Ministry of Justice

Regulating damages based agreements

A response by the Association of Personal Injury Lawyers

August 2009

The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers with a view to representing the interests of personal injury victims. The association is dedicated to campaigning for improvements in the law to enable injured people to gain full access to justice, and promote their interests in all relevant political issues. Our members comprise principally practitioners who specialise in personal injury litigation and whose interests are predominantly on behalf of injured claimants. APIL currently has around 4,400 members in the UK and abroad who represent hundreds of thousands of injured people a year.

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:

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Executive summary

Introduction

APIL welcomes the opportunity to respond to the Ministry of Justice's consultation regarding the regulation of damages based agreements (DBAs).

Before we address the issues of regulation of DBAs, we thought it may be helpful to set out our position regarding their use in personal injury claims. Our general view is that DBAs can provide access to justice in limited circumstances, when other means of funding are not available. Our reticence is due to the fact that damages are purely compensatory. We believe firmly in the principle of "*polluter pays*" and ideally, successful claimants should never have to pay out part of their compensatory damages to simply cover the cost of being represented and obtaining that compensation. A claim for damage is not a windfall but an attempt to restore the person, as far as possible to their pre-accident status, by those that have been negligent (to the extent that money can do this).

There are some instances, however, in which injured people may obtain compensation but can only recover limited costs from the wrongdoer. This applies in cases where:

1. a driver is untraced and an application must be made to the Motor Insurers' Bureau;
2. a person is injured as a result of a crime and can receive compensation as a result of the Criminal Injuries' Compensation Scheme (CICS);
3. where an injury claim is pursued through an employment tribunal.

When other means of funding are not available, a claimant should continue to have the right to enter into a DBA to ensure he is able to get advice and representation in his claim. APIL conducted research in March 2005 which indicated that on average the percentage increase between the first offer and final settlement in the cases looked at

was over 50 per cent. This clearly shows that the use of independent legal advice substantially protects claimants from the risk of under-settling their claims.[1]

The consultation and the research referred to and relied upon in it are focussed on employment tribunals, because it is believed that the majority of DBAs are used in employment tribunal claims. The Ministry of Justice is seeking, however to apply the regulatory regime it develops to all DBAs, no matter which forum a dispute may be heard in and no matter who the representative is. We are concerned that this approach may be too "broad brush".

We are concerned that the focus on employment tribunals may lead to confusion about DBAs used in other circumstances. Examples of such claims are those to the MIB or Criminal Injuries Compensation Authority (CICA). The consultation paper, for example, says that the process in most tribunals is inquisitorial. This is certainly not the case in practice at a Criminal Injuries Compensation Appeals Panel tribunal, which is adjudicative and involves an adversarial process where the claimant and CICA contest the relevant issues before an independent panel. It is important to understand the nature of the forum in which DBAs are used because this has an effect on whether cases are likely to succeed, and consequently on the contingency fee applied or charged in each case.

We also question whether there is client dissatisfaction among those clients who are represented by lawyers on a contingency basis for a personal injury claim as we have seen no evidence of this. The research referred to in the consultation paper does not cover such claims.

Despite this, we understand there is a regulatory gap, in that there are no current rules specifically applying to DBAs. We also agree that claimants should be protected from

[1] Potential impact of the threshold limit for personal injury cases within the small claims court being raised to £5,000, APIL research March 2009.

unfair practices as it is important that client's damages are not subject to unreasonable deductions.

There already exists extensive professional regulation where the representative is a solicitor, barrister or legal executive. We are concerned that double regulation would not be of benefit to consumers. We therefore urge the Ministry of Justice to ensure that the regulations that are introduced take in to account the fact that lawyers who are already regulated must comply with detailed rules on costs, and that these rules apply when acting for clients under DBAs or otherwise. It is important, however, that all other parties (from outside the legal profession) in the business of providing advice or representation funded by DBAs should be tightly regulated. The spectre of the Accident Group and Claims Direct litigation indicate that market forces offer insufficient protection to often vulnerable individuals.

We also urge caution when drafting regulations concerning DBAs, given the experience of the introduction of regulations which applied to Conditional Fee Agreements (CFAs). Following their introduction there was confusion and significant satellite litigation which had the unintended consequence of making many CFAs unenforceable. We welcome the fact that the Ministry of Justice has recognised these dangers by including a provision in the draft clause[2] which means that non-compliance with the DBA regulations will not necessarily render a DBA unenforceable providing the receiving party is bound by professional rules of conduct affecting these matters. In the instances where an advisor or representative is not a legal professional, and thus free from sanctions from a professional body, any breach in the regulations should vitiate their right to any remuneration under the DBA or at all. We believe that this is particularly important given the fact that DBAs (and the regulatory scheme now being applied to them) may in future be extended to other types of claim.

[2] The draft clause in the Coroners and Justice Bill to insert s.58AA in to the Courts and Legal Services Act 1990

We believe the best protection for clients is to require those acting under DBAs to be required to provide clear information about costs from the outset. The Solicitors' Code of Conduct requires solicitors to set the best information possible about the likely overall cost of a claim clearly and in writing. If the DBA regulations stipulated that every representative, acting under a DBA was required to do this, this would:

1) ensure consumers were adequately protected as they would know the likely cost from the outset;
2) ensure that representatives who already have to comply with such rules do not have to bear the extra expense of complying with further regulations; and
3) be unlikely to result in a wave of technical challenges to the enforceability of DBAs.

A. The provision of clear and transparent advice and information provided to consumers (questions 1 – 5)

We believe the provision of clear information about costs, in writing and from the outset, is the key to ensuring that clients are adequately protected when being represented under a DBA.

If the client knows what the costs will be from the outset, he can make an informed decision as to whether to proceed with that representative under a DBA or seek advice elsewhere.

This information should include the representative's best estimate of the value of the claim (including both general damages (those for pain suffering and loss of amenity) and special damages (other losses such as loss of earnings or travel expenses)) and give an estimate of what the claim will actually cost, rather than a percentage figure.

These figures can only ever be estimates, as advisers can never be certain of the value of claim from the outset. The regulations must ensure that this is clear and that claimant representatives are remunerated in circumstances where, for genuine reasons, whilst at the same time as protecting the consumer. This could be achieved by requiring representatives to advise clients, in writing, of the fact of and reason for any change in the estimate as the case progresses, as well as final costs at the end of the case. Any complaint about the representative's bill can always be referred to the relevant body. Solicitors' clients, for example, can ask the Legal Complaints Service to look at any bill of costs for non-litigious work.

Whether disbursements, VAT and other costs are included in quoted contingency fee should not be prescribed by the regulations. Although there is a superficial attraction to a client being given one percentage figure that includes all fees, it is not always appropriate for a client to be charged in these terms.

If an all inclusive percentage is charged, there is less incentive for the representative to advise the client, for example, that counsel's opinion would be beneficial, as this would have to come out of the representative's costs. In other words, the conflict of interests between client and representative will increase.

Representatives should however be required to set out clearly what is included in the percentage fee, what is excluded, and, in relation to the latter, what these excluded costs are likely to amount to. A total estimate of costs should also be given to ensure that the claimant can make an informed decision.

Clients should also be told the basis on which charges are calculated. For example, clients should be told if there a link between the fee and the time the representative will spend on the case, and of any relevant hourly rates.

In short, we believe that the regulations should not lay down the way that charges under DBAs are calculated. They should instead say that clients must be advised in writing about certain key facts.

B. The maximum percentage of the damages that can be recovered in fees from the award (questions 6 & 7)

We recognise the arguments both for and against capping the percentage of damages that can be recovered in fees. We believe that if claimants are given clear information about costs from the outset, they will be able to make their own decisions about whether to engage a particular representative to act for them. Market forces will then act to keep costs down.

The risk with any cap is that it can become the normal charging rate. If such a cap is set at a low level, many cases will not be taken on. If it is set at a high level many people will be paying more than necessary to be represented.

Any percentage charged needs to reflect the risk of potential failure in a case. If percentages are capped, representatives could be dissuaded from undertaking very difficult cases. For example, one of our experienced members has told us he represented a child who was injured as a result of being shaken by her father, who was an assistant prison governor. The Crown Prosecution Service did not prosecute him because of his status, which made the claim to the CICA much more difficult. The claim was refused by five firms of solicitors. The APIL member accepted the case on a contingency basis with a success fee. With hard work and skilled expert evidence the claim was eventually successful and the child was made a substantial award. The DBA and the percentage fee charged under this was vetted by the Supreme Court Costs Office and found to be perfectly acceptable in the circumstances. It may be that if

there had been a cap on the percentage that could be charged such a claim may never have been pursued.

C. Controlling the use of unfair terms and conditions (questions 8 – 10)

We believe that clients represented under DBAs should be protected from unfair practices. The first step in ensuring such protection would be to ensure the Unfair Contract Terms Act 1977 applied to all DBAs.

Secondly, a balance needs to be struck between the claimants interest, and the right of the representative to be paid for work properly carried out. Clauses which penalise claimants should not be allowed. Settlement clauses should reflect the fact that the representative has the right to be paid at a fair rate for work properly carried out, not be designed to punish a claimant for deciding to progress their case in a way that the representative does not advise. It is after all the claimant's case, not the representative's.

In addition, DBAs should make clear that claimants are credited for any costs recovered from the other party in a case. In claims against untraced drivers, for example, the MIB makes a small contribution towards costs, and clearly the client should be given credit for this.

Finally, there should be a rule against sharing the contingency fee with another person or body. Fees should reflect the cost of work and risk the representative is taking in running the case, not be a mechanism to allow third parties to receive dividends from clients' damages.

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