DEPARTMENT FOR CONSTITUTIONAL AFFAIRS

SIMPLIFYING CONDITIONAL FEE AGREEMENTS

A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS

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The Association of Personal Injury Lawyers (APIL) was formed in 1990 by claimant lawyers with a view to representing the interests of personal injury victims. APIL currently has over 4,800 members in the UK and abroad. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants. APIL does not generate business on behalf of its members.

APIL's executive committee would like to acknowledge the assistance of the following in preparing this response:

David Marshall	President, APIL
Mark Harvey	Secretary, APIL
Allan Gore	Treasurer, APIL
Martin Bare	Executive committee member, APIL
Roger Bolt	Executive committee member, APIL
Mark Turnbull	Executive committee member, APIL
Doug Christie	Member, APIL

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

Miles Burger
Policy Research Officer
APIL
11 Castle Quay
Nottingham
NG7 1FW

Tel: 0115 958 0585
Fax: 0115 958 0885

E-mail: miles.burger@apil.com

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Introduction

1. Funding is an extremely important issue, as it determines the extent to which the injured and bereaved can pursue personal injury claims. Conditional fee agreements (CFAs) are, of course, now the main funding mechanism for personal injury cases. Whilst APIL sought the retention of legal aid, it has sought to make CFAs, with recoverability, work to deliver access to justice.

2. Claimant solicitors are, however, finding it difficult to achieve this. Both the Access to Justice Act 1999 and the secondary legislation made under it contain drafting uncertainties. In view of this, no-one could have blamed the insurance industry for seeking reasonable clarification through the courts. Instead, however, the insurance industry has launched a campaign to undermine CFAs by challenging the system at every turn. This led to Baroness Scotland making the following statement at APIL's conference in 2003:

   "Some challenges to the new regime were inevitable. New legislation is invariably scrutinised and its parameters tested. However, what occurred went well beyond this and has been unreasonable and destructive."

3. Judges have also expressed concern that insurers are still challenging the validity of CFAs, despite a strong Court of Appeal judgment in Hollins v Russell in May. Lord Justice Brooke stated that he thought the Court of Appeal had "made it clear that this nonsense had to stop" and that if it continued, the court "may have to get people up here and warn them off". In addition, recent comments made by FOIL and insurer representatives at the Civil Justice Council's costs forum in Oxford were discouraging and it

seems that the costs war is far from over. The Government must take this into account in considering the future of CFAs.

4. For as long as these problems continue, claimant solicitors will find it increasingly difficult to conduct personal injury claims, complex or otherwise, on a conditional fee basis. The risk is that those without Before-the-Event (BTE) insurance and without access to public funding will find it extremely difficult to pursue reasonable personal injury claims. The objectives of the Access to Justice Act 1999 will have been undermined.

5. We must make the CFA system work and APIL welcomes this consultation paper which allows for timely reflection on the operation of the current system. Any system of CFAs must, in APIL's view:

   - Be clear;
   - Be certain;
   - Be simple and easy to use;
   - Be adequately and appropriately regulated;
   - Have appropriate consumer protection; and
   - Provide for the recovery of additional liabilities.

   Our detailed suggestions on how this could be achieved are outlined below.

6. In summary, APIL calls for the abrogation of the indemnity principle for personal injury claims which would allow the development of a simple CFA, which would be easy for solicitors to use and for clients to understand and difficult for insurers to unreasonably challenge. Following the abrogation of the indemnity principle, the Court will still be able to order that reasonable and proportionate costs be paid by the loser. Under

the Legal Aid scheme, the Courts regularly determined reasonable hourly rates for the assessment of costs to be paid by the loser, notwithstanding the absence of any agreement with the client and the express delinking of rates to be paid by the loser from the rates paid by the Legal Aid Board.

7. APIL also calls for many of the client care protections to be removed from secondary legislation, where they have provided a tool for unreasonable defendant challenges, and to be placed in professional rules of conduct where their proper purpose of client protection can be attained.

8. The CFA 'lite', or the CFA 'simple', as it is sometimes known, was intended to remedy many of the problems caused by the continued existence of the indemnity principle. This form of CFA seems, however, to be plagued with problems of its own. For example, under a CFA 'lite', clients are not liable to pay their own solicitor's costs or their own disbursements if the case is lost unless one of the exceptions in regulation 3A(5) applies. Most reputable after-the-event insurers sell products which indemnify clients for costs and disbursements for which they are liable to pay. As clients are not liable to pay disbursements under a CFA 'lite', however, no sum is recoverable for disbursements under the policy. This means that the need to pay for disbursements will fall on solicitors. As disbursements can be significant, this could well deter solicitors from using the CFA 'lite'. While it is provided in the rules that a lawyer can charge an increased uplift in respect of disbursements from the defendant, this situation is not ideal. APIL feels that what is needed is a simple CFA where there is a limit to recoverable charges but where the client is able to be charged or made liable for disbursements. In addition, it is our impression that claimant solicitors are nervous about using the CFA 'lite'. With the continuing costs war, there is a fear that insurers will assert new technical challenges. We understand that many would prefer to continue

using the CFA 'standard', challenges of which have already been considered by the Court of Appeal.

9. It should be remembered, however, that many of the problems experienced within the personal injury market, and in particular, consumer problems, have arisen not from CFAs but from after-the-event insurance products and the layering of additional costs by claims intermediaries. These issues must also be addressed if CFAs are to be successful in delivering access to justice.

General

Following the Court of Appeal's judgment [in Hollins v Russell] of the 22 May 2003 is any additional legislative action necessary to provide that only material breaches of the CFA requirements should render agreements unenforceable and if so what changes would need to be made?

10. APIL believes that the current system of CFAs is too complex and this is largely due to the continued operation of the indemnity principle. In response to insurers' mischievous challenges based on the indemnity principle, the Government introduced the Conditional Fee Agreement (Miscellaneous Amendments) Regulations 2003. These regulations allow solicitors to agree with their clients that the client will only be liable to pay his fees and expenses if and to the extent that he recovers costs or damages from the proceedings.

11. These regulations only amend the indemnity principle, however, they do not abolish it. It remains illegal at common law to enter into a CFA and section 27 of the Access to Justice Act makes it clear that any attempt to charge a conditional fee outside the circumstances permitted in the relevant legislation will be unlawful and unenforceable. It remains

possible for insurers to challenge a CFA on technical grounds. Government attempts to alleviate the problems caused by the indemnity principle can only, therefore, have limited effect. Whilst the Court of Appeal's recent judgment on technical challenges in Hollins v Russell has been helpful, public comments from the insurers and their representatives have demonstrated that they still intend to make challenges. The underlying problems will remain for as long as the indemnity principle operates.

12. APIL believes that the system of CFAs should be simplified so that solicitors can feel confident about using CFAs and so that access to justice can be delivered. We have doubts, however, that this will be achieved by amending the existing system. Instead, primary legislation should be introduced to:

- remove the indemnity principle; and
- provide that only claimants can seek to challenge the validity of their CFAs.

We acknowledge that parliamentary time may not allow the introduction of such primary legislation for quite some time, although we would like to see the matter expedited.

13. In the interim, therefore, APIL calls for the establishment of a 'statutory' form of CFA, as proposed by Master O'Hare at the recent Civil Justice Council costs forum. This could be achieved through secondary, rather than primary legislation, which would state that all CFAs would be deemed to include the provisions stated in secondary legislation. This system would be advantageous because it would be both simple and certain. The CFA would then incorporate by reference the statutory terms leaving only individual express terms (e.g. the amount of the success fee) for individual

agreements. This should lead to both simpler documentation for clients to understand and far fewer opportunities for technical challenges for defendants.

To what extent do the existing professional rules provide the client with information appropriate to his or her needs?

14. APIL believes that the existing professional rules in relation to explaining CFAs are not specific to CFA, probably because of the existence of the current statutory regulations. APIL feels that the Law Society should significantly redraft the necessary rules, giving more specific guidance as to what a solicitor has to explain to the client and ideally this guidance should be illustrated via examples. If the indemnity principle was to be abrogated or a statutory CFA introduced, as we have suggested, CFAs would be simple and easier for solicitors to explain and for clients to understand.

To what extent has the combination of case law and legislation contributed to a change in client care needs?

15. Legislation and case law on the recoverability of both success fees and after-the-event insurance premiums have changed clients' care needs considerably. Clients are not exposed to the same magnitude of risk as they were in the pre-recoverability regime.

What elements of the contractual and consumer protection provisions should be regulated in secondary legislation and what can be governed by professional practice rules?

16. Many of the client protections contained within secondary legislation are aimed at the risks posed by CFAs without recoverability under the old pre-April 2000 regime. Whilst we believe that many of these contractual and client care safeguards remain necessary, it seems excessive for them to be enshrined in legislation. In view of the fact that recoverability has reduced the risks posed to clients by CFAs, it would be proportionate for many of the protections to be contained within the professional rules of conduct. Indeed these professional practice rules are extensive and include the Solicitor's Practice Rules 1990, Solicitors' Costs Information and Client Care Code 1999 and the recent Guide to the Professional Conduct of Solicitors. There seems to be little justification for placing tighter restrictions on solicitors using CFAs than on solicitors using alternate funding mechanisms.

17. Protections relating to the recovery of costs from damages (i.e. the cap) should, however, be included within secondary legislation. Damages are carefully calculated to meet an injured victim's losses and expenses, such as loss of earnings and the cost of nursing care. Damages should not, in APIL's view, be used to meet cost liabilities. As legislation allows this, however, secondary legislation should require lawyers to inform clients of their intentions in this respect from the outset. We also believe that secondary legislation should include provisions requiring the solicitor to specify whether there is a limit or cap on the amount of costs a solicitor can recover from his clients damages and, if so, what that cap is.

18. In considering consumer protection, the government should not, however, only look to the regulation of solicitors using CFAs. They must also consider the regulation of the sale of after-the-event insurance and the regulation of claims intermediaries.

Conditional Fee Agreement Regulations 2000

To what extent is regulation 2(1)(c) superfluous?

19. APIL believes that regulation 2(1)(c) is superfluous because, as stated in the consultation paper, regulation 2(1)(b) contains a general requirement to specify the circumstances in which the solicitor's fees are payable.

To what extent does regulation 2(1)(d) require a reference to damages?

20. It is essential that regulation 2(1)(d) continues to refer to damages.

What other changes to regulation 2 are desirable in the interests of justice?

21. APIL believes that regulation 2(2) should be removed. This states that:

> "A conditional fee agreement to which regulation 4 applies must contain a statement that the requirements of that regulation which apply in the case of that agreement have been complied with."
>
> This requirement is obtuse and should be removed.

Do you think that regulation 3(1)(b) should be amended to make clear that the requirement to disclose the compensatory element only applies where there actually is a compensatory element?

22. APIL believes that regulation 3(1)(b) should be amended to make it clear that the requirement to disclose the compensatory element applies only where there actually is a compensatory element. As noted in the consultation paper, it was not the intention of the drafter to require the solicitor to state that there was no compensatory element in the success fee. It would, therefore, be helpful to clarify this.

To what extent do regulations 3(2) and 3(3) continue to be relevant?

23. APIL believes that regulations 3(2) and 3(3) continue to be relevant. Regulation 3(2)(a) provides for the disclosure of the reasons for setting the success fee at the relevant level. As this involves the waiving of privilege, it is important that this client protection remains within the secondary legislation.

24. Whilst regulations 3(2)(b) and (c) are relevant client protections, they should be included within professional rules of conduct rather than within the relevant secondary legislation.

Are the simplified contract and consumer protection requirements as substituted by 3A appropriate to the type of CFA provided for in 3A(1) or could these requirements be simplified further?

25. APIL does not believe that the consumer protection requirements, as substituted by regulation 3A should be simplified further. Amending the new CFA 'lite' will only lead to further confusion and will not tackle the actual problems within the system. The system of CFAs would still be too complex and the indemnity principle could continue to cause problems. APIL calls for the abrogation of the indemnity principle for personal injury

claims and if this is achieved, the CFA 'simple' and the regulations allowing such agreements would become redundant.

Are additional requirements needed to provide for simple CFAs that are contingent on the recovery of damages and if so should these be provided for in regulations, practice rules or in some other way?

26. As noted, APIL believes that solicitors should be legally required to inform their clients if they intend to recover costs from their client's damages. The relevant secondary legislation should also specify a cap on the amount of damages from which costs can be recovered. We address this point in more detail below. We do not believe that any additional requirements are necessary.

To what extent could the simplified contract and consumer protection requirements be extended to all CFAs?

27. APIL does not have views about the use of CFAs in non-personal injury cases. For the reasons given above, APIL also doubts that extending the simplified contract and consumer protection requirements will solve the problems for the CFA regime.

Is it necessary for the Law Society guideline, that the amount recovered by way of success fee should be limited to 25% of the damages recovered, to be reintroduced to cater for those types of CFA where the agreement is contingent on the recovery of damages?

28. The imposition of the 25 per cent cap relates to the old regime, where a success fee was not recoverable from a defendant. In order to protect damages a voluntary cap of 25 per cent of the total damages was

recommended by the Law Society. With the provisions of the Access to Justice Act 1999 that the success fee, in a winning case, should be recovered from the defendant the use of the 25 per cent cap is no longer appropriate. APIL proposes that if the claimant is liable for part of the success fee, then the solicitor should say whether or not the amount that might come out of damages should be capped. Unless it seems that for some reason the success fee will not be recovered from the Defendant, the level of this cap, however, should probably be below the 25 per cent suggested as it should only reflect the so-called 'compensatory' element of the success fee with the risk element being paid by the Defendant.

To what extent do the regulations 4(2)(a) to (d) provide the client with necessary information and therefore continue to have any relevance?

29. Regulations 4(2)(a) to (d) seek to ensure that clients are aware of their potential liability, that they are given the opportunity to make an informed choice from the range of available options and are not put to any unnecessary expense, which might not be recovered. This information is extremely important and solicitors should continue to provide it to their clients. Indeed APIL feels that the solicitor should be under a duty to give advice to the client about why insurance is being recommended and what product and why at any time that they are advising a client to take it out; not just at the time a CFA is signed as is presently the case. The requirements should, however, appear within solicitors' professional rules of conduct rather than within secondary legislation.

To what extent is it necessary to single out insurance as a funding option?

30. APIL believes that it is necessary for insurance to be singled out as a funding option. It is important that the client is aware of the ability to

minimize his liability through the use of insurance. This applies not only to CFAs but also to different types of insurance offered by different types of service providers, such as both sides costs insurance. The requirement should, however, appear within solicitors' professional rules of conduct rather than within secondary legislation.

To what extent is it necessary for the solicitor to declare any interest?

31. APIL believes that solicitors should declare any interests to their clients, so that their clients can make informed decisions. This requirement should, however, be placed within solicitors' professional rules of conduct rather than within secondary legislation.

Is there an argument for making the regulations less detailed in their requirements, given the continuing presence of professional obligations?

32. As APIL has outlined in this response, many of the current client protections contained within the regulations should be moved to professional rules of conduct. If this occurred, the regulations would be less detailed.

Collective Conditional Fee Regulations 2000

Although the CCFA regulations will be considered in the light of responses to the questions on the general regulations, are any changes required to the specific CCFA regulations, which would facilitate their use?

33. APIL welcomed the introduction of Collective Conditional Fee Agreements (CCFAs). These agreements allow funders, such as trade unions, to enter into one central CFA with solicitors. Further, section 30 allows prescribed membership organisations to recover, as part of the costs order, a sum which reflects the provision the organisation has made against the risk of meeting the liabilities of the member whose case it has underwritten. As such it should have been a powerful tool for the improvement of access to justice. Whereas, however, with individual CFAs the indemnity principle has been used as the basis for technical challenges, in the case of CCFAs the indemnity principle creates a further complication to the whole CCFA regime.

34. Whilst, under the indemnity principle, the costs 'belong' to the individual claimant, and since the funder is not a party to any Court action, then the funder has no right to indemnity in relation to costs. Accordingly, all client care documentation, and CCFAs themselves, have to be wholly unnecessarily complicated by the imposition on the individual client of a liability for costs followed by an indemnity from that funder to that individual. This leads to a situation where solicitors are obliged to try to explain these matters to lay clients where, whilst the documentation imposes liability for costs, the true nature of the arrangement is such that the cost will be met by the funder.

35. The Government has recognized this problem in its response to the consultation on collective conditional fees:

"The Government recognises that clients are not always versed in legal proceedings and misconstrue the agreements they have entered into. The client having been told that they have no liability whatever the outcome of the case does not understand why the agreement states that there is a liability. This is a particular concern in cases funded by trade

unions or membership organisations. The government believes that it is in the interests of all concerned for there to be complete clarity in the provision of these services. The operation of the indemnity principle clearly inhibits clarity."

36. The Government goes on to state:

"Although the introduction of CCFA regulations under section 58 of the Courts and Legal Services Act 1990 (as amended) abrogates the indemnity principle for CCFAs, the Government is persuaded that there is no longer any justification for the operation of the principle when assessing costs no matter how funded."

37. Notwithstanding the above paragraph, the Courts have held that the indemnity principle has not been abrogated for CCFAs. In Gliddon v Lloyd Maunder (Supreme Court Costs Office, unreported) the Costs Judge found that the indemnity principle applied to CCFAs meaning that all of the problems outlined in the first part of this response on CCFAs still exist. Yet, as stated by Master O'Hare in the Gliddon case, providing the CCFA complies with the regulations and statutes, it avoids breach. The result, regardless, is that CCFAs are not as effective as they could and should be in delivering access to justice. In APIL's view the benefits of CCFAs will only be fully realized if and when the indemnity principle is abrogated.

Membership Organisation Regulations 2000

To what extent does the client need to be aware of the membership organisation's liability?

38. The client should be told the correct position in straightforward language, i.e. that the membership organization will meet any liability for Defendants'

costs [and own disbursements once the legislation is amended] provided the member complies with the term's of the membership organisation's scheme.

To what extent are 3(3)(b), (c) and (d) superfluous given professional rules on client care?

39. APIL believes that sections 3(3)(b), (c) and (d) are superfluous.

Are any other changes necessary to facilitate the use of the regulations?

40. APIL believes that section 30 of the Access to Justice Act should be amended to make it clear that a membership organisation can recover a notional premium in respect of both Defendants' costs and own disbursements.

41. Section 29 of the Access to Justice Act 1999 states:

"Where in any proceedings a costs order is made in favour of any party who has taken out an insurance policy against the risk of incurring a liability in those proceedings, the costs payable to him may, subject in the case of court proceedings to rules of court, include costs in respect of the premium of the policy."

In Callery v Gray, the Court of Appeal found and the House of Lords agreed, that insurance premiums were recoverable under this section whether proceedings had been issued or not.

42. Section 30 deals with the recovery of the notional premium set by a membership organisation. This provision states:

"(2) If in any of the proceedings a costs order is made in favour of any of the members or other persons, the costs payable to him may, subject to subsection (3) and (in the case of court proceedings) to rules of court, include an additional amount in respect of any provision made by or on behalf of the body in connection with the proceedings against the risk of having to meet such liabilities."

The mention made in section 30, ss.2, of 'court proceedings' illustrates that the intention behind the drafting of the section was to differentiate between 'proceedings' and 'court proceedings'. Thus 'proceedings' within section 30 can be interpreted in the wider sense, meaning that 'proceedings' are analogous with the interpretation the Court of Appeal and House of Lords applied to the term in section 29 in Callery v Gray. The practical consequence of this interpretation is that proceedings in the context of both section 29 and section 30 means both pre- and post-issue.

APIL also believes that section 30 should be amended so that self insurance can be as extensive as after-the-event (ATE) insurance.