

## PERSONAL INJURY LITIGATION – THE CASE FOR LEGAL AID

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Compensation claims for injuries suffered as a result of road traffic accidents, accidents at work, or “trips” along the public highway are the staple diet of Northern Ireland’s civil courts. When the *Civil Justice Reform Group* was preparing its Interim and Final Reports on the Civil Justice System in Northern Ireland<sup>1</sup> these were the principal case types the Group had in mind when designing its recommendations about judicial case management.<sup>2</sup> The article by Brian Sherrard discusses in more detail why the recommendations concerning judicial case management were made. This article is concerned with how cases of this kind should be supported financially for those litigants unwilling and unable to afford the risk of losing and thus finding themselves potentially liable for the costs of both parties. It begins by considering the current system, the problems it is perceived to have, and the reasons why it might be suggested that it should be replaced. Afterwards the two most frequently suggested alternatives to that system are discussed, before proceeding to consider whether fundamental change (in the form of a new system) is desirable.

### LEGAL AID – THE CURRENT FUNDING SYSTEM

At present a person contemplating the institution of legal proceedings would be entitled to Legal Aid if their financial situation fell within the conditions laid down in the Legal Aid (Financial Conditions) Regulations (NI) 2001<sup>3</sup> and they persuaded the Legal Aid Department that they satisfied the merits test laid down in article 10(4) of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981.<sup>4</sup> The grant of Legal Aid provides two forms of protection to successful applicants. First, they are not responsible for paying their own solicitors’ (and barristers’) costs unless they are liable because of means to pay a contribution to those costs. Secondly, whether or not they are paying a contribution, they are not liable to pay their opponent’s costs even if they lose their case. Strictly speaking the indemnity principle still applies and the successful opponent is entitled to costs but against the Legal Aid Fund. In practice costs are never recovered against the Fund because the successful unassisted litigant has to meet the virtually impossible test of demonstrating *severe financial hardship* if a costs order were not made.<sup>5</sup>

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<sup>1</sup> Civil Justice Reform Group, *Review of the Civil Justice System in Northern Ireland* – Interim Report (Belfast, 1999), and the Final Report (Belfast, 2000).

<sup>2</sup> See Interim Report paras 9.28-9.40; Final Report paras 96-100.

<sup>3</sup> SR 2001/111.

<sup>4</sup> The test is whether the applicant shows “reasonable grounds for taking, defending or being a party” to legal proceedings.

<sup>5</sup> Legal Aid, Advice and Assistance (NI) Order 1981 art. 11(1)(e); Legal Aid General Regulations (NI) 1965 reg. 18.

The Lord Chancellor's Department wants to remove Legal Aid from most personal injury compensation claims. This is clear from a reading of the two main Northern Ireland Court Service Reports on Legal Aid Reform in Northern Ireland.<sup>6</sup> What might replace Legal Aid, either Conditional Fee Agreements (CFAs) or a Contingency Legal Aid Fund (CLAF), will be discussed in more detail later but at this stage the main arguments against the retention of Legal Aid will be set out and evaluated.

### **(a) Rising Costs**

The first argument against Legal Aid is unsurprisingly one of cost. It is said that Legal Aid's costs are rising inexorably and that they are out of control. Thus in the Legal Aid consultation paper it was pointed out that Legal Aid Fund expenditure in Northern Ireland had increased from £12.19m in 1990/1991 to £28.85m in 1997/1998.<sup>7</sup> When viewed in isolation that figure is certainly disturbing but it does not represent the true position as far as personal injury cases are concerned. That figure is the total figure for Legal Aid expenditure and includes Legal Advice and Assistance, Criminal Legal Aid, and Legal Aid for matrimonial cases. In all of the above there is virtually no recoupment of public funds from unassisted parties. By contrast where a personal injury case funded by Legal Aid is won or settled with the payment of damages by the defendant the costs will also be paid by the defendant. This occurs in the very clear majority of cases.<sup>8</sup> Personal injury litigation is in fact one of the least expensive parts of the overall Legal Aid budget so the argument from public expenditure considerations is thus a weak one.

### **(b) Blackmail Settlements**

The above pejorative is used to refer to allegedly weak cases, which should not have been granted Legal Aid, and which are settled because it is more cost effective from a defendant's point of view to do this than incur the cost of going to trial, winning, and finding oneself unable to recover costs. While there are undoubtedly cases where Legal Aid is granted when it should not be, no substantial evidence has ever been produced of this occurring on a widespread scale. In particular there is no evidence to suggest that cases where Legal Aid should not have been granted are anything other than hindsight judgments which benefit from material the original adjudicator had no access to. As will be suggested below alternative funding systems to Legal Aid may not address this problem except at unacceptable cost. From the defendant's point of view the grant of Legal Aid in Northern Ireland may not be so desperate a situation as it could be in England and Wales. This is because the fixed scale costs applying here (in contrast to billing by the hour

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<sup>6</sup> A consultation paper, *Public Benefit and the Public Purse – Legal Aid Reform in Northern Ireland* (1999, The Stationery Office) was issued in June 1999. A decisions paper, *The Way Ahead – Legal Aid Reform in Northern Ireland* (2000, The Stationery Office) was issued in September 2000.

<sup>7</sup> At para 1.3.

<sup>8</sup> See e.g. *Legal Aid Annual Report 2000-2001*, HC 524 (2002, London, The Stationery Office) p 50, where the table shows that over 80% of the typical personal injury cases mentioned above have been disposed of in this way.

in England and Wales) make the costs of defending a case at trial much more predictable.

### **(c) Unfair Advantage**

Linked to the last argument is the argument that the grant of Legal Aid unfairly discriminates against defendants because they have no costs protection even when they vindicate their position in court. This is a weak argument against Legal Aid because for the clear majority of defendants there is no significant hardship involved in being unable to recover costs. Most defendants are effectively insurers and can pass these costs on to insured persons in the form of higher premiums. The issue here is not discrimination but allocation of risk. Whether the current allocation of risk is the most sensible is an economic judgment and requires consideration of the alternatives. As will be suggested below the alternatives are not better than Legal Aid. One area where there is potentially unfair discrimination is where the defendant is not backed by insurance. The requirement to demonstrate *severe financial hardship* before costs can be recovered can be very hard for an uninsured defendant. But this is an argument to amend the current system (to one of *financial hardship*) as the Legal Aid Advisory Committee suggested in 1998<sup>9</sup> and as the Scottish Executive is currently minded to do.<sup>10</sup>

### **(d) Prioritising Social Welfare Law**

The current Government has made fighting social exclusion one of its main priorities. Clearly the Community Legal Service established in England and Wales is expected to play a major role in this. Social welfare law is thus likely to rank higher than personal injury litigation in the allocation of public resources.<sup>11</sup> It is difficult to contest the propositions that tackling social exclusion is a worthy objective and that social welfare law should be a higher priority than personal injury litigation. However to provide the kind of service really needed in social welfare law is likely to be very expensive and is likely to require very considerably increased investment in the voluntary advice sector, the latter having far more expertise in this area than traditional legal services providers. No argument against that is presented here. But it must be recognised that only the most limited impression is going to be made on social welfare law provision by diverting resources from personal injury litigation. The latter does not impose a particularly severe burden on the public purse, simply because most of its costs are borne by insurers. There is thus no convincing argument here for the withdrawal of Legal Aid from personal injury cases.<sup>12</sup>

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<sup>9</sup> *Submission by Lord Chancellor's Legal Aid Advisory Committee on the Reform of the Legal Aid Scheme in Northern Ireland* (Belfast, 1998) para 15.4.

<sup>10</sup> In the debate in the Scottish Parliament on 8<sup>th</sup> report 2001 of the Justice 1 Committee, *Report on Legal Aid Inquiry* (SP Paper 437), the Deputy First Minister and Minister for Justice (Mr Jim Wallace QC) stated that he intended to find a suitable opportunity to reduce "severe hardship" to "hardship". See [www.scottish.parliament.uk/official\\_report/session-02/sor0313-02.htm#Col110166](http://www.scottish.parliament.uk/official_report/session-02/sor0313-02.htm#Col110166).

<sup>11</sup> This was suggested at para 8.9 of the 1999 consultation paper.

<sup>12</sup> Most readers should be familiar with the story of asking the Kerryman for directions and getting his standard reply – "Well I wouldn't start from here."

**(e) Why Should Northern Ireland Be Different?**

This argument has not been forcefully made in the printed word but at least one Lord Chancellor's Department minister has expressed the view that the onus is on Northern Ireland to explain why different considerations apply to it. In the present context this would involve showing why Legal Aid should not be withdrawn from personal injury cases when it has been in England and Wales. In answering this specific argument it has to be accepted that there are probably only a few relatively minor differences between Northern Ireland and England and Wales in this regard. The fixed costs regime was averred to above and in the discussion of CFAs below some reference is made to the nature of the legal services market in Northern Ireland. Opposition to change, especially the adoption of CFAs can be put much better in terms of scepticism as to whether any of the proposed changes are likely to effect any improvement. The discussion below of CFAs and CLAF, especially CFAs, is very much to the effect that few problems in the current Legal Aid system would be solved by CFAs anyway and that a great many other problems would be created. So Northern Ireland would be better to do as Scotland seems to be doing and reform its Legal Aid Scheme, rather than removing it from one particular field. In Scotland the 8<sup>th</sup> Report of the Justice 1 Committee made no reference to CFAs or CLAF and recommended both an inflation linked increase in the lower capital limit for Civil Legal Aid and serious consideration by the Executive of the introduction of tapering of financial eligibility criteria.<sup>13</sup> In the debate in the Scottish Parliament on this report (13<sup>th</sup> March 2002) the Minister said he intended to bring forward regulations to increase the lower capital limit from £3,000 to £6,000 and the upper limit from £8,500 to £10,000. He also said he was attracted in principle to introducing a new, tapering system of contributions that would allow eligibility to be further extended up the income scale when the cost of legal action is too great for those on middle incomes to undertake.<sup>14</sup> In correspondence with the author the Justice Department of the Scottish Executive has stated that it "has not ruled out (or in) the option of CFAs at some point in the future" but this statement does not alter the picture presented by the debate in any way. Northern Ireland cannot do what Scotland can because Legal Aid remains a matter reserved for Westminster<sup>15</sup> but it cannot be seriously suggested that this has anything to do with the merits of the argument.

**(f) Only The Very Poor Are Covered**

According to this argument there is no point in continuing with Legal Aid for personal injury cases when financial eligibility has been cut down so far that only the very poorest sections of the population are covered. It is common knowledge, of course, that when Legal Aid was first introduced the clear majority of the population were covered. The objective was that it should

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<sup>13</sup> *Report on Legal Aid Inquiry* (SP Paper 437) [www.scottish.parliament.uk/official\\_report/cttee/just1-01/jlr01-08-01.htm](http://www.scottish.parliament.uk/official_report/cttee/just1-01/jlr01-08-01.htm) at para 40.

<sup>14</sup> *Supra* n 10.

<sup>15</sup> Northern Ireland Act 1998, sch 3, para 15.

provide access to justice for all those who could not afford to litigate from their own resources. Now Legal Aid omits many persons who could not afford the costs of a lost court case and some alternative needs to be found for them. It would be too expensive to restore Legal Aid to the comprehensive level it once stood at and it would be unsatisfactory to have a two tiered system of Legal Aid for the very poor and an alternative for those better off. In this connection it might be argued that Scotland is not proposing to go back to anything like comprehensive Legal Aid provision. So, the argument appears to run, it would be better to have one system for all those, whether poor or just not wealthy, who could not afford to risk losing a court case and having to pay one<sup>16</sup> or two sets of costs.

Lurking behind this argument is perhaps a fear of something else. Personal injury cases do not cost the taxpayer a vast amount of money because most costs are borne by the insurance industry and passed on to insured persons in higher premiums. There is no reason to suppose that this would be dramatically altered if financial eligibility criteria were substantially raised for personal injury cases. But if there were a substantial rise in financial eligibility for personal injury cases it might be difficult to resist this for family cases and Legal Advice and Assistance.<sup>17</sup> Although never explicitly stated the Government's real argument for removing personal injury cases from Legal Aid may well be to avoid substantial increases in expenditure on those parts of the Legal Aid budget where costs cannot be recouped from unassisted parties.

The strength of this argument heavily depends on the merits of alternatives to Legal Aid in this field. It will be argued below that CFAs are totally unsuitable and should not be introduced. CLAF presents a much better chance for successful reform and is almost infinitely preferable to CFAs. If it works it could provide very comprehensive cover for litigants unable to bear the risk of adverse costs orders. Whether the access to justice problems of persons on middle incomes justifies the removal of Legal Aid from this area is another question. If CLAF were to work the answer might be "yes" but not if it failed. If it did fail there might be problems justifying the abolition of a system providing access to justice for some in favour of one which failed to provide it satisfactorily for any. It might well be better to go down the Scottish road and extend Legal Aid without a contribution to some persons and meet the middle incomes group problem by way of tapered contributions. The latter group of litigants might still have to pay hefty sums to fund their own cases but payments could be spread over the whole life of

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<sup>16</sup> Strictly speaking the loser should pay both their own lawyers' costs and their opponents'. An agreement between solicitor and client that the solicitor will make no charge or will charge no professional fee in the event of losing would fall foul of the principles against maintenance and champerty. See *Awwad v Geraghy & Co (a firm)* [2000] 3 W.L.R. 1041, which applies to all litigation in Northern Ireland because no statutory exception has been made for conditional fees in any context. However in *Leeds City Council v Carr*, *The Times* 12<sup>th</sup> November 1999, the Court of Appeal said it was acceptable for a solicitor to waive professional fees in the event of a loss, so long as no agreement to this effect was made at the commencement of litigation. Schiemann LJ approved this decision in *Awwad* at p 1057.

<sup>17</sup> Not to mention Children Order.

the case and they would be protected against paying their opponents' costs if they lost. If there remained an access to justice problem for some people the scale of it might be sufficiently small to provide some hope that legal expenses insurers could fill the void.

### **(g) Administration**

This is not the place to indulge in bashing of the Legal Aid Department. But it cannot be doubted that the level of service it has provided to clients and the profession, for whatever reason, has been totally unacceptable. Anecdotal information possessed by the author suggests it is getting progressively worse. Nobody has suggested that Legal Aid should be removed from personal injury cases for this reason because there are other areas of Legal Aid provision where the service is equally bad. But it is difficult to believe that it has not been a factor in the back of civil servants' minds that handing over personal injury cases to the private sector through CFAs would make one part of the Legal Aid problem go away. However this cannot be an acceptable reason for the abolition of Legal Aid in this area. If Legal Aid is capable of delivering reasonable access to justice it should be preserved unless it can be demonstrated that there is a better alternative. If the administration of an otherwise suitable system is malfunctioning then strenuous efforts should be made to remedy the malady.

### **CONDITIONAL FEE AGREEMENTS – THE ENGLISH SOLUTION**

In England and Wales (but not in Scotland) the Access to Justice Act 1999 has effectively withdrawn Legal Aid from most personal injury cases. There is no substantial doubt that the Lord Chancellor's Department would prefer the same thing to happen in Northern Ireland. This idea first appeared in print with the publication of the Legal Aid consultation paper in 1999<sup>18</sup> but met with overwhelming opposition from consultees. Following the publication of the decisions paper in September 2000 the Lord Chancellor asked the Legal Aid Advisory Committee to investigate the viability of a Contingency Legal Aid Fund (CLAF) as another alternative to Legal Aid for personal injury cases. The Legal Aid Advisory Committee's report was published in August 2001,<sup>19</sup> cautiously advised that CLAF would be viable, and reiterated opposition to CFAs. CFAs will be considered in this section of the article, while the CLAF will occupy the next section.

In essence a CFA works as follows. When a solicitor is instructed to take on a case solicitor and client agree that the solicitor will not charge any professional fee if the case is lost. The client may be liable to pay for disbursements but some other arrangement may be made between solicitor and client about these. If the case is won the solicitor is entitled to charge an uplifted fee (normal fee plus success fee) to reflect the risk that the solicitor will earn nothing from those cases which lose. If the case is lost the client remains liable for the successful opponent's costs but these can be met from an "after-the-event" (AEI) insurance policy which the client can enter into at

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<sup>18</sup> At para 8.9.

<sup>19</sup> Report by Lord Chancellor's Advisory Committee on The Viability of Establishing a Contingency Legal Aid Fund or Conditional Fees in Northern Ireland.

the commencement of the litigation. This premium is also recoverable, along with the success fee, from the opponent if the case is won. CFAs would not be an appropriate system of funding for personal injury cases in Northern Ireland for the following reasons.

### **(a) Conceptual Muddle**

Opposition to CFAs begins with the view that they represent something of a conceptual muddle. As persons familiar with personal injury practice in Northern Ireland will be aware there is fairly widespread use of “playing it by ear” style litigation in this jurisdiction. This is no more than the use of speculative fee arrangements of the kind twice blessed by the Court of Appeal in 1999 and 2000.<sup>20</sup> Disbursements will usually be paid by the solicitor on an ongoing basis but if it appears that the case is not going to settle and that proceeding to trial would involve substantial risk of losing, the case may be quietly abandoned. No professional fee will be charged and the solicitor may just charge the client for disbursements. As this indicates the real access to justice problem for clients who do not qualify for Legal Aid is one of paying their opponents’ costs in the event of losing. CFAs do not address this problem, except through the indirect route of the AEI policy. But it is quite clear that an AEI policy is not necessary for a CFA and that insurance can be used independently of CFAs to protect a client against an adverse costs order. In discussions with the Legal Aid Advisory Committee the Lord Chancellor’s Department expressed the view that speculative fee arrangements would make it easy for Northern Ireland solicitors to adapt to CFAs. But the reality is likely to be very different. With CFAs solicitors are nearly committed to going on with the case once it has started. Regular review of the prospects of success would certainly be prudent but it would be much more difficult to abandon a case which appeared too risky than it would be if the case were commenced on a “play it by ear” basis.

### **(b) Nature Of The Legal Profession In Northern Ireland**

Another aspect of the legal services market militating against CFAs is the large number of small “family” firms in this jurisdiction. Many of these firms are general practices and would be used to providing all or almost all of their clients’ legal services. To the extent that something more specialised is required, especially in the personal injury field, the Bar is used to provide the necessary back up. There is no reason to suppose that clients are getting an unsatisfactory service, and for firms that are failing their clients no reason to believe that the market cannot take care of the problem. CFAs have little to contribute in this area and could well give rise to problems of their own. It is well known that CFAs call for expertise of their own and in England and Wales this has led to greater specialisation, as much in doing CFA work as personal injury *per se*. Clients in Northern Ireland might have difficulty in understanding why firms which have handled personal injury cases quite satisfactorily in the past do not provide this sort of service any longer because they have no expertise in CFA work. Research in England and Wales has suggested that small firms may have difficulty meeting

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<sup>20</sup> *Supra* n 16.

disbursements due on CFA cases on an ongoing basis.<sup>21</sup> Too much should not be made of this specific point in Northern Ireland because solicitors commonly pay disbursements in personal injury cases on an ongoing basis. However a small firm which lost the first couple of CFA cases it handled could find itself in serious financial difficulty. It is probably not accidental that most CFA specialist firms in England and Wales are much larger than the typical Northern Ireland practice.

### (c) Complexity

CFAs are extremely complex because they involve an untidy mix between two very different systems – the English indemnity principle and the American contingency fee system. The latter shares one thing in common with CFAs in that a losing plaintiff's solicitor will earn no fee. The difference lies in the liability of a losing CFA plaintiff to pay the successful opponent's costs, usually through an AEI policy. The losing contingency fee plaintiff has no such liability because of the absence of a "loser pays" rule in many United States' jurisdictions. The difficulties which this mix involves are illustrated by the complex satellite litigation already engendered over questions such as the liability of the defendant to pay a success fee when a case is settled before proceedings are issued<sup>22</sup> and the size of the AEI premium.<sup>23</sup> All this makes the common description of CFAs as "no win, no fee" thoroughly misleading because a successful client would remain technically liable to meet any costs not recovered from the opponent. The *Claims Direct* debacle, where clients had to meet success fees and AEI premiums from damages because the Access to Justice Act 1999 was not made retrospective, was justifiably described as "No win, no fee. Win, big fee." Quite apart from specific problems in particular cases, it has clearly been difficult to explain CFA arrangements to clients.<sup>24</sup>

### (d) Increase In Litigation Costs

As success fees and AEI premiums are added to the costs paid by losing defendants (in practice insurers) litigation costs in some cases will inevitably rise and the rise will be passed on to insured persons in the form of higher premiums. This may not of itself be a bad thing if no payment for lost cases results in a significant number of weak cases not being brought. There is a formidable body of evidence suggesting that CFA lawyers in personal injury cases are very risk averse but this seems to be reflected in more than just a reluctance to bring cases where there is substantial doubt about the prospects of success.<sup>25</sup> It is also reflected in very high success fees which are

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<sup>21</sup> J. Shapland, "Affording Civil Litigation: The Implications of Changes to Legal Aid in England and Wales", paper presented to Socio-Legal Studies conference, Loughborough, April 1999.

<sup>22</sup> See *Callery v Gray* [2001] 3 All E.R. 833.

<sup>23</sup> See *Callery v Gray (No. 2)* [2001] 4 All E.R. 1.

<sup>24</sup> See the Society of Advanced Legal Studies report, *The Ethics of Conditional Fee Arrangements* (London, 2001) at paras 3.29-3.36.

<sup>25</sup> See the three studies carried out by Stella Yarrow and Pamela Abrams – S. Yarrow, *The Price of Success: Lawyers, Clients and Conditional Fees* (London, 1997, Policy Studies Institute); S. Yarrow, *Just Rewards? The Outcome of Conditional Fee Cases* (London, 2000, University of Westminster); S. Yarrow and



significantly out of proportion to the risk of losing.<sup>26</sup> It seems likely that less is gained in weak cases being weeded out than is lost in the big increase in the costs of cases actually brought. The fixed fee system applying in Northern Ireland means that this jurisdiction has already been very successful at keeping litigation costs low and predictable. This system should not be tinkered with.

### **(e) The Pressure To Win**

One argument of CFA proponents is that Legal Aid lawyers will be paid whether they win or lose and therefore have no sufficient incentive to give clients' cases their best endeavours. This argument is open to serious dispute. It is condescending about the consumer because it assumes that clients would be unable to determine whether solicitors were pulling out all the stops. More plausible is the view that solicitors who get good results for their clients get a good name and that this provides sufficient incentive to win. Another argument used by CFA proponents is that solicitors who know they are going to be paid even if they lose will take cases on Legal Aid which should not be taken. This assumes that the Legal Aid authorities routinely fail to give Legal Aid applications sufficient scrutiny. For this there is absolutely no evidence. Legal Aid is sometimes granted when hindsight reveals the case was weak but there are limits to anyone's ability to predict outcomes. Which is better? To grant Legal Aid and find out afterwards that the case is a loser; or refuse to take a case on a CFA because of doubts about success? There is a powerful body of evidence already to suggest that CFA solicitors have been leaning too much in the latter direction.<sup>27</sup>

To the extent that CFAs provide further incentives to win it can be argued that this is at the expense of the lawyer's duty to the court. The sort of problems coming to mind here are suborning evidence, coaching witnesses, and failing to give discovery of documents and other evidence damaging to a client's case. In the specific context of expert witnesses there is also the danger that experts who fail to produce "winning" reports or evidence may not be instructed again. There is little point in arguing that there are rules against this sort of conduct because "professional fouls" of this nature are very difficult to detect.

### **(f) Conflicts Of Interest**

If solicitors are only paid where they succeed in obtaining damages for their clients, either through an out of court settlement or a victory in court, there must be a substantial risk that solicitor attitudes to settlement offers may be influenced by their desire to secure some payment for their work. Some clients may well feel pressurised into accepting settlement offers they are unimpressed by. Another possibility, probably only arising in high quantum High Court cases and very rarely in any event, is that solicitors might advise

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P. Abrams, *Nothing to Lose? Clients' Experiences of Using Conditional Fees* (London, 2000, University of Westminster).

<sup>26</sup> The Court of Appeal's decision in *Callery v Gray*, *supra* n 22, still leaves these fees very high at 20%.

<sup>27</sup> *Supra* n 25.

against acceptance of a satisfactory settlement offer in the hope of earning a higher fee for a bigger award. There are some anecdotal accounts of this happening under the American contingency fee system where fees are percentages of damages recovered so it is not inconceivable that it could happen in Northern Ireland where professional costs are derived from scales linked to the sum recovered. As the Society of Advanced Legal Studies said of this problem – “we...consider that there is no effective remedy for these conflict of interest dangers, which are inherent in any system making use of CFAs.”<sup>28</sup>

It is possible to see the solicitor/barrister relationship being corrupted by a CFA arrangement. Where barristers are instructed on CFA terms there could well be tension between solicitor and barrister, to the client’s detriment, where there was any disagreement about steps taken prior to the barrister being instructed or anything occurring afterwards. Solicitors might instruct barristers on non-CFA terms to ensure they have wholly objective and disinterested opinions on matters of liability and settlement offers.

### **(g) Role Of Insurers**

The problem for most litigants being the need to get protection against potential liability for opponents’ costs an AEI policy will be indispensable in most cases. This means that AEI insurers play a decisive part in determining who can pursue personal injury litigation. Where an AEI insurer considers a claim too risky a policy is not likely to be offered and in other cases only offered at a premium many litigants might have difficulty in affording. Where solicitors are permitted to grant AEI policies under authority delegated by insurers, fear of incurring the insurers’ disapproval may increase their risk averseness.<sup>29</sup> There is also something unattractive about one section of the insurance industry deciding when another section of the same industry will be sued. The Court of Appeal recently held that a passenger in a road traffic accident was not obliged to use a legal expenses insurance policy provided by the driver’s liability insurers to underwrite a claim against the driver.<sup>30</sup>

It should be apparent from the above that any improvement in terms of access to justice effected by CFAs would be purchased at a very high price. Scotland has not been prepared to pay that price and Northern Ireland consultees would be similarly disinclined if the decision were left to them. But it is more important to say that CFAs would contribute little to addressing the problems, or perceived problems, with the current Legal Aid system. To the extent that public expenditure is reduced on Legal Aid this is mainly by reducing clamour to increase financial eligibility limits outside of the personal injury arena. In any event society’s costs on personal injury litigation are just moved off the balance sheet to the insurance industry and, judging by the size of success fees and AEI premiums, increased quite

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<sup>28</sup> *Supra* n 24 at para 3.52.

<sup>29</sup> *Ibid* at para 2.68, where it is pointed out that AEI insurers under delegated authority arrangements often demand success rates of 95% before they are prepared to renew a firm’s delegated authority.

<sup>30</sup> *Sarwar v Alam* [2001] 4 All E.R. 541. It was emphasised that appearances do matter.

significantly. Blackmail settlements is a perceived problem at its height and would only be solved via CFAs at the risk of denying access to justice to litigants with less than near certain prospects of winning. The unfair advantage Legal Aid supposedly grants assisted persons is seriously exaggerated and can be better addressed by allowing successful defendants to recover costs against the Legal Aid Fund more frequently than at present. Social welfare law is not effectively prioritised by cutting a budget not incurring heavy expense, especially if that is only to be used as an excuse for controlling expenditure on those areas of the current Legal Aid budget more closely approximating to social welfare law (e.g. family law). To remove Legal Aid from this area because of administrative difficulties would be a thoroughly unprincipled move.

### **THE CONTINGENCY LEGAL AID FUND – A THIRD WAY?**

In the Legal Aid Advisory Committee (LAAC) report<sup>31</sup> mentioned above there is qualified support for the introduction of a Contingency Legal Aid Fund (CLAF) in Northern Ireland. But it is important to recognise how deep this qualification is. LAAC is not recommending CLAF as a panacea for all access to justice problems in the personal injury field. It is not recommending the removal of Legal Aid from this area at all. It is simply suggesting that if fundamental reform is unavoidable then CLAF is infinitely to be preferred over CFAs. This says as much about how bad LAAC thought CFAs were as it does about its enthusiasm for CLAF. In fact LAAC's first preference was retention and extension of the Legal Aid Scheme.

In this section it is proposed first to describe the kind of CLAF scheme LAAC had in mind and then to indicate how it might compare to CFAs and traditional Legal Aid. The description of CLAF will be brief as more detail can be found in the LAAC report and the principal purpose of this section is to discuss the extent to which CLAF might be an improvement on CFAs or Legal Aid.

#### **(a) Essence of a CLAF**

The fundamental purpose of a CLAF is to protect CLAF-supported litigants against adverse costs orders. So litigants pursuing cases with CLAF support can rely upon the fund to meet their liabilities for costs. As will be seen when the kind of CLAF LAAC recommended is outlined below this liability may not necessarily be the same as it would be under the traditional English indemnity principle. As CLAF has to meet costs liabilities it needs some seed funding to start with and also needs to replace those funds paid out in some way. This can be either through a deduction from successful plaintiffs' damages or an accretion to the costs paid by losing defendants.

#### **(b) Case Categories<sup>32</sup>**

In view of the experimental nature of CLAF it was recommended that it be used, at least initially, in standard personal injury cases such as road traffic accidents, accidents at work, and tripping cases.

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<sup>31</sup> *Supra* n 19.

<sup>32</sup> *Ibid* at paras 1.6-1.9.

**(c) Compulsory CLAF?**<sup>33</sup>

The question here was not whether all litigants had to be CLAF-supported or all solicitors CLAF solicitors. The issue was whether any solicitor who was a CLAF solicitor should be required to put all his or her cases through CLAF. At this stage of deliberations it was contemplated that CLAF would operate by way of a deduction from successful plaintiffs' damages. It was considered very likely that at least some plaintiffs with near certain chances of success would be unwilling to contribute a portion of their damages into CLAF. They would likely go to non-CLAF solicitors and pursue their claims without any kind of financial support. Rather than lose a client it was thought that some CLAF solicitors would pursue the case outside of CLAF, in the same way that some traders evade payment of VAT. This "adverse selection" problem would likely lead to CLAF supporting the weaker cases, deducting higher amounts from damages to remain solvent, and becoming less viable. Hence it was recommended that CLAF solicitors should not have to put all CLAF qualifying cases through the fund.

**(d) Deduction From Damages Or Accretion To Costs?**<sup>34</sup>

If CLAF could not be made compulsory it was necessary to make it sufficiently attractive that plaintiffs would choose it. The solution suggested here was the recommendation that the fund be kept solvent by requiring losing defendants (in practice insurers) to pay a levy on costs to go into CLAF itself, the normal costs still going to plaintiffs' solicitors in the normal way. Thus the main burden of funding CLAF would fall on insurers, just as it does under Legal Aid and CFAs. A viability study of CLAF, carried out on behalf of LAAC by the Legal Services Research Centre, concluded that the CLAF levy on costs would be cheaper for insurers than success fees plus AEI premiums less recovered costs in cases they won.

**(e) Costs Covered By CLAF**<sup>35</sup>

Losing plaintiffs' costs should be included because to omit them would make CLAF resemble CFAs too closely. In an endeavour to discourage taking weak cases it was recommended that CLAF should pay only 50% of professional costs and all disbursements for these cases. It was recommended that the costs of winning defendants should not be recovered from the fund except in cases where this would cause *financial hardship* or where the judge certified that the case had no reasonable prospects of success. All this keeps the burden of the scheme on insurers as it is under Legal Aid but it also ensures that the burden is relatively light and compares favourably with CFAs.

**(f) Financial Eligibility**<sup>36</sup>

Two issues were dealt with here. The first was a recommendation that CLAF should be means tested but that financial eligibility limits should be

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<sup>33</sup> *Ibid* at paras 1.10-1.13.

<sup>34</sup> *Ibid* at paras 1.14-1.15.

<sup>35</sup> *Ibid* at paras 1.16-1.19.

<sup>36</sup> *Ibid* at paras 1.20-1.22.

set at levels much exceeding those applying under Legal Aid. This was because CLAF should operate as a substitute for Legal Aid and also ensure wider access to justice. The second issue was a recommendation for CLAF supported plaintiffs to pay a registration fee of £150, subject to exemptions for those on passport benefits or low incomes.

### **(g) Administration And Operation<sup>37</sup>**

The likelihood that the Legal Services Commission (expected to succeed the Legal Aid Department under forthcoming legislation) would inherit most of the staff of the Legal Aid Department led LAAC away from recommending a system under which solicitors routinely applied for permission to take cases through CLAF. Instead LAAC recommended that solicitors should decide themselves whether a case was eligible for CLAF assistance and should be guided by a code laid down in advance by delegated legislation or from the Legal Services Commission. As solicitors would still be paid for lost cases it would be necessary to monitor their decisions on CLAF eligibility and to impose penalties, the ultimate being expulsion from CLAF, for poor performance.

The scheme outlined above compares favourably with CFAs. It possesses neither the potentially horrendous complexity of CFAs nor the ethical problems that system inevitably presents. The viability study also indicates that it is likely to be cheaper than CFAs from the point of view of the insurance industry which would ultimately underwrite the cost of either scheme. This argument also puts into the shade the further arguments about blackmail settlements and the perceived unfairness to defendants of seeking vindication in court without hope of recovering costs. Those arguments were not very persuasive in any event. CLAF is also a system which the Northern Ireland legal profession could much more easily manage than CFAs. Risk share, so integral to CFAs, is an alien concept to small firm practitioners despite the experience with speculative fees in this jurisdiction. CLAF would also afford greater weight to the merits of clients' claims, as opposed to CFAs where AEI insurers' needs to make profits sometimes overshadow access to justice issues. CFAs may have an edge over CLAF in so far as everyone can be covered by CFAs, in contrast to CLAF which would be means tested to some extent. However a CLAF which operated as a real substitute for the Legal Aid scheme there used to be, which covered everyone who could not afford to lose a court case, would largely solve this problem. The only other major point of comparison between CFAs and CLAF concerns the role of an agency like the Legal Services Commission in monitoring the decisions of solicitors in funding cases through CLAF. This expense can be avoided altogether with CFAs but may be a modest price to pay for preserving some degree of public ethos via a CLAF.

A more important question for this article is how CLAF would compare to Legal Aid. This comparison is easier to make because these two systems share more in common with each other than CFAs share with either of them. It is now proposed to assess the advantages and disadvantages of Legal Aid and CLAF in the personal injury context from the point of view of the main stakeholders in the debate – clients, plaintiff lawyers, insurers, and the public

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<sup>37</sup> *Ibid* at paras 1.23-1.27.

interest. But one caveat must be entered before this task is commenced. CLAF is an untried system and the best that can be attempted at this stage is some prediction of how it *might* operate. Its viability depends very heavily upon the accuracy of the conclusions drawn by the viability study contained in the CLAF report. That study was based upon a set of figures which may not be entirely representative of the kind of cases to go through CLAF.<sup>38</sup> Another consideration which should be kept in mind by policy makers is the appropriateness of fundamental reform when the weaknesses of Legal Aid (apart from administration) are so much open to dispute.

From the perspective of clients there is little to choose between Legal Aid and CLAF. Both offer the same sort of protection against adverse costs orders and both are capable of being available to a similar range of people. That Legal Aid covers an ever diminishing percentage of the population is due to Government's unwillingness (for whatever reason) to preserve it. CLAF's wider coverage is not because of any structural advantages it may possess. What clients have to pay from their own pockets depends largely on the type of Legal Aid or CLAF systems adopted. Contributions are probably more likely with Legal Aid and registration fees more likely with CLAF. Deductions from damages won by successful CLAF-plaintiffs represents one potential big difference but problems of adverse selection persuaded LAAC to recommend an accretion to costs paid by defendants instead.

From the point of view of plaintiff lawyers there is again little to choose between Legal Aid and CLAF. For successful cases the same costs would be recovered from the defendant as the accretion to costs paid by losing defendants in CLAF cases would go into the fund. Only CFAs provide plaintiff solicitors with success fees for winning cases. CLAF appears to offer plaintiff solicitors more than Legal Aid because its apparently wider coverage might mean that solicitors needed to resort to speculative fees less frequently but this would not be due to any structural features of CLAF. Legal Aid appears to offer more so far as the Legal Aid Fund pays more than 50% of losing plaintiff solicitors' professional costs but the latter proposal is not an essential feature of CLAF and could be extended to Legal Aid.

Insurers would have to pay an accretion to costs under the CLAF scheme proposed by LAAC and might therefore prefer that Legal Aid be retained. But there is a real prospect that the accretion to costs could be quite modest because CLAF would not be paying out as much to losing plaintiffs' solicitors as the Legal Aid Fund is. Registration fees might also place a little more of the burden on plaintiffs than Legal Aid contributions. There is also the possibility that CLAF might be successful in reducing the number of losing cases and, if so, saving insurers some additional money from defending claims without hope of recovering costs. Any change in the test

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<sup>38</sup> It was based on figures provided by the Legal Aid Department of cases where Legal Aid certificates were granted. The figures provided information on the success rates of those cases, damages recovered, and costs incurred. One way in which the figures might not be representative of CLAF cases is that cases which settled before Legal Aid was applied for are not included. As these cases would probably often go through CLAF the viability study's conclusions may be cautious but it would still be wise to bear in mind that the study might not be comparing like with like.

for recovering costs against the fund, from *severe financial hardship* to *financial hardship*, would certainly not be for the benefit of insurers but something might be saved in cases where the judge certified that the claim had no reasonable prospects of success. The advantages and disadvantages of CLAF or Legal Aid from an insurer's perspective might be fairly evenly balanced.

Finally one must consider the public perspective, which means something more than the interests of Government. In purely financial terms the Government would probably most like CFAs because they don't require any taxpayer's money. But that does not mean that CFAs are cheaper from society's perspective. If, as the viability study suggests, CFAs would cost insurers more than CLAF then CFAs cost society more than CLAF because the costs to insurers would be passed on to insured persons in the form of higher premiums. To favour CFAs on this ground is not an immense improvement on an accounting trick. CLAF would probably cost the taxpayer less than Legal Aid because if CLAF were successful the taxpayer's only charge would be the seed funding, and that would only need to be incurred once. The other public interest consideration involves the administration problem in the Legal Aid Department. The Government could reduce this considerably by adopting a CLAF although it would remain for other categories of Legal Aid. Neither is it the most principled reason for introducing a new system. When CLAF is viewed in this light its advantages over Legal Aid depend on the same variables discussed in the previous paragraph.

## CONCLUSION

Legal Aid in Northern Ireland is chronically badly administered. This, however, does not constitute a sufficient reason for its removal from any category of civil litigation. The other perceived problems with Legal Aid, cited as reasons why it should be removed from personal injury cases, are either demonstrably false or deserve a "not proven" verdict at best. It could almost be argued that so bad have been the administrative difficulties in the Legal Aid Department that the strengths and weaknesses of Legal Aid in Northern Ireland are not properly understood.

The case for Legal Aid in personal injury cases is essentially that it has not been shown to be failing (other than administratively) and that suggested alternatives do not offer sufficient reason to believe that improvement can be expected. Of the two serious alternatives suggested for Northern Ireland, either CFAs or CLAF, the latter is to be preferred. CFAs would probably be a disaster and should not be contemplated any further. The absence of any enthusiasm for CFAs in Scotland strongly suggests what would happen in Northern Ireland if local policy makers had a choice in the matter. No matter how exciting it may be to experiment with a CLAF it remains questionable whether there is sufficient evidence of irreparable damage to Legal Aid that such an unpredictable scheme should be introduced to replace it. At the very least there should be a pilot study of CLAF which involves neither the abandonment of the current system nor a commitment to proceed with CLAF regardless of the study outcome. In any event the advantages of a CLAF over a properly functioning Legal Aid system are far too tenuous to support the case for fundamental change. The most one can say with confidence is

that if the status quo is a non-option then CLAF is a preferable road to go down than CFAs.