

Council Policy Guideline

Section 347 of the *Legal Profession Act 2007*

Applications to be Paid More than the Statutorily Capped Amount in Speculative Personal Injury Claims

The “50/50 Rule” or “50% rule” in speculative personal injury claims is now to be found in Section 347 of the *Legal Profession Act 2007*. This section commenced on 1 July 2007. It replaced Section 48IC of the *Queensland Law Society Act 1952*, which commenced on 6 November 2003 and which replaced an earlier QLS Council (non-binding) “ruling” dating from August 2002.

The legislative provisions apply (applied) to any request for payment made on or after their respective dates of commencement, whether or not a Client Agreement or Costs Agreement was entered into before that date.

The Queensland Law Society Council has considered a number of applications made pursuant to these provisions which limit the amount recoverable by way of professional fees for conducting a speculative personal injury claim.

Pursuant to Section 347, the Council may, in writing, approve an amount greater than the amount that would be calculated according to the statutory formula. In exercising its discretion, Council has indicated that, when considering an application, it would look for evidence that:

1. the legislative provisions have been disclosed to the client and the client has given his or her informed consent to the payment of a greater amount than that allowed by the legislation; or
2. the law practice/practitioner has been misled by the client to a material extent with the result that the amount recovered by the client was significantly less than the amount that would have been recovered if the client had not misled the law practice/practitioner.

Council, in the exercise of its discretion pursuant to this Section, will consider, amongst other factors, the following principles:

1. Council may grant a waiver of the limits otherwise imposed by Section 347 where a misrepresentation or misleading conduct by, or on behalf of, the client causes, or substantially contributes to, an outcome in the action inferior to that which would reasonably be expected if the misrepresentation or misleading conduct had not occurred.
2. When deciding an application for waiver under Clause 1, Council may have regard to, inter alia, the extent to which the misrepresentation or misleading conduct contributed to the inferior outcome, and to whether or not the misrepresentation or misleading conduct was intentional.
3. Having considered an application for waiver under Clause 1, Council may grant a full or partial waiver of the limits otherwise imposed by Section 347, approve a specific quantum of fees and outlays, refuse to grant a waiver or make such other decision concerning the limits as it thinks fit in the circumstances.
4. If there were other circumstances which could be attributed to either side, then that side should bear the “costs” which can be related to those circumstances.
5. Council should be able to take into account the fact that a fully informed client has agreed, for whatever reason, to a waiver of the Section 347 formula.
6. Council should also be able to have regard to the fact that the professional fees of a firm which previously dealt with a file prior to its transfer to the applicant firm were paid in full.

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7. Council should also consider whether the applicable client agreement was entered into prior to August 2002 (when the original Council “ruling” came into effect).

It is suggested that, should a practitioner wish to make an application to the Council for it to exercise its discretion pursuant to this Section, the practitioner should fully address the matters averted to in the principles outlined above, which should include, where applicable:

1. giving their client a notice in relation to the existence and effect of Section 347;
2. providing their client with a costs statement indicating the full amount that would be payable for fees and disbursements if it were not for the application of Section 347;
3. advising the client that they have (in most cases) a whole of contract retainer agreement with the practitioner and that the practitioner is obliged to continue acting for the client even though they would not be paid the full value of their fees and disbursements unless the Council authorised the payment of a greater amount pursuant to Section 347;
4. obtaining the client’s signed authority which indicates that they have been advised of the above and are agreeable to the practitioner being paid more than the amount allowed pursuant to the Section;
5. advising the client that they should seek independent legal advice before agreeing to the practitioner’s request;
6. setting out in detail the misrepresentation or misleading conduct by the client which caused, or substantially contributed to, an inferior outcome. Where it is asserted that the misrepresentation or misleading conduct was intentional, the practitioner should provide evidence in support thereof;
7. in the case where professional fees of a firm which previously dealt with the file have been paid in full, details in relation to the quantum of such fees.

Enquiries should be directed to David Franklin at the Society on 07 **3842 5820**.