

ACCESS TO JUSTICE

3/05/2014

Funds In Court

Access to Justice

Access to justice has improved with key reforms such as the Civil Procedure Act 2010[Vic]. Concomitantly, the reforms introduced by the Chief Justice of the Supreme Court over the last ten years, have also increased access and reduced delays in many areas of the court. While Funds in Court, the Costs Court¹, and the Legal Services Commissioner², challenge legal costs after a case settles; more could be done to make access fairer and more equitable for clients with a disability. Conditional costs agreement, often referred to as “no win, no fee” agreements have made justice more accessible and have been on the increase and provide good returns to legal firms. Such agreements are based on an assessment of the “risk” associated with winning or losing a case. However, these kinds of agreements can put the client at risk of further financial disadvantage. Can a client with an acquired brain injury or other intellectual disability give informed consent and sign a conditional cost agreement, when their capacity to understand the agreement is both untested and limited? What are the processes in place to safeguard the client’s best interest and can they be improved?

FUNDS IN COURT: ABOUT US

All moneys paid into the Supreme Court of Victoria under an order of the Court or any Act or the Rules are held by the Senior Master of the Court: Supreme Court Act 1986, s. 113(1). Funds are paid in by all Courts and VoCAT.

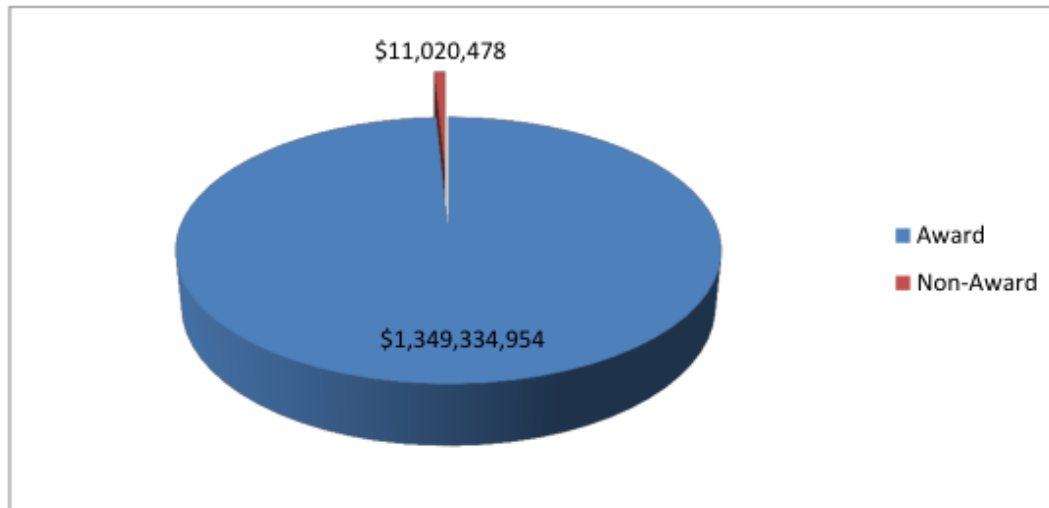
Pursuant to the Courts Legislation (Funds in Court) Act 2004, in any proceeding in the County Court, Magistrates Court or Victims of Crime Assistance Tribunal in which it is adjudged or ordered that money be paid for a person under disability, unless otherwise ordered, that money is paid into the Supreme Court, and held by the Senior Master as if pursuant to an order in a civil proceeding in the Court. “Award” or “compensation” funds.

The bulk of the funds and assets administered by the Senior Master are held for persons under disability, whether due to minority, or an intellectual or severe physical disability (or both). People whose money is so administered are called “beneficiaries”. Such funds are called “Award” or compensation funds. “Non-Award” or “disputed” funds “Non-Award” or “disputed” funds are funds paid into Court that are not held for persons under disability; for example, funds paid into Court as security for costs or in respect of a dispute in a pending proceeding in the Court.

¹ <http://www.supremecourt.vic.gov.au/home/costs+court/>

² VCAT J25/2013 Legal Services Commissioner v Bektas

Break up of "Award" and "Non Award" funds (i.e. financial liabilities to beneficiaries) as at 30 June 2013



FIC is a division of the Supreme Court of Victoria that assists the Senior Master to fulfill his/her duties in administering all funds paid into the Court in civil proceedings and, in particular, the funds paid as compensation to persons under a legal disability [beneficiaries].

The Senior Master, The Honorable Associate Justice John Eftim, is a Judicial Member of the Court. Pursuant to section, 75 of the Constitution Act 1975, the Chief Justice, The Hon Marilyn Warren, and the President of the Court of Appeal, the Judges, Associate Judges and Judicial Registrars constitute the Court

FIC is a "client focused" organisation. All FIC employees are conscious that their primary consideration is providing high-level service delivery to the beneficiaries.

FIC Beneficiaries

FIC beneficiaries represent people from all levels of Victorian society. Approximately half are people under 18 years of age who have received money from Victims of Crime Assistance Tribunal (VoCAT). These young people represent some of the most vulnerable and underprivileged members of Victorian society, many of whom have grown up in dysfunctional and abusive family environments. Those who have received compensation for an injury at birth are, usually, severely intellectually and/or physically disabled. Many would not be able to survive without constant mechanical and physical support. Beneficiaries who have had a transport or work accident have usually suffered an acquired brain injury [ABI]. Such beneficiaries come from the full spectrum of socio-economic and ethnic backgrounds, however many are from disadvantaged backgrounds.

Sources of Awards Funds

Amounts paid to beneficiaries range from \$500 from VoCAT to multi-million dollar awards for medical negligence at birth. The types of compensation received include:

Supreme Court and County Court:

1. Medical Negligence
2. Transport accident
3. Workplace injury

The majority of such funds are usually held "until further order" [UFO]. This means that they cannot be paid out without an order of the Court. The reason for this is that the beneficiary does not have capacity to manage his or her own financial affairs; this is usually because such beneficiaries have suffered an acquired brain injury [ABI]

Magistrates Court: Minor actions and physical injuries (e.g. dog bites, playground accidents) and non-ABI compensation. Such funds are usually paid to minors and are paid out when the beneficiary turns 18.

Victims of Crime Assistance Tribunal: Compensation paid to victims (whether primary, secondary or related) of sexual, physical or psychological abuse. Such compensation is usually paid to minors and is paid out when the beneficiary turns age 18.

FIC advocaes for the rights of the beneficiaries [clients].

FIC employs trust officers, and client liaison officers who work with the beneficiaries so that their day-to-day affairs are manageable. FIC also has an investment unit that works to secure the best growth environment for the beneficiaries' funds so that they remain as financially as strong as FIC can secure.

FIC employs specialised lawyers whose main task is to examine each conditional cost agreement, and or legal cost bills, to confirm evidence of work claimed to have been performed.³

Acquired Brain Injury (ABI) and the Current Legal Process

Acquired Brain Injury (ABI) is an injury to the brain, which results in deterioration in cognitive, physical, emotional or independent functioning. ABI can occur because of trauma, hypoxia (lack of oxygen to the brain), infection, tumor, substance abuse, degenerative neurological diseases or stroke. The impairments to cognitive abilities may be either temporary or permanent and may cause partial or total disability or psychosocial maladjustment (Department of Human Services and Health, 1994)

There are numerous causes of ABI—the most common being motor vehicle accidents. A significant percent of ABI cases occur as a result of motor vehicle accidents and usually lead to severe injury and even death. Another common cause of acquired brain injury is from firearms. Ninety percent of all ABI cases stemming from firearms are fatal. Slip and fall accidents are the leading cause of ABI in adults over 65 and physical abuse or violent shaking is the leading cause of brain injury in infants and young children. Other catastrophic incidents such as sporting accidents and medical malpractice can also cause severe damage to the brain.

The effects of an acquired brain injury can vary depending on the severity of the injury. In some cases, the symptoms are mild and go away with proper treatment. Mild symptoms include headache, confusion, dizziness, fatigue, blurred vision, change in sleep and behavioral patterns, and more.

Some more serious consequences of acquired brain injury include:

- Cognitive Defects – Coma, amnesia, shortened attention span, problem solving and judgment deficits, loss of space and time perception
- Motor Sensory Complications – Weakness, paralysis, poor balance and coordination, spasticity, reduced endurance, tremors, problems swallowing
- Perceptual and Sensory Defects – Loss or change in sensations, tastes, hearing, touch, and smell, and vision problems
- Language and Communication Problems – Difficulty speaking, writing, reading, or identifying objects

³ See case studies which shows the work they perform

- Functional Complications – Difficulty with daily activities such as bathing and dressing, organizational problems
- Social and Psychiatric Changes – Problems understanding or interacting in social situations, irritability, decreased motivation, depression, anxiety
- Traumatic Epilepsy – Two to five percent of ABI victims experience seizures
- Death – Many cases of ABI result in death

The costs associated with treating an acquired brain injury can be substantial and vary on an individual basis. Some victims of ABI require long-term care and rehabilitation while others short-term or less intensive treatment.

When a beneficiary [client] has suffered an acquired brain injury from an accident or from birth, they may have limited ability to make an informed choice about the best course of legal action.

They will also have limited or no access to other funds such as the NDIS nor paid employment during and after the court proceedings leaving them very dependent on the funds awarded for the remainder of their life.

Legal firms that advertise, “no win no fee” appear attractive and there are few other options for the client, or points of informed contact to protect a client and their family prior to signing a conditional cost agreement. At the first point of contact, and subsequent, the client can also suffer from acute distress, anxiety, lack of clarity, memory loss, language barriers, including slurring of speech and will not, depending on the severity of the ABI or disability, be able to comprehend the full implications of signing an agreement.

FIC staff observe these clients are unlikely to have been in a position to give informed consent.

While clients of FIC receive the full benefit of having legally trained staff and experts in legal costs challenge the merits of a cost bill, other plaintiffs in the system do not as challenging a bill will in turn create additional legal costs of which has to paid by the client.

Having a disability or an ABI will translate to longer than normal hours as communicating with the beneficiary [client] may involve longer consultation periods to explain the process, the legal firm’s progress, gathering expert evidence and legal research. However, the likelihood of winning the case is assessed early on, and based on the facts of the case. The signing of the conditional cost agreement occurs before work begins.

The observation of Funds in Court staff is that conditional costs agreements are used even where a plaintiff has a strong case and there is virtually no risk that the case will be unsuccessful. Further costs such as uplifts are invariably claimed at 25% irrespective of the risk.

FIC staff also makes the observation that plaintiffs (and litigation guardians) are not properly advised of the consequences of entering into conditional costs agreements. Plaintiffs are led to believe that their case is complex and will only be litigated if they sign a conditional costs agreement even where the case is strong and recovery assured.

Costs Court.

The Costs Court is established by Section 17 of the Supreme Court Act 1986 to hear and determine the assessment, settling, taxation or review of costs in the Supreme Court, County Court, Magistrates Court and Victorian Civil and Administrative Tribunal. The court as well hears costs disputes between Legal Practitioners and their clients pursuant to Division 7 of Part 3.4 of Chapter 3 of the Legal Profession Act 2004 and Division 5 of Part 4 of the Legal Practice Act 1996. The Costs Court, as presently constituted comprises an Associate Judge designated as the Taxing Master, a Judicial Registrar and two Costs Registrars.

To have a complaint heard in the cost court requires the client to source another lawyer, have him or her assess the original costs bill, then take on the advice establishing if there is merit in taking the matter further. These key decisions are very difficult to make if you have the won the case.

Overarching obligation to ensure costs are reasonable and proportionate

Another process to question the basis of a legal bill is enshrined in the Civil Procedure Act 2012, in Section 24 which imposes a positive obligation to take steps to ensure that costs are not excessive and empowers courts to sanction those who breach their obligations. However, there is no costs matrix or formula that can be applied in determining whether parties have met their obligations.

The power to issue sanctions under the Civil Procedure Act, Part 2.4 of the Act governs the courts power to issue sanctions for contraventions of the overarching obligations. **Yara Australia Pty Ltd & Ors v Oswal [2013] VSCA 337 (27 November 2013).**⁴ This case is good example of a Court of Appeal case, which shows the power of the court to examine this issue of overarching obligations.

Common Law Protocols [CLPS]

Another issue occurs when there are a number of law firms and lawyers who do not participate in the Common Law Protocols [CLPS] ⁵. The CLPs were agreed to between TAC, the Law Institute of Victoria and the Australian Lawyers Alliance in 2005.

Despite the CLPs, the role of the Court, the Legal Services Commissioner, TAC submits there is an increasing trend in average professional costs claimed by Plaintiff solicitors over the last five years of approximately 43%. From the high \$20,000 to \$40,000, or an average growth of 9% per annum.

The amount paid by TAC for all legal costs exceeded \$50 million in 2012-13 year.

The role of FIC is to protect the interest of the beneficiaries.

Uplift Fees.

A substantial majority of applications to FIC for solicitor/client costs claim uplift fees in accordance with a conditional costs agreement. The provisions relating to costs agreement are set out in Division 5 of Part 3.4 of the Legal Profession Act 2004 ("the Act"). Section 3.4.27 of the Act details the requirements for conditional costs agreements - often referred to as "no win, no fee" agreements. It should be noted that a party entitled to claim costs from another party could not claim an uplift fee from that party - that is an uplift fee is not recoverable on a "party/party" or "standard" basis. This means that the beneficiary will inevitably be liable for the entirety of an uplift fee payable to his or her own solicitor out of the funds paid into Court.

Section 3.4.28 of the Act allows a conditional costs agreement to provide for the payment of an uplift fee. Section 3.4.2 of the Act defines an uplift fee as "additional legal costs (excluding disbursements) payable under a costs agreement on the successful outcome of the matter to which the agreement relates.

Under section 3.4.28 of the Act:

The basis of calculation of the uplift fee must be separately identified in the agreement (sub-section 2).

The agreement must contain an estimate of the uplift fee or, if that is not reasonably practicable, a range of estimates of the uplift fee and an explanation of the major variables that will affect the calculation of the uplift fee (sub-section 3); if a conditional costs agreement relates to a litigious matter (a) the agreement must

⁴ <http://www.austlii.edu.au/au/cases/vic/VSCA/2013/337.html>

⁵ <https://www.tac.vic.gov.au/claims/forms-and-brochures-clients/information-brochures/other-publications/common-law-protocols>

not provide for the payment of an uplift fee unless the law practice has a reasonable belief that a successful outcome is reasonably likely; and (b) the uplift fee must not exceed 25% of the legal costs (excluding disbursements) otherwise payable (sub-section 4).

It is important to note that under section 3.4.31 of the Act, a costs agreement that contravenes, or is entered into in contravention of any provision of this Division is void (my emphasis). Both sections 3.4.28 and 3.4.31 are part of Division 5 of Part 3.4 of the Act.

In FIC's experience, some solicitors come "unstuck" because their costs agreements with uplift fees purport to allow the imposition of the uplift on both professional charges and disbursements that have been paid by the solicitor. It is worth noting that before 9 May 2007, an uplift fee could be applied to both professional charges and paid disbursements. Although the Act was amended some time ago, some solicitors still use "old" conditional costs agreements that do not reflect the changes to the Act made with effect from 9 May 2007.

The other common deficiency is a failure to include a separate estimate (or a range of estimates) of the uplift fee that will be payable. As noted, given the effect of section 3.4.31 of the Act - which voids a conditional costs agreement that contravenes any provision of section 3.4.28 of the Act - a conditional costs agreement that doesn't include a separate estimate of the uplift fee is at least notionally void.

Before FIC pays any application claiming an uplift fee, FIC ensures that the conditional costs agreement relied on by the solicitor to claim the uplift fee complies fully with the Act. In that sense, beneficiaries are afforded an extra degree of protection. Although any client of a law practice is entitled to apply to VCAT to set aside a costs agreement or apply to the Costs Court to have the legal costs reviewed, this would of course require the client to obtain independent legal advice (and incur additional expense) to determine the validity or otherwise of the costs agreement.

Finally, some solicitors fail to enter into a new conditional costs agreement once a Litigation Guardian is appointed. The Court generally takes the view that a solicitor cannot rely on a conditional costs agreement that has been signed by the beneficiary if a Litigation Guardian is subsequently appointed.

Case studies

The following are examples of conditional costs agreements for those who it can be argued could not give informed consent and or where the legal bill was in breach of the Legal Profession Act 2004.

Case 1. The beneficiary was 73 years of age when as a pedestrian, he was hit by a motor vehicle whilst crossing the road. The TAC admitted liability on behalf of the driver of the vehicle. The beneficiary had migrated to Australia in his late twenties and was illiterate in both his native language and English having attended only one year of schooling. As a result of the accident, the beneficiary sustained inter alia a closed head injury resulting in cognitive impairment, nervous and psychological upset, delusional disorder, adjustment disorder, anxiety and depression.

Despite the beneficiary's background, injuries and a medical report that referred to the beneficiary's high-level cognitive impairment, the solicitors entered into a conditional costs agreement with the beneficiary providing for professional charges to be calculated on the basis of hourly rates together with an uplift fee of 25%. Although the beneficiary was accompanied by his son (who was later appointed as Litigation Guardian) when he signed the conditional costs agreement, it would be difficult to contend that the beneficiary had the capacity to give informed consent when he entered into the agreement. The conditional costs agreement itself did not include an estimate of the uplift fee as required under section 3.4.28(3) of the

Legal Profession Act 2004 (“the Act”). The disclosure statement provided to the beneficiary was also deficient in that it misstated the time limit for an application to the Costs Court to review the solicitors’ legal costs.

The TAC granted a Serious Injury Certificate and the beneficiary’s claim was settled at a settlement conference (in accordance with the TAC’s protocols) in the sum of \$175,000.00 with the retention of benefits of about \$25,000.00 plus party-party “protocol” costs. As liability was not an issue, it could be argued that an uplift fee of 25% was not appropriate as there was little or no chance that the solicitors would not be paid.

Case 2. The solicitors acted on behalf of a beneficiary with autism in respect of a claim to the Western Australian Office of Criminal Injuries Compensation. The beneficiary had been the victim of a sexual assault. The beneficiary was awarded the sum of \$23,000.00 in compensation plus \$720.00 for treatment and report expenses (which were reimbursed to the solicitors) with a maximum of \$4,900.00 for future treatment expenses.

The solicitors submitted a tax invoice seeking payment of about \$5,770.00 including professional charges of about \$5,187.00. The solicitors’ claim for professional charges included a 25% uplift fee in the amount of about \$1,037.00. The solicitors relied on a conditional costs agreement signed by the beneficiary’s father that provided for an uplift fee of 25% on professional charges although it did not indicate the basis on which those professional charges were to be calculated. The Disclosure Statement provided to the beneficiary’s father stated that “an uplift fee is warranted because there are risks that your case may not be successful” and purported to allow the uplift fee to be applied to “...total costs to be charged, including paid disbursements”. This constitutes a clear breach of section 3.4.28(4)(b) of the Act which provides that an uplift fee must not exceed 25% of the legal costs **excluding** disbursements (our emphasis). There were many other deficiencies in both the conditional costs agreement and the Disclosure Statement although under section 3.4.31 of the Act, a costs agreement that contravenes section 3.4.28 of the Act is void.

It is difficult to understand what risks the solicitors were facing (that would justify the imposition of an uplift fee) in acting on behalf of the beneficiary in what is, in effect, an administrative process. The amount claimed by the solicitors appeared excessive and included some 13 hours of attendances by a solicitor and a bit less than 4 hours of attendances by a clerk – in addition to claims for perusing documents and preparing correspondence. The professional charges requested by the solicitors (about \$5,187.00 including a 25% uplift fee of \$1,037.00) would represent about 22.5% of the funds paid into Court on behalf of the beneficiary.

It should be noted that the solicitors subsequently moderated their claim by excluding the uplift fee. The solicitors agreed with the Court’s assertion that an uplift fee was “inappropriate” given the circumstances of this matter although the claim has yet to be finalised.

Case 3. The solicitors acted on behalf of a young woman who injured her knee whilst playing lacrosse at her secondary school. After a trial of some nine days, judgment was handed down in favor of the beneficiary in the total amount of about \$216,000.00 plus party-party costs.

The beneficiary’s claim for party-party costs was settled on an “all in” basis for \$160,000.00. As the beneficiary’s claim for party-party costs included disbursements (including Senior and Junior Counsel) totaling about \$130,000.00, the solicitors effectively recovered party-party professional charges of about \$30,000.00.

The beneficiary’s Litigation signed a conditional costs agreement that provided for a range of hourly rates together with an uplift fee of 25%. Given that the matter ran to trial, it would be difficult to contend that an uplift fee was not appropriate in this case. However, the solicitors’ conditional costs agreement was seriously deficient in a number of respects and included a clause that purported to allow the solicitors to charge a

“...one time interest charge calculated at a maximum rate of 10% of the amount paid by us for outlays on your behalf”. This clause arguably amounted to an attempt to impose an effective uplift on disbursements in direct breach of section 3.4.28(4)(b) of the Act.

The solicitors originally claimed total solicitor/client professional charges of more than \$79,000.00 **excluding** any uplift fee. The professional charges recovered on a party-party basis (about \$30,000.00) represented only about 37% of solicitor/client professional charges **excluding** any uplift fee – a very low rate of recovery and at least indicative of excessive solicitor/client professional charges. The amount being requested by the solicitors also represented about 37% of the funds paid into Court on behalf of the beneficiary – arguably a disproportionate amount.

When the multiple deficiencies in the conditional costs agreement were pointed out to the solicitors, they abandoned their claim for an uplift fee and moderated solicitor/client professional charges. The solicitors’ claim for unrecovered solicitor/client costs was eventually settled for \$25,000.00 – a saving to the beneficiary of some \$48,000.00 to the beneficiary.

While a legal professional can charge up to 25% in an uplift fee there is no process for the client to judge the legal bill, the basis for uplift, nor value for service. If they are in strong disagreement with the final costs they can write to the Legal Services Commissioner which will require further legal opinion prior to lodgment, or they can refer to a cost consultant at more cost to them. If however they are not able to understand the original conditional costs agreement it is highly unlikely they would pursue any options after the case has been settled. This latter course of action has dire consequences; the funds left for the client are depleted and this has a long term negative impact on the client, who cannot work and she/he cannot receive a disability pension until most or all of the funds are gone.

Fixed Costs Agreements

On October 15th 2013, the Victorian Treasurer introduced two bills amending the Transport Accident Act 1986 [the TAC Act]. The first bill which was passed by the Lower House, concerned changes in the number and type of benefits available and changes to payments for some services.

The second bill to amend the act allows the making by the Governor General in Council [GIC] of an order to impose fixed costs for claims, applications and proceedings issued pursuant to section 93 of the TAC Act.

The second bill, to introduce a fixed legal costs model for proceedings under section 93, and, costs will not be recovered except in accordance with the legal costs order once made however this amendment did not pass and we make the observation that this approach also poses issues for our beneficiaries and for other plaintiffs. A fixed cost agreement would result in the beneficiary paying the difference between the order and the final bill, and an additional cost would be the uplift of 25%.

Contingency Fees

Contingency fees – presently illegal in Victoria – would have the effect of decreasing the amounts available for future care. LawAid is a scheme established by the Law Institute of Victoria and the Victorian Bar Council with the support of legislation – ss 40A – 40H *Legal Aid Act 1978*. Under this scheme the plaintiff enters into an agreement with the trustees of LawAid. LawAid provides funds for disbursements (disbursements only – not costs). If the plaintiff’s claim is unsuccessful the disbursements do not have to be refunded to Law Aid. If the plaintiff’s claim is successful a percentage of the plaintiff’s award (excluding costs) must be paid to LawAid. Section 40C allows the trustees to take up to 10% of a plaintiff’s award but generally they take 5.5% (including GST). This is effectively a contingency fee

Case 1 – plaintiff A suffered serious injury as an infant as a result of medical negligence. Assessed as requiring an award of \$4.2M to properly provide for plaintiff A, the proceeding was eventually compromised for \$2M plus party/party costs. A close relative of plaintiff A acted as her Litigation Guardian.

The litigation guardian entered into an agreement with the LawAid Trustees and a conditional costs agreement with plaintiff's A's solicitor. LawAid provided \$6,800 for disbursements and claimed \$90,000 from plaintiff A's damages. The amount recovered by LawAid bears no relation to the amount expended.

Contingency fees are particularly disastrous for personal injury plaintiffs without any ongoing entitlement for medical and care costs. All future care must be paid from their common law damages.

Plaintiff A's litigation guardian was not a professional person and it is doubtful that he/she understood the LawAid agreement. Law Aid relies on plaintiff solicitors to explain the agreement to plaintiffs and has no way of ensuring that disclosure has been adequate.

The Litigation Guardian, we make the observation, is often a member of the family and of who has little to no experience of legal matters and of cost agreements, has limited schooling and may not be able to advise or explain the process or the implications of the agreement. The legal guardian, if a family member or friend of the plaintiff may also have a potential or real conflict of interest.

The true cost of the legal proceedings.

There has been a real growth in legal costs. This growth seems disproportionate to the real risk of a particular case. The use of uplift often presented at the optimum level of 25% or more, appears excessive.

In any event, the costs as outlined in our case studies supports an observation that some legal firms are finalising costs at a premium level, which is unfair to plaintiffs who have a disability or an ABI, and not perhaps at a more modest or at a lower level.

The role of Funds in Court, to independently monitor and question a legal bill on behalf of the beneficiaries, may well provide an example of a way forward for government and agencies all of whom are committed to ensuring access to a justice system that is fair and equitable.