

**Department of Justice for Northern Ireland
Alternative Methods of Funding Money Damages Claims**



A response by the Association of Personal Injury Lawyers

June 2013

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation with a 20-year history of working to help injured people gain access to justice they need and deserve. We have around 4,000 members, 70 of those in Northern Ireland, committed to supporting the association's aims and all of whom sign up to APIL's code of conduct and consumer charter. Membership comprises mostly solicitors, along with barristers, legal executives and academics.

APIL has a long history of liaison with other stakeholders, consumer representatives, Governments and devolved assemblies across the UK with a view to achieving the association's aims, which 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.

Any enquiries in respect of this response should be addressed, in the first instance, to:

Alice Warren, Legal Policy Officer

APIL

3 Alder Court, Rennie Hogg Road, Nottingham, NG2 1RX

Tel: 0115 9435428; Fax: 0115 958 0885

e-mail: alice.warren@apil.org.uk

Introduction

APIL welcomes the opportunity to respond to the Department of Justice for Northern Ireland's consultation on alternative funding for money damages. APIL understands that financial resources within civil legal aid are limited and appreciates that the Northern Ireland Courts and Tribunal Service (NICTS) wants to prioritise those who are most vulnerable. However, as we have previously stated, money damages cases can yield financial resources back into the legal aid fund in successful cases; therefore we do not understand the rationale behind the removal of money damages from the scope of legal aid.

However, if the proposals are to go ahead, we believe that conditional fee agreements are the best option to ensure that the need for access to justice is served.

Q1 Do consultees accept that if the Northern Ireland Legal Services Commission is to make savings on the legal aid spend that it is worthwhile exploring options for alternative funding mechanisms for money damages cases?

We agree that it is worthwhile exploring options for alternative funding mechanisms. We have previously stated that if legal aid is to be cut, there must be suitable alternative funding available, otherwise injured people will be prevented from obtaining representation and consequently the compensation that they are entitled to.

We have made representations on numerous occasions in the past about the low cost to the Northern Ireland Legal Services Commission of personal injury claims. In successful claims, costs are recovered from the other side through the "polluter pays" principle. The Compensation Recovery Unit (CRU) has a legal right to recover social security benefits and NHS costs from compensators in cases where a personal injury claim has been successful, for example, following a road traffic accident or injury at work. In 2009-2010 the CRU recovered £13.6 million, comprising £5.4m of benefit payments and £8.2m of NHS costs, relating to approximately 20,300 cases. The monies recovered in these cases far exceed the £2 million cost to the legal aid fund as stated by the Access to Justice Review team in its November 2010 Discussion Document¹.

As the statistics from the initial discussion paper show, the cost to the legal aid fund of money damages cases is very little and a fraction of the cost of other types of cases. This is because the costs in money damages cases are ultimately paid by the losing party, or are recovered elsewhere and therefore do not act as a drain on the legal aid fund.

If so, which of the options described would be your preferred option and why?

¹ Paragraph 4.21 http://www.courtsni.gov.uk/sitecollectiondocuments/northern_per_cent20ireland_per_cent20courts_per_cent20gallery/a2j/p_a2j_discussion_paper.html

Our preferred option would be that the legal aid system remains unchanged. Legal aid is vital in ensuring that there is a level playing field between the plaintiff and defendant. If this is not possible, we prefer option 2, Conditional Fee Agreements with set success fees being paid by the losing defendant.

Option 1 Money damages are retained within the scope of legal aid through the funding code

APIL has previously raised concerns that the changes to the funding code as proposed would mean that a proportion of people who were previously entitled to legal aid will no longer be so entitled under the funding code. The decision on whether to grant legal aid in particular cases where the client was financially eligible would be determined by applying a merits test based on consideration of the interaction between likelihood of success, the scale of damages likely to be awarded and the projected costs. This would be particularly disadvantageous for claims with a value of £5,000 or less. In these cases, if the prospects of success were assessed as very good (80 per cent or more), legal aid would be awarded, provided that damages were expected to exceed projected costs; but if prospects of success were moderate (50-60 per cent), legal aid would not be awarded unless the damages were likely to exceed costs by at least a factor of four. As there is a base minimum of work to be done in PI cases, regardless of the value, there may be difficulties in meeting this requirement. Further, the process of determining prospects of success could potentially be more difficult in cases with a value of £5,000 or less, because investigative help would be unavailable.

This will therefore leave many injured people, in particular those with lower value claims, without access to legal representation, resulting in them not bringing a claim or feeling that they have to settle direct with the defendant's insurance company, which may seek to under-settle claims made by unrepresented plaintiffs.

Option 2 Conditional Fee Agreement with set success fee being paid by the losing defendant

When legal aid for personal injury cases was cut in England and Wales, the Government instead put in place a structure which allowed solicitors to take on cases which had a good prospect of success. Conditional Fee Agreements (CFAs) coupled with After The Event (ATE) insurance (which protects plaintiffs from having to pay the defendants' costs if the plaintiff loses) and success fees (which allow the plaintiff solicitors to build up a fund to pay for those cases it took for plaintiffs which did not succeed), both of which were recoverable from the defendant, ensured that in England and Wales, access to justice was maintained.

The system and accompanying regulations were not without fault but the majority of problems were resolved, and the system eventually worked well.

It is important that success fees and ATE should be regulated; and it is also important that there are a number of ATE providers in the market so that premia are competitive.

Option 3 Conditional Fee Agreement with set success fees being paid by successful plaintiff

Option 4 Contingency Legal Aid Fund (CLAF): a percentage of damages paid into the fund to sustain it for future cases

APIL cannot agree to a solution which means that plaintiffs will not receive 100 per cent of their damages. Therefore we cannot agree to option 3 or 4. While contingency fees are undoubtedly simpler to understand than CFAs, APIL has always believed that the damages paid to a plaintiff 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 injured person. APIL believes that CFAs are still the correct approach if money damages cases are to be removed from the scope of legal aid.

If option 3 or 4 were introduced, then the damages awarded to victims would have to be increased substantially to ensure that the plaintiff received sufficient compensation to cater for their needs after their injury.

Option 5 Jackson Model

APIL has continually campaigned against the introduction of Lord Justice Jackson's recommendations in England and Wales. We fundamentally disagree with a large proportion of the proposals in the Jackson model. Firstly, Jackson LJ proposed that success fees should be paid out of damages as this will give the plaintiff a financial interest in controlling costs and seeking early settlement. In APIL's view, success fees and ATE should be regulated and remain recoverable. The purpose of a success fee is to compensate solicitors for the losses incurred as a result of those cases it takes on which prove to be unsuccessful. The success fee is therefore like an insurance premium and the cost of the risk is paid for by the wrongdoer. The plaintiff should not be forced to take a financial interest in the claim, and their damages should not be eroded to pay for their legal costs. All injured people should have access to justice and be able to preserve their damages.

The Jackson model also contains provision for damages to be uplifted by ten per cent to mitigate the effect of plaintiffs having to pay the success fee out of their damages. APIL is unhappy with this proposal as general damages are too low in any event; the ten per cent does not fully compensate for the deduction of ATE premiums and success fees; and as stated above, damages should not be used to pay for legal costs.

Under the Jackson model, qualified one way cost shifting will also be implemented. Here, the plaintiff will not be liable for the defendant's costs in a lost case, unless the case is pursued unreasonably, or the relative financial means of the parties are such that it would be reasonable for costs to be paid. The rationale for this is that the defendant is often economically stronger than the plaintiff or covered by insurance. True one way cost shifting where the plaintiff is never at risk from costs, could work for personal injury claims, including clinical negligence and multi-party actions. But the Jackson proposals are flawed. The lack of clarity around the definition of a case that is "pursued unreasonably" will lead to satellite litigation.

Option 6 Contingency fee scheme

As above for option 3 and 4, we cannot endorse a contingency fee scheme where the innocent plaintiff must lose a proportion of their damages to pay for their legal costs.

Q2 Do you think there are any other options not discussed in this consultation for alternative mechanisms for funding money damages cases that would provide access to justice?

We are unable to offer comments on this.

Q3 Should any insurance mechanism be available to all solicitors or be confined to specific firms or panels of expert solicitors?

It is important that injured people are not denied access to a solicitor of their choice and are not penalised for choosing their own solicitor from the outset of their claim. If insurance provision is only provided for panel solicitors or certain firms, this will restrict the plaintiff's freedom of choice of solicitor.

Q4 What interest is there from providers to make available the products these options describe? If you are an insurance provider please outline whether you would be interested in providing a product and a brief description and a brief description of how you would see it working.

We are not able to offer comment on this question.

Q5 Irrespective of funding option should a successful plaintiff have to contribute from their damages to the costs of the case?

As mentioned above, we believe that a plaintiff's compensation is sacrosanct, and they should be able to keep 100 per cent of their damages. The innocent victim should not have

to contribute towards the costs of the case- this should fall on the wrongdoer. The system of “polluter pays” should remain.

If, against our recommendations, a system were put in place where the plaintiff has to pay their solicitors costs out of the damages that they are awarded, then damages would have to be increased to ensure that the plaintiff has enough money to cater for their needs once they have paid for their legal costs out of their award.

Q6 Irrespective of funding option should a successful defendant be able to recover their own costs?

Yes. The entire system should remain based on the “polluter pays” principle.

Q7 Should there be a “success” fee paid to the winning solicitor? Who should be responsible for paying it? How could the cost of the success fee be controlled?

We believe that legal aid should be retained, and the system be kept simple with no success fees, but instead a scaled fee when the solicitor wins the case (as the system is currently). However, if option two (Conditional Fee Agreements) were put into place, success fees should be paid to the winning solicitor to allow a fund to be built up which will pay the costs of those cases he takes on which subsequently prove unsuccessful, thereby preserving access to justice for many, rather than the few with cast iron cases. The success fee should be recoverable from the losing defendant.

Q8 In your preferred option are there any other safeguards which you would want to see built into the system?

We would need the system to be fair and proportionate in costs. The system must ensure a level playing field between plaintiffs and defendants, and access to justice for all. CFAs enable access to justice for all.

Q9 Irrespective of the option do you agree that discretion should be limited to prevent unnecessary satellite litigation?

We agree that measures should be put in place to ensure that there is no unnecessary satellite litigation. The current Northern Irish system operates in a clean cut way, and their satellite litigation problems. We are in favour of options which will keep it operating in this way. Satellite litigation would affect access to justice because it would clog the courts with cases, dealing with technical disputes.

Q10 Do you believe any of the options would have an adverse effect on any of the section 75 groups?

Conditional Fee Agreements would be the preferred option to ensure as little adverse effect as possible on any group of people, as they enable access to justice regardless of financial means. Any option which requires the plaintiff to give away a proportion of their damages would have an adverse effect on all plaintiffs but this would be particularly disadvantageous for those such as the elderly and the disabled.

Q11 Do you think any of the options would have a greater impact on non-legally aided cases?

Option 2 is the best option for those who are not legally aided. CFAs guarantee access to justice for all, not just those who satisfy the financial eligibility requirements for legal aid.

- Ends -

Association of Personal Injury Lawyers

- ▶ 3 Alder Court, Rennie Hogg Road, Nottingham, NG2 1RX
 - T: 0115 958 0585 ● W: www.apil.org.uk ● E: mail@apil.org.uk