THE BAR of NORTHERN IRELAND

Alternative Method for Funding Money Damages Claims

Bar Council – Consultation Response

Introduction

1. The Bar Council is the representative body of the Bar of Northern Ireland. Members of the Bar specialise in the provision of expert independent legal advice and courtroom advocacy. Access to training, experience, continual professional development, research technology and modern facilities within the Bar Library enhance the expertise of individual barristers and ensure the highest quality of service to clients and the court. The Bar Council is continually expanding the range of services offered to the community through negotiation, tribunal advocacy and alternative dispute resolution.

2. The Bar Council welcomes the opportunity to contribute to the Department of Justice's consultation on an Alternative Method for Funding Money Damages Claims in Northern Ireland. However, we are concerned that this consultation represents yet more unnecessary duplication in this area given that the proposals contained in the Access to Justice 2 Review have simply been regurgitated in this separate simultaneous consultation. The Bar queries the need for two consultations to be issued in this manner when dealing with the same recommendations.

3. The Bar's response to this consultation is structured according to our comments on the proposals outlined in each of the questions contained in the document.

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?

4. The Bar Council is completely opposed to the introduction of Conditional Fee Agreements in Northern Ireland. We would point to the problematic history of the CFA model in England and Wales where the cost of litigation is often disproportionate to the size of the claims involved. The introduction of the Access to Justice Act 1999 saw the removal of legal aid from most personal injury claims with a range of changes brought in to make success fees and after-the-event insurance premiums recoverable from a losing defendant. One striking example of the exorbitant cost of litigation is exemplified by the Supreme Court case of *Coventry v Lawrence* [2015] UKSC 50. This case involved a nuisance dispute between neighbours under which the damages payable could never have exceeded £74,000. However, the success fees and ATE insurance involved in the case led to a costs bill of over £1 million for the defendant.

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5. The Jackson reforms introduced under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 resulted in alterations to the operation of CFAs with success fees now payable out of the plaintiff's damages. This has resulted in an improved situation for defendants. However, we would contend that the system developed in England and Wales has been driven by the wholly disproportionate costs being charged by lawyers. The changes introduced under the Access to Justice Act 1999 and the subsequent Jackson reforms were designed to fix an English problem. The difficulties experienced in England and Wales, particularly in relation to disproportionate legal costs, are not a feature of the system in Northern Ireland which operates scale costs.

6. There is simply no evidence to suggest that the legal fees being charged in NI act as a disincentive to litigate or otherwise impede access to justice. Consequently, we would query why the Department would seek to bring in a new system to address a problem from another jurisdiction which is not specific to Northern Ireland. There is no need for CFAs to be introduced in NI as they would not improve access to justice.

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

7. The Bar would point to a number of difficulties with the operation of CFAs. The fundamental problem with the system introduced under the Jackson reforms, whereby success fees are payable out of the plaintiff's damages, is that it gives lawyers a financial interest in the outcome of the case and therefore places them in a position of potential conflict. We would contend that this does nothing to improve access to justice and in fact does the exact opposite. Evidence from England and Wales suggests that solicitors are turning away more valid but complex and difficult cases given that they represent an unreasonable commercial risk. This includes those with high early investigation costs, cases involving disputed liability, cases with emerging and contested points of law and cases involving complex and difficult expert evidence on causation. Consequently, adequate legal representation is becoming more difficult to obtain and even when it is plaintiffs are being pressured to settle cases so that lawyers get their success fee.

8. The Bar Council of England and Wales produced a report in September 2014 entitled *The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO): One Year On* which surveyed barristers on the impact of the Jackson reforms with 716 respondents. This highlighted that in privately funded work

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where CFAs may have once been attractive due to the right to recover success fees and any ATE insurance premiums, they have now become much riskier to accept. Over a quarter (27%) of respondents indicated that they now require a higher prospect of success before accepting a case, while 27.86% of respondents suggested that the Jackson reforms had forced them to require a higher prospect of success as well as a higher quantum than they would have required prior to LASPO[1]. The creation of a similar situation in Northern Ireland would do nothing to improve access to justice for those individuals who are not eligible for legal aid.

9. Another difficulty with the implementation of CFAs is the suggestion that fees should be claimed from the damages payable to plaintiffs, particularly in personal injury cases, which represents a complete anathema to lawyers. The fundamental objective of an award of damages is to compensate the plaintiff for pecuniary and non-pecuniary losses sustained as a result of the defendant's wrong doing. The principle that a sum of money will restore the plaintiff to the same position if she/he had not sustained the wrong does not apply in cases of personal injury. For example, damages can never adequately compensate a plaintiff who has suffered a life changing injury or brain damage as a result of an individual's clinical negligence. Despite the concept of restoration by way of damages being ill suited to personal injury claims, this remains the most effective method of compensating the injured plaintiff. Consequently, we believe it is impossible to justify such an alternative funding mechanism which allows for a deduction from the plaintiff's damages.

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

10. The Bar does not agree with the suggestion that a 100% success fee should be allowed. As highlighted above, we are opposed to the introduction of CFAs in Northern Ireland. However, we take the view that if CFAs are to be introduced then success fees must be recoverable from a defendant. If the Department instead seeks to bring in CFAs which permit recovery from the plaintiff then success fees must be capped at 20% of the general damages (for pain, suffering and emotional distress). The cap should apply to general damages (up to an agreed limit). Regardless of any cap success fees should not be recoverable from

[1] The Bar Council of England and Wales, *The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO): One Year On* at paragraph 65, September 2014, at http://www.barcouncil.org.uk/media/303419/laspo_one_year_on_-_final_report_september_2014_.pdf (last accessed 12 February 2016)

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special damages (this includes pecuniary loss for past and future loss of earnings plus care costs). It would be manifestly unjust to allow for a reduction in pecuniary loss damages awarded to a severely injured or brain damaged plaintiff who must depend upon those damages to fund past and future care.

Q4. Should the 20% 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?

11. See the Bar's response to question 3. If contrary to the Bar's opposition CFAs are to be introduced in NI, a cap of 20% should be implemented and this should only apply to general damages up to an agreed limit. We do not believe that a lower tapered cap should apply for high value cases.

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?

12. The Bar disagrees that no success fee should be permitted for road traffic accidents as this is a very simplistic and unfair approach. We would refer to the comments contained in the Access to Justice 2 Review at paragraph 22.34 that road traffic claims are the "most straightforward area of personal injury" and "they seldom raise difficult liability issues". We disagree entirely with this viewpoint. There is no justification for excluding claims arising out of road traffic accidents given that significant injuries regularly result from these, including brain damage, loss of sight and loss of limbs. The severity of such injuries often require the advice of neurologists, orthopaedics, neuropsychologists, psychiatrists, consultants in rehabilitation, care consultants and forensic accountants. Furthermore, even in cases where injuries are minor the assessment of liability issues is often difficult and unpredictable, necessitating the involvement of a range of experts. Consequently, a blanket exception for road traffic claims is entirely unjustified.

Q6. What impact would the introduction of Qualified One Way Cost Shifting have on defendants (we would particularly welcome quantitative evidence from defendants)?

13. The Bar notes that the introduction of Qualified One-Way Cost Shifting (QOCS) under the Jackson Reforms was meant to address the specific problems

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experienced under the system in England and Wales. However, we would stress the fact that this is quite clearly *qualified* given that plaintiffs can be liable to pay the defendants' costs in certain situations. This most typically happens when a plaintiff fails to beat a defendant's Part 36 offer to settle. In other words, the Part 36 offer regime "trumps" QOCS so that a plaintiff who refuses a defendant's Part 36 offer but fails to do better at trial is at risk for the defendant's costs from the end of the relevant offer period. The result of this is that it is still necessary to obtain ATE insurance and the premium for this can never be recovered from the defendant. It is clear that the system of QOCS in England and Wales presents difficulties for plaintiffs in some circumstances.

14. As highlighted above, the Bar is opposed to the introduction of CFAs in Northern Ireland. However, if the Department disregards this then any system of QOCS would have to be carefully designed and implemented. Clear and unequivocal guidelines would be required highlighting that under such a system a plaintiff must only be liable for the costs of a defendant in very limited circumstances in order to avoid uncertainty and the potential for satellite litigation. A plaintiff who is guilty of fraud or acts in bad faith could be penalised. However, such allegations would have to be exhaustively pleaded by a defendant who intends to rely upon this.

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?

15. See the Bar's response to question 6 for our concerns around the difficulties which have arisen in England and Wales. We believe that a plaintiff must have their damages protected in the event that they fail to beat an offer. In addition, the rules in which defendants are permitted to make an offer must be clearly defined. We see no reason why the current practice in respect of lodgements should be changed; an offer at some stage should not be allowed to affect the position that a successful plaintiff is entitled to recover his or her costs.

16. For example, a situation may arise where the financial power and resources of an insurance company greatly exceeds that of the injured party. It would lead to extreme injustice that an injured person could be denied the right to appropriate compensation because they do not have the financial power of the defendant. We would be very concerned that a practice could be allowed to develop where defendants make low offers in the knowledge that the plaintiff will be placed

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under extreme pressure to accept the offer rather than risk becoming liable to pay the defendant's costs.

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

17. The Bar is strongly opposed to the removal of money damages cases from the legal aid scheme, given the relatively low costs and having regard to its valued and acknowledged role in providing access to justice for a significant proportion of the population. We highlighted in response to the Department's previous consultation in 2013 that the removal of legal aid from the majority of money damages claims will inevitably deprive access to necessary legal services for those who are vulnerable and economically disadvantaged within society.

18. Furthermore, the cost to the legal aid fund of money damages cases in Northern Ireland is relatively small yet legal services in respect of these cases are in high demand. The relatively low cost is due to the fact that costs in money damages cases are paid by the losing party and do not represent a burden to the legal aid fund.

19. Meanwhile one of the central roles of counsel in money damages cases is to try to achieve resolution of claims properly, fairly and cost effectively. The present system for the disposal of money damages cases is a system where settlement is very much the norm. In straightforward cases, settlement is negotiated at a very early stage and before the issue of proceedings with opposing counsel, solicitor or insurer.

20. In many cases, proceedings are issued, but in the overwhelming majority of these cases, settlement is achieved by experienced members of the Bar after consultation with their respective clients, witnesses, and where engaged, experts. Of the remaining few cases listed for hearing, most are settled in the days leading up to trial or on the morning of trial. Statistics show that the overwhelming majority of money damages claims, in the region of 90%, are in fact resolved without the need for judicial determination, those settlements being achieved with the skill and expertise of counsel and without the need for structured mediation.

21. We also take the view that the list of money damages cases remaining within the scope of legal aid in the Access to Justice 2 Review must not be exhaustive.

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Clinical negligence claims remaining within scope should not be limited to babies with severe neurological injury. What is the rationale for restricting this to a baby as opposed to a 5, 10 or 15 year old or an adult? If legal aid is restricted to such a category of injury then all persons having that injury must be entitled. Why should this be restricted to severe neurological damage occurring as a result of clinical negligence? If a baby, child or adult suffers serious injury from, for example, exposure to a noxious substance then why is he or she not equally entitled to legal aid to pursue a case?

22. The Bar remains of the view that legal aid must remain available in all clinical negligence cases. This funding is critical for those plaintiffs who have been injured as a result of clinical negligence. In most cases, liability, causation and quantum issues are extremely complex. Due to the potential costs involved in prosecuting a clinical negligence claim, counsel and solicitors are particularly diligent in ensuring that proceedings are instigated and advanced to hearing where there is a reasonable prospect of success. Consequently, we would also be opposed to legal aid operating as a supplement to CFAs in such cases.

23. The Bar believes that careful consideration must be given to identifying the basis upon which the appropriate categories selected to remain within the scope of legal aid are decided upon, restricted and defined. We also agree that the following cases should remain within the scope of the legal aid fund:

    - Claims against public authorities concerning serious wrong doing, abuse of position or power or significant breach of human rights;
    - Claims concerning the abuse of children or vulnerable adults or sexual assault;
    - Claims relating to diffuse mesothelioma. However, in respect of this category, it is difficult to see the rationale for removal of all other asbestos related claims. Why should lung cancer, asthmatic or other respiratory conditions be excluded? Why should a case such as injury from exposure to radioactive material be outside the scope?

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.

24. The Bar Council disagrees with the proposal that legal aid should operate as a supplement rather than an alternative to CFAs and should only be available for elements of a case. We would request further information from the Department

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on the elements of a case which it envisages would be funded by legal aid. However, we fundamentally believe that legal aid should remain available for the entirety of a claim which remains within the scope of legal aid. To do otherwise would be to deprive those who cannot afford disbursements or other costs not covered by CFAs of access to justice.

25. We would also point to the comments of Jackson LJ in the *'Review of Civil Litigation Costs: Final Report'* highlighting the fundamental importance of preserving the continuation of publicly funded legal services to the success of the Jackson reforms around CFAs and QOCS:

> *"I do not make any recommendation in this chapter for the expansion or restoration of legal aid. I do, however, stress the vital necessity of making no further cutbacks in legal aid availability or eligibility. The legal aid system plays a crucial role in promoting access to justice at proportionate costs in key areas. The statistics set out elsewhere in this report demonstrate that the overall costs of litigation on legal aid are substantially lower than the overall costs of litigation on conditional fee agreements. Since, in respect of a vast swathe of litigation, the costs of both sides are ultimately borne by the public, the maintenance of legal aid at no less than the present levels makes sound economic sense and is in the public interest."*[2]

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.

26. The Bar Council takes the view that there is no justifiable rationale for applying a minimum damages threshold. The potential value of a claim must not be a factor which determines access to justice. Scale costs already in operation in Northern Ireland ensure that small claims result in reasonable costs and therefore ensure that access is preserved.

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?

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[2] Lord Justice Jackson, *'Review of Civil Litigation Costs: Final Report'*, December 2009, paragraph 4.2 at https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf (last accessed 12 February 2016)

Please provide details of any difficulties you envisage in implementing this proposal.

27. This issue is unlikely to arise in practice given that legal aid already operates as a fund of last resort. If there is a reasonable and credible alternative (i.e. not an alternative which would put an intolerable financial strain on the client) to legal aid funding then the client should be advised to avail of that alternative. This has always been the accepted approach.

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% of damages?

28. The Bar disagrees with this proposal and requests further clarification from the Department around the nature of the damages affected by such a contribution. For example, where damages are awarded in a catastrophic injury claim for future care it would be unreasonable to reduce that element of the award given that it is calculated to provide essential care to a plaintiff.

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 incentivise the pursuit of meritorious cases and to produce savings for the legal aid fund?

29. The Bar objects strongly to this proposal. As outlined above, we do not accept the premise of the introduction of conditional fee arrangements or the removal of money damages cases from the scope of legal aid. The measures outlined within the consultation would heavily restrict the access to funding for damages cases to the point that it is unlikely to support any. To add a further financial obligation is unnecessary and borders on punitive, given the suggestion in the Access to Justice 2 Review at paragraph 24.19 that "the payment may even exceed the cost of services". We would also raise serious concerns about the level of administration and bureaucracy which will be created by the introduction of new or revised criteria.

Q14. What additional safeguards or protocols should apply in money damages cases?

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30. The Bar outlined above a range of concerns around the introduction of CFAs in response to question 2. We would reiterate that the Department should not introduce a new system to address a problem from England and Wales which is not specific to Northern Ireland. The introduction of CFAs in NI would not improve access to justice in any way for the general public. However, if the Department disregards this then there is a need to safeguard against the problems which have arisen in England and Wales with lawyers being placed in positions of conflict by success fees being paid out of the plaintiff's damages. We disagree with the recommendation that successful plaintiffs should be exposed to the potential of losing a share of their damages through the payment of such a fee. The only way to prevent this is to allow for CFAs to be recoverable from the defendant rather than the plaintiff.

31. Practitioners would also require detailed further guidance on the operation of such a system. We would also contend that existing pre-action protocols and judicial case management must be retained.

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