PERSONAL INJURIES BAR ASSOCIATION

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To: Robert Wright Esq.
Ministry of Justice

Cap on Success Fees

1. This paper deals with the suggestion for a cap on success fees limiting them to 25% of the sum of general damages and past losses i.e. 25% of the award *excluding* damages for future loss.

2. At the recent CJC workshops on implementing the reform the MoJ produced a paper on the cap stating (emphasis added) that:

> 2. The cap reflected Sir Rupert's recommendation which in turn endorsed the voluntary cap *which existed in the previous non recoverable regime* where solicitors could take a success fee of not more than 25% of damages excluding future care and loss.

3. The emphasised clause is a mistake. The system never worked on the basis of a cap at 25% of only general damages and past loss. It was a cap at 25% of *all* damages.

4. In his Preliminary Report at 3.1 and 3.2, Jackson LJ summarised the previous position accurately: when CFAs were introduced in 1995 the Law Society introduced a voluntary cap on recovery of success fees at 25% of all damages recovered.

5. In the Final Report Jackson LJ stated (Solution page 112 para 4.20):

> "In my view the proper course is to abolish recoverability and to revert to style 1 CFAs as they existed before April 2000. Those arrangements were satisfactory and opened up access to justice. … During December 1996 APIL confirmed that those

> arrangements provided access to justice for personal injury claimants and that those arrangements were satisfactory.

However Jackson LJ then had crossed wires and went on to recommend:

> In order to assist personal injury claimants in meeting the success fee out of damages I recommend that:
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> (i) the level of damages for pain suffering and loss of amenity be increased by 10% across the board.
>
> (ii) The amount of the success fee which lawyers may deduct be capped at 25% of damages excluding damages referable to future care and for future losses.
>
> …

6. It is important to identify the extent of this change because, with the percentage remaining at 25%, the 2 positions have a superficial similarity. Where there is no claim for future losses, there will be no difference in practical outcome - we need not worry about catering for the vast majority of small claims when considering the argument over the cap. It only has a practical difference in cases with future losses - the substantial claims for the seriously injured. In those cases, the change reduces the size of the success fees pool *by about three quarters*; more in some. The seriously injured will be affected disproportionately by the change of position.

7. The effect of this will be very significant in terms of restricting access to justice in substantial (hence more heavily defended) cases involving future losses. Good cases (60-80% chances of success) which were economic to litigate on CFA before 2000 will be uneconomic if the misapprehension of how the voluntary cap applied historically is retained in future thinking.

8. The historical backdrop should also be appreciated. APIL's confirmation in 1996 (see above under §5) was given at a time when legal aid was still available in clinical negligence cases; and most high value PI cases were being handled under existing legal aid certificates. The new system had barely been road-tested.

9. PIBA can find no express justification in the final report for the massive reduction in available success fees in substantial cases. This occurs at a time when LSC funding is being removed from clinical negligence claims, which require very substantial investment in work and carry significant risk. Defendants, including the Government in its many guises, will be indirectly defended from meritorious (60-80%) claims of the more seriously injured members of society.

10. Under the proposed "QOCS and no recoverability" scheme, Defendants have no interest in the operation of the cap in terms of costs - unless they are open in terms of discouraging meritorious claims from being started in the first place.

11. The only legitimate effect to be considered is on Claimants as a group. A balance has to be struck between the amount by which successful Claimants have to subsidise unsuccessful Claimants through the system, and the number of would-be successful Claimants who are denied entry to the system altogether.

12. There is no Claimant lobby asking for a constricted cap. No charity or union or other legitimately-interested body is calling for it as a protection of successful claimants. One of the reasons put forward underpinning a need of reform is to make Claimants take an interest in the costs they incur; and it is presupposed that they will actively seek different quotations as to base and success fees. With downward pressures of such a nature, there is no further need of a highly constricted cap which will deny would-be Claimants with good cases access to the system.

13. The problem of a constricted cap is particularly acute for the trial advocate.

14. If the cap has already bitten before trial, how can there be access to appellate justice on a level playing field for claimants under the current proposal? Appellate review is a basic human right in all cases but particularly important in tricky, hard fought ones and at the cutting edge. Take mesothelioma disputes, pleural plaques (*Rothwell*), limitation (*Hoare*) or fatal accidents involving suicide (*Corr*), take stress at work (*Hatton*) or MIB cases *(Phillips*).

15. Take as an arithmetical example a 3 day County Court case with total damages of say £250,000: £50,000 in general damages and past losses and £200,000 of future losses. With a contested trial (the Defendant must have considered it had a better than 50% chance of success) the success fee is set at 100%. The suggested cap, however, will allow a success fee pool of £50,000 x 25% = £12,500 only. Let us imagine solicitor's fees of £50,000 including the trial, and barrister's fees of £5,000. On a pro rata basis the barrister will receive 5,000/55,000 x the available £12,500 = £1,136. This is an actual uplift of only 23% for working mostly at the sharp end of a trial which could go either way. Even money litigation at trial (the Bar's staple after changes to Fast Track) cannot be endured at odds of roughly 4:1 *on*. And it is simply impossible to run or respond to an appeal on any economic basis.

PIBA's submission

16. PIBA is concerned enough that successful Claimants will have to contribute to the system out of their damages (but for the purposes of this Paper it is assumed to be so.) The concern for the successful, however, is overwhelmed by that for the injured members of society who will, if the cap is constricted, never be able to count themselves as successful since they will be denied entry into the system.

17. If QOCS is to be introduced, the cap should reflect Jackson LJ's original position. It should be set at 25% of *all* damages, which was the actual arrangement before 2000.

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For and on behalf of PIBA

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