Department of Justice for Northern Ireland
Access to Justice 2
Alternative Methods of Funding Money Damages Claims

A response by the Association of Personal Injury Lawyers
February 2016

The Association of Personal Injury Lawyers (APIL) was formed by plaintiff 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 plaintiffs. APIL currently has around 3,800 members in the UK and abroad who represent hundreds of thousands of injured people a year many of whom use the court system.

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; and
- to provide a communication network for members.

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Introduction

APIL welcomes the opportunity to comment on Colin Stutt's recommendations in Access to Justice 2, and in particular those recommendations relating to alternative methods of funding money damages claims. This response addresses both the questions in the dedicated *Alternative Method for Funding Money Damages Claims* consultation, as well as other relevant recommendations contained within the Access to Justice 2 review.

Legally aided money damages cases cost the legal aid budget very little. Most are successful and the money is recouped back from the other side, who are in the majority of cases insured – car insurance and employers liability insurance are both compulsory. At the same time, people on low incomes are able to access the compensation that they require to put them back, as closely as possible, to the position they were in prior to their injury. We are extremely disappointed in the decision to remove legal aid for money damages cases, and stress that before legal aid is removed, or at least in tandem with this removal, a workable alternative funding mechanism must be put in place.

Executive summary

APIL believes that

- Legal aid should remain for personal injury cases.
- Conditional fee agreements with recoverable success fees would be the best option for a workable alternative. This model would provide access to justice for all.
- If, as proposed in the Access to Justice 2 report and the Alternative Methods of Funding Money Damages consultation, a system with success fees capped at 20 per cent of total damages is implemented, this must be coupled with a general uplift in damages, of up to 20 per cent, to ensure that the injured person is still put back in the position they were in prior to their accident.
- If success fees are introduced as a funding mechanism, they must be implemented for all cases, including road traffic accident claims. In England and Wales, when success fees were recoverable from the other side, success fees in road traffic accident cases were set at 12.5 per cent before trial, and 100 per cent at trial.
- Given that an ATE market is not yet fully developed, a carefully drafted system of qualified one way cost shifting should be introduced.

Legal aid

We acknowledge that it has been decided that legal aid will be removed for money damages cases. We would like to take this opportunity, however, to stress that personal injury cases result in very little money taken from the legal aid fund, and legal aid itself ensures that there is a level playing field between the plaintiff and well-resourced defendant. Legal aid plays a very important role in safeguarding access to justice.

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, and there is around a 95 per cent success rate for legally aided personal injury cases. Providing legal aid for cases also ensures that money is recouped back to the hospital or other services that may have been involved in the treatment of the injured person. 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 exceeded the £2 million cost to the legal aid fund as stated by the original Access to Justice Review team in its November 2010 Discussion Document[1].

More recently, it was acknowledged at paragraph 6.1 of the 2014 Access to Justice 2 agenda setting document, that legal aid for personal injury costs very little compared to other categories of case.

In any event, before legal aid is removed, a workable alternative funding mechanism must be put in place. At the very least, this new system should be implemented in tandem with the removal of legal aid. To remove legal aid before any alternative system is put in place will create a gap in funding and will result in denial of access to justice for injured people.

Conditional Fee Agreements

Q1 Do you agree that Conditional Fee Agreements (no win/no fee) can enhance access to justice including for those who are not eligible for legal aid and cannot afford to litigate in the current system?

APIL would welcome the introduction of conditional fee agreements with success fees recoverable from the defendant, only as an alternative funding mechanism if legal aid is removed. CFA's will ensure access to justice across the board, not just for those with low incomes.

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. Recoverable success fees are by far the best option to replace legal aid, as the system is based on polluter pays, and the successful plaintiff will be sure to retain 100 per cent of their damages, damages which have been awarded for the purpose of putting them back, as closely as possible, to the position they were in before the negligence.

We believe that CFAs with recoverable success fees should be implemented in Northern Ireland. The difficulties experienced in England and Wales which led to the Jackson review and a funding model with success fees taken from the claimant's damages, were unique to that jurisdiction. Spiralling and disproportionate legal costs are not an issue in Northern

[1] Paragraph 4.21 http://www.courtsni.gov.uk/sitecollectiondocuments/northern per cent20ireland per cent20courts per cent20gallery/a2j/p_a2j_discussion_paper.html

Ireland, because of scale costs. Scale costs are essentially fixed, and ensure that legal costs never go beyond damages awarded.

Whichever CFA model is adopted in Northern Ireland will be a huge shift from current practices. It is extremely important that the alternative funding mechanism is reviewed within the next few years, to ensure that access to justice is being maintained. We therefore welcome Colin Stutt's recommendation to review CFA's after three years.

Q2 Do you envisage any difficulties with the operation of CFAs in Northern Ireland for the plaintiff, defendant or legal profession?

A system which would allow recoverable success fees would not cause any issues for the plaintiff, as it would ensure access to justice and allow the plaintiff to retain 100 per cent of their damages. There may be problems due to an under-developed ATE insurance market, but this could be combated by the introduction of qualified one way cost shifting, as set out below.

Q3 Should a 100 per cent success fee be allowed, or should a lower success fee be set (subject to the overall cap of 20 per cent of damages)?

APIL believes the fairest alternative to legal aid is a CFA model with success fees recoverable from the defendant. This will ensure that people are able to access justice. It is important that success fees are regulated. A success fee, which is recoverable from the defendant, of up to 100 per cent may be warranted if the case carries a high level of risk. This means that more difficult and complex cases can be taken on by firms, and access to justice is preserved for all. Before the Jackson reforms were introduced in England and Wales, Part 45.16 CPR provided that the recoverable success fee in all road traffic accident cases was 12.5 per cent, unless the case went to trial, in which case the success fee was 100 per cent.

CFAs with non-recoverable success fees; success fees capped at 20 per cent of damages

As above, we believe that the circumstances which lead to the imposition of the Jackson reforms are unique to England and Wales, and it is not necessary for those, or similar, reforms to be implemented in Northern Ireland. Costs are already kept under control by a system of scale costs. If success fees are not recoverable from the other side, however, a model which prevents any more than 20 per cent of the total damages being taken as a success fee is preferable to a system which sets the cap at 25 per cent of general damages – as is the case in England and Wales. Apart from being simpler to understand for the plaintiff, the system allowing for a 20 per cent cap is more suitable for the Northern Irish jurisdiction, where damages tend to consist solely of general damages, with special damages rarely being awarded. A lower cap, with no ring fencing, will generally lead to plaintiffs being able to keep a greater portion of their damages than if the "Jackson" model were lifted directly from England and Wales and implemented in Northern Ireland.

If a CFA model which requires the success fee to be deducted from the plaintiff's damages is introduced, further safeguards are required. When success fees started to be taken from the claimant's damages in England and Wales, a 10 per cent uplift on general damages was introduced to offset that the success fee would now be funded out of those damages. The 10 per cent up lift in damages was confirmed by the Court of Appeal decision of *Simmons v*

Castle[2], to assist the claimant in meeting the additional risks and costs arising from the reforms. We note that there are currently no plans to introduce a *Simmons v Castle* type uplift on any general damages awarded in Northern Ireland, and this cannot be just.

If the CFA model whereby success fees are taken from the plaintiff's damages (subject to a cap of 20 per cent of the plaintiff's damages) is implemented, it is imperative that a *Simmons v Castle* type uplift is included in any calculation of damages. Colin Stutt, in his report, dismissed the idea of an uplift, and even recommended at paragraph 22.38 that to avoid a damages "creep" where by judges make higher awards to compensate for the potential reduction in damages under the CFA, "that there could be an "avoidance of doubt" provision in regulations stating that nothing in the new provisions altered the principles applied by a court when assessing damages, including the right to full compensation. In that way if a judge appeared to be inflating an award under the new regime, there would be a clear legal ground on which a defendant could appeal".

Colin Stutt also refers to the assertion that damages in Northern Ireland are higher than elsewhere in the UK. This a red herring, as special damages are not often pleaded or awarded in this jurisdiction, with the award for general damages including provision for things that would in England and Wales come under a calculation for special damages. For example Plaintiffs do not routinely submit schedules of loss particularly at County Court level for such items as cost of additional services domestic or gardening, or additional heating or phone costs. Special damages claims are usually restricted to loss of earnings claims or direct out of pocket expenses such as physiotherapy. If one was comparing the overall level of compensation in Northern Ireland to England and Wales to include the whole of the compensatory award of specials and generals there would not be such a marked difference in quantum.

We have compared the level of damages set out in the NI Judicial College Guidelines 2013 with actual damages awarded in England and Wales for similar injuries, in examples set out below:

Example one

England and Wales*: KAJ v SITA UK (2014)*

Total damages awarded for a below the knee amputation of one leg were £172,500, following a reduction of 30 per cent for contributory negligence. General damages were £90,000, and special damages were broken down further into care costs (£40,000), prosthetic costs (£49,000), loss of income (£45,000) and aids and equipment costs (£26,000).

Northern Ireland: The Northern Ireland Judicial College Guidelines state that a below the knee amputation of one leg is worth between £115,000 - £200,000.

Example two

England and Wales: *James Thorn v Trail Plus*

[2] [2012] EWCA Civ 1039

A 47 year old man received £5,500 for a cut to his forehead sustained when he collided with protruding wire during a half marathon in September 2012. The wound took one week to heal. The scar was 3cm x 0.1cm but was expected to flatten within 8/9 months. A small area of scarring would be visible from a close distance.

Northern Ireland: The Northern Ireland Judicial College Guidelines state that trivial scarring is worth between £1,000 - £6,000.

Example three

England and Wales: *Hood v TGI Fridays*

A woman received £6,549.15 for an injury to her lumbar spine after slipping on wet steps at the defendant's premises. The injury persisted for 18 months from the date of the accident.

Northern Ireland: The Northern Ireland Judicial College Guidelines state that where full recovery takes place without surgery within a period of several months and two years, the award should be between £3,000 and £15,000, and where full recovery is made within a period of a few days, a few weeks or a few months, then the award should be up to £4,000.

Additionally, the amount awarded is that which the judge believes will put the plaintiff, as closely as possible, back in the position they were in prior to their accident.[3] Damages are calculated on this basis, so if a part of the damages is used to pay a success fee, this will leave the plaintiff with fewer damages and they will not be properly compensated for their loss. Lord Justice Jackson set out the importance of providing an uplift in damages in his report, commenting that "in order to ensure that the claimants are properly compensated for personal injuries, and that the damages awarded to them (which may be intended to cover future medical care) are not substantially eaten into by legal fees, I recommend as a complementary measure that awards of general damages for pain, suffering and loss of amenity be increased by 10 per cent…". There is no reason why this rationale should not apply to Northern Ireland also.

We recommend, therefore, that there should be a 20 per cent uplift in damages, to offset the 20 per cent which could be taken as a success fee, with a tapering for higher value cases in line with the tapered cap for those higher value cases.

Q4 Should the 20 per cent cap on the success fee apply to the total damages awarded, or should a lower tapered cap apply for high value cases in line with the proposals in Scotland?

There should not be a piecemeal implementation of the Taylor proposals on success fees. This involved a careful consideration and balance of interests.

Q5 Do you agree that the success fee should not apply in cases of road traffic accidents? Are there other types of cases where the success fee should not apply?

[3] The role of damages in putting the plaintiff back to the position they were in prior to their accident is set out clearly by Lord Blackburn in *Livingstone v Rawyards Coal Company.* Here, Lord Blackburn stated that "compensation should be that sum of money which will put the party who has been injured in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation".

If success fees are introduced, all cases should be subject to some level of success fee, which ideally should be recoverable from the defendant. To exclude an entire category of cases from success fees simply because they are deemed "more straight-forward" will mean that it will be no longer viable for firms to take on more complex types of those cases, and this will ultimately lead to a restriction in access to justice. Not all road traffic accident cases are "straight forward", and to have a blanket exemption simply based on the type of case will mean that an injured person who has been in a road traffic accident which is not straight forward – for example where there is contributory negligence, a complete denial of liability, the facts are in dispute or there is a pre-existing medical condition - may struggle to get legal representation, and will be denied the chance to obtain access to justice.

We maintain that success fees should be recoverable from the defendant. While the main 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 not simply risk based. A portion of the fee is a funding element to aid cash flow, which reimburses the solicitor for having to defer payment of disbursements and other fees by the client until the end of the case. Before the Jackson proposals in England and Wales , the Civil Procedure Rules Part 45.16 provided that success fees in road traffic accident cases were set at 12.5 per cent if the case did not go to trial. We believe that if a CFA model with success fees is introduced in Northern Ireland, this rationale should also be applicable here. A system of tiered recoverable success fees which would crystallise at certain stages (lower for an early admission, higher if the case goes to trial) would incentivise earlier admissions, which is good for all.

Qualified one way costs shifting and After the Event Insurance

As described above, when legal aid was removed for personal injury claims in England and Wales, a system of conditional fee agreements with recoverable success fees and ATE premiums was introduced. ATE played an important role in insuring the claimant against having to pay the defendant's costs should their claim be unsuccessful, and also helping to fund disbursements (as disbursements are not covered by CFAs). It is important that there is competition in the ATE market to ensure that premiums are competitive, and also to ensure that cover can be obtained where required. We acknowledge that the ATE market in Northern Ireland is not fully developed at present, but believe that if a system of CFAs with success fees recoverable from the defendant and a need for ATE insurance was implemented in Northern Ireland, this would lead to the development of an ATE market.

Given that the ATE market is not yet properly developed, however, a system of qualified one way costs shifting, which is then supplemented by ATE insurance, may be the better option. ATE premiums should be recoverable, or at the very least legal aid should remain for those who cannot afford to pay an ATE premium. In England and Wales, qualified one way costs shifting operates by providing that, if a claimant is unsuccessful with their claim, they will not be ordered to pay the defendant's costs. A defendant will, however, still be ordered to pay a successful claimant's costs. This is "qualified", because the claimant loses this protection if they fail to beat the defendant's Part 36 offer to settle; the claim is found on the balance of probabilities to be "fundamentally dishonest"; or the claim is struck out as disclosing no reasonable grounds for bringing the proceedings, or as an abuse of process, or for conduct likely to obstruct the just disposal of the proceedings.

A system of qualified one way costs shifting implemented in Northern Ireland must be robust and must not lead to uncertainty or satellite litigation. There are a number of pitfalls in the QOCS rules in place in England and Wales, and these should not be transferred to any model adopted in Northern Ireland.

The main issue with QOCS in England and Wales is the uncertainty surrounding fundamental dishonesty. Part 44.16(1) CPR provides that orders for costs against a claimant may be enforced, to the full extent of such orders with the permission of the court, where the claim is found on the balance of probabilities to be fundamentally dishonest. Lord Justice Jackson's original proposal was for there to be an exception to QOCS based on fraud by the claimant. When CPR was amended to implement this proposal, the provisions on QOCS included an exception where the court found there had been fundamental dishonesty by the claimant. The Civil Justice Council of England and Wales (CJC) made recommendations on fundamental dishonesty, and suggested that the claimant should lose the benefit of QOCS if fraud was proven on a civil standard.

The CJC recommended that the definition in *Brighton and Hove Bus v Brooks*[4] should form the basis of any definition of fraud to be used. In *Brighton*, the criteria required to be present for fraud were that the fraud must be pleaded by the defendant: statements and representations must have been made that were false: the statements must have been likely to interfere with the course of justice in some material respect; and at the time they were made, the maker had no honest belief in their truth and knew they were likely to interfere with the course of justice. The CJC explicitly rejected the suggestion that anything short of fraud, such as exaggeration, should lead to the loss of QOCS protection. Unfortunately, the Government did not take on board this recommendation, and the term "fundamentally dishonest" was included in the Civil Procedure Rules.

This has created uncertainty for both claimants and defendants, with case law being left to determine exactly what fundamental dishonesty is. County Court cases so far have indicated that fundamental dishonesty is a lower threshold than fraud. For example, certain cases appear to equate an adverse finding of fact with a finding of dishonesty – *Creech v Severn Valley Railway*[5]. In this case, a man attempted to sue Severn Valley Railway after he tripped on matting left behind after an ice rink, which had been set up at the station to entertain people whilst a track was closed, was subsequently removed. The judge in this case accepted the railway's evidence that the ice rink was still on the concourse at the time that the accident was meant to have occurred, and so the claimant was deemed fundamentally dishonest and lost QOCS protection. He was ordered to pay £11,000 in defendant's costs. However, it is clear that just because a witness has misremembered, or has been found not to be credible, this does not equate to them being dishonest.

A further issue highlighted in several County Court decisions is that defendants appear to be allowed to make an application informally at the end of the trial, without formally pleading the allegation of fundamental dishonesty, as was the case in *Oana v O'Duinn*[6].

The implementation of QOCS in Northern Ireland would provide an opportunity to rectify these issues and create greater certainty.

[4] [2011] EWHC 2504 (Admin)
[5] Telford County Court, March 2015
[6] Northampton County Court, 2014

Q7 Should the plaintiff have some of their damages protected where they become liable for some of the defendants costs when they fail to beat an offer?

It is also important that the QOCS model ring fences part of the damages in the event that an offer to settle is not beaten. If a plaintiff fails to beat a defendant's offer, they should not then be put in a position where they could lose all of their damages paying the defendant's costs. This would encourage bad defendant behaviour, with defendants making lower offers knowing that plaintiffs will not challenge them for fear of losing all of their compensation.

Alongside any QOCS model, we believe that there would need to be provision for top-up ATE cover. QOCS does not fund disbursements, it only provides (potential) protection against having to pay the defendant's costs. Firms, particularly smaller ones, may struggle to fund disbursements upfront, requiring the plaintiff to pay. In order to prevent this being a barrier to access to justice in the absence of legal aid, top up ATE cover should be provided, to supplement those costs that QOCS does not cover.

Defendant costs should be capped at no more than the plaintiff scale costs if they have been successful. In England and Wales, CPR Part 45.29F (2) provides that "if in any case to which this section applies, the court makes an order for costs in favour of the defendant, the court will have regard to, and the amount of costs ordered to be paid shall not exceed, the amount which would have been payable by the defendant if an order for costs had been made in favour of the claimant at the same stage of proceedings." In general, defendant costs should be lower than plaintiff costs as there is less work required by the defendant legal representatives.

Scope of legal aid

Q8 Do you agree with the report's proposals for the areas that should be retained within the scope of legal aid? If not, what areas should remain within scope, and why?

We believe that cases involving children and cases where there is a catastrophic or life changing injury should remain within the scope of legal aid. These cases are complex, lengthy and expensive to run.

We also suggest that legal aid should remain for all clinical negligence cases, not just those cases involving neurological injury occurring at birth or shortly after birth. It is often necessary in clinical negligence cases for the solicitor to obtain an expert report from England or Wales, because the expert network in Northern Ireland is much smaller. This is costly, and firms are often unable to carry the cost of this disbursement until the end of the case. Legal aid should remain for these cases to ensure that proper reports can be sourced. The case can then be won, with ultimately no cost to the legal aid fund.

Also, while we welcome the decision to keep cases involving diffuse mesothelioma within the scope of legal aid, we fail to see the rationale behind the removal of all other asbestos related cases. These cases will have the same issues as mesothelioma cases – requiring investigation into employment history, interviews to establish facts. These cases should also remain within the scope of legal aid.

Q9 Do you agree that legal aid should operate as a supplement, not a full alternative, to CFAs and should only be for elements of a case? Please provide details of any difficulties you envisage in implementing this proposal.

We believe that if a case and individual is eligible for legal aid, it should be available for the entire case. It is important that if someone in need is awarded legal aid funding, they have the certainty that they will be able to pursue their case until the end, and their legal aid will not be removed at any point during the process. If legal aid is available for certain elements of the case but not others, and CFAs are in place instead, legal aid could remain for those who cannot afford to fund their disbursements, which will not be covered in the CFA.

Q10 Do you agree that the private client principle of applying a minimum damages threshold should apply? Please provide details of any difficulties you envisage in implementing this proposal.

It is unjust to consider that the value of the case in monetary terms is the most important consideration for access to justice. Very small value cases, for example delayed diagnosis, can have a significant impact on a victim's life, and can therefore be every bit as important to the plaintiff as a higher value claim. The value of the claim should not be the predetermining factor for entitlement to recovery. That compensation should put the plaintiff back, as closely as possible, to the position they were in before their accident, is enshrined in law[7] - if a person has suffered a small amount of damage, they deserve the compensation, however small, to put them back into the position they were in prior to their accident.

Q11 Do you agree that legal aid may be refused, or funding may be limited if alternative funding is available to the client, or the case is suitable for a CFA? Please provide details of any difficulties you envisage in implementing this proposal.

Solicitors, when applying for legal aid, must already consider whether an alternative to legal aid would be available for their client. Solicitors have a professional duty to advise on the best funding option, and in a particular case, legal aid may be the best option for the particular client, even if there is an alternative funding mechanism. "Alternative funding" will not always be the best option, as a claim on household insurance involving a BTE policy would increase subsequent premiums for the plaintiff. For someone who would be eligible for legal aid, in particular, this would put a strain on their finances which they simply could not afford.

Q12 Do you agree that it is appropriate that those who have benefited from legal aid to pursue a case should make a contribution to the legal aid fund to make it self-funding, subject to a cap of 20 per cent of damages?

We do not agree that money should be taken from the plaintiff's damages – the function of damages is to put the plaintiff back, as closely as possible, to the position he would have been in had he not been injured, so we are in principle against this proposal for that reason.

However an alternative way of looking at this would be to introduce a capped contribution for the plaintiff to make from his damages, but at the same time uplift the award made to the injured person by the same amount (as described above at question 3), to ensure that the

[7] Blackstone v Rawyards Coal

injured person remains fully compensated, and the legal aid fund is replenished, thus allowing legal aid for money damages cases to remain.

If this proposal does not find favour with the Department of Justice, then a legal aid model as described above would at least allow legal aid for money damages to remain. If a contribution is to be taken from the plaintiff's damages to fund the legal aid system, without an uplift in damages, we do not believe, that this should be as high as 20 per cent. This would amount to a significant sum of money from someone who has already been assessed as having limited means and who is likely to be suffering financial hardship as a result of the negligence of another. We believe that a 10 per cent contribution would be fairer, and that this would still enable the legal aid fund to be self-funding – especially in relation to personal injury cases which, as we have mentioned above, cost the legal aid fund very little.

Q13 Do you agree that risk rates (rates lower than would be recoverable from the other side if successful) should be paid in unsuccessful legal aid cases to incentivize the pursuit of meritorious cases and to produce savings for the legal aid fund?

Scale fees already operate in Northern Ireland on the basis of swings and roundabouts – that costs balance out and the money received from complex cases evens out the low costs received on simpler cases. To lower costs further in losing legal aid cases would upset this balance and firms may be reluctant to take on more difficult cases. In any event, the number of cases that will receive the benefit of legal aid -should the proposals go through - will be very small, so any savings produced would be minor.

Other issues highlighted in Access to Justice 2

Eligibility for legal aid

There should be uniform civil income limits and a gross income cap (3.13)

Harmonisation could go some way to improving access to justice, as it will remove the complexity of different legal aid tests.

It is important that harmonisation and a revised means test does not result in a reduction in eligibility for those who are in need of legal aid. As set out in the 2013 consultation on eligibility and harmonisation, we note that the upper income limit is to be harmonised at £10,682. This is an increase from the current upper threshold for civil legal aid excluding personal injury, which currently stands at £9,937, but it is a decrease from the current income thresholds for: civil legal aid including personal injury (£10,955); Advice By Way Of Representation (£12,168); and Legal Advice and Assistance (£12,168).

It is likely therefore, that there will be a reduction in the number of people who are eligible for legal aid and this will cause problems for access to justice.

Benefit receipt should operate as a passport on income only, not capital (3.13)

We do not agree that removing passporting on capital is the correct way to iron out this (mostly academic) anomaly. If passporting on capital is removed, anyone with capital

between £8,000 and £16,000 will be deemed ineligible for civil legal aid even when they are in receipt of income support. If the Government considers a person with savings up to £16,000 to possess a level of financial means low enough to warrant income support, then it is unlikely that such a person will be able to fund his own legal representation. This will simply bar vulnerable people from access to justice, leading to a system where there will be a social security system that supports people to live, but not to enforce their civil and legal rights in the courts. This is unacceptable.

We suggest that the correct way to resolve this anomaly is that for those people who fall below the lower disposable income limit for legal aid, but do not qualify for income support, the upper capital limit should be harmonised with that of income support, at £16,000.

A new strategy for remuneration

A far more restrictive approach should be adopted to the rules for authorising leading counsel or two counsel across all case categories (4.58)

We are concerned that the proposed reforms will hinder the injured person's right to compensation. The proposals indicate that prior authority would be required, or a certain set of criteria would need to be satisfied before senior counsel could be instructed in a publicly funded case. There would also need to be prior authority for junior counsel to be instructed in a case where authorisation for senior counsel has already been granted. Senior counsel is vital in all High Court personal injury cases, and also in the more complex cases in the County Court. To attempt to remove legal aid funding for counsel in these cases is illogical, and will have dangerous consequences for access to justice for vulnerable injured people. There should not be the need for prior authorisation, or a set of criteria that needs to be met before authority for counsel can be granted.

It is essential that there must be equality of arms between the individual claimant who – more often than not – is a one-time user of the court system, and the well-resourced defendant. This fundamental principle must not be jeopardised by the proposals. The injured claimant will be up against insurers who will not need to ask for prior authority or meet a certain set of criteria in order to obtain senior counsel. It is necessary that the claimant has the opportunity to be represented by counsel with the same level of expertise and experience as the defendant, to ensure equality of arms and therefore access to justice. There should not be any need for the claimant to satisfy extra requirements to obtain the same level of representation as the defendant.

Costs

The indemnity principle of costs should be abolished (22.24)

We agree that the indemnity principle should be abolished.

Justice reform – underlying principles

Where possible, business should be conducted by telephone or email rather than at oral hearings

Supporting more business by email and telephone, reserving oral hearings for the most significant hearings where oral advocacy is needed.

The practice of placing cases on a whole day list should cease

Time slots should be allocated for hearings instead of placing them all at the same time.

The practice of overlisting should be reduced

We agree with these proposed reforms. The county courts are experiencing difficulties in inefficient practices which add to costs and delays which ultimately cause distress to those trying to obtain justice. Costs and time could be saved throughout the process in the following ways:

1) There should be consideration of standard directions for the progression of court matters, which should be applied uniformly in all county courts. The general county court practice direction on interlocutories is working well at present, but the application needs to be uniform. Penalties should be given to those who do not comply with the directions.
2) Reviews by the bench should be conducted via telephone conference or similar. At present, as explained above, there are fixed costs in the county court, and solicitors are expected to travel to court for case reviews. This means that the solicitor may spend hours travelling to and from the court, with the cost of this time not being recoverable. This problem will be exacerbated if the proposals to close courts, particularly in the west of the province, are to go ahead, as the travel times will increase further.
3) There should also be more effective listing of cases, with an appropriate allocation of resources. At present, cases are often delayed and postponed, and this causes inconvenience and distress for those injured who are seeking access to justice. Those delayed once should then be given priority so as not to turn away the plaintiff again. Delays could be reduced if greater attention is paid when organising lists to ensure that where there is a “half day” case, only a reasonable, achievable amount of other cases are listed for that day.
4) Further costs could be saved by making the system paperless, or at least maximising the use of email. There are a number of paperless trial systems in place at present.

We remain concerned, also, about the increase of the jurisdictional limit and the lack of specialisation of county court judges. Personal injury cases, even those of a lower value, are not necessarily legally straightforward, and often involve complex arguments on apportionment or causation. There should be greater specialised training for judges, to ensure equitable and efficient disposal of cases. Training and performance monitoring should be conducted on a continuing basis to ensure the specialist’s skills and experience remain relevant. “Docketing” should be introduced, whereby judges who have undertaken

such specialised training are allocated cases which reflect their specialism through certification. This would mean that there would be specialist court lists, and so the court's time would be used more effectively and efficiently.

Civil non-family justice reform

The county court should be made the compulsory point of entry for an increased range of cases (19.21)

We support any reforms which will lead to early admission of liability by defendants and a fair predictable procedure for obtaining the appropriate level of damages for the injured person. As all county courts can already deal with any claim in tort, the suggestion that there should be a single point of entry into the county court would, hopefully, be simpler and far more efficient than the current model. Additionally, as above, we believe that having a single point of entry into the county court will result in judges being docketed to deal with cases in which they have the most experience and training. Therefore cases will be dealt with by specialists, which will hopefully lead to a more efficient process and fair, consistent outcomes. However, there must be local access to justice - the claimant must still have the right to have their claim heard in their local court.

- Ends -

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