"Should a cap be imposed on the contingency fee to be deducted from Damages?" (it is 35% in ETs and is proposed at 25% for PI by Lord Justice Jackson). Do different considerations apply to commercial cases?

1. The cost reform objectives are reiterated in the impact assessment of the MoJ IA No: MoJ 080 27/04/11 (MoJ 080); "the primary objective of the proposals is to reduce civil litigation costs so that they are more proportionate to the level of claims, to ensure that unnecessary and excessive litigation is not encouraged, and to rebalance the cost liabilities of claimants and defendants, where currently claimants are subject to significantly less financial exposure than defendants. The proposal's aim is to reduce costs while ensuring that parties who have a valid case are able to bring or defend the claim."

2. It is clear that a cap will achieve the cost saving and proportionality objectives, and has no impact on rebalancing, leaving the key objective for the working party to consider: "are the parties who have a valid case able to bring or defend a claim?"

3. The MoJ proposal is to introduce a cap on CFA success fees in personal injury cases of 25% of damages excluding damages for future care and loss. Lord Justice Jackson, in his 10th lecture in the implementation programme on 29th February 2012 "Why Ten Percent" in footnote 13 comments "the Personal Injuries Bar Association (PIBA) and the Bar Council have recently sent me forceful submissions that the 25% cap should apply to all damages, as it did before April 2000. I can see the sense of allowing the dispensation in appropriate cases, provided that the success fee is only payable by the client, as it was pre April 2000. The reason why I proposed ring-fencing damages in respect of future loss was out of deference to the vociferous submissions of PIBA, APIL and others in 2009."

4. There are two categories of case which are most impacted by the 25% cap. Firstly, those cases which are close to 50:50 in prospects, but still satisfying the old Legal Aid merits test *(see 1 below)*. The concern is that the case should be capable of being brought, but that it warrants a higher uplift to make it commercially viable. Secondly, cases with high costs to damages ratio, for instance some fatal accident cases due to the very low level of bereavement damages (£11,800), and in claims for the young, elderly and increasingly the unemployed where the past loss claim is modest due to there being no loss of earnings element. Again, the case warrants a higher uplift to make it commercially viable. Stewarts

Law's response to Lord Justice Jackson's Review of Civil Litigation Costs: Final Report, at page 2 paragraph 2, referred to their own data, which showed that the average minimum prospects of a post Jackson case would need to be in excess of 75% to make it commercially viable. Consequently meritorious claims which carry a risk of losing greater than 25% would be at real risk of not securing representation. When this cohort of cases were analysed on an individual basis 26% of the group would not have been accepted at the lower post-Jackson success fee and a further 18% would have been borderline for acceptance *(see attached).* This data, which is obviously commercially sensitive, has been submitted by Stewarts to the MoJ direct. They (the MoJ) were apparently content with the methodology because they asked Stewarts in July 2010 to help them create a similar spreadsheet as they were hoping to gather their own larger dataset. The Forum of Complex Injury Solicitors (FOCIS) data produced a similar result we understand.

5. In these two categories paradoxically the 25% cap designed to protect the claimant acts against him or her in preventing their claim being brought at all and it is this which is of concern in fulfilling the Government's stated objective. In such circumstances it seems appropriate to allow the case to proceed by increasing the potential costs recovery by the solicitor.

6. It is recommended that the cap should apply to <u>all</u> damages to avoid too many applications for liberty to apply *(see footnote 1)*. Much greater proportionality is achieved by the percentage cap. In Lord Justice Jackson's final report, page 17, paragraph 2.20, he states with regard to judicial surveys that "subject to various caveats, claimant costs in CFA cases, which have been analysed, range from between 158%-203% of the damages awarded. Claimant costs in non CFA cases, which have been analysed, range between 47%-55% of the damages awarded". It is also clear that Lord Justice Jackson's original recommendation was made on the strength of submissions received, rather than on any other basis (see paragraph 3 above). It appears clear that PIBA have reflected on their view and it is recommended that APIL should also be consulted on this point, and if they agree with PIBA, these joint submissions should attach considerable weight, and be accepted.

7. In making this recommendation we are alive to the possibility that in some cases the recovery achieved from damages may be greater than that which is economically required. We regard this as a lesser evil than the claimant being unable to bring the claim at all, and one which should be tempered by increased competition between law firms.

8. Residually, there should be a liberty to apply to the court provision, on the grounds which applied to the original Legal Aid merits test pre 2000 (see footnote 1). There was pre-2000 no cap on the

overall amount of the success fee, although the Law Society recommended a 25% cap on all damages, which was largely followed by most members.

9. We recommend that the caps applicable to CFAs and DBAs should be harmonised in terms of applicability and quantum.

10. In making these recommendations in respect of personal injury claims, we do not favour caps in respect of commercial claims, where we regard the negotiation of terms as one between competent parties.

11. We do suggest that adoption of the FOS “consumer” and “business” definitions may be useful. This would invoke the 25% cap on claims brought by claimants who are individuals (whether for personal injury or any other matter) and businesses with a turnover below €2m and 10 employees, but no cap for businesses with a higher turnover or workforce.

John Spencer & Peter Smith

Dated: 29th May 2012

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1. Civil Legal Aid Merits Test - Section 15(2) of the Legal Aid Act 1988, provides that: 'A person shall not be granted representation for the purposes of any proceedings unless he satisfies the board that he has reasonable grounds for taking, defending or being a party to the proceedings'.

The board's note for guidance 6-06 in the Legal Aid Handbook 1992 indicates that the area office must be satisfied, on the facts put forward and the law which relates to them, that there is a case or defence which should be put before a court for a decision.

The availability and strength of evidence to support the facts alleged will be taken into account.

The same note goes on to say that the aim must not be over cautious but, on the other hand, not to grant legal aid for cases where there is little or no hope of success.

The second limb of the merits test is the so-called reasonableness test which, in accordance with s 15(3) of the 1988 Act, permits civil legal aid to be refused if, in the particular circumstances of the case, it appears to the board unreasonable that the applicant should be granted representation.

This limb permits legal aid to be refused, for example, if the application reveals some illegal motive, the conduct of the applicant is such as to be unacceptable to the court or the proceedings are not likely to be cost effective.