The Law Society of England and Wales

Litigation Funding

A response by the Association of Personal Injury Lawyers

March 2009

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation whose members help injured people to gain the access to justice they deserve. Membership comprises of solicitors, barristers, legal executives and academics who are all committed to serving the needs of people injured through the negligence of others.

The aims 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:

John McQuater – Vice President;
Stuart Kightley- EC member;
Gary Barker- Coordinator of APIL costs and funding special interest group.

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Executive summary

- While contingency fees (where each party pays its own costs and the claimant solicitor deducts his costs from the claimants damages) are undoubtedly simpler to understand than CFAs, APIL has always believed that damages paid to a claimant should be sacrosanct.

  It is not in the interests of justice or fairness for costs which have arisen from the negligence of the wrongdoer to be paid by the innocent victim.

  APIL has devoted an enormous amount of time and resources to make CFAs work and believes this is still the best way forward. If contingency fees were to be introduced in this country, the amount and structuring of damages would have to be increased substantially to ensure claimants do not have to pay the price for the negligence they have suffered.

- Access to justice is largely served by the healthy funding options that are currently available.

- APIL are not aware of evidence to suggest that evidence under the current conditional fee system solicitors have behaved unethically or settlements have been low because a solicitor has an interest in the case.

- After detailed research and full consultation if some form of contingency fees were to be proposed the Government would need to look very carefully at regulation and transparency.

- Collective actions are not served by conditional fee agreements and that further work is needed in this area to ensure that access to justice is met.

- Third party funding can be beneficial to claimants where there is no other method of funding available, for example like a fund of last resort. They are however, currently unregulated and unlawful in personal injury claims. It is essential that if this type of funding is to be allowed that appropriate regulation is put in place to protect the injured person and the Solicitors Regulation Authority amends its Code of Conduct to permit their usage.

- APIL has consistently campaigned for the removal of the indemnity principle since the introduction of CFAs.

- APIL does not believe that fully abolishing the cost shifting rule would be in the interests of justice or fairness. Where costs have arisen out of the negligence of a wrongdoer they should not have to be paid by the innocent victim. We believe in the principle that the polluter pays.

Introduction

We welcome the opportunity to response to this consultation paper on litigation funding. Our response does not necessarily deal with each question raised in the consultation paper but sets out our position more generally on the issues raised in relation to personal injury only.

Contingency fees

APIL's policy on contingency fees is based on the contingency model where each party bears its own costs and the claimant solicitor deducts his costs from the

claimants damages. Whilst we agree that this type of agreement is undoubtedly simpler to understand than Conditional Fee Agreements (CFAs), APIL has always believed that damages paid to a claimant should be sacrosanct.

It is not in the interests of justice or fairness for costs which have arisen from the negligence of the wrongdoer to be paid by the innocent victim.

If contingency fees were to be introduced in this country, damages would have to be increased substantially to ensure claimants do not have to pay the price for the negligence they have suffered.

1. **Do you agree with these arguments? Are there others that you would list?**
2. **Do you agree that these are the main arguments against contingency fees?**

The arguments for and against contingency fees detailed in the paper are ones that are frequently heard in the legal arena when debating the validity of contingency fees in this jurisdiction. Indeed some of the arguments were used in relation to conditional fee agreements before they were introduced. We would like to make the following general points on some of the arguments raised.

Access to justice is largely served by the healthy funding options that are currently available. However, one area that does need further consideration and that is being looked at by the Civil Justice Council is collective actions.

The argument that a form of contingency fee is used in the predictable costs regime without apparent problems does not accord with APIL's findings following a survey of our members in June 2008. Our survey found that a large number of members were experiencing continuous difficulties recovering costs under the predictable costs scheme. Problems with the scheme included:

- Failure by losing party to promptly pay predictable costs, delays reaching several months in many cases;
- Continuous attempts to challenge the predictable costs claimed;
- Insurers routinely sending predictable costs claims to costs negotiators who then seek to reduce the amount of the predictable claim and or its disbursements;
- Refusing to pay predictable costs in RTA claims where there is no personal injury (ie: bent metal claims) which are clearly within the ambit of the rules.

Despite the decisions in *Nizami v Butt, Kilby v Gawith* and *Wetzel v KBC Fidea* in which the basic fundamentals of the predictable costs scheme were challenged by defendants who failed in their attempt, such challenges appear to be continuing unabated.

Relationship with ethical duties

3. Do you agree with these views?

We agree that there is no evidence under the current conditional fee system to suggest that solicitors have behaved unethically or settlements have been low because a solicitor has an interest in the case. Indeed the evidence from our members is that they have acted professionally with the system that they have been given and they have made CFAs work.

Deciding the percentage

4. If costs were not recoverable, should certain types of case be excluded from contingency fee funding? Please give your reasons.

5. Do you agree that a mechanism needs to be set to limit the percentage of damages that can be claimed? Please give your reasons.

6. What mechanism do you favour? Please give your reasons.

7. **Do you agree that the existing mechanisms for conditional fees are sufficient for contingency fees? Should there be others? Please state your reasons.**
8. **Should certain work (e.g. clinical negligence) be specifically excluded from any contingency fee arrangements? If yes, please specify and give reasons.**
9. **If the answer to question 8 is no, should certain elements of damages in personal injury and clinical negligence claims be exempt from the contingency percentage calculation If yes, please specify and give reasons.**

Our position on contingency fees is set out at the beginning of this paper. There are various types of contingency fee agreement around the world and we feel it would be inappropriate to comment on the minutiae until more detailed research has been conducted in this area.

After detailed research and full consultation if some form of contingency fees were to be proposed the Government would need to look very carefully at regulation and transparency. A decision would need to be reached on who would be arbitrator, would it be a matter for the courts or would it be a professional conduct issue.

There would also need to be absolute transparency in the agreement and any figures or percentages quoted to the injured person so that they are able to make an informed choice on the funding available to them.

Recovery of costs

10. **Do you agree that costs should follow the event where there is a contingency fee agreement? Please give your reasons.**
11. **Are there additional safeguards needed to protect defendants from inappropriate high contingency fees? Please give your reasons.**

Again we feel unable to respond on such details as sufficient research into this method of funding has not yet been undertaken.

12. Do you agree that it is appropriate for solicitors to have access to a wide number of funding options in order to assure access to justice?

As mentioned above, we believe that there are currently a variety of funding options available to the claimant and that any funding option should allow the claimant the freedom to choose a solicitor of their choice.

We have already highlighted that collective actions are not served by conditional fee agreements and that further work is needed in this area to ensure that access to justice is met. We accept that CFAs are invariably inappropriate in such cases, there is little after the event insurance available (if at all) and the Legal Services Commission applies a wider public interest test before such cases are accepted. We therefore support the work of the Civil Justice Council in this area.

Unmeritorious claims

13. Are you aware of evidence to suggest that there are unmeritorious claims being put forward as a result of the existence of conditional fee arrangements? If so, please give full details.

We do not hold data on this; however, our members would suggest that it is simply not in their interests to pursue unmeritorious claims as they are not going to get paid for them. Claimant lawyers are often criticised in the press for running unmeritorious claims on the one hand but on the other for cherry picking the best claims when running claims on a CFA.

Conditional fees

14. Do you agree with this view of conditional fees?

15. Do you consider that CFAs have led to a profusion of unmeritorious claims? If so, please give reasons and provide supporting evidence.

16. Are there any reforms that you think should be made?

APIL fought the abolition of Legal Aid, but went on to work on the Woolf reforms which were introduced within a very short time frame.

There were genuine concerns regarding CFAs before their implementation, there were suggestions that access to justice may be affected and that CFAs would be unviable for claimant firms because, if they did not win, they would not get paid. There were also suggestions from some that this type of agreement could erode the client solicitor relationship and lead to a conflict of interests. APIL members have devoted an enormous amount of time and resources to make CFAs viable and believe that these are still the best way forward in the majority of cases. Claimant lawyers worked hard with representative bodies to ensure that the agreement now works, success fees were implemented, after the event insurance introduced and whilst there have been problems, on the whole claimants are committed to making this method of funding work to facilitate justice of various groups of claimant. Following many technical challenges CFAs are now established within our legal system and should be allowed a period of time to 'bed down' fully before further major reform is considered.

Third party funding

17. What arrangements in your view are most suitable to ensure that claimants' interests are properly protected where a third party is funding the action?

18. Should third party funders in an unsuccessful case be responsible for all of the successful party's costs?

19. Should third party funders be restricted to a maximum amount that they can charge on a contingency basis and, if so, what should the maximum be?

20. In the light of the changing attitudes of the judiciary and the current regulatory regime of Claims Management Companies, should Solicitors Conduct Rule 9.01(4) be removed?

21. Should Solicitors be permitted to engage in third party funding activities? If yes – Should Solicitors be permitted to fund their own client's case?

Third party funding is a developing area, when advising a claimant on the pursuit of a claim, lawyers investigate all funding options available. This type of funding arrangement can be beneficial to claimants where there is no other method of funding available, for example like a fund of last resort. Third party funding can be beneficial to claimants where there is no other method of funding available, for example like a fund of last resort. They are however, currently unregulated and unlawful in personal injury claims, because of rule 9 of the Solicitors code of conduct. It is believed that it was not the intention of rule9 to prohibit this method of funding, however, until this is looked into by the SRA a lawyer seeking to fund a personal injury claim in this manner must seek a waiver from the SRA.

It is essential that if this type of funding is to be allowed that appropriate regulation is put in place to protect the injured person and the Solicitors Regulation Authority amends its Code of Conduct to permit their usage.

We are not in a position to respond to question 19.

We believe that if real consideration is to be given to the removal of conduct rule 9.01(4) it should only be done after wider consultation of the profession.

Other costs issues

22. Should the indemnity principle be abolished? Please give reasons.

APIL has consistently campaigned for the removal of the indemnity principle. Since the introduction of CFAs the continued use of the indemnity principle has lead to confusion.

As the personal injury market continues to develop the public increasingly expect to be able to bring claims without being liable for the cost, regardless of whether they win or lose. In most cases claimants are not charged anything for the cost of bringing a claim because their lawyers waive any claim for costs not recovered from the opponent. A solicitor cannot provide their client with this assurance at the outset of the claim for fear of breaching the indemnity principle. Members report that paying parties habitually look for any breach of the principle to avoid their liability for costs and indeed the indemnity principle has lead to technical challenges and satellite litigation in recent years.

There has been concern expressed in some quarters that the removal of the indemnity principle would abolish the only mechanism in litigation that controls costs. We would not however, agree with this argument. We have guideline hourly rates and detailed assessment which would ensure that costs do not escalate.

23. Should the costs shifting rule be retained?

APIL does not believe that fully abolishing the cost shifting rule would be in the interests of justice or fairness. Where costs have arisen out of the negligence of a wrongdoer they should not have to be paid by the innocent victim. We believe in the principle that the polluter pays.

We believe that the current range of funding options is healthy and allows access to justice subject to the exception of collective actions as mentioned. If we were to move

away from costs shifting there would be a concern that some or all of the civil justice principles could become eroded.

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