely denied. In the absence of any specific ruling on this point we urge the LSC not to impose the statutory charge, particularly when the charge is not applied where liability has been admitted prior to the inquest. Such a procedure not only negates the spirit of the *Khan* ruling in positively encouraging the “defence” to indulge in legal tactics but it also entrenches a defensive mindset whereby admissions of liability will be delayed until the end of an inquest in order to avoid any liability for costs while placing the burden on the family. If the government is serious in its commitment to early resolution of clinical disputes and the learning

from adverse incidents then such punitive anomalies and irregularities have no place.

Remuneration

The current rates for inquest representation is set at magistrate court rates. This appears to have been governed by a misapprehension that inquest proceedings are akin to criminal ones. This is clearly not the case and even less so where the death involves issues of clinical complexity. It is not unusual for an admission of liability to follow from an inquest where the family has been fully represented. Most AvMA solicitors undertaking inquest work will be panel solicitors who specialise in clinical negligence work. For many years AvMA have experienced grave difficulties in obtaining representation for clients that approach us because of the reluctance of solicitors to undertake it given the large amount of preparation involved that goes unremunerated. The alternative is for the client to pay for the investigation (as well as carry the burden of advocacy costs if the statutory charge/contribution is imposed).

The situation for solicitors is to be contrasted with that of the barrister. Counsel is entitled to payment for the preparation time involved. Solicitors are entitled to remuneration only for the representation itself. Many barristers instructed are at a junior level, “cutting their teeth” on clinical negligence work. Any advocate should be entitled to remuneration based on experience and the amount of work undertaken regardless of whether preparatory or advocacy work is involved.

Conclusion: Fulfilling the Article 2 obligation

The tenet of the proposed amendments on the public funding of legal representation at inquests is predicated upon the belief that the inquest is the appropriate forum in which the state discharges its article 2 obligations. However, there are potentially alternative ways that the duty may be discharged. AvMA has witnessed with increasing concern the seemingly intractable problems experienced by bereaved families in accessing information and obtaining

adequate explanations along with redress following a relative's death in hospital in suspicious circumstances. In Sieminska the E Ct HR considered that "redress" meant a mechanism whereby those health professionals responsible for a death were "made accountable." Arguably, this could happen through a complaints procedure inquiry, through a professional body or an inquest. However, in ***Powell*** the E Ct of HR expressed as a requirement that liability should be capable of being determined. An inquest may not as a matter of law determine liability.[1]Similarly the GMC or complaint procedure cannot make findings of negligence. In *Khan,* Brooke L.J. held that an inquest was necessary because the private investigations carried out by the Trust and its admission of liability were not in that case sufficient to discharge the obligations under article 2.

What then should transpire in a situation where no inquest has been held and a potential claimant applies for public funding in order to investigate a civil claim? While we appreciate this specific point falls outside the scope of the present consultation exercise AvMA believes it is now opportune to lay a marker to urge the LSC to reconsider its policy with regard to the funding of such claims. Many bereaved families are being denied access to justice simply because the sums do not add up for the purposes of "cost/benefit" in the absence of a substantial dependency claim. It remains our view, and one upon which we expressly sought the advice of counsel, that the LSC leave themselves open to challenge on the grounds of a breach of article 2 in denying applicants access to public funding particularly so in circumstances where no inquest has taken place. AvMA have collated a number of examples where public funding has been refused on the grounds of cost/benefit not being satisfied. Such refusals may, if tested, be found to violate article 2.

Nothing can be more serious than a fatal medical accident yet the state exonerates itself from its obligation to offer bereaved relatives a full and adequate explanation of the circumstances surrounding a death in a state institution on commercial grounds. Perhaps the prudent approach is to campaign

[1] Rule 42 of the Coroners Rules 1984

to increase the bereavement award so as to remove the stubborn obstacle to obtaining funding. However, we hope that in the light of the above the LSC will reflect further upon its legal obligations if not its moral ones.

We hope that our observations are of assistance and reiterate once again our willingness to contribute further if considered helpful.

Fiona Freedland
Legal Director
AvMA

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