

The Northern Ireland Funding Code will be underpinned by detailed decision-making guidance. Draft guidance in respect of the principles of merits, costs and damages is available for consideration below.

The Northern Ireland Legal Services Commission invites views and comments by Friday 19th January 2007.

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Merits, Costs and Damages

Prospects of success

1.1 Definition

1. Prospects of success criteria are central to the Code. All applications for Legal Representation, save for a limited range of family, judicial review or mental health cases, must demonstrate a minimum level of prospects of success before funding can be granted. However, the concept of “prospects of success” is a flexible one which takes on different meanings in different contexts. The Code defines prospects of success as:

“the likelihood of the client obtaining a successful outcome in the proceedings, assuming the case were determined at trial or other final hearing. Guidance may give examples of what may constitute a successful outcome for different types of proceeding.” (Section 2.3 of the Code criteria)

2. Because prospects of success are defined by reference to the outcome at trial or other final hearing, the test is an objective legal test as to how likely the case would be to succeed before the judge or other tribunal. For the purposes of prospects of success criteria, the prospect of obtaining an early offer of settlement of the case from the other side is irrelevant. Likelihood of settlement may be influenced by factors such as whether the other side wishes to settle because of the difficulty of recovering costs from the client or in order to avoid adverse publicity at trial. Such considerations are not relevant to prospects of success as defined in the Code, but they may be taken into account in the cost benefit assessment as explained below.

3. In most cases the issue is whether the case would be successful at the first instance final hearing. It is not necessary to take into account whether it is likely that the case would subsequently be appealed to the Court of Appeal or House of Lords. If funding is applied for to appeal a first instance decision to the Court of Appeal, prospects of success means the prospects of that appeal being successful (whether or not the case might ultimately go on to the House of Lords).

4. Although prospects of settlement are not taken into account, the prospects of a case being finally concluded by the court in advance of a contested trial should be taken into account. For example, if in a claim for damages there is an argument that the opponent has a defence under the Limitation (Northern Ireland) Order 1989, or similar legislation, the danger of the case being defeated on this ground must be taken into account, whether or not the limitation issue is dealt with as a preliminary point or at the final hearing. Prospects of success in that context means the prospect that the case will both avoid being dismissed at a preliminary stage and then go on to be successful at trial.

1.2 What is meant by “a successful outcome”?

1. This depends entirely on the nature of the case. It is a question of considering what in substance the case is all about from a reasonable client's point of view and why the client has applied for funding. It is important to look at what the client is realistically intending to achieve from the proceedings. This may be more limited than the client's case set out in the pleadings, for example, a client bringing a claim for wrongful dismissal may be claiming damages and also a claim for reinstatement into his old job. If it is the case that the claim for reinstatement is speculative or otherwise unlikely to succeed, the correct approach is to treat the case primarily as a claim for damages and to consider the prospect of obtaining a substantive money award.

2. The application form for Legal Representation for non-family proceedings requires the client to specify what he or she is seeking in the proceedings. The first issue for the Commission is whether the case is primarily a money claim. This is an objective test. Save for cases with exceptional circumstances such as a significant wider public interest or which are of overwhelming importance to the client, if the primary legal remedy is a claim for damages or other money award the case must be considered under the Code as a money claim.

3. For money claims:

- (a) A successful outcome means obtaining judgment for substantive damages (that is, any award which is more than a purely nominal amount); or
- (b) If the opponent has made a payment into court a successful outcome means obtaining judgment for an amount greater than the payment into court.

4. If the client is a defendant to proceedings:

- (a) Having the case against the client dismissed will be a successful outcome;
- (b) Securing a substantial reduction in the size of the claim made against the client can also constitute a successful outcome for the defendant. Again this is an objective test. One should consider the realistic size of the claim against the client and the prospect of substantially reducing that claim;

(c) But if the claimant makes an offer to settle, a successful outcome for the client means either having the claim dismissed or having a judgment against the client for an amount less than the offer to settle.

5. Many cases involve non-quantifiable claims or mixtures of money and non-money remedies. Deciding what counts as a successful outcome depends on all the facts of the case. Guidance on specific categories of case gives examples of what constitutes a successful outcome for different types of case.

1.3 Categories of Prospects of Success

1. When prospects of success are evaluated under the Code each case must be put into one, and only one, of the following six categories:

- (a) Very Good – **80%** chance or more of obtaining a successful outcome;
- (b) Good – **60%–80%**;
- (c) Moderate – **50%–60%**;
- (d) Borderline – this applies where the prospects of success are not poor, but, because there are difficult disputes of fact, law or expert evidence, it is not possible to say the prospects of success are better than 50%;
- (e) Poor – prospects of success are clearly less than 50% so that the claim is likely to fail;
- (f) Unclear – the case cannot be put into any of the above categories because further investigation is needed. (See section 1.4 below.)

2. Estimating prospects of success can never be an exact science, especially at the early stages of litigation. Therefore it is a matter of legal judgment and experience to decide which of the above categories applies to any particular case. Predictions of chances of success often vary during a case as new information comes to light.

3. Different prospects of success thresholds are set for different types of case under the Code. Most types of case can only be funded where prospects of success are at least 50% that is within 1 (a), 1(b) or 1(c) above. Funding will always be refused where prospects of success are poor.

4. For some types of case covered by the Code, funding may be granted when prospects of success are only in the borderline category. This applies to cases with a significant wider public interest, cases that have overwhelming importance to the client, or are in a priority case-type area. Borderline prospects of success are also a minimum requirement for certain categories where it is not appropriate to insist on specific percentage success prospects, for example private law family disputes concerning children. In all these types of case if prospects of success are not over 50%, a judgment must be made as to whether the prospects of success should be categorised as borderline or as poor. The difference between these two categories cannot be expressed in precise percentage terms. A case may be regarded as having borderline prospects of success if the client has a good arguable or prima facie case which should be put before the court, even though because of disputes of

fact, law or expert evidence it is not possible to say that the legal prospects of success are over 50%.

5. In deciding whether a case has borderline or poor prospects of success it is important to look at all the issues the client must establish to prove his or her case. For example, in a product liability case the client may have an arguable case for showing that the product is dangerous, that the opponents failed their statutory or common law duties and that the breach of duty may have caused the injury or loss complained of. However, when taken together, the chance of succeeding on all these issues and winning the case may well be clearly less than 50%, in which case prospects of success are poor and funding must be refused.

1.4 When are prospects of success “unclear”?

1. This is a very important issue in the Code because it determines the level of service which is available. In an application for Legal Representation if prospects of success are unclear funding may only take the form of Investigative Help.

2. In a general sense, prospects of success could be said to be “unclear” in almost every case – only limited information is available at the outset of a case and prospects of success may only really be clear shortly before trial. That is not the meaning of the term in the Code, which defines “unclear” by reference to the need for further investigation. Therefore cases should only be put into this category if there are specific steps which need to be taken, preferably at a very early stage, after which a reasonable estimate of strength of the case can be made. The point at which prospects of success cease to be unclear for the purposes of the Code can be equated to the point at which a private paying client would feel able to make a decision whether or not to litigate.

3. Whether prospects of success are unclear depends on all the circumstances of the case, but there are certain types of proceeding which are very likely to fall into this category. Clinical negligence cases are the best example because a client with a potential clinical negligence claim will usually not have a clear idea of what has gone wrong. This will only become clear when medical records, and where appropriate an expert report, have been obtained. Industrial disease cases have a similar profile. The same is not true of most other personal injury cases where a reasonable estimate of prospects of success can usually be made following the initial interview with the client.

4. There is no assumption in the Code that most cases should go through the stage of Investigative Help before they receive Full Representation. In some types of case, for example housing, the great majority of cases can proceed straight to Full Representation if all other criteria are satisfied. Note also that a case should not be regarded as having unclear prospects of success merely because further investigation is needed to establish the size of the claim.

5. The fact that prospects of success are unclear does not mean that Investigative Help is necessarily the appropriate level of service to provide. If only limited investigative work is needed to make prospects clear this should be carried out at the Legal Help level rather than a certificate being granted for this purpose.

6. It is important to distinguish between the categories of borderline and unclear. In a case where prospects of success are borderline under the Code, it may well be difficult to give a precise estimate of those prospects. However it is likely to remain difficult to estimate prospects of success right up until trial, simply because of the disputes of fact, law and expert evidence in the case. By contrast, in a case where the prospects of success are unclear, significantly greater clarity will be achieved when the initial investigative work has been carried out. The test therefore is whether there is identifiable investigative work which could be carried out at an early stage, after which it should be possible to give a reliable estimate of prospects of success? If this is so, prospects of success are unclear under the Code.

1.5 Types of Cost Benefit Criteria

1. Cost benefit criteria are fundamental to the Code. Although the different types of benefit to be gained from proceedings vary enormously, and may or may not be quantifiable, in almost all cases covered by the Code it is necessary to consider whether what is to be gained from the proceedings justifies the likely costs. Even for levels of service which do not have a separate specific cost benefit criterion, issues of cost and benefit are central to decision-making.

2. Different types of case require different forms of cost benefit criteria. The Criteria for Full Representation under the General Funding Code include three separate cost benefit tests. For this purpose every case must be put into one, and only one, of the following three categories:

(a) Quantifiable claims (criterion 5.7.2) – in these cases funding will only be granted for cases which satisfy specific strict damages to costs ratios which vary according to prospects of success;

(b) Unquantifiable claims (criterion 5.7.3) – in these cases the test is whether the benefits to be gained from the proceedings justify the likely costs, such that a reasonable private paying client would be prepared to litigate, having regard to the prospects of success and all other circumstances;

(c) Public interest cases (criterion 5.7.4) – in these cases the test is a general one that the likely benefits of the proceedings must justify the likely costs.

3. In deciding whether a case is a quantifiable or non-quantifiable claim, the case should be looked at objectively. It is necessary to consider what the primary realistic remedy or objective sought by the client is, in just the same way as considering what would count as a “successful outcome” as discussed

at section 1.2 above. The main test for quantifiable claims is whether the claim is primarily a claim for damages by the client.

4. The following will not generally be treated as quantifiable claims:
 - (a) Claims which include both quantifiable and non-quantifiable elements, except where the damages claim is clearly the dominant purpose of the proceedings;
 - (b) Cases which are of overwhelming importance to the client as defined in the Code – see guidance at section 1.10 below;
 - (c) Where the client is a defendant or third party in the proceedings;
 - (d) Cases arising from the death of a loved one, especially where the death engages Article 2 of the ECHR.

5. Where the criteria for quantifiable claims under the General Funding Code apply, the funding decision follows automatically once the figures for costs and for damages have been determined in accordance with the guidance at sections 1.6 and 1.7 below. The minimum cost benefit ratios in the General Funding Code are as follows:

- (a) If prospects of success are very good (80% or more) likely damages must exceed likely costs;
- (b) If prospects of success are good (60%–80%), likely damages must exceed likely costs by a ratio of 2:1;
- (c) If prospects of success are moderate (50%–60%), likely damages must exceed likely costs by a ratio of 4:1.

6. Outside the General Funding Code certain case categories have their own specific cost benefit criteria. These are considered in section 1.9 below and in category specific guidance.

1.6 Defining Costs

1. For the purpose of cost benefit criteria “likely costs” means an estimate of likely total gross costs to be incurred on behalf of the client to disposal of the proceedings. Note that (unlike the definition of prospects of success) estimates of likely costs must take into account the likelihood of the case settling before trial. Where likely costs are specified on the application form, reasons must be given on behalf of the client to explain the estimate of likely costs and any assumption as to the stage at which the case is likely to settle. The estimate of likely costs will be based on the experience of the practitioner in dealing with cases of a similar type.

2. When calculating likely costs the aim is to determine the likely total gross cost to the Civil Legal Services Fund if the action were unsuccessful or costs were otherwise not recovered from the other side. Costs should be based on the appropriate rates prescribed in regulations which apply to costs payable out of the Fund, but the estimate of likely costs must also take into account any likely enhancement or uplift on costs. Note also that:

- (a) Counsel's fees and all disbursements must be included within the overall estimate of likely costs;
- (b) However VAT should not be included. All costs figures and cost thresholds in the Code are exclusive of VAT;
- (c) Any costs already incurred by the Fund by way of Legal Help or Help at Court or under an earlier certificate in the same proceedings should be taken into account. Costs incurred privately should not be taken into account.

3. Costs must be kept under review throughout a case so that cost benefit criteria can be reapplied at all key stages.

4. Because estimates of likely costs take into account the prospect of early settlement, such estimates must be revised upwards if and when settlement does not take place when anticipated.

1.7 Defining Damages

1. Likely damages are defined as a realistic estimate of the size of any money award the client would receive if substantially successful at trial or final order. This must be a fair estimate of what the claim is likely to be worth if successful, not a calculation of the maximum possible that the client would win if successful on every conceivable issue in the case. Note that:

- (a) The estimate should be of the likely award if successful at trial; it should not be a discounted estimate of what it is thought the opponent is likely to offer by way of early settlement;
- (b) The figure should be discounted to reflect any likely reduction to an award at trial through contributory negligence or otherwise;
- (c) If the other side has already made a payment into court or other settlement offer which covers costs incurred to date, the figure for likely damages is the amount the client would receive at trial beyond what is already on offer;
- (d) If the case would involve statutory benefit re-couplement, the normal procedure would be for the statutory benefit to be repaid by the opponent to the Compensation Recovery Unit. The estimate of likely damages for the client would not therefore need to take into account or

make any reduction for benefit re-coupment, provided the damages figure is the amount that the client will actually receive;

- (e) Likely damages must be discounted if there is doubt as to whether the opponent will be able to pay any money award – see next paragraph.

2. It is important that cases only receive public funding where they produce real benefits for the client. The estimation of likely damages must therefore take into account the ability of the opponent to pay. The suggested approach to this issue is as follows:

- (a) If the opponent is insured or is a public body or large company and there is no evidence to suggest difficulties in recovering any award, no discount should be made;
- (b) If the opponent is a “man of straw”, is bankrupt or otherwise appears very unlikely to be able to satisfy any money judgment, the estimation of likely damages should be reduced by 100%, which will inevitably lead to funding being refused;
- (c) If there is some doubt about ability to pay, perhaps in the form of indications that the opponent is in financial difficulties, a smaller discount should be made to the estimate of likely damages – usually of approximately 25%. Where funding is continued in such a certificate, enquiries should be made as a matter of urgency to determine more reliably whether or not the opponent is likely to be able to satisfy any award.

1.8 The Reasonable Private Paying Client

1. The cost benefit criterion in the General Funding Code for unquantifiable claims which have no significant wider public interest provides for funding to be refused “unless the likely benefits to be gained from the proceedings justify the likely cost, such that a reasonable private paying client would be prepared to litigate, having regard to the prospects of success and all other circumstances”. The same form of test applies to most private law family cases.

3. The aim of the private client test is to ensure that there is a level playing field between those who can afford to litigate privately and those who do not have the financial resources to do so. It follows that public funding should not be provided if a case is insufficiently strong for a private client to risk his or her own money, and bear the risk of having to pay the costs of the other side. To allow funding generally in such circumstances would be unfair to opponents, particularly bearing in mind the difficulty of recovering costs where the client is funded as part of Civil Legal Services.

4. The private client test must be applied objectively according to whether a reasonable private client would be prepared to litigate. The fact that the client may feel very strongly about the case or be determined to go to court is not

relevant. The notional client being considered under this test is a person with reasonable but not super-abundant means, such that the client could afford to litigate privately but to do so would be something of a sacrifice.

5. The private client test as defined in the Code must take into account all the circumstances of the case, but in particular must have regard to the prospects of success. Even where Code criteria do not specify mandatory cost benefit ratios, there is a very close connection between prospects of success, costs and damages. Advice to a reasonable private paying client as to whether a case is worth pursuing must take into account the likelihood of succeeding. It follows that:

- (a) If prospects of success are only a little over 50%, funding should only be granted if the benefits to the client will be really substantial such that the likely costs are justified;
- (b) By contrast, if prospects of success are very high and costs are almost certain to be recovered from the other side, a private paying client would be more prepared to litigate over benefits which were more modest in extent, but were still sufficiently important that a reasonable client would litigate.

6. In deciding what weight to attach to a non-quantifiable benefit when applying the private client test, it is important to consider whether the case might result in a real enhancement of the quality of life of the client. For example, establishing the client's entitlement to some welfare benefit may be justifiable if the client is in real need of that benefit. Similarly, litigating with a view to preserving one's home may be justifiable (especially if there are children involved), even if the property has a low or negative equity, always providing that the strength of the case or the other circumstances warrant it. By contrast, litigating over the proceeds of sale of a property with no or negative equity would not be justified.

7. Funding as part of Civil Legal Services is unlikely to be granted if the only matter at stake is loss of stature, dignity or reputation. However, discrimination cases may be of considerable importance to the client.

8. Human rights issues are specifically recognised in the Code in the criteria concerning judicial review and claims against public authorities. Even in cases not covered by those criteria (for example cases considered under the General Funding Code), weight should be attached to any breach of human rights of the client. A private paying client might well be prepared to litigate in such circumstances provided the prospects of success and other circumstances of the case justified it.

1.9 The Proportionality Test

1. In certain priority categories under the Code the cost benefit criterion is expressed in the following terms, that funding may be refused unless "the likely costs are proportionate to the likely benefits of the proceedings, having

regard to the prospects of success and all other circumstances.” This form of cost benefit test applies to judicial review cases, claims against public authorities, housing and domestic violence cases.

2. Drafting the cost benefit criteria in this way in these priority areas reflects the fact that the purpose of public funding cannot be achieved simply by applying the private client test. Funding in such cases exists to ensure also that public authorities are accountable for the lawfulness of their actions, that people facing social exclusion through homelessness are given the opportunity to preserve a roof over their head, and that victims of domestic violence are properly protected under the law. That does not mean that cost benefit considerations are irrelevant in such cases. It is particularly important that public funds are allocated to best effect in such areas. Funding should only be provided where the benefits of the proceedings and the issues at stake justify and are proportionate to the likely costs.

3. The following general approach to cost benefit may be adopted:

(a) It is always appropriate to consider what the objectives of the case are from the client’s point of view and whether the client is primarily seeking a money award or a less quantifiable benefit;

(b) If the case is primarily a money claim from the client’s point of view, the cost benefit ratios in the General Funding Code may be considered – but as guidelines only. If the case satisfies those cost benefit ratios the proportionality test is also satisfied. If the claim does not satisfy those ratios, wider issues may be considered;

(c) If the case is not primarily a money claim it is appropriate to consider the private client test as described above. If the private client test is satisfied, the proportionality test is also satisfied. If the private client test is not satisfied, it is appropriate to consider wider issues;

(d) If a case does not meet the cost benefit criteria of the General Funding Code, funding may still be provided if the costs are proportionate to the benefits of the case. Proportionality is a concept well established, for example, in ECHR case law. However, proportionality is essentially a common-sense test, rather than a precise legal determination. Decisions on proportionality should in particular take into account:

(i) The importance of the issues raised by the case, for example how serious is the wrongdoing alleged in a claim against a public authority?

(ii) How far short of the cost benefit criteria in the General Funding Code the case falls. The less cost effective the case appears to be, the more serious must be the issues raised by the case to justify public funding.

1.10 Overwhelming Importance to the Client

1. Overwhelming importance to the client means a case which has exceptional importance to the client beyond the monetary value (if any) of the claim, because the case concerns the life, liberty or physical safety of the client or his or her family, or a roof over their heads (section 2.4 of the Code criteria).

2. Overwhelming importance to the client is an important issue under the Code because it allows funding to be granted even in cases where the prospects of success are only border-line. In cases of overwhelming importance to the client the strict cost benefit ratios for quantifiable claims do not apply.

3. As defined in the Code, overwhelming importance is an exceptional consideration. It will only apply to a very small minority of cases. Although the individual circumstances of the client will be taken into account, the test of whether a case has overwhelming importance must be approached objectively, i.e. whether a reasonable client would regard the case as of overwhelming importance.

4. A case should not be regarded as of overwhelming importance to the client merely because the subject matter of the wrong originally complained of concerned life or liberty. For example, not every action brought against the police alleging false imprisonment would qualify under this test. Such a case arises from an alleged deprivation of liberty, but liberty of the client would not be affected by the outcome of the proceedings. By contrast, a judicial review of a decision in an asylum case might allege that, unless the decision was quashed, the client would face imprisonment, torture or death in the other country. Assuming the allegation was plausible given knowledge of the circumstances in the country concerned; such a case would clearly satisfy the criterion of overwhelming importance to the client.

5. Overwhelming importance requires the case to have significance beyond the mere money value of the claim. Therefore the fact that a claim for damages is very substantial, so that the successful outcome would greatly increase the client's quality of life, does not qualify as overwhelming importance to the client under the Code.

6. The following are illustrations of the above approach by reference to the four types of case which come within the definition of overwhelming importance to the client:

- (a) Life – some asylum cases may come within the definition but fatal accident claims do not;
- (b) Liberty – detained clients claiming habeas corpus come within the definition, but damages claims for earlier false imprisonment do not;

- (c) Physical safety – injunctions to protect the client or his or her family from violence come within the definition, but damages claims concerning dangerous products or other personal injury do not;
- (d) A roof over one’s head – a possession action in which the client is at real risk of losing their home would come within the definition (whether or not the client has a right to be re-housed by the Northern Ireland Housing Executive (NIHE)) as would a judicial review seeking to order the NIHE to house a homeless person. However, the great majority of housing disrepair claims (which generally concern the home rather than the issue of whether the client has a home at all) does not. The test is whether the home is itself in issue in the proceedings. Proceedings the outcome of which would leave the client in financial difficulties, so that the home may then be at risk, do not constitute overwhelming importance to the client for the purposes of the code.

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