LEGAL AID ADVISORY COMMITTEE REVIEW INTO ESTABLISHING A CONTINGENCY LEGAL AID FUND IN NORTHERN IRELAND

WRITTEN SUBMISSIONS OF THE ASSOCIATION OF PERSONAL INJURY LAWYERS

1. The Association of Personal Injury Lawyers (APIL) was formed as a membership organisation in 1990 by plaintiff lawyers committed to providing the victims of personal injury with a stronger voice in litigation and in the marketplace. We now have around 4,800 members across the UK and abroad, and membership comprises solicitors, barristers and academics. We have 104 members in Northern Ireland.

2. The association's main objectives 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 victims in the legal system
   - To campaign for improvements in personal injury law
   - To promote safety and alert the public to hazards
   - To provide a communication network for members.

3. These written submissions follow and expand upon oral submissions made at the meeting held on 19 January 2001 ("the meeting"), at which it was made clear that APIL fully supports the introduction of a contingency legal aid fund ("CLAF") in Northern Ireland. Such a fund would both provide the necessary access to justice for victims of personal injury and be financially viable. APIL can, of course, only make submissions in respect of funding for personal injury claims.

4. In summary, APIL believes that the CLAF should be practitioner led, in that, solicitors should decide which cases receive CLAF funding. This system would operate with close monitoring by the body responsible for the CLAF.

APIL also strongly believes that the CLAF should not be funded by claimants but should be funded by defendants or their insurers.

5. It is understood that the government certainly intends to replace legal aid with an alternative system of funding either in the form of a CLAF or through legislation to support conditional fee agreements ("CFAs"). APIL shall, firstly, outline why it is believed CFAs would not be a viable alternative to legal aid and shall then address both the advantages of a CLAF and the individual consultation questions of the committee.

Conditional Fee Agreements Not A Viable Alternative to Legal Aid

6. It is understood that there is much opposition in Northern Ireland to the introduction of CFAs and the committee has already identified many of the difficulties that would be experienced were they to be introduced, for example, problems of obtaining after the event insurance at a reasonable, and so recoverable, rate and conflicts of interest for practitioners.

7. In addition to the above, APIL believes that CFAs would not be viable in Northern Ireland without a substantial increase in the costs that are recoverable upon the successful conclusion of a case. This is for the following reasons. To keep financially afloat, solicitor's practices would have to be able to recover sufficient costs and success fees. To do this, solicitors would have to ensure that they only took cases on a CFA basis that they were reasonably confident they would win, as no payment is received if a case is lost. Litigation is, of course, full of uncertainty and solicitors can never be fully confident that they will win all cases. They must ensure, therefore, that the costs and success fees recovered on the cases won allow for the absorption of costs incurred but not recovered on the cases lost. This can only be done if, firstly, success fees are set at the correct level following careful risk assessment and, secondly, if the actual costs recovered are sufficiently high. In Northern Ireland, due to the system of fixed costs, they would not be.

8. The difficulty outlined above would be exacerbated by the nature of solicitor's practices in Northern Ireland which are extremely small in size. The risks of losing cases could not be spread widely and would be very concentrated. Absorbing the costs of just a few lost cases would be extremely difficult for such firms. In addition, in England and Wales, practitioners had time to adjust to using CFAs, both financially and practically, as they were introduced in August 1995. Practitioners in Northern Ireland would have no such opportunity, however, as it is being suggested that CFAs would be introduced overnight if a CLAF is deemed unsuitable.

9. CFAs would also lead to reduced access to justice. Due to the low level of costs and concentrated risk, outlined above, there is a severe risk that solicitors would only be able or willing to take on cases which they were confident of winning. This means that meritorious but more difficult and less certain cases would not be able to get off the ground. There is certainly anecdotal evidence to suggest that this is happening in England and Wales. It was noted at the meeting that one catalyst for the removal of legal aid is the government's belief that access to justice is not being properly facilitated by legal aid because the financial eligibility criteria make only the very poorest sections of society eligible. This often means that middle-income families are ineligible for legal aid but yet cannot personally afford the risks of litigation. APIL accepts that legal aid, as it exists, does not facilitate access to justice for many people. CFAs, however, would merely remove one barrier to access to justice and replace it with another.

10. The government also believes that introducing CFAs would 'level the playing field' between funded and unfunded litigants. The government appears to believe that funded litigants have an unfair advantage in litigation against the unfunded, as the funded litigant can conduct a claim without the fear of personal financial risk. This may give a litigant a powerful position in the litigation. The government, no doubt, fear that this perceived unfairness would continue were a CLAF established. APIL can appreciate the grounds for the government's concerns in respect of some family and neighbour disputes where litigants are both individuals and inequality could occur.

11. This unfairness does not appear, however, in most personal injury claims for several reasons. Most importantly, the litigants are not both individuals. The victims of personal injury usually pursue claims against the insured, for example, drivers and employers. The funded victim of personal injury, therefore, usually litigates against well resourced insurance companies who are repeat players and experienced in litigation. In personal injury claims it is the very business of the 'unfunded' insurance company to calculate the risks of costly litigation ensuing from the risks taken by their insured. If such risks are miscalculated the cost can be passed on, in any event, to the risk takers, the insured. The insurance company suffers no 'personal financial risk'. The victim of personal injury has no such option and must take on the risk of losing savings or capital. This is extremely harsh in view of the fact that by very reason of their personal injury they are financially disadvantaged because, for example, they may not be able to work or may have to pay for care. In such cases there is indeed an unlevel playing field between the litigants. It is not, however, levelled in favour of the funded victim but is levelled in favour of the repeat player insurer. For this reason, it is essential that the civil justice reforms are implemented to establish a fairer system of litigation. This would crucially include the introduction of a personal injury protocol to encourage early admissions of liability and disclosure of evidence and also a requirement for meaningful and substantive defences.

12. The government additionally fears that the provision of funding leads to funded litigants 'dragging their heels'. Many personal injury claims take many years, however, not because of 'dragged heels' but because it may be necessary for symptoms to settle and a prognosis to become clear. In such a situation a well-resourced insurance company should not be allowed to exert pressure on a personal injury victim to bring about a quick conclusion of a claim.

13. Essentially, it is hoped that APIL has demonstrated that personal injury victims, and the claims brought by them, merit individual consideration and that their circumstances merit access to funding. Such victims should not

have to suffer personal financial risk when trying to obtain the damages they need and to which they are entitled.

The Advantages of a Contingency Legal Aid Fund

14. APIL believes that the disadvantages of CFAs identified above and of legal aid perceived by the government could be avoided if a CLAF were introduced.

15. A CLAF could 'level the playing field'. It would mean that those with meritorious cases could pursue claims for compensation without incurring unfair and undesirable risk against well-resourced insurance companies. It would also provide a system of funding based on merits (as described later) rather than means. No one group of financial means would be discriminated against or be at an advantage.

16. It would also be advantageous in the sense that the risks of litigation would be spread amongst a large number of solicitors and a large number of litigants. This would mean that meritorious but more complex cases could still be pursued.

Committee Questions

What body should run the CLAF? Should it be the (to be formed) Legal Services Commission or the Law Society or some other independent body?

17. APIL believes that the CLAF should be practitioner led. Solicitors should be responsible for deciding which cases receive funding through the CLAF on the basis of a defined merits test. The reasons for this are outlined below. Such solicitors would, however, be subject to close monitoring and scrutiny to ensure that no abuse of the CLAF occurred. The same body responsible for administering the funds of the CLAF would conduct this central monitoring.

APIL has no preferences as to the identity of this body providing it is independent, experienced in legal funding and well resourced.

To what extent should it be compulsory to use the CLAF? It seems to the Committee to be very difficult to justify requiring all litigants to sign up to the CLAF and not to fund a case from their own resources or seek alternative support. If someone has what they believe to be a very strong case, or are otherwise willing to take the risk of losing, they should be allowed to litigate without having to promise to give up a percentage of their damages. However the Committee believes that nay solicitor offering litigation services should either be a CLAF solicitor or a non-CLAF solicitor. It should not be possible for a CLAF solicitor to process certain cases outside the CLAF as this might mean too many of the weaker cases being handled through the CLAF, thus potentially putting strains on the Fund's solvency. Would consultees agree with this approach?

18. APIL understands that this question is aimed at the issue of 'adverse selection' and ensuring that sufficient claims are funded through the CLAF to allow the risks of litigation to be widely spread so that the fund is financially viable. APIL recognises that the risk of adverse selection is extremely high if the fund is financed by contributions from claimants. For this reason it is believed that the CLAF should be funded by defendants or their insurers and will only survive if approached in this way. If claimants are not required to make any contributions to the fund there is no incentive to seek legal advice and assistance from a solicitor that would not fund it through the CLAF, as there would be no disadvantage to using the CLAF.

19. In addition to the above, to encourage solicitors to bring cases within the CLAF, using the CLAF should be made attractive. This would be achieved if disbursements were funded on an on-going basis. In Northern Ireland it is common practice for solicitors to fund disbursements on behalf of their clients. There is anecdotal evidence to suggest that this causes financial difficulties for smaller firms, especially as, for example, recent tax changes have required doctors, engineers and other experts to ensure that interim payments are made on their bill and will not, any longer, wait until a case is concluded before payment is required. A 'run of the mill' road traffic accident or accident at work will, on average, require a solicitor to incur disbursements in the region

of £400 and £500. An average file load of 300 personal injury cases would mean a solicitor's firm would be carrying total average costs of around £120,000 to £150,000 for long periods, depending on the time each claim took. For guidance, an average claim takes between a year and eighteen months.

20. The funding of disbursements would, therefore, be a welcomed and attractive feature of the CLAF. Disbursements are necessary in all cases, not just the weak and such a scheme would attract the stronger cases into the CLAF.

21. APIL disagrees with the Committee on their view that any solicitor offering litigation services should either be a CLAF solicitor or a non-CLAF solicitor. If this requirement were introduced at the point at which the fund were established, APIL fears that too few solicitors would become CLAF solicitors and the fund would quickly fail. It is believed that the solution lies in making use of the fund attractive to both solicitors and litigants as suggested above. In time, APIL believes that most solicitors would want to make use of the CLAF.

22. Other protectionist measures could also be introduced such as requiring the solicitor to decide at a very early stage whether the claim should be funded through the CLAF or not. This would prevent a solicitor seeking funding through the CLAF only when it was discovered that the claim was much weaker than initially believed. Notification could, for example, be required within six weeks of the solicitor obtaining their initial instructions when little would be known about the defendant's or insurer's attitude towards the claim. Solicitors would, of course, also be prevented from withdrawing cases from the CLAF once registered. This would prevent solicitors taking cases out of the CLAF that have much stronger prospects of success than initially thought.

Should assistance from the Fund be completely free at the outset or should litigants be required to pay a registration fee? If so, how much?

23. The requirement of a registration fee superficially appears to be an attractive means of increasing the funds of the CLAF and so increasing its financial viability. There is little point, however, in charging a registration fee that most clients would be unable to pay and a large registration fee would have an adverse effect on access to justice. If the fee were low enough to be affordable, however, such fees would have little financial impact on the fund. In addition, in all likelihood it would cost as much, if not more, to administer the collection of the registration fee than the registration fee itself. For these reasons, APIL is opposed to the imposition of a registration fee.

What criteria should be used to determine whether a case gets funding? Should this be limited to substantial grounds for taking proceedings or should wider considerations, such as those proposed for Legal Aid by the Decisions Paper, be taken into account as well?

24. Solicitors would decide which of their cases should receive funding through the CLAF following the careful application of a merits test. Cases assessed as having prospects of success of 50% or over should have CLAF funding available to them. This approach would pose no problem as long as the solicitors conducting the cases are trained and competent in their field. The College of Personal Injury Law provides such training in the field of personal injury law and practice and would gladly assist with a scheme of accreditation. The proposed model would also depend upon close monitoring by the responsible body.

Who should decide whether a case is supported by the Fund? Should the solicitor approached by the client decide this or should the matter be referred to the body operating the scheme?

26. It has already been noted that APIL believes that this decision should rest with solicitors. This would have the advantage of reducing the administrative costs of the CLAF. There is no reason why the competent personal injury lawyer

would not be able to assess which cases should go through the CLAF and make a risk assessment of each case. Such a scheme should, of course, be subject to very close monitoring by the responsible body that would randomly audit cases to ensure that solicitors were not abusing the CLAF. Solicitors would, therefore, have to make their files for all claims available for inspection. Appropriate sanctions should be available and imposed if necessary and should include exclusion from use of the CLAF. APIL would be pleased to assist with the detail of a monitoring scheme if adopted.

What categories of case, such as medical negligence and civil actions against the police, be excluded on grounds of complexity or prospects of success? Should these cases remain within the Legal Aid scheme?

27. APIL believes that general personal injury claims should be included in the CLAF scheme. However the following cases should remain within the legal aid scheme:

- Medical negligence
- Public interest cases
- Multi party actions
- High value / high costs cases.
- Actions against the state (including tripping cases)

28. This is mainly because such cases are in their nature complex and, though justifiably pursued, may fail for various reasons. Such cases, therefore, could have an extremely negative effect on the financial viability of the fund.

Could the Fund be adjusted so as to cover defendants without a counterclaim and/or other litigants not seeking a damages remedy?

29. APIL does not believe that the CLAF should assist defendants, as it is believed that this would have a negative impact upon the financial viability of the fund.

At the very least, such assistance should initially be excluded until the economics of the CLAF become clear.

Should the Fund cover disbursements on an ongoing basis?

30. APIL has clearly stated that the CLAF should fund disbursements on an ongoing basis. It is recognised, however, that it would be administratively difficult to refund disbursements as they are paid. It would be much more sensible to fund disbursements in stages. Two stages would be appropriate to minimise administration. The first stage would be at the issue of proceedings and the second stage would be at the end of a case if the case is lost. If the case were settled, however, and proceedings not issued the disbursements should be paid 6 months from the date of admission. This would prevent solicitors from having to sustain the cost of disbursements for long periods of time to their financial disadvantage.

If the fund is covering disbursements on an ongoing basis would it need to be initiated with a substantial government grant given that it might be some time before successful assisted persons were paying contributions into the Fund?

31. It seems inevitable that for the CLAF to be able to support the funding of cases before any have been successfully concluded, a substantial government grant will be needed to initiate the fund. It is interesting to note that the scheme in Hong Kong was initiated with a $1 million grant from the lotteries fund of Hong Kong.

Should the Fund meet the costs of unsuccessful assisted persons in full or in part as well as successful opponents where a case supported by the Fund is lost?

Unsuccessful assisted persons

32. APIL believes that the CLAF should meet the costs of unsuccessful assisted persons. If the cases are handled by competent solicitors and monitored closely by the responsible body APIL does not believe that many cases will, in fact, be lost.

Successful opponents

33. The CLAF should not meet the costs of successful opponents, as this would have a negative impact on the viability of the fund.

What percentage of damages should a successful assisted person be required to pay into the Fund? Two considerations need to be balanced here. One is that too high a percentage and litigants with good cases may not use the Fund so that greater pressure may be placed on its solvency. Another is that to be truly successful the Fund would need to be able to cover a wide range of expenses, which in turn might require a substantial deduction from damages.

34. No deduction should be made from a personal injury victim's damages in order to contribute to the CLAF. This is for two reasons. Firstly, damages are carefully calculated to recompense a victim of personal injury for resulting losses and expenses and should not be used for an alternative purpose. Suggestions of ring fencing certain heads of damages as made by the Bar Council of England and Wales some time ago do not allay APIL's fears, as all heads of damages are essential. Secondly, where a victim has successfully pursued a claim against a defendant for damages, to which he is entitled, he should not suffer. APIL strongly believes that it is the defendant that should pay the contribution.

35. APIL does not believe that it can advise on the appropriate percentage contribution that should be made by the defendant to make the fund financially viable. This is a matter on which actuaries must provide advice and guidance.

The contribution should be reduced, however, if the case is settled (as occurs in Hong Kong) to encourage early settlement.

36. It is presumed that the insurance industry would prefer a fixed percentage contribution to CFAs as it would provide an element of certainty in each case as to the likely costs, which does not feature with CFAs in England and Wales.

37. If claimants are required, however, to make a contribution to the CLAF, the contribution should be as low as possible to ensure that damages are not eroded to too large an extent for the reasons outlined above. It should be noted, however, that if claimants were required to make such contributions, there is a justified fear that courts may, undesirably, start awarding inflated costs as occurs in America.

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