THE DEPARTMENT FOR CONSTITUTIONAL AFFAIRS

PERIODICAL PAYMENTS AND PART 36

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 nearly 4,700 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.

The aims of the Association of Personal Injury Lawyers (APIL) are:

- To promote full and prompt compensation for all types of personal injury;
- To improve access to our legal system by all means including education, the exchange of information and enhancement of law reform;
- To alert the public to dangers in society such as harmful products and dangerous drugs;
- To provide a communication network exchanging views formally and informally;
- To promote health and safety.

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

Colin Ettinger	President, APIL
Allan Gore QC	Vice-President, APIL
David Marshall	Immediate Past-President, APIL
John Pickering	APIL representative on Chief Medical Officer's Advisory Committee
Kevin Grealis	Clinical Negligence Special Interest Group (SIG) Secretary, 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

PERIODICAL PAYMENTS AND PART 36

Introduction

1. APIL welcomes the opportunity to put forward its comments in response to the Department for Constitutional Affairs (DCA) discussion paper and draft note setting out the options for amending Part 36 in relation to periodical payments. In summary, APIL firmly believes that the Part 36 regime should not be imposed on cases where periodical payments will form part of the damages award. APIL feels that neither of the Part 36 options proposed in the discussion paper and draft note are appropriate for periodical payments. In addition, Part 36 arrangements do not offer considerable incentives in relation to periodical payments. Indeed, there are already various incentives within the current system which encourage the use of periodical payments.

2. APIL considers that the complex structure of a periodical payment makes it practically impossible to be able to effectively compare Part 36 periodical payments into court and the final periodical payments award so as to calculate whether the claimant will have costs awarded against him. This complexity in relation to periodical payments also affects funding issues by: allowing defendants to tacitly pay monies into court prior to a proper assessment of quantum, putting pressure on claimants; making it difficult for a lawyer to effectively assess the merits of a Part 36 offer, thus leaving both himself and the client open to cost sanctions; and making risk-averse legal funders such as After-The-Event (ATE) insurers, Before-The-Event (BTE) insurers and the Legal Services Commission (LSC) require considerable evidence for the rejection of a Part 36 proposal before continuing to fund the case.

3. APIL proposes that the current structure in dealing with costs – court discretion at the conclusion of the case via the operation of Civil

Practice Rule (CPR) 44 – should be maintained until there is sufficient evidence to justify otherwise.

Incentivising the use of periodical payments

4. APIL feels that there are adequate *"incentives"*[1] in the current system of periodical payments to make Part 36 arrangements unnecessary. For example, the practice direction which came into force in October 2003 requires the claimant to consider whether any settlement should be by periodic payment, particularly when the claimant is under a certain age or is incapacitated due to a disability or injury. It is now normal for cases over half-a-million pounds to obtain reports considering whether a periodic payment arrangement is appropriate and, if so, there is further scrutiny concerning the use of such a mechanism.

The complex structure of periodical payments

5. APIL considers that the complex structure of a periodical payment makes it practically impossible to be able to effectively compare Part 36 periodical payments into court and the final periodical payment award so as to calculate whether the claimant will have costs awarded against them. Unlike a lump sum award, where an annuity will be purchased out of the finally agreed damages amount – a top-down approach[2] – periodical payments will potentially consist of a series of investment vehicles, each reliant on other products in the portfolio. This bottom-up approach[3] – a highly specific approach tailored to the needs of the individual case – will potentially consist of, for example, with-profits structures, simply annuity rates, deferred annuities and so on and may involve getting different annuity rates quoted by different life

[1] Discussion Paper – Paragraph 3: *"Part 36 accordingly gives financial incentives, in the form of provisions on costs, to both parties to make and accept offers."*
[2] Civil Justice Council – '*Structure Settlements: report of the Master of the Rolls' Working Party*' (August 2002) – paragraph 32 (This document can be found at: http://www.civiljusticecouncil.gov.uk/files/FINAL_structured_settlements_report_-_8_Aug_02.pdf)
[3] Ibid, paragraph 33

companies. Any comparison would involve the analysis of the basic elements of various annual provisions but would also have to consider the relative financial merits of the vehicles being proposed to achieve these. The complex nature of this comparison would necessitate additional financial advice to make any judgment call. This in turn, APIL envisages, would lead to additional costs and possible satellite litigation.

Difficulties in advising claimants

6. APIL also feels that the complexity of periodical payments will aversely affect the funding arrangements of cases by introducing significant uncertainty into the proceedings, and will lead to increasing difficulties for lawyers in advising their clients. This is particularly problematic as the majority of cases to which periodical payments will be applicable are those of a high value (over half-a-million pounds), which in turn indicates the high level of disability and vulnerability of the claimants; most will require constant care and attention for the rest of their lives. Within the current system of lump sum damage awards, the lawyer is able to assess the likely financial range within which the lump sum damages will fall. Yet even under the current system, a modest change in the multiplier can lead to the damages award being reduced by hundreds of thousand of pounds, leading to difficulties for the claimant in deciding whether to accept or reject the proposal.

7. The difficulties surrounding whether or not to accept a proposed Part 36 settlement are further amplified by the tendency of defendants to make tactical payments into court, prior to any significant quantum evaluation taking place. For example, APIL members have reported that this tactical action is regularly used by the National Health Service Litigation Authority (NHSLA) in the context of clinical negligence cases. The purpose of it is to put pressure upon the claimant to settle, and also to gain a possible cost sanction again the claimant.

8. Indeed, APIL believes that the practice of payment into court could be used by defendants to unfairly disadvantage claimants due to the complexity of periodical payments. For example, a defendant could put forward a periodic payment at a very early stage without any detailed quantum investigation having been undertaken. The particular difficulty, as already mentioned, is that the formulation and structure of periodical payments are extremely complex, so it would be difficult for the claimant to effectively ascertain the true value of the defendant's offer. Such an action would subsequently put considerable pressure on the claimant.

9. In respect of funding, APIL feels that the complexity of periodical payments will act as a disincentive to both legal representatives and institutional funders to continue to take on high-value personal injury work. This directly affects claimants' access to justice. The vast majority of personal injury cases are now conducted under a conditional fee agreement (CFA)[4]. APIL's concern is that the complexity, and resulting uncertainty, of assessing a Part 36 periodical payment offer into court will not allow firms to effectively risk assess whether or not they will be able to beat this Part 36 payment later in court. If a Part 36 payment is not subsequently beaten in court, the claimant will have costs awarded against him. Compounding this problem is the fact that the cases where such a scenario are most likely to occur – i.e. cases where periodical payments are to be used – tend to be both high value and labour intensive. The potential significant loss of income, through paying the other side's costs and not being paid for their own costs, will dissuade many firms from taking these kinds of cases on. This constriction of legal providers will adversely affect injured claimants' access to justice.

10. In addition, APIL feels that it would be almost impossible for a lawyer to effectively advise a claimant with any kind of certainty to reject a Part

36 periodical payment offer into court, faced with the uncertainties involved. Due to these uncertainties, and the risk of having costs sanctions applied, the odds would be tilted very much in favour of the defendant, with the claimant having to accept whatever offer was put forward.

11. APIL further considers that the unpredictability of considering the permutations involved in periodical payments will aversely affect funding in relation to other providers. For example, many ATE insurance providers impose very stringent requirements with regard to Part 36 payments. Many have the power to withdraw cover in the event that a Part 36 offer is rejected. The problem is that ATE insurers are naturally risk averse and, even if the claimant's lawyer were to argue that a particular Part 36 offer should be rejected, if the case were considered borderline, then there would be a strong risk that the ATE insurer would withdraw cover. Subsequently, if cover were withdrawn the claimant would be at risk for all costs incurred by both sides.

12. In the context of other areas of litigation - for example, clinical negligence - where legal aid survives, a similar problem can be seen to exist in relation to the Legal Services Commission (LSC). While relatively less stringent than ATE providers, the LSC still needs to be provided with strong and clear advice as to the reason for the rejection of a Part 36 proposal and for funding to be continued. It is worth noting, however, that the LSC is itself becoming more risk averse – e.g. the use of merit tests. Finally, there is the position of the Before-the-Event insurers (BTE), often considered the traditional Legal Expense Insurers (LEI). As with the ATE insurers, many BTE insurers have similar clauses with regard to Part 36 proposals. They are also very risk averse and will only continue to provide indemnity where there are very clear reasons for the rejection of a Part 36 proposal.

[4] There is already much tension about the implications of CFAs, particularly in the context of Part 36 under the existing regime. For example there are various litigation cases which are currently going to the Court of Appeal

Conclusion

13. In conclusion, APIL believes that neither of the Part 36 options proposed in the discussion paper and draft note are appropriate for periodical payments, and imposition of a Part 36 scheme onto periodical payments would lead to significant injustice for many vulnerable claimants. APIL proposes that costs should continue to be dealt with at the conclusion of a case by the court, under the provisions of the Civil Practice Rule (CPR) 44[5]. Under CPR 44.3 (4) the Court has the discretion to apply costs as appropriate. This would seem to be an appropriate approach at the moment due to the relative novelty of periodical payments within damage awards and the current embryonic market place which exists for insurance products to support periodical payments. In addition, the assessment of costs after the case will allow the court to have a full and clear picture of the entire canvas and the issues involved, particularly concerning the calculation of quantum. Being able to fully consider all the facts will allow the court to make a costs order which reflects the equitable position for all concerned.

14. Finally, APIL suggests that prior to any further amendments to the periodical payments regime, particularly in relation to costs, the use of periodical payments needs to 'bed-in' within the current damages scheme. We feel that periodical payments should learn to 'walk' before they can 'run'[6]. Further changes to the periodical payments regime should thus be based on an adequate body of experience being obtained. For example, detailed research could be undertaken as to the form and content of periodic payments arrangements being put into place, their formulation, the investment vehicles being used and the trends which thereby emerge. Only when there is a very full and detailed analysis of the actual picture will it be possible to make any sensible determination about whether particular styles of approach are

concerning the interpretation of the Law Society conditions.

[5] This view reflects that given in the Civil Justice Council's report – '*Structure Settlements: report of the Master of the Rolls' Working Party*' (August 2002)

[6] For example, there have been no official guidelines released concerning the use of periodical payments.

appropriate and thus, whether any costs sanction should be applied in the event of a rejection of periodic payment proposals.