EDITION ONE – FIRST UPDATE

APRIL 2013

A BARRISTER'S GUIDE TO YOUR PERSONAL INJURY CLAIM

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INTRODUCTION TO THE UPDATE

This is the first update to the guide, which was published in September 2012, via the website: http://www.abarristersguide.org.uk.

The guide has always been a 'not-for-profit' project (with donation made to Help for Heroes – Battleback). Originally, it was only available via Amazon, for purchase as a book or ebook.

Readers may still purchase the guide via Amazon, but they can now download copies for individual use, free of charge, from the website.

This update to Edition One is free to download for purchasers and those who have downloaded the guide.

The update reflects several important changes to personal injury claims which have been introduced by the Government as from 1st April 2013 (and others, from July 2013).

Please note that, as with the guide, this update is intended to provide accurate information, but it does not pretend to give advice in any specific situations, and is not, and should not be taken as, a substitute for professional advice.

REASON FOR THE UPDATE

As from 1st April 2013, the government has introduced some extremely important changes into personal injury claims. The changes require explanation, and amendments to Edition One of the guide.

There are a range of further technical changes introduced by the new rules, which affect the way in which personal injury claims will be conducted by your representatives, and managed by the court. The guide is not intended to deal with such technical issues, which should be explained by your legal representatives.

DO THE CHANGES AFFECT MY CLAIM – DO I NEED THE UPDATE?

Some of the changes introduced will affect most readers, whose claims conclude after April 2013. These are technical procedural developments (such as 'costs budgeting') directed towards reducing costs.

Of more obvious importance are the new rules surrounding the funding of personal injury claims, which introduce fundamental changes into the system.

The changes are unlikely to affect you:

- **If your claim was issued at court before 1st April 2013.**
- **If your claim is issued at court after 1st April 2013 but you entered into a funding arrangement, typically a 'no-win-no-fee' conditional fee agreement (or 'CFA') with your solicitor before 1st April 2013.**

The changes are likely to affect you if:

- **You suffered your injury after 1st April 2013**
- **You entered into a funding arrangement with your solicitor after the 1st April 2013.**

MORE CHANGES ON THE WAY – EXTENSION OF THE PORTAL SCHEME

The "Portal" is the name of an online claims scheme introduced by the government, some years ago, to try to deal with simple road traffic claims (with a total value of less than £10,000). Such claims would often involve a modest rear-end collision, causing a modest physical injury, some vehicle damage, and sometimes a period off work.

Individuals who wanted to commence a portal claim had, and still have, to do so with assistance from a solicitor.

From July 2013, it is intended to extend the "Portal" to deal with higher value road traffic claims (with a value of up to £25,000) and, more important, claims arising from injuries at work (also known as 'employer's liability' claims), and so-called 'public liability' claims, most common of which are tripping claims against local councils.

The tab "who needs the guide" on the website (http://www.abarristersguide.org.uk) will direct you to the portal to see if it might apply in your situation.

MORE CHANGES ON THE WAY – FIXED RECOVERABLE COSTS

In February 2013 the government published proposals concerning the introduction of "fixed recoverable costs" in a range of claims. If such changes are introduced, it will radically reduce the legal fees which can be recovered from the defendant by your legal representatives.

This severe downward pressure on costs will inevitably lead to more and more 'legal work' being undertaken at much lower cost, by less qualified individuals. Regardless of how diligent these individuals may be, unless they are exceptionally well supervised, it is inevitable that their lack of qualifications and experience will take its toll, and mean that individuals with personal injury claims are far less capably represented.

This is another reason to read and digest the guide so that you can feel confident that you are receiving a professional service.

HOW TO USE THIS UPDATE TO EDITION ONE

This update will refer to the changes by reference to each "Part", "section" and sub-section of Edition One of the guide, and each paragraph within that part – **with the original paragraph number of the guide shown in bold text**.

Some parts of this update will be repetitive, because the radical changes introduced on 1st April 2013 have implications for many aspects of personal injury claims. I want to make sure that all readers (even if they only consult one part of the guide/update) will be aware of the changes and their impact.

THE UPDATE

PART ONE: INTRODUCTION AND OVERVIEW

SECTION 2: WHAT YOU CAN EXPECT FROM A CLAIM

THE AIM OF THE PROCESS

1. In **paragraph 30** I stated that the aim of the law was: to return you as nearly as possible to the position you would have been in 'but for' the accident. In fact, the changes introduced on 1st April 2013 mean that there are several situations in which you may not receive all of you damages:

You win your claim which was funded under a CFA

(a) If you have entered into a no-win-no-fee agreement after 1st April 2013 (also known as a conditional fee agreement, or **'CFA'**), and you 'win' your claim in a settlement, or trial, your legal representatives will be entitled to deduct a success fee (which is calculated by reference to some elements of that compensation) which was previously paid by the losing defendant (and you will have to pay an insurance premium, if you have taken out insurance to protect you against paying the defendant's costs: see below, paragraph 21, and 34-36);

You win your claim which was funded under a DBA

(b) If you succeed in a claim having entered into a 'damages-based-agreement' (or **'DBA'**) (one of the new funding options introduced in April 2013) but recover less in costs from the losing defendant than the percentage of compensation you agreed to pay your representatives. DBA's seem unlikely to be popular in personal injury work. Some solicitors may develop an 'attractive version' for a claimant but be careful you understand your obligations before you enter into such an agreement;

You lose your claim which was funded under a DBA

(c) If you enter a DBA, and your case fails, depending on the terms of the agreement you signed, you could be liable to pay the costs of 'disbursements' (usually meaning 'non-lawyer' costs such as court fees and the costs of medical/non-medical expert witnesses), which could be very substantial (especially if the claim failed at a trial). This is another reason why DBA's are likely to be very unpopular in personal injury cases;

You win your claim (CFA or DBA) but receive less than a defendant offer

(d) An example illustrates the danger. If a defendant makes an offer to settle a claim for £30,000, and at the trial a year later, the Judge awards the claimant compensation of £25,000, under the new rules, the defendant is entitled to deduct all of its reasonable costs *from the £25,000*, before it pays any of the compensation. In this example, it is highly likely that the costs of a year's litigation and a trial would easily extinguish the compensation;

(e) Except in very rare situations, usually resulting from fundamental dishonesty by a claimant, the defendant is only permitted to recover its costs against the claimant up to the limit of the award made by the court. So, in the example above, if the defendant's costs since their offer were £35,000, they would only receive £25,000 from you (because that would be all of your damages award).

2. There are some additional situations in which you may actually end up with a personal liability to pay money rather than receive compensation. These situations will be very rare, but you must be aware of them:

Your claim is 'struck out' by the court before it concludes at a trial

(a) If your claim is 'struck out' by the court due to serious failures to comply with court rules (or because it has no prospect of succeeding), you could be liable to pay the defendant's legal costs;

Some, or all, of your claim is thought to be 'fundamentally dishonest'

(b) In this situation, which typically arises from surveillance evidence or a clear lie in a court document a person has certified as true, the court and the defendant may take a number of steps which can have extremely serious consequences, quite apart from the impact such evidence may have on compensation. These include awarding costs against an individual who has been dishonest, as well as the possibility in a very clear case, of further court proceedings against that person which could end in a prison sentence. It is very important to remember that these dire consequences will not affect you at all providing you are truthful and accurate, which includes checking your witness statement very carefully, and correcting any incorrect impression in your evidence (for example by telling your representatives of any improvement in your symptoms/capabilities since a statement was signed).

SECTION 3: HOW DOES THE LAW COMPENSATE ME?

MONEY SPENT AND MONEY LOST

3. **Paragraph 43** explained that in most personal injury cases, by far and away the largest part of the claim is past and future earnings loss. Under the changes introduced on 1st April 2013, if you are represented on a CFA (which is by far the most likely type of funding arrangement) your representatives will be entitled to a 'success fee'. This will be a percentage of their costs up to a ceiling, or 'cap', which is equivalent to 25% of the total of your 'past financial losses' (including therefore earnings) and award for PSLA (see next paragraph).

PAIN AND SUFFERING AND LOSS OF AMENITY

4. **Paragraphs 44-46** of the guide explained that compensation awarded for the actual injury (or injuries), and its consequences is called the award for '**P**ain, **S**uffering and **L**oss of **A**menity' ('amenity' meaning loss of enjoyment of life),

also described as **PSLA**, or 'general damages' (all meaning essentially the same thing). There have been three changes since the first edition of the guide:

(a) The book referred to which assists judges and practitioners to estimate awards is now known as the 'Judicial College Guidelines', instead of the 'Judicial Studies Board' Guidelines;

(b) In cases decided after 1st April 2013 (where the funding arrangements, e.g. your CFA, was entered into after 1st April 2013), the government has increased in the awards for PSLA by 10% to balance some other changes which have been introduced;

(c) From 1st April 2013 your representatives acting under a CFA will be entitled to deduct a portion of your award for PSLA/general damages (as well as your past financial losses) as a 'success fee' (see paragraph 8-16, below).

PART TWO: YOUR RELATIONSHIP WITH LAWYERS

SECTION 4: THE DIFFERENT LAWYERS YOU WILL ENCOUNTER AND THEIR ROLES

HOW DOES A SOLICITOR ATTRACT/OBTAIN WORK?

5. **Paragraph 59-60** explained that some firms of solicitors obtained work via referral agreements with other businesses, including examples, such as an agreement to pay an insurance broker (or claims company) a fee to refer an injured person to them (a 'referral fee'). These referral fees have been made illegal.

TRUST: THE CORNERSTONE OF YOUR RELATIONSHIP WITH YOUR LAWYERS

6. **Paragraph 88-101** dealt chiefly with the importance of trust in your relationship with your lawyers. Under the new rules, trust is, if anything, more important. There are a range of new issues upon which you will need high quality advice because:

   (a) There are more 'funding options' for your claim (paragraph 1, above);

   (b) You could lose some or all of your compensation in costs if you fail to 'beat' an offer made by the defendant (paragraph 1(d), above, and 34, below);

   (c) You will have to pay a success fee out of your compensation to your representatives (paragraphs 8-16, above);

   (d) There are (rare) risks that you might personally be responsible to pay the defendant's costs (see paragraph 2(a), (b), above and paragraph 23, below);

(e) There are risks that you might have to pay for your own side's expert evidence if you agreed that your lawyers would act for you under a 'damages-based agreement' ('DBA').

DEFENDANT NO LONGER PAYS 'SUCCESS FEES'

7. Under the new rules, the defendant will not have to pay you any 'success fee' (i.e. a percentage increase on your costs) merely because you succeeded in your claim.

YOUR REPRESENTATIVES ARE NOW PERMITTED TO TAKE A 'SUCCESS FEE' FROM YOU

8. In **paragraph 99**, I concluded a discussion on the importance of trust between you and your representatives by saying that unlike the US, "in England and Wales, the injured person generally receives all of their damages." However, the Government has now permitted legal representatives to take a success fee from your compensation.

THE SUCCESS FEES AND CONDITIONAL FEE AGREEMENTS (CFA'S)

9. The rules introduced on 1st April 2013 permit your legal representatives to take 'a cut' (i.e. a percentage) of *some* of your damages as a 'success fee' for taking the risk that your case may not succeed (in which case your representatives would not recover any of their fees).

10. Your representatives are allowed a 'success fee' in return for agreeing to act for you. The success fee is a percentage increase on their costs. The percentage may be based upon a number of factors, e.g. the risks of a claim not succeeding. In many situations, your representatives may seek a similar percentage success fee to that before the rules changed (ie which the

defendant previously paid). In others, they may suggest a 'staged' success fee - in other words the success fee could be low if the claim concludes early on, and increase in stages as the claim gets closer to trial. The most important point is that in no circumstances can the success fee you are liable to pay your representatives exceed a ceiling, or 'cap' which is calculated as a vat inclusive figure representing 25% of:

(a) The damages that you recover for 'pain, suffering and loss of enjoyment of life' award (i.e. the award for the 'injury' itself), and

(b) Financial losses up to the date of settlement (after the deduction of any sums repayable to the CRU – i.e. relevant state benefits: the guide, page 109). (Given the changes in the names of benefits being introduced in April 2013, it is important that you clarify with your representatives which of your benefits will be deducted from your 'financial losses from the accident to settlement/trial' before they take the 'cut' you have agreed in the CFA).

11. It is worth noting that in general past financial losses are often easier to 'prove' than future losses because it is generally easier to demonstrate 'what you have lost' (typically earnings you would have received since the accident), 'what you have spent' (on medication, travel, etc.), and what help you have received ('care' and assistance in/around the home): see generally section 16 of the guide.

12. Also, future losses are objected to by defendants because they are logically speaking 'speculative' – in the sense that they have not yet happened. Whilst that is obviously true, remember that you only have to prove elements of your

claim are likely to occur (the guide, section 14). Remember also that there may even be situations in which your past loss of earnings could be modest (e.g. because your employer went out of business anyway, perhaps a downturn in your ‘trade’), but the future loss could be substantial (e.g. the downturn lifted, and new employers in the field were looking for employees with your skills).

13. Trust remains the key. You simply need to understand the basis on which your claim is assessed by your representatives, so that you can be confident that your claim is being settled on the right basis. On the face of it, the new rules create a potential conflict between you and your representatives, because it is in their interest to maximise those parts of your claim against which they can deduct their success fee. While it may be very unlikely that your legal representatives will try to take an unfair advantage of the new rules, if you want reassurance you must ask for a clear written explanation of what they consider to be the value of each element of your claim, and why.

14. There are two further points worth remembering:

    (a) These changes were not introduced by claimant lawyers. In several respects it is going to be as uncomfortable for them, as it is for you, to have to settle claims knowing that different settlements could significantly increase/decrease what they are paid, and what you receive;

    (b) You and your lawyers have to use this new system, and the best way to do so is to be aware of the tensions it produces.

15. The new rules provide *only* for the deduction of benefits repayable to the CRU before the success fee is calculated. There is no mention of other non-CRU benefits (such as housing benefit, child tax credit, etc.) which you have received as a result of the accident. The defendant is (generally) entitled to deduct such benefits from your claim. It seems very likely that those benefits must also be deducted from your claim *before* your representatives calculated their success fee (otherwise the 'cap' on the success fee would be calculated on a higher sum than you had actually received).

SUCCESS FEES AND DAMAGES-BASED AGREEMENTS (DBA'S)

16. Success fees are also available where the claimant has entered into a 'damages-based-agreement' (or **'DBA'**). For a variety of reasons, it seems unlikely that DBA's will be popular in personal injury work. Some solicitors may develop an 'attractive version' for a claimant but be careful you understand your obligations before you enter into such an agreement.

SECTION 8: FUNDING A PERSONAL INJURY CLAIM

FUNDING YOUR CLAIM

17. **Paragraph 141-156** of the Guide dealt with funding a personal injury claim. This update has already dealt with these issues in detail. This is where the new rules of April 2013 have made their greatest impact.

REFERRAL FEES BANNED

18. The new rules outlaw referral fees.

NO RECOVERY OF LITIGATION INSURANCE PREMIUMS EXCEPT IN RARE CASES

19. The new rules prevent the recovery of litigation insurance, which was previously taken out by claimants to protect against having a personal liability to pay the defendant's costs. Premiums were previously reclaimed from the (losing) defendant as part of the costs of litigation. The changes prevent the recovery of those premiums from the defendant.

20. On the face of it, a claimant is exposed to paying the costs of the successful defendant *if* he has not accepted an offer he later fails to beat, because the new rules enable the defendant (in a typical case) to deduct those costs from (and up to the limit of) the compensation. There are several other changes designed to mitigate the effects of this change:

    (a) The defendant cannot generally recover its costs of the litigation from you, unless you have not accepted an offer you later fail to beat;

    (b) Damages for PSLA (pain and suffering: the guide, paragraph 44) are increased by 10% (for cases decided after 1st April 2013 where the funding arrangement, e.g. your CFA, was entered into after that date).

21. It is interesting that 'ATE' insurers are already offering policies to 'cover' the defendant's costs where you fail to beat a defendant offer. Even if the premium for such a policy cannot be recovered from the defendant, it may still prove attractive to have that protection (provided that the other terms of the insurance policy are acceptable).

THE DEFENDANT CANNOT GENERALLY RECOVER ITS COSTS FROM YOU

22. In order to deal with the risk that an unsuccessful and (under the new rules) uninsured claimant might have to pay the defendant its costs, the government *generally* prohibits the successful defendant from recovering its costs against you.

23. There remain some exceptional circumstances in which you could be ordered to pay some/all of the defendant's costs:

    (a) If you fail to beat your opponent's offer in a case in which (as in most cases) there is no fundamental dishonesty involved: the defendant is entitled to deduct its reasonable costs from the compensation awarded to the claimant (but see paragraph 1(d), above, and 34-36, below);

    (b) If the court considered that some, or all, of your claim was fundamentally dishonest;

    (c) If the court was critical of any conduct of your representatives;

    (d) If your claim is 'struck out' by the court (e.g. due to serious failures to comply with court rules, or because it has no prospect of succeeding).

<u>DEFENDANT DOES NOT HAVE TO PAY ANY SUCCESS FEE TO THE CLAIMANT</u>

24. The new rules prevent the recovery of any success fee from the defendant. Previously, there was either a fixed success fee (e.g. in road traffic and workplace claims), depending on when the claim settled (the nearer to trial the higher the success fee), or the court assessed the success fee after the end of the case, by weighing up (broadly) how risky the case was at the time the lawyer agreed to act for the claimant (the riskier the claim = the higher the success fee).

A NEW CAP ON THE 'SUCCESS FEE' IS INTRODUCED INTO CLAIMS

25. As just explained, before the changes of 1st April 2013, legal representatives who acted for injured claimants on a no-win-no-fee, CFA, basis were permitted to recover success fees from the losing defendant. The changes in April 2013 prevent recovery of this type of success fee from the defendant. However, claimant representatives are now permitted to recover their 'success fee' out of a portion of your compensation. I have explained these changes (paragraphs 7 -14 above).

PART FOUR: PUTTING THE CLAIM TOGETHER

SECTION 18: FURTHER STAGES IN THE LITIGATION

ALLOCATION TO A TRACK

26. There are three tracks. The first is 'small claims track', which is broadly used for disputes which involve smaller sums of money. Excluding those arising from road accidents, where the injury itself commands compensation of under £1,000, the claim is dealt with in the small claims track. (It seems likely that this limit will rise before long).

27. At present road traffic claims valued up to £10,000 must be dealt with through the "RTA Portal" – described fully on the website.

28. After July 2013, the government intends to extend the "Portal" scheme to road traffic accident claims with a value of up to £25,000, as well as to claims arising from injuries at work (also known as 'employer's liability' claims), and so-called 'public liability' claims, most common of which are tripping claims against local

councils. The website will be updated to help you deal with these changes in due course.

PART FIVE: WHEN AND HOW CLAIMS END

SECTION 21: OFFERS TO SETTLE

29. The court rules allow parties to make any number of offers to each other before and during the claim process. The whole purpose of ‘offers’ is to promote settlement, essentially by creating pressure on the other side.

30. The new rules have introduced an even greater pressure upon both sides to try to settle their differences. Before the April 2013 changes, in general, a claimant who does not defeat a defendant offer at a trial will receive the compensation awarded by the court, and recover (a reasonable) litigation insurance premium (whether BTE or ATE: see section 8 of the guide).

31. The new rules preventing the recovery of ATE insurance premiums are coupled with two important new provisions concerning offers that the parties to a claim may make to one another.

CLAIMANT OFFERS TO DEFENDANTS

32. Before the changes introduced on 1st April 2013 a claimant who ‘beat’ an offer to settle their claim (made under a specific court rule – part 36) was permitted to recover a discretionary increase in interest on all of the costs and damages awarded, from 21 days after the offer was made until the trial (or settlement).

33. The new rules provide that, in addition, a claimant who 'beats' his own offer may be awarded an additional amount of 10% on top of their damages (but not exceeding £75,000). For example, if a claimant offered to settle a claim for £150,000 and was awarded £180,000 at trial, then under the new rule, he would also be awarded £18,000 extra compensation.

DEFENDANT OFFER TO CLAIMANTS

34. The defendant is also permitted to make offers to settle claims. If you succeed in your claim at a trial, but your compensation is less than an offer of settlement made by the defendant, you are very likely to be ordered to pay the defendant's costs from 21 days after the offer was made. So, where a defendant offers to settle a claim for £30,000, and at the trial a year later, the Judge awards you compensation of £25,000, the defendant will then be entitled to deduct all of its reasonable costs (as assessed by the court) *from the £25,000*, before it pays you any of the compensation. In this example, it is highly likely that the legal costs of a year's litigation and a trial would extinguish the compensation.

35. In **paragraph 364** the guide discussed pressures which arise in cases in which your legal representatives have to advise the BTE or ATE insurer whether a defendant offer is 'reasonable'. Following the rule changes of 1st April 2013, in BTE cases (broadly cases where you have legal cover via household, motor, or other insurance: see the guide, section 8) the same situation will apply as discussed in the guide. But ATE premiums cannot be recovered as a litigation cost (where the new rules apply) meaning that ATE insurance in its present form will cease to exist.

36. However, ‘ATE’ insurers are already offering policies to ‘cover’ the defendant’s costs where you fail to beat a defendant offer. Even if the premium for such a policy cannot be recovered from the defendant, it may still prove attractive to have that protection (provided that the other terms of the insurance policy are acceptable).

SECTION 22: WHAT HAPPENS IF THINGS GO WRONG AND/OR I FEEL PRESSURED TO SETTLE?

37. **Paragraph 375 – 383** the guide discussed what to do if things go wrong. It seems likely, given the changes introduced on 1st April 2013, those due to be introduced on 1st July 2013 (extending the ‘Portal’) and the recently published proposals to introduce “fixed recoverable costs” for a wide range of cases, the chances of things going wrong is going to increase.

38. This is because the severe downward pressure on costs will inevitably lead to more and more ‘legal work’ being undertaken at much lower cost, by less qualified individuals. For example if, after July 2013, ‘fixed recoverable costs’ replace the present system of costs, claimant lawyers will be paid a great deal less for each case. That will inevitably mean that less work is undertaken on a case (so that it can still be ‘cost-effective’) and/or that a great deal of the work undertaken is done by unqualified individuals who are much cheaper to employ than solicitors and legal executives (see paragraph 66 of the guide). Regardless of how diligent these people may be, unless they are exceptionally well supervised, it is inevitable that their lack of qualifications and experience will take its toll on the quality of the work undertaken on cases.

39. It seems inevitable that the tensions introduced by these changes will lead to more widespread dissatisfaction at the service provided to claimants by their representatives.

40. Please do consult the checklists in Part 8 of the guide, concerning what questions to ask your solicitor or replacement solicitor, and do take an active role in your claim, whether it is a Portal claim or not, and set out any significant concerns in writing.

SECTION 27: APPEAL

41. In paragraph 10, above, it is explained that the changes introduced on 1st April 2013 prohibit the recovery of a ‘success fee’ by your representatives of more than 25% of a claimant’s award for PSLA (i.e. pain and suffering) and pre-trial financial loss (after the deduction of CRU benefits).

42. However, you should also be aware that, in relation to appeals (i.e. from the trial judge to the appeal court), the cap on the success fee on costs is, in fact 100% (instead of the 25% cap up to trial) – something to discuss and clarify with your representatives.