APLA's submission to the Senate Legal Aid Inquiry

Peter Semmler QC, APLA National President

On 2 April Catherine Henry, APLA New South Wales Branch President, John Peacock, APLA Executive Officer and I attended the Australian Senate Legal and Constitutional References Committee Legal Aid Inquiry. Over a period of approximately 45 minutes Catherine and I made submissions about the appalling lack of, and pressing need for, proper legal aid in personal injury cases in this country.

While other submissions to this inquiry have concentrated on the need for legal aid in criminal cases, our submissions were exclusively directed to the need for legal aid in civil cases and in particular in personal injury litigation. We emphasised that the lack of legal aid in personal injury cases has adverse consequences not only for the victims of tortious behaviour but also for Australian society as a whole. The undoubted deterrent effect upon the behaviour of individual and institutional tortfeasors in, for example, medical negligence and product liability cases, is lost if difficult but meritorious cases cannot be taken to court because of lack of funds.

Pro bono or speculative litigation is not a substitute for a proper system of legal aid in this country. The whole system of personal injury compensation relies too heavily upon the preparedness of those lawyers who act for injured plaintiffs to prosecute the case on the basis that they will only be paid if the case is successful. We pointed out to the inquiry that because of the increasing costs of disbursements alone (including filing fees, expert reports, and transcript costs) the burden on lawyers who act for plaintiffs is unacceptable. Lawyers are not bankers. It is simply unfair that lawyers who act for plaintiffs in particular should be required to prop up the system of accident compensation in this country.

The point was made that there is little utility in the Federal Government passing consumer-oriented legislation such as amendments to the Trade Practices Act which are designed to make it easier for the victims of dangerous products to establish fault on the part of the manufacturer if, because of the inequality of resources available to the plaintiff on the one hand and the multinational defendant on the other, the victims are unable to litigate to make use of such laws.

We emphasised that the notion of equal access to justice is an illusion if personal injury plaintiffs in large, difficult, but meritorious cases cannot afford to go to court. We pointed out that historically the benefits of success by individual plaintiffs in path-finding litigation are enjoyed by society as a whole. We referred the senate inquiry to the asbestos litigation in the late 1980's and the HIV litigation in the early 1990's as examples of difficult cases where the precedent established by one success benefits many others.

The senators conducting the inquiry were intrigued by a proposal which we put forward whereby legal aid in personal injury cases could become self-funding. This would involve successful plaintiffs in complex, difficult but substantial cases which could not be brought without considerable financial assistance agreeing to make a significant contribution to the legal aid fund in the event that their cases are successful, thereby enabling other difficult cases to be funded.

One of the terms of reference of the senate inquiry is as follows:

The equity implications arising form the current tax deductibility regime for legal expenses, including the corporate sector.

We made clear APLA's position on this issue. The tax deductibility of litigation expenses by corporate defendants is inequitable. It is particularly pernicious in an environment where no legal aid is effectively available to personal injury plaintiffs. On the one hand the Commonwealth Government says it is unable to afford to fund litigation by the victims of negligent behaviour. But on the other hand the Commonwealth presently provides by way of a tax break substantial relief to corporate defendants who are ultimately shown to have been negligent. Under the present system corporate defendants in personal injury cases are entitled to run "Rolls Royce" defences at the taxpayers' expense even though ultimately such defences may be proven to have no merit. Yet at the same time injured plaintiffs who have lost their capacity to earn are given no tax concessions and no legal aid.

The inquiry appeared most interested in APLA's submissions and has indicated that it will probably seek further input from us.

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Denial of legal aid may stop medical lawsuit

By JENNIFER COOKE

A landmark product liability case against the Federal Government and the Commonwealth Serum Laboratories (CSL) may be abandoned unless the Commonwealth reverses its decision to refuse legal aid.

And yesterday the Australian Plaintiff Lawyers' Association (APLA) questioned whether a conflict of interest existed where the Government had refused to fund a case in which it was the main defendant.

The lengthy case, to start next week before a civil jury of six in the Victorian Supreme Court, is a test case for another 131 plaintiffs, 20 of them from NSW.

All were among 2,100 adults and children treated with Commonwealth-sponsored pituitary-derived human hormone drugs for infertility or short stature between 1967 and 1985.

If won by the plaintiff, a woman known only as APQ, this case could create a precedent.

More than three years ago, APQ sued the Commonwealth and CSL, claiming psychiatric injury akin to post-traumatic stress disorder from the shock of being told she might one day contract the lethal Creutzfeldt-Jakob disease (CJD), as four other Australian women did after fertility drug injections.

CJD has a latency period of more than 40 years.

Mr Sean Millard, the senior lawyer in the two-man Melbourne firm of Rennick Briggs, which represents APQ, said yesterday that the case was "hanging by a knife edge" and might have to be abandoned. Legal aid was applied for in September 1993.

Just before Christmas last year, after protracted legal aid negotiations, it was refused under changed guidelines of the Public Interest and Test Cases Scheme and the Special Circumstances Scheme.

Since the same time, State Attorneys-General and the Federal Government have been opponents in an escalating war over Commonwealth attempts to cut $120 million over three years from the national legal aid budget.

Civil cases will be hardest hit.

During the past three months, Rennick Briggs has exhausted other avenues of raising money for administration costs, expected to total at least $163,000.

"All efforts are being made to persuade the Attorney-General to review his decision and provide legal aid before the trial starts," Mr Millard said.

The APLA president, Mr Peter Semmler, QC, said yesterday that APQ's case was of "obvious public importance" because it highlighted the fact that cuts to legal aid funding "posed a dire threat to the right of victims of negligence to bring claims now and in the future".

A spokesmen for the Federal Attorney-General confirmed that APQ had been refused legal aid but said her application failed to meet criteria under a one-off Commonwealth scheme that was not part of general State and Territory legal aid funding.