

Caps on Success Fees in CFA Cases and Contingency

Fees in DBA cases

1. This paper is intended to set out in headline form the key issues affecting the position on caps on both success fees in CFA cases and contingency fees in DBA cases. In both scenarios it is proposed that a cap be put in place limiting the amount to be deducted for either a success fee or a contingency fee at 25% of the sum of general damages and past loss. In other words, neither a success fee or a contingency fee percentage may be applied to any element of damages for future loss. It is submitted that this is a major cause for concern and that this policy needs to be reviewed.
2. It is important to note that the position of a cap has no impact or relevance to the defendant. It is strictly a matter between the claimant and his or her lawyer.
3. It should be noted that the present proposed cap on CFAs restricting the percentage reduction to general damages and past loss is inconsistent with the original arrangement for CFAs introduced in 1995. Under this regime the cap on success fees in CFA cases was set at 25% of all damages recovered. There is some confusion within the final report of Jackson about this issue which has been highlighted in representations made by the Personal Injuries Bar Association. Further, it appears that Lord Justice Jackson may recognise this point bearing in mind the apparent concession about the scope of the cap referred to in his 10th implementation lecture (on 29th February 2012, footnote 13 to para 2-7).
4. The position of a cap limited to general damages and past loss has a very serious impact whether in the context of the CFA funding regime or the DBA one. The item has no practical relevance in the context of low value cases where there is likely to

be no or no insignificant element of future loss. However, in the context of many more serious personal injury cases the damages for future loss make up the substantial proportion of the case and this has the greatest influence on the potential level of cost being incurred. In many of the most serious injury cases general damage and past loss account for less than 10% of the overall damages in issue. It follows the position of the cap as currently prescribed potentially disproportionately affects those who have the more significant claims and are by definition the most needy.

5. The clear implication is that this will risk restricting access to justice. The position is best understood by reference to a worked example. The illustration used by the Personal Injuries Bar Association in the paper of the 9th November 2011 clearly demonstrates the concern. The principles of the arithmetic apply whether in the context of a success fee for the CFA or in the context of a DPA.

“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 $£50,000 \times 25\% = £12,500$ only. Let us imagine solicitor’s fees of £50,000 including the trial and barrister’s fees of £5,000. On a pro rata the solicitor will receive $50/55 \times £12,500 = £1,136$ ”.

The simple point shown by this example is that the level of return is uneconomic for either a solicitor or a barrister.

6. The above concern becomes amplified in the context of appeals. There is no additional fund to be accessed should an appeal be necessary. Hence, the economics of the case become even more skewed should an appeal be pursued.
7. There is a further practical problem which arises if the proposed cap mechanism is used. In many cases the defendant will simply make a global offer to settle. This will

not be broken down between heads of claim. How then are the claimants' representatives (solicitor or barrister) to attempt division so as to determine a number to which the relevant percentage applies? It creates the potential for a conflict of interest.

8. An additional complication may arise in the context of interim payments. On the largest cases there is frequently a claim for an interim payment and in many of the catastrophic injury cases that interim payment is intended to be utilised for the purchase of a suitably adapted property. Frequently this interim payment will substantially exhaust the damages to be recovered for general damages and past loss. How then would one work any claim for recovery of either a success fee or contingency fee? The potential for conflict of interest between those representing the claimant and the claimant is again raised.
9. The position of the proposed approach to caps needs to be considered in the context of the MOJ's announcement on Qualified One Way costs Shifting (QOCS). The MOJ paper of March 2011 said, "Successful claimants will recover their base costs (the lawyers hourly rate fee and disbursements) from defendants as for claims whether funded under a CFA or otherwise but in the case of a DBA the costs recovered from the losing side would be set off against the DBA fee, reducing the amount payable by the claimant to any shortfall between the cost recovered and the DBA fee".

It follows that there is a relationship between a potential QOCS impact and the size of any contingency fee claimant. The implications of this have not been thought through but it can easily be understood that the lower the potential contingency fee amount (caused by the limit of the cap) the greater the tension that arises on the viability/commerciality of the case. It is conceivable that this might further deter to the pursuit of meritorious cases.

10. The overall concerns outlined above are recognised by both the consumer organisations and charities who have a particular interest on behalf of claimants in this area. All have expressed a concern about the proposed mechanism of operating

the cap and none are lobbying for a constricted cap. It is argued that such a cap is necessary in order to protect the consumer but this case fails to have proper regard for the very significant risk that the meritorious cases will not be pursued because they will be uneconomic. It should be noted that if the percentage deduction for success fees/contingency fee were to be applied to the entirety of the damages award then there is a strong probability that commercial pressures will apply whereby claimants will actively seek different quotations as to base costs and success fees/contingency fee percentages and this will naturally buy downward pressure.

11. A further and obvious point is that the position of the cap as presently prescribed may create an inequality of resource as between claimant and defendant. The claimant representatives will be very restricted on the level of costs to be recovered whereas the defendant will have no such position and will be able to operate on a commercial basis with their representatives.
12. In the circumstances, it is submitted that it is inappropriate to impose a cap on success fees or a cap on contingency fees limited to the sum of general damages and past loss. Instead, there should be an amendment of the proposed cap so as to allow the full access to all damages.
13. If it is still felt that this is a step too far, then, it may be possible to allow some element of process to be introduced to provide some reassurance. For example, in the context of cases for children or persons under a disability a Judge (Master/District Judge) could on the ex-parte application of those representing the proposed claimant sanction the utilisation of an agreement which attached to all heads of damage. The Judge would be able to determine whether the cap should attach to all heads of damage so as to ensure adequate potential funding resource. This could be dealt with as a paper exercise.

This proposal could potentially be widened to cover all cases if there was a major reservation about the issue, although it is submitted that fully informed adults ought to be in a position to contract as they deem appropriate.

Additionally it should be noted that safeguards can be applied as the professions regulatory bodies impose appropriate standards of professional behaviour so as to mitigate any risk of abuse.

14. A further variation in the context of para 13 might be for the Judge to consider whether to allow the cap to attach to other specific heads of loss (such as future loss of earnings) rather than all damages but this style of approach starts to add in layers of complexity which are potentially unattractive.

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