

**“What cap, if any, should be imposed on the
Contingency fee to be deducted from damages
in personal injury cases?”**

Options Paper

The Ministry of Justice (MoJ) proposes a cap should be imposed on the contingency fee to be deducted from damages of 25% of general damages and past losses. The working party (WP) has considered the impact of this proposal, and options available with regard to the cap with two issues in mind, namely access to justice and protection of damages. The options which have been considered by the WP are:

Option 1 – 25% of general damages and past losses. This maximises the protection of damages, but creates potential deterioration in access to justice.

Option 2 – 25% of all damages. This provides protection of damages but without a serious denial of access to justice. This also provides limited protection of damages.

Option 3 – 35% as applied in Option 1 or 2. This is the percentage applied in employment tribunal cases. 25% appears a more modest and appropriate percentage to use in personal injury cases and is consistent with MoJ thinking.

Option 4 – allowing a “liberty to apply to the Court” provision labelling the usual cap to be varied subject to criteria as used to apply under the Civil Legal Aid merits test “reasonable grounds for taking, defending or being a party to proceedings”. Whilst this maximises flexibility, it is thought by the WP that this option is likely to give rise to a small industry in applications to the Court and, on that basis, is undesirable.

Option 5 – no cap. This allows no protection of damages. This appears to be the position presently advanced by PIBA. In essence, their case is that the cap is not to protect the Defendant only the Claimant. If so, the market should decide and the Ministry should do nothing.

The WP favours Option 2 since it provides back stop damages protection, but without significantly damaging access to justice. The WP is particularly concerned about those cases closest to 50:50 in prospects (but still having merit in old Legal Aid test terms), and those cases with a high costs to damages ratio. There is evidence that potential Claimants in these categories would be denied access to justice and this was undesirable. The old law Society recommended 25% cap applied to all damages. Complex injury cases typically involved most work around future losses. There was increasingly effective competition in the market which offered some protection to potential Claimants.

The WP noted and considered the position of APIL; the APIL EC is in favour of a cap being set against all damages, rather than general damages and past losses, and that the cap should be at least 25% and no more than 50% of damages. The EC felt it needed to see a fully worked through scheme in order to identify more precisely the percentage which should be applied.

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