

List of Recommendations

- (1) There should be only **one** corresponding set of regulations for all cases where the funding mechanism is by way of a DBA (but not by a CFA which is covered by separate regulations), whatever the nature of the claim and whether proceedings are issued or not.
- (2) The statutory definition of a DBA in s.58AA (3) (a) CALSA) Court and Legal Services Act) relating to DBAs in employment tribunals should apply to **all** DBAs.
- (3) The current general definition of personal injury in CPR 2.3*, recently applied to the Qualified One Way Costs Shifting (QOCS) regime, should also be adopted in relation to DBAs. (This means that a professional negligence claim arising from a personal injury claim is **not** a personal injury claim).
- (4) The DBA that is approved for use and regulated in England and Wales is **not** referred to in the Rules and Regulations (**annex 6**) to as the 'Ontario' model.
- (5) The WP prefers the model based on the contingency fee system in Ontario, which is the basis of all its further recommendations below, but adds the important caution that care will need to be taken in determining precisely what elements of unrecovered costs (solicitor's fees, counsel's fees, VAT, ATE premium and disbursements) may be taken from the contingency fee after prior deduction of recovered base costs and disbursements.
- (6) The Solicitors Regulation Authority and Bar Standards Board should review their current guidance to ensure that the use of new DBAs is adequately covered alongside the existing guidance in relation to CFAs.
- (7) In employment cases the cap should remain at 35%.
- (8) In personal injury cases conducted on a DBA the contingency fee (comprising solicitor's fees and counsel's fees plus VAT) but excluding disbursements and ATE premiums should be capped at a maximum of 25%.
- (9) The damages from which the contingency fees can be taken in personal injury cases should **not** be limited.
- (10) In commercial cases there should **not** be a cap on the contingency fee, but consideration needs to be given to a cap – possibly 50% - in consumer/micro enterprise commercial cases (as defined in the FSA handbook.)
- (11) The Court should approve in the usual way the costs at the same time as approving a settlement where the DBA relates to a claim on behalf of a child or patient.

- (12) When lawyers who wish to use a DBA to fund a multi - party/group/collective action make an application to the Court for a Group Litigation Order (GLO) they should simultaneously apply to the Court for approval of the level of the contingency fee within the regulated cap on the % deduction from damages. If a GLO is not sought the level of the contingency fee will be open to challenge by the clients at the end of the case.
- (13) Those who draft the rules and regulations should consider the drafts in Annex 6 to this report and pay attention to the desirability of consistency of approach in the regulation of DBAs and CFAs, allowing for the basic differences in the two models.
- (14) CPR 44 is amended where necessary to include reference to DBAs.
- (15) In the 15 years since CFAs have been lawful the legal profession's various specialist litigation associations have produced their own varieties of model CFA, the same steps should be taken by the specialist associations and professional bodies in relation to model DBAs.
- (16) Some appropriate mechanism (possibly the CPR) is adopted to extend 'Hodgson immunity' from adverse costs to lawyers acting on a DBA.
- (17) Some appropriate mechanism (possibly the CPR) is adopted to make it clear that the *Arkin* principle also applies to a Third Party Litigation Funder who provides commercial finance in a DBA case.
- (18) There should not be an obligation to notify the opposing party that lawyers have entered into a DBA and that appropriate amendments are made to the CPR.

**Civil Procedure Rule 2.3: 'claim for personal injuries' means proceedings in which there is a claim for damages in respect of personal injuries to the claimant or any other person or in respect of a person's death, and 'personal injuries' includes any disease and any impairment of a person's physical or mental condition.*