Civil justice reforms

The Government is reforming civil litigation funding and costs to remove unnecessary costs and to restore balance to the system.

The reforms will be implemented in April 2013 through Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (the Act), and associated orders and regulations and changes to the Civil Procedure Rules, subject to a delayed implementation for mesothelioma claims, which will not come into effect until a review has been undertaken, and insolvency claims, which will not come into effect until April 2015).

The full package of reforms is as follows:

Reforming conditional fee agreements

The Act will abolish the recovery of success fees and after the event (ATE) insurance premiums from the losing side. People will still be able to use conditional fee agreements (CFAs) but will have to pay their lawyer's success fee and any ATE insurance (if taken out) themselves.

Recovery of after the event (ATE) insurance premiums in clinical negligence cases

The provisions in the Act allow a limited exception in respect of clinical negligence cases where ATE insurance premiums relating to expert reports will remain recoverable.

Following a consultation with stakeholders, we are considering the next steps and are discussing the various options available with stakeholders. We will announce the way forward shortly.

25% cap on success fees in personal injury cases

The success fee in personal injury cases will be subject to a cap of 25% of damages (subject to this amount not exceeding the regulatory maximum of 100% of base costs), excluding damages for future care and loss. No more than 25% of such damages can be taken as a success fee in personal injury cases (including solicitors' success fee, any barristers' success fee and VAT).

The cap will apply to net damages after Department of Work and Pensions (DWP) benefit recovery (the DWP seek to recover benefits paid out where a claimant subsequently recovers damages including for loss of income).

The lawyer will be required to provide clear information to the claimant on how the success fee has been calculated including showing the breakdown between solicitor and barrister (if appropriate), and the type of damages that the cap applies to (excluding future care and loss). This will be a new requirement, for both CFAs and damages-based agreements (DBAs), and is designed to help transparency and consumer protection, and make it easier for clients to compare success fees.

The cap will not apply to appeal proceedings. The amount of success fee will be negotiated between the lawyer and client.

The orders and regulations are now being drafted and will be consulted on, where required, with statutory consultees.

Damages-based agreements

The Act will allow the use of damages-based agreements (DBAs) in all areas of civil litigation. DBAs will provide a useful additional form of funding for claimants.

There will be a 25% cap on the amount of damages, excluding damages for future care and loss, that can be taken as the lawyer's fee under a DBA in personal injury cases.

There is already a pre-existing cap of 35% on damages in employment tribunal cases.

There will a cap of 50% on damages for all other cases under a DBA in civil litigation.

The regulations are now being drafted and will be consulted on statutory consultees.

10% increase in non-pecuniary general damages

There are other measures being introduced outside of the Act such as the 10% increase in non-pecuniary general damages such as for pain, suffering and loss of amenity, which will help balance the impact of the CFA changes.

This is being taken forward by the senior judiciary. The Court of Appeal has recently stated that this increase would take effect from 1 April 2013 in the case of Simmons v. Castle [2012] EWCA Civ 1039.

Costs protection in personal injury claims: Qualified one way costs shifting

A system of qualified one way costs shifting (QOCS) in personal injury cases will also be introduced so that claimants conducting their case properly will not have to pay towards defendants' costs if the claim fails.

The Government has previously issued two Written Ministerial Statements (24 May 2012: Column 94WS and 17 July 2012: Column 130WS) setting out further details on the application of QOCS, which are as follows:

QOCS would be available for all:

- claimants whatever their means; there is to be no financial test to determine eligibility. Claimants who lose will not have to contribute towards defendants' costs as long as they behave appropriately (there is to be no minimum payment by a losing claimant);
- claims that are discontinued during proceedings (subject to the claim not being fraudulent); and
- appeal proceedings; the requirement for permission to appeal would be able to control unmeritorious appeals.

QOCS protection would be lost if the:

- claimant is found to be fraudulent on the balance of probabilities;
- claimant has failed to beat a defendant's 'Part 36' offer to settle; and
- case has been struck out where the claim discloses no reasonable cause of action or where it is otherwise an abuse of the court's process (or is otherwise likely to obstruct the just disposal of the proceedings).

The principles set out in Part 36 of the Civil Procedure Rules (offers to settle) would override QOCS protection, but only up to the level of damages recovered by the claimant.

The Civil Procedure Rules have been drafted on this basis and will be considered by the Civil Procedure Rule Committee in October 2012.

Increased sanctions under Part 36 of the Civil Procedure Rules

The sanctions under Part 36 of the Civil Procedure Rules (offers to settle) are being reformed in order to encourage early settlement. The previous two Written Ministerial Statements (mentioned above) also published further details, which are as follows:

- There is to be an additional amount to be paid by a defendant who does not accept a claimant's offer to settle where the court gives judgment for the claimant that is at least as advantageous as an offer the claimant made to settle the claim. This additional sanction is to be calculated as 10% of damages where damages are in issue, and 10% of costs for non-damages claims;
- In mixed (damages and non-damages) claims, the sanction will be calculated as 10% of the damages element of the claim;
- The sanction is to be subject to a tapering system for claims over £500,000 so that the maximum sanction is likely to be £75,000; and
- There would only be one sanction applicable for split trials.

Section 55 of the Act, which provides for rules of court to be made in relation to civil proceedings involving a claim for money[1], came into force on 1 October 2012 under The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No.2 and Specification of Commencement Date) Order 2012. This section also confers a power on the Lord Chancellor to provide that rules of court may make similar provision in relation to civil proceedings which include a non-monetary claim.

Further regulations are being drafted and will be consulted on. Changes to the Civil Procedure Rules have also been drafted and will be considered by the Civil Procedure Rule Committee in October 2012.

Proportionality

There will be a new rule on proportionality; the test is intended to control the costs of activity that is clearly disproportionate to the value, complexity and importance of the claim.

Changes to the Civil Procedure Rules have been agreed by the Civil Procedure Rule Committee and will come into effect on 1 April 2013.

Referral fees

The Act also prohibits the payment or receipt of referral fees in personal injury cases. This is consistent with the CFA reforms and will further reduce incentives for unnecessary litigation.

The ban will capture all the main parties – solicitors, claims management companies and insurers. Any breaches of the ban will be for the relevant regulators to enforce and they will impose appropriate sanctions on the persons whom they regulate. The

[1] To permit a court to order an additional amount to be paid to a claimant by a defendant, where the defendant does not accept the claimant's offer to settle and the court gives judgment for the claimant that is at least as advantageous to the claimant has the claimant's offer.

regulators are the Solicitors Regulation Authority, the Claims Management Regulator, the Bar Standards Board and the Financial Services Authority.

The regulators are required to have appropriate rules in place to enforce the ban from April 2013. The Ministry of Justice have been and will continue to work with all regulators to ensure that a consistent approach to enforcing the ban is taken.

The Government is implementing a number of other reforms in the future, which include:

Road Traffic Accident Scheme

In a written ministerial statement issued on 9 February 2012, the government announced the publication of the Government's response to the civil justice consultation on "Solving disputes in the county courts", stating it will be extending to £25,000 the existing RTA PI scheme. Previously, the government announced its intention, by April 2013, to

- Extend the current Road Traffic Accident PI scheme to include claims up to £25,000 (currently £10,000);
- Expand the scheme to cover employers' liability (EL) and public liability (PL) claims; and
- Reduce the fixed recoverable costs within the scheme.

The progress so far is as follows:

- The RTA Pre-Action Protocol has been amended by a sub-committee of the Civil Procedure Rule Committee (CPRC) and will be submitted for approval by the full CPRC in early October.
- The sub-committee has also drafted a new EL/PL Protocol to support "horizontal" extension of the scheme. This will also be submitted for to the CPRC for consideration in October.
- The sub-committee is also working on the amendment/drafting of the necessary claim forms and the relevant Civil Procedure Rules (CPR)
- Subject to approval of the Protocols, the RTA Portal Company (which runs the software supporting the existing Protocol) is working towards the modification of the RTA Portal and the establishment of a new EL/PL Portal by April 2013.
- Work on fixed recoverable costs is being taken forward.

Whiplash

The Government will be issuing a consultation document on Reducing the Costs and Numbers of Whiplash claims. We will be seeking stakeholder views on a number of areas especially on the proposal to increase the small claims limit for personal injury cases from £1k to £5k and also on the introduction of independent medical panels.

Copies of the consultation and related impact and equalities impact assessments will be available to download from the MoJ website following publication.

The consultation will run for 12 weeks and a number of stakeholder sessions will be held during this period, if you are interested in attending one of these sessions please send your details to: whiplashcondoc@justice.gsi.gov.uk

Background

CFAs are a type of 'no win no fee' agreement under which lawyers do not receive a fee from their client if they lose a case, but can charge an uplift (a 'success fee') on top of their base costs if they win. When the lawyer wins a case, these costs including the success fee are 'recoverable' i.e. paid by the losing party. Under the current arrangements, success fees of up to 100% of base costs and after the event (ATE) insurance premiums are recoverable from the losing party. ATE insurance can be taken out by parties in a CFA funded case to insure against the risk of having to pay their opponent's costs and their own disbursements if they lose. This means that defendants can be liable for almost twice the costs they would normally have to pay if the case was not on a CFA.

CFAs became enforceable under section 58 of the Courts and Legal Services Act 1990, which was brought into effect in 1995. The first Order made it possible for CFAs to be enforced in personal injury claims, insolvency proceedings and applications before the European Court of Human Rights. The initial introduction of CFAs was intended to plug the access to justice gap for those who did not qualify for legal aid but had insufficient funds to afford to pay for legal services. In 1998 the category of case in which CFAs were permitted was extended to all civil proceedings, but not to family and criminal cases.

The current regime, with recoverable success fees and after the event insurance premiums, allows claims to be pursued with no real financial risk to claimants and with the threat of excessive costs to the defendant. The Government believes that access to justice for all parties depends on costs being proportionate and unnecessary cases being deterred.

Lord Justice Jackson, a Court of Appeal judge, carried out a year long review of the civil litigations costs and published his final report, Review of Civil Litigation Costs in January 2010[2]. After full consultation[3], the Government published its response on 29 March 2011 indicating that the CFA reforms and other related measures will be implemented. Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act contains provisions to implement the changes.

These civil justice reforms will restore a much needed sense of proportion and fairness to the existing regime, not by denying access to justice, but by returning fair balance to the system. The reforms will also help businesses and other defendants who have to spend too much time and money dealing with avoidable litigation, actual or threatened. Substantial unnecessary costs will be removed from the system, leading to significant savings to defendants.

Ministry of Justice
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[2] http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/jackson-final-report-140110.pdf
[3] [ARCHIVED CONTENT] Proposals for reform of civil litigation funding and costs in England and Wales and http://webarchive.nationalarchives.gov.uk/20111121205348/http://www.justice.gov.uk/downloads/consultations/jackson-report-government-response.pdf