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Assembly

## Research and Information Service Briefing Paper

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# Access to Justice Review: Money Damages

## 1 Introduction

The Access to Justice Review suggests that money damages is the one significant area that should be removed from the scope of civil legal aid. This paper considers the options set out in the Access to Justice Review Team final report on the future of money damages cases including the introduction of Conditional Fee Agreements (CFAs) also known as 'No Win, No Fee' arrangements. This paper also considers developments in England and Wales in relation to these agreements.

## 2 Access to Justice Review

Legally aided money damages cases mostly involve claims for negligence, for example road traffic accidents, tripping, medical negligence and accidents at work.<sup>1</sup> The Access to Justice Review Team note that over the last decade until 2009/10, there was a reduction in the number of legal aid certificates granted for money damages cases. However this trend has been reversed since 2009/10 particularly in relation to road

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<sup>1</sup> Access to Justice Review Northern Ireland "The report", August 2011, 80.

traffic accidents and medical negligence cases and it has been suggested that spend on legal aid on money damages has fluctuated between £1.5 million and £2 million.<sup>2</sup>

The Access to Justice Review considers removing money damages from the scope of legal aid and reviews other funding alternatives. The Access to Justice Review suggested a number of options in the discussion paper including:<sup>3</sup>

- Retain money damages within the scope of legal aid as envisaged in the funding code and give further consideration to the limitations on investigative help for lower value claims;
- Remove money damages from scope of legal aid and introduce conditional and contingency fees with safeguards recommended by Lord Justice Jackson in his review of civil litigation costs;
- Negotiate the introduction of a Contingent Legal Aid Fund (CLAF) or supplementary legal aid scheme where losing cases are funded out of a ring fenced fund which is maintained out of a levy of damages in successful cases;
- A privately arranged insurance scheme where subscribers from the legal profession would for a small fee be able to underwrite claims up to a specific value.

In a submission to the Access to Justice Review, the Northern Ireland Human Rights Commission (NIHRC) has raised concerns that “no win no fee” arrangements may not provide access to justice for the poorest in society. The NIHRC draws on experience from England and Wales which suggests that the introduction of CFAs has tended to increase its overall cost and increase the financial risks for many individuals.<sup>4</sup> The Access to Justice Review Team also outlined a number of points that were highlighted to them in the course of the review:<sup>5</sup>

- Some organisations representing lawyers commented that current arrangements provided good value for money in terms of benefits secured for vulnerable clients;
- The taxpayer benefits by more than the cost of legal aid in money damages cases through the Compensation Recovery Unit’s Ability to recover NHS and social security benefits from damages won as a result of accidents;
- Concerns were raised regarding the combined effect of the merits calculation under the Funding Code and the ending of funding for investigative help for cases worth less than £5000 would remove lower value cases from the ambit of legal aid with a disproportionate impact on those with very low incomes;
- Concerns raised by the Public Accounts Committee about the costs of litigation, especially in low value cases such as tripping where claimants’ and defendants’ costs can exceed the damages;

<sup>2</sup> Access to Justice Review Northern Ireland “The Report” August 2011,80

<sup>3</sup> Access to Justice Review Discussion Document, November 2010, 21.

<sup>4</sup> NIHRC “Submission to the Access to Justice Review”, January 2011, 6.

<sup>5</sup> Access to Justice Review Northern Ireland “The Report”, August 2011, 84-

- There was support across various stakeholders for the court system in NI including the introduction of pre-action protocols and the transparency of the county court scale costs system for fixing levels of remuneration;
- There was support for the planned extension of the county court jurisdiction to include cases worth £30,000 in damages, raised from the current £15,000 limit;
- Concerns were raised by a number of consultees regarding the complexities of some clinical negligence cases and emphasised the importance of retaining these within the scope of legal aid;
- There was opposition to the introduction of referral fees and to the development of a claims management industry in NI;
- Some respondents raised concerns about options that involved some or all of lawyers' fees being taken out of the damages awarded to clients.

In the final report, the Access to Justice Review Team concluded that the financial risks involved with a Contingency Legal Aid Fund are too great to justify recommending it as an option for replacing legal aid in money damages cases.<sup>6</sup> The Review Team has also made the following recommendations in respect of money damages cases:

- Most money damages should be removed from the scope of legal aid except for more complex clinical negligence cases, providing an alternative means can be implemented;<sup>7</sup>
- The Introduction of Conditional Fees in NI through commencement of Article 38 of the Access to Justice Order (Northern Ireland) 2003 and the relevant recommendations in Lord Justice Jackson's Review of Civil Litigation Costs would offer a sound basis for ensuring access to justice in money damages cases;<sup>8</sup>
- Insurance based solutions in money damages cases are attractive however more details need to be fleshed out on its workings and full consultation should take place before a decision is taken whether to adopt this option.
- The Review Team state that 'it is difficult to draw any other conclusion that referral fees and the claims management industry adds to costs..' and the Review Team suggest a ban on referral fees be maintained in Northern Ireland.<sup>9</sup>

The Review Team also pay further consideration to money damages claims in clinical negligence cases. It is suggested that until new arrangements for funding money damages claims have bedded in, that clinical negligence claims involving a sum of money that brings them into the High Court jurisdiction should remain within the scope of legal aid. In more serious complex clinical negligence cases it is suggested that a panel of suitable accredited solicitors is established to undertake this area of legally aided work. The Review Team also note work that is going on in England and Wales by

<sup>6</sup> Access to Justice Review Northern Ireland "The Report" August 2011, 86

<sup>7</sup> Access to Justice Review Northern Ireland "The Report" August 2011, 86

<sup>8</sup> Access to Justice Review Northern Ireland "The Report" August 2011, 86

<sup>9</sup> Access to Justice Review Northern Ireland "The Report" August 2011, 87

the Department of Health regarding fact finding at early stages to facilitate early resolution in changes to the NHS Redress Act 2006. The Review Team recommend that the Department of Health, Social Services and Public Safety (DHSSPS) establishes the applicability of this work to Northern Ireland. The Review Team also consider county court procedures in facilitating early resolution of cases.

The Review Team highlights the positive responses to increasing county court jurisdiction to cover cases up to £30,000. However it is suggested that consideration is given to case management tools in the county courts processes to facilitate early exchange of information, appropriate details of civil bills and defence responses and the use of incentives to encourage early settlement of cases. It is also recommended that DoJ keeps in touch with the Ministry of Justice on the evaluation of the Road Traffic Accident personal injuries scheme being conducted by the Ministry of Justice to assesses whether lessons can be learnt from this model.<sup>10</sup>

### 3 Developments in England and Wales

The Access to Justice Act 1999 reduced the scope of civil legal aid, particularly in personal injury cases. This was done with the view these cases could be funded by Conditional Fee agreements (CFAs).<sup>11</sup> The Ministry of Justice proposed in November 2010 to reform CFAs in a Green Paper on reforming civil litigation costs in England and Wales.<sup>12</sup> These proposals implement recommendations of a previous review on civil litigation funding by Lord Justice Jackson.<sup>13</sup> Lord Justice Jackson stated that “in some areas civil litigation costs are disproportionate and impede access to justice”.<sup>14</sup> The main recommendations of Lord Justice Jackson’s report for change to civil litigation costs include:

- Abolishing the recoverability of After the Event Insurance Fees from losing parties.<sup>15</sup>
- Abolish recoverability of CFA success fees from losing parties;<sup>16</sup>
- The introduction of Qualified One Way Costs Shifting (QCOS) particularly in personal injury cases which means that the claimant will not be required to pay the defendants costs if the claim is unsuccessful;<sup>17</sup>

<sup>10</sup> Access to Justice Review Northern Ireland “The Report” August 2011, 147.

<sup>11</sup> Ministry of Justice “Proposals for the Reform of Civil Litigation Funding and Costs”, November 2010,11

<sup>12</sup> Ministry of Justice “Proposals for the Reform of Civil Litigation Funding and Costs”, November 2010

<sup>13</sup> Review of Civil Litigation Costs (Final Report),21 December 2009, xvi,

<http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/jackson-final-report-140110.pdf>

<sup>14</sup> Review of Civil Litigation Costs (Final Report), i, <http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/jackson-final-report-140110.pdf>

<sup>15</sup> Review of Civil Litigation Costs (Final Report), 92,

<http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/jackson-final-report-140110.pdf>

<sup>16</sup> Review of Civil Litigation Costs (Final Report), 108,

<http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/jackson-final-report-140110.pdf>

<sup>17</sup> Review of Civil Litigation Costs (Final Report), 89,

<http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/jackson-final-report-140110.pdf>

- Increase the level of general damages for personal injury, nuisance and other civil wrongs to individuals by 10%.<sup>18</sup>

CFAs are the most common type of ‘no win no fee’ agreements in England and Wales. Under this type of agreement, Lawyers do not receive a fee if they lose a case, however if they win they can charge an uplift on top of their base, which is a success fee.<sup>19</sup> The Government is proposing to implement Lord Jacksons recommendations including that CFA success fees should no longer be recoverable from the losing party.<sup>20</sup> In addition, it was proposed that After the Event Insurance Fees (ATE) fees (which cover a party against liabilities they will incur if a case is lost) would also no longer be recoverable from the losing party.<sup>21</sup> ATE is often taken out in conjunction with a CFA.<sup>22</sup> The Government intends to make one change to Sir Rupert’s recommendation on ATE. It is proposed there will be a tightly drawn power to allow the recoverability of ATE insurance premiums to cover the costs of expert witnesses’ reports in clinical negligence cases. The detail will be set out in regulations and the Government indicates it will engage with various bodies to ensure joint reports can be commissioned where possible to minimise the need for ATE insurance.<sup>23</sup>

Furthermore it is proposed that there will be an increase in general damages by 10% to assist claimants meet the success fees if recoverability of ATE is abolished.<sup>24</sup>

According to the Government, a number of flaws were highlighted in the recoverability scheme including: CFAs are used by the wealthy and well resourced; CFA clients have no interest in the costs being incurred on their behalf; CFAs lead to excessive costs burden; and CFAs lead to cherry picking by lawyers.<sup>25</sup> The Government notes that on one hand recoverable costs represent a source of funding for the winning party and ensure access to justice however in contrast recoverable costs place a burden on the losing party and can impede access to justice.<sup>26</sup> It has been suggested that the ‘No Win No Fee’ reforms will have an adverse impact including that they would prevent lawyers from taking up public interest cases and potentially victims getting less for their injuries.<sup>27</sup> It has been highlighted by an individual who used CFA and ATE in order to fund her libel case against a newspaper, that proposals to abolish the recoverability of

<sup>18</sup> Review of Civil Litigation Costs (Final Report), 116,

<http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/jackson-final-report-140110.pdf>

<sup>19</sup> Ministry of Justice “Proposals for the Reform of Civil Litigation Funding and Costs”, November 2010, 18

<sup>20</sup> Ministry of Justice “Proposals for the Reform of Civil Litigation Funding and Costs”, November 2010, 18

<sup>21</sup> Ministry of Justice “Proposals for the Reform of Civil Litigation Funding and Costs”, November 2010, 30

<sup>22</sup> Ministry of Justice “Proposals for the Reform of Civil Litigation Funding and Costs”, November 2010, 30

<sup>23</sup> Ministry of Justice “Reforming Civil Litigation Costs in England and Wales: Impelentation of Lord Justice Jackson’s recommendations- The Government’s response” <http://www.justice.gov.uk/downloads/consultations/jackson-report-government-response.pdf>

<sup>24</sup> Ministry of Justice “Proposals for the Reform of Civil Litigation Funding and Costs”, November 2010, 36

<sup>25</sup> Ministry of Justice “Proposals for the Reform of Civil Litigation Funding and Costs”, November 2010, 22-23

<sup>26</sup> Ministry of Justice “Proposals for the Reform of Civil Litigation Funding and Costs”, November 2010, 18

<sup>27</sup> <http://www.guardian.co.uk/law/2011/may/18/lawyers-demand-pause-legal-aid-reforms?INTCMP=SRCH>

ATE from the losing party could “prevent ordinary people holding powerful institutions to account”.<sup>28</sup>

The Government also noted the recommendation of Lord Young in his report “Common Sense, Common Safety” to extend the framework of the Road Traffic Accident scheme in low value personal injury cases in Road Traffic Accident to all fast track personal injury claims up to £25,000 including clinical negligence cases. The Government signalled its intention to introduce the extended process by April 2012, subject to consultation and as part of wider civil justice reform.

The Ministry of Justice highlighted that Lord Justice Jackson recommended a ban on the payment of referral fees in personal injury case however this was not dealt with by the Green Paper. The Government indicated that it was awaiting the outcome of the Legal Services Board consultation on referral fees before reaching a conclusion.<sup>29</sup> However the Ministry of Justice has announced in September 2011 that referral fees will be banned in personal injuries claims to tackle rising insurance costs.<sup>30</sup> The Green paper also addresses the issue of reforming the approach to clinical negligence and noted Lord Justice Jackson’s recommendation to implement the NHS Redress Act 2006. The Department of Health are considering how to reform clinical negligence, especially low value claims and improve fact finding as means to speed up claims settlements. It was reported that a Private Members Bill was introduced to amend the NHS Redress Act 2006.<sup>31</sup> This Bill had its second reading in the House of Commons in September 2011.

#### 4 Republic of Ireland- Injuries Board.ie

The Republic of Ireland takes a different approach to dealing with personal injuries. InjuriesBoard.ie (formerly the Personal Injuries Assessment Board (PIAB) was established is an independent statutory body established under the Personal Injuries Assessment Board Act in 2003. InjuriesBoard.ie deals with all personal injuries claims except for medical negligence.<sup>32</sup> In order to make a claim, applicants submit a claim online or by post. Claimants are charged €45 to make a claim for personal injury and in the case of respondents who consent to an assessment by InjuriesBoard.ie, they must pay an application fee of €850. If the respondent’s insurance company agrees

<sup>28</sup> The Guardian “My libel victory underlines a need for journalists to check their facts” 29 July 2011, <http://www.guardian.co.uk/commentisfree/libertycentral/2011/jul/29/sarah-thornton-review-journalists-telegraph>

<sup>29</sup> Ministry of Justice “Proposals for the Reform of Civil Litigation Funding and Costs”, November 2010, 18

<sup>30</sup> Ministry of Justice “Minister announces referral fee ban”, 9 September 2011, <http://www.justice.gov.uk/news/features/feature-090911a.htm>

<sup>31</sup> Ministry of Justice “Proposals for the Reform of Civil Litigation Funding and Costs”, November 2010, 89

<sup>32</sup> [http://www.citizensinformation.ie/en/justice/civil\\_law/personal\\_injuries\\_assessment\\_board.html](http://www.citizensinformation.ie/en/justice/civil_law/personal_injuries_assessment_board.html)

to handle this claim, they will pay the fee.<sup>33</sup> In 2009, the average timeframe from the date of the respondent consenting to InjuriesBoard.ie assessing the claim is 6.5 months. Prior to the introduction of InjuriesBoard.ie, the average timeframe for cases pursued through the litigation system prior was 36 months.<sup>34</sup> The actual savings in 2009 was €44.1 million (InjuriesBoard.ie v the litigation system ).<sup>35</sup> The Access to Justice Review Team considered a statutory body to determine the quantum of damages along the lines Injuries Board model. The Review Team highlighted that whilst this body works well, it was established to meet the particular requirements of that jurisdiction. It was concluded by the Review Team that the circumstances in NI do not warrant the potential expenses and risks associated with setting up such a scheme.<sup>36</sup>

## 5 Conclusions

The Access to Justice Review suggested that one of the significant areas that could be removed from the scope of civil legal aid is money damages. This paper has considered the Review Team's suggestions as to how money damages could be funded. The Review Team recommends the introduction of Conditional Fees in NI through commencement of Article 38 of the Access to Justice Order (Northern Ireland) 2003 and the relevant recommendations in Lord Justice Jackson's Review of Civil Litigation Costs

The Ministry of Justice has proposed changes to civil litigation costs, implementing Lord Justice Jackson's recommendations. These include abolishing the recoverability of CFA success fees and ATE insurance for the losing party as well as increasing general damages by 10%. It should be noted however concerns have been raised particularly with regards to the changes to CFAs. In response to the Ministry of Justice's proposals it has been suggested that some of the changes to No Win No Fee and ATE could have an adverse impact for example on lawyers taking up public interests cases or ordinary people holding powerful institutions to account.

The Republic of Ireland has taken a different approach in establishing a statutory body to assess all personal injury claims except for medical negligence known as InjuriesBoard.ie (formerly the Personal Injuries Assessment Board). Prior to the introduction of InjuriesBoard.ie, the average timeframe for cases pursued through the litigation system prior was 36 months. The InjuriesBoard reported that actual savings in 2009 was €44.1 million ( InjuriesBoard.ie v the litigation system). The Access to Justice

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<sup>33</sup> [http://www.citizensinformation.ie/en/justice/civil\\_law/personal\\_injuries\\_assessment\\_board.html](http://www.citizensinformation.ie/en/justice/civil_law/personal_injuries_assessment_board.html)

<sup>34</sup> <http://www.injuriesboard.ie/eng/Statistics/>

<sup>35</sup> <http://www.injuriesboard.ie/eng/Statistics/>

<sup>36</sup> Access to Justice Review Northern Ireland "The Report", August 2011, 84.

Review Team considered a statutory body similar to the model in the Republic of Ireland but concluded that the circumstances of NI did not warrant the expenses or risks associated with setting up such a scheme.