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EDITORIAL

Another special issue appears within these pages. The theme is *Access to Justice and Legal Aid Reform*. Two broad and interrelated subjects are dealt with. First, is the Civil Justice Review, discussed in the first two articles of this collection. Secondly, there is the reform of Legal Aid, discussed in the remaining four articles. It should not be assumed that Legal Aid reform is a more important topic. The preponderance of articles dealing with that topic mainly reflects the fact that more is currently happening in that field with the recent publication of the draft Access to Justice (Northern Ireland) Order 2002.

The two reports of the *Civil Justice Reform Group*[1]advised against the adoption of *Woolf* style judicial case management in Northern Ireland. This was essentially because it was felt that this would increase costs by "front loading" cases with unnecessary interlocutory proceedings. There was no need to do this because most cases settled anyway and there existed in the County Courts a satisfactory "light touch" form of judicial case management through the Certificate of Readiness. The two articles on the Civil Justice Review offer different perspectives on the theme of judicial case management. The first article, by Brian Sherrard, explains why *Woolf* style judicial case management was rejected for the High Court in particular, and the second, by His Honour Judge Hart QC, describes, *inter alia*, the unique contribution which the County Courts in Northern Ireland have made to case management.

Then the action moves to Legal Aid. The first two articles, by David Capper and Richard Moorhead, were written before publication of the draft Access to Justice Order. The former considers the two principal suggested substitutes for Civil Legal Aid in personal injury cases, namely conditional fee agreements (CFAs) and the Contingency Legal Aid Fund (CLAF), and makes the case for the retention and expansion of the Legal Aid Scheme, albeit managed by a different entity than currently. The latter is a broad critique of CFAs as they have operated in England and Wales. It provides some context in which the current debate on financing personal injury litigation may be set.

As a result of the draft Access to Justice Order it is not likely that any kind of CLAF will be introduced in Northern Ireland. Articles 41-42 allow for the establishment of private "litigation funding agreements", under which an individual or body could fund advocacy services for the benefit of others. So one of the crucial recommendations of the Legal Aid Advisory Committee, that a CLAF be launched with a significant sum of public "seed money", has been rejected. This does not of itself mean that "litigation funding agreements" would fail but the rejection of two other Legal Aid Advisory Committee recommendations almost certainly will. The first of these was

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[1] The interim report was discussed in D Capper, "Keeping Woolf from the Door – the Reform of Civil Procedure in Northern Ireland" (1999) 50 *NILQ* 434; the final report in D Capper, "Final Report of the Civil Justice Reform Group – Still Keeping Woolf from the Door" (2000) 51 *NILQ* 619.

that CLAF would need to operate by way of an accretion to costs paid by losing defendants, instead of a deduction from damages paid by winning plaintiffs. The Committee's concern here was that "adverse selection" would kill CLAF because litigants with good cases would take the risk of losing, CLAF would end up supporting weaker cases, and that greater deductions would have to be made from damages to maintain solvency. Together with the rejection of the other recommendation, that the costs of winning defendants be paid from the Fund only exceptionally, these proposals would probably guarantee CLAF's demise within a relatively short timescale.

This comprehensive rejection of CLAF, while still paying lip service to it, probably represents a strong steer towards CFAs. An enabling power to introduce CFAs is included in articles 39-40 of the draft Order but the Government may well hesitate before it tries to make CFAs the standard way of financing personal injury litigation in Northern Ireland. There is widespread opposition to CFAs in this jurisdiction and an ad hoc committee of the Northern Ireland Assembly investigating the matter may express negative views. The Northern Ireland Affairs Select Committee, while not currently examining Legal Aid in Northern Ireland, produced an interesting report on the subject last year and may not need much encouragement to rekindle its interest. In this context it is worth pointing out that the Scottish Parliament, which unlike the Northern Ireland Assembly has power to legislate in this area, appears to have set its face firmly against the adoption of CFAs.

If CLAF is rejected and CFAs are not introduced the only way forward may be to use the powers contained in articles 10-20 of the draft Order to make better provision for personal injury cases through Legal Aid. Hence the *Funding Code* may have to provide for standard personal injury cases, unlike the equivalent code in England and Wales. One argument for doing this, which does not come from the "no alternative" perspective, is that Legal Aid has been so badly managed in Northern Ireland that its potential may be unknown. Should the Legal Services Commission prove to be the strong managerial body almost everyone hopes it will be, it might be able to manage the current Legal Aid Scheme and provide a service superior to anything CFAs or CLAF could offer.

An issue which does not loom large in the succeeding pages, and which has played only a small part in the Legal Aid reform debate, is the effect of the Human Rights Act 1998 and the European Convention. At the time of writing the decision of Kerr J in *In the matter of an application by Jacqueline Lynch for judicial review*[2] is hot off the press. In that case the applicant sought judicial review of a decision not to grant her Legal Aid for defamation proceedings she was taking against a newspaper and a monthly magazine. In denying the application Kerr J examined Strasbourg judgments indicating that Article 6 access to justice rights were far from absolute. He dismissed the application largely because he believed that the particular libel case the applicant wanted to bring was not one she needed legal representation to present effectively. He acknowledged the difficulty but believed that the assistance of the court would be sufficient for the issues in dispute. Interestingly his lordship's judgment relied rather less on

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[2] High Court, judgment delivered 18th June 2002.

Strasbourg decisions which suggested that a state had a very wide discretion in setting public expenditure priorities. These authorities suggested that a blanket denial of Legal Aid for defamation cases was a legitimate step for the state to take but Kerr J did not go this far in his judgment. This might suggest that the blanket exclusions of Legal Aid from certain categories of civil cases may need to be re-examined. Given the likely introduction of a *Funding Code* encompassing a broader range of considerations relevant to the grant of Legal Aid a better way of proceeding might be to allow a discretion to grant Legal Aid for currently excluded case categories, albeit affording those categories relatively low priority in the fixed budget governed by the *Code*.

But Civil Legal Aid is about much more than just money recovery damages claims. There is a wide range of tribunals, still not expressly brought within the Legal Aid Scheme despite the power contained in article 12(6) to add to the areas covered. Linked to this area is social security and the other areas of work currently undertaken by the voluntary advice sector. The article by Les Allamby considers what implications current reform proposals might have for this sector.

Finally the article by Judge David Smyth QC considers the potential future for Criminal Legal Aid. The draft Order does not say much, apart from the abolition of the "Appropriate Authority" and the standardisation of fees, but there are a few hints as to more radical reforms for the future. So this article goes on to consider the experience in Edinburgh and the West Midlands with Public Defender schemes.

Not much has happened to implement the reforms proposed by the *Civil Justice Reform Group*, apart from increases in the monetary limits of the Small Claims Court and the District Judges' civil bill list. The most noticeable feature of the draft Access to Justice Order is how many decisions are left to delegated legislation. The devil is in the detail and many issues remain unresolved. It is hoped that this collection of articles makes a real contribution to debate in these areas.

David Capper

CASE MANAGEMENT – THE CIVIL JUSTICE REFORM GROUP'S APPROACH

Brian Sherrard, Barrister and Principal Legal Assistant to the Lord Chief Justice of Northern Ireland*

INTRODUCTION

Background

On 21 February 1998 the Lord Chancellor, the Right Honourable Lord Irvine of Lairg, announced the formation of the Civil Justice Reform Group (CJRG). Under the chairmanship of Lord Justice Campbell the CJRG was tasked with examining the civil justice system in Northern Ireland with a view to assessing how it could be made as accessible, economical and efficient as possible. The review was, from the outset, framed in terms of the "Access to Justice" reports published by Lord Woolf in 1995 and 1996 with the CJRG specifically required to have regard to the conclusions contained therein.[1] Central to Lord Woolf's analysis of how the English system (assessed as excessively adversarial, expensive, slow and complex) could be improved was the concept of case management. Unsurprisingly then, the CJRG was expressly tasked with assessing the possible contribution of "hands-on case management" to an improved system.

The object of this article is to discuss the CJRG's approach on the question of case management. The conclusion reached was an enthusiastic endorsement of a system designed to place primary responsibility on the parties, motivated by a range of incentives, but preserving ultimate responsibility in the courts.

What is "hands-on" case management?

The expression "hands-on" case management does not appear in the Civil Procedure Rules. Neither do Lord Woolf's interim or final reports offer a definition. It is submitted, however, that a close reading of the reports supports the proposition that "hands-on" case management is not equivalent to judicial case management but denotes a concept confined to those cases of such value, length or complexity as to fall within the strongly interventionist environment of the multi-track. Indeed, chapter 7 of the interim report, dealing exclusively with the fast track, makes no reference to "hands-on" case management, yet, as discussed below, both the small claims track and fast track are subject to an unprecedented level of judicial control. In short, "hands-on" case management is just one aspect of a much larger concept. On this analysis the vast majority of cases in England and Wales will fall outside "hands-on" case management but remain subject to judicial case management. Moreover, whether falling within "hands-on" case

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* The author assisted the Civil Justice Reform Group in the preparation of its interim and final reports.

[1] *Access to Justice*, Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales; *Access to Justice*, Final Report to the Lord Chancellor on the Civil Justice System in England and Wales.

management or otherwise the success of the system is heavily dependent on the co-operation of the parties and it would be wrong to assume that litigant rooted management has completely disappeared. Indeed, whole rafts of reforms (considered below in the context of Northern Ireland case management) have ensured that the parties remain central. The system provides precedent for the proposition that one size of case management cannot fit all. Its diversity demonstrates that the central tenet of Woolf is effective management from wherever it stems.

Components to case management under the Civil Procedure Rules

Judicial Case Management falls to be considered under two related headings:

i) the preliminary stage – allocation; and ii) post allocation – preparation for trial.

Allocation

Judicial allocation of proceedings is one of the main innovations of the Woolf reforms. Each claim is commenced by a claim form which, when defended, must be allocated to a case management track: the small claims track, the fast track or the multi–track.[2] Allocation in each case is a judicial decision although the Civil Procedure Rules provide the Court with guidance as to which case management track is appropriate.[3] The track into which a case is allocated will dictate the general degree of case management to be applied to it. On the defence being filed the Court will send the parties an allocation questionnaire.[4] Each party must file the completed allocation questionnaire no later that the date specified in it. Upon filing, or when the period for filing has expired, a Master or District Judge will proceed with the allocation. Although most allocation decisions will be made upon the basis of the pleadings and allocation questionnaires, the Court may order a party to provide further information and, perhaps more significantly, may hold an allocation hearing if it thinks it is necessary.[5] An allocation decision may be readdressed in two ways, through reallocation or an appeal.

The scope of each case management track is specified in the rules. In summary, the small claims track is the normal destination for claims valued at not more than £5,000 and personal injury claims for not more than a £1,000. The fast track is designed for claims with a value of not more than £15,000 and the multi-track is for claims above that amount or claims of lower financial value but greater duration or evidential complexity than those normally to be allocated to the fast track.[6]

The Master or District Judge will not simply allocate the case to its appropriate track but in most cases will expect to have enough information to give case management directions. Standard directions for each track are set out in Practice Directions contained within the Civil Procedure Rules.

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[2] CPR Part 26.
[3] CPR Part 26.6 – 26.8.
[4] CPR Part 26.3.
[5] CPR Part 26.5(4).
[6] CPR Part 26.6

Post Allocation Case Management Tracks

In accordance with the general principle of proportionality running through the Civil Procedure Rules, the extent of post allocation Judicial Case Management depends upon the designated track. The small claims track is the least managed, the clear expectation being that directions made on allocation will be sufficient.[7] However, even on this tier there is an opportunity for the Court to hold a preliminary hearing on the basis that special directions are necessary to ensure a fair trial.[8] A preliminary hearing may also be held where it appears necessary for a party to attend at Court to ensure that he understands what he must do to comply with the special directions. Moreover, as the rules specifically state that the Court may add, vary or revoke directions it must be the case that judicial scrutiny subsists until final disposal of the claim.

A more pronounced form of case management is a central feature of the fast track where on allocation the Court will give directions for the management of the case and set a case management timetable.[9] At this stage the Court will also fix a trial date or "trial window", a period within which the trial is to take place. The rules stipulate that the standard period between the giving of directions and the trial will not be more than 30 weeks.[10] Key variations to the case management timetable may only be made upon application to the Court.[11] The most significant management upgrade from a small claims track is the introduction of a "listing questionnaire" which must be returned to the Court by the parties by the date specified in the Notice of Allocation.[12] That date will not be more than 8 weeks before the allocated trial date or start of the trial window period. The listing questionnaire may provoke a listing hearing and represents the Court's second substantive opportunity to issue directions. Post listing questionnaire directions will include a trial timetable setting out the time allowed for each aspect of the trial.[13] The Practice Direction informing the fast track states that a party dissatisfied with a direction should either apply to the Court for it to be reconsidered or lodge an appeal.[14]

The most intensive form of case management is reserved for claims allocated to the multi-track.[15] Upon allocation the Court will give directions for the management of the case and set a timetable for the steps to be taken before trial.[16] The allocation Court may also fix a "case management conference" or "pre-trial review". Although case management remains with the Master or District Judge he or she may consult and seek the directions of a judge of a higher level about any aspect of case management.[17] A case management

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[7] CPR Part 27.
[8] CPR Part 27.6.
[9] CPR Part 28.
[10] CPR Part 28.2(4).
[11] CPR Part 28.4.
[12] CPR Part 28.5.
[13] CPR Part 28.6.
[14] CPR 28PD.4(3)(1).
[15] CPR Part 29.
[16] CPR Part 29.2.
[17] CPR 29PD.3(10)(2).

conference or pre-trial review may also be fixed at any time after the claim has been allocated and the rules do not preclude the number of such hearings that may take place.[18] Variation of key aspects of the case management timetable may only be made upon application to the Court.[19] As in the fast track the parties are required to complete a listing questionnaire which may in certain circumstances provoke a listing hearing.[20] A pre-trial review may arise on receipt of the listing questionnaires.[21] The Practice Direction linked to the multi-track anticipates that directions made by the Court may be challenged by way of either reconsideration or appeal.

ANALYSIS OF CASE MANAGEMENT UNDER THE CIVIL PROCEDURE RULES

Preliminary management – claim commencement and case allocation

From the outset the CJRG adopted Lord Woolf's vision of an effective civil justice system.[22] At the core of that vision was the concept of proportionality. The assertion in Lord Woolf's interim report that "Procedures and cost should be proportionate to the nature of the issues involved" found ultimate expression in the overriding objective of the Civil Procedure Rules which states:[23]

> (1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.
>
> (2) Dealing with a case justly includes, so far as is practicable -
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> ……..
>
> (c) dealing with the case in ways which are proportionate -
>
> i. to the amount of money involved;
> ii to the importance of the case;
> iii. to the complexity of the issues; and
> iv. to the financial position of each party;….

Marrying the overarching principle of proportionality to Lord Woolf's interrelated recommendations as to claim commencement and case allocation presented the CJRG with its initial case management challenge. Under Lord Woolf's recommendations, and now in the Civil Procedure Rules, claims are commenced and pursued by the same novel process consisting of a "claim form" and "particulars of claim".[24] Essentially, the same originating process is to be adopted regardless of the value of the claim. The move appears to have been uncontroversial in England and Wales perhaps because the same Writ system previously attached to both the County Court and High Court.

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[18] CPR Part 29.3.
[19] CPR Part 29.5.
[20] CPR Part 29.6.
[21] CPR Part 29.7.
[22] CJRG interim report paragraph 6.1.
[23] CPR Part 1.
[24] CPR Part 7. An alternative procedure for claims at Part 8 CPR exists for proceedings previously commenced by originating summons.

Not so in Northern Ireland where the CJRG viewed unified proceedings as something of a dichotomy, preferring to conclude that proportionality could best be achieved by maintaining separate initiating processes throughout the tiers, reflective of the value and complexity involved. The CJRG argued that the present scheme allowed the legal profession liberty to initiate proceedings efficiently, concentrating time and effort on those cases in which detail is desirable and useful. It concluded that "simple proceedings risk being made unduly complex and professional time would arguably be consumed on less significant matters, unnecessarily increasing costs, at the expense of those requiring most attention."[25]

Critics of the CJRG's approach could argue with some justification that the content of each issued claim form differs dramatically depending on the nature of the claim. Notably however, the main thrust of the Woolf reforms is not towards blanket unification of procedure and significant differences exist between the newly created tiers. In Northern Ireland, the very least that can be said is that the existing processes have the advantage of familiarity and have successfully stood the test of time. Furthermore, the physical layout of the existing processes is indicative of the detail appropriate. This is particularly relevant with regard to the small claims application form, the process most often used by personal litigants. Criticisms of a possible deficiency of information in County Court and High Court proceedings may have had more credibility in the absence of the CJRG's ringing endorsement of pre-action protocols which should, in most cases, ensure that the claim and defence are fully understood well in advance of issue.

While it is perhaps possible to detect an emotional attachment to existing processes, in particular the civil bill, the CJRG's suggested reform of the Writ indicates that this was not a determining factor. It is submitted, rather, that the primary reason for retaining separate processes is contained within the CJRG's clear antipathy towards judicial allocation of proceedings. Separate processes are consistent with, and can contribute towards, an effective system of party-determined case allocation.

Under Part 26 of the Civil Procedure Rules all defended claims, regardless of value, complexity or the willingness of the parties to co-operate towards resolution, require an initial judicial determination. Again, the CJRG was clearly aware of a tension between this requirement and the objective of proportionality and wholly rejected the introduction of judicial case allocation in Northern Ireland. Its reasons for doing so included:

(a) existing practitioner expertise in case allocation;

(b) existing costs sanctions aimed at deterring inappropriate allocation;

(c) lack of evidence to suggest that practitioner led allocation was failing;

(d) doubts as to whether a procedural judge would be in a better position to judge appropriate allocation than legal representatives familiar with the client and case;

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[25] Interim report paragraph 10.10.

(e) the likelihood of increased delay;

(f) increased burden on courts, the legal profession and judiciary; and

(g) existence of procedures to remedy inappropriate allocation before trial.

It could be argued that the CJRG showed considerable restraint in its assessment of the impact of judicial allocation in Northern Ireland. A number of other important factors were not expressly specified but may be implied:

(a) Excessive intervention: It is, quite simply, excessive to subject every case, regardless of circumstances, to judicial scrutiny. When there is evidence to suggest that most claims settle without need for judicial attention it seems inappropriate to devote judicial time to an exercise that can be carried out more effectively by litigants. The inevitable delay would be worsened by the possibility of allocation hearings, the opportunity to apply for reallocation and appeal of allocation decisions;

(b) Judicial complement: There are seven Masters of the High Court and four District Judges in Northern Ireland, all of whom are already fully engaged in important work;

(c) Full cost recovery: The costs attendant upon the appointment of additional judicial officers and the increase in administration would, under present circumstances, have to be recovered, with implications for fees and, accordingly, access to justice.

The CJRG's rejection of judicial allocation and willingness to work within the existing allocation scheme is implicit in a number of recommendations aimed at tightening control of allocation. Removal powers were to be extended to County Court judges. Importantly, the recommendation included a power to remove a case to the High Court on the judge's own motion. The CJRG advised further clarification on the law surrounding remittal to the County Court and recommended that the onus should be placed upon a plaintiff in a contested remittal to establish that the case ought to remain in the High Court.[26]

The CJRG drew comparisons between the standard allocation directions applied to most cases under the CPR and the rule based automatic provisions relating to expert evidence and discovery contained in the Supreme Court Rules and County Court Rules. In rejecting allocation directions the understated but obvious conclusion was that the same objectives could be achieved automatically and without unnecessary, costly and time-consuming judicial intervention in each and every case. Those cases in which rule imposed co-operation could not be achieved could then be addressed on the basis of need. The exchange of witness statements, an important feature of allocation direction, is not a feature of Northern Ireland civil justice and was rejected by the CJRG.[27] Other, more innovative, aspects addressed in the

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[26] Final report paragraphs 57-62.
[27] Final report recommendation 62.

standard directions, such as the consideration of ADR, could be addressed effectively through obligations imposed by way of pre-action protocol and the overriding objective, considered later.

Post allocation management – small claim track, fast track and multi-track

Allocation under the Civil Procedure Rules is to "tracks" rather than courts. The CJRG observed that the tracks proposed by Lord Woolf were substantially equivalent to the jurisdictions of the Small Claims Court, County Courts and High Court.[28] Accordingly, the CJRG welcomed the concept of "tiering" but concluded that nothing further needed to be done to achieve that objective.[29] Thus in Northern Ireland post allocation case management falls to be considered under the heads of the Small Claims Court, the County Courts and the High Court, the comparators being the small claims track, the fast track and the multi-track respectively.

The Small Claims Court

The Small Claims Court has operated in Northern Ireland since 1979. The CJRG's interim report made an exhaustive examination of the system then in place and concluded that it worked satisfactorily to achieve its purpose: to be a forum in which smaller value disputes may be settled in a straightforward, efficient and inexpensive manner. The thrust of the CJRG's recommendations concerned substantive differences between the model operated in England and the Northern Ireland equivalent. Fundamental variations included the court's financial jurisdiction and the exclusion of personal injury and road traffic claims. The success of the existing system was recognised by the thoughtful rejection of major change, with the CJRG expressly conceding its concern not to sacrifice the positive aspects of the jurisdiction.[30]

As noted above, under the Civil Procedure Rules the small claims track is the least managed of the three. Management arises in two contexts: the directions made on allocation and those made during preliminary hearings. Post allocation management is limited to the opportunity to conduct "preliminary hearings" – an existing feature of the English system – at which special directions may be made. The procedure of the Small Claims Court in Northern Ireland is set out in the County Court Rules (Northern Ireland) 1981, which makes no specific provision for directions or preliminary hearings. That said, the CJRG noted that such hearing were a rare occurrence but did not go on to recommend that they become a feature of the process. The primary reason for that decision appears to be the wish to avoid undue complexity. The CJRG considered that where necessary interlocutory relief could be sought but that it should not be encouraged.

A holistic examination of the Small Claims Court in Northern Ireland might reveal why the CJRG was reluctant to make further reference to case

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[28] Interim report paragraph 6.3.

[29] See, for example, paragraph 8.22 of the Interim report in which the principle of tiering is used to argue against the introduction of straightforward but high value cases into the County Courts.

[30] Interim report paragraph 7.4.

management. In particular, the CJRG was aware that the nature of claims dealt with in Northern Ireland was radically different from that in England and Wales. The continued exclusion of both personal injury and road traffic litigation together with a very modest financial jurisdiction and a strict no costs rule should generally ensure that overly complex or protracted matters are left to the County Courts. In any event, where complications arise the system is sufficiently informal and flexible to allow some latitude.

Ironically the most significant "innovation" by the CJRG with reference to case management in the Small Claims Court has long been a familiar feature elsewhere in the civil justice system. The CJRG noted that while less than 14% of small claims were contested the remainder had to be formally proved due to the absence of a default judgment procedure. The CJRG hesitated before ultimately recommending the introduction of such a procedure, fearing unfairness could result in penalising legally unsophisticated respondents. This concern was met by additional recommendations providing for clear warnings and a mechanism whereby a default judgment could be set aside.[31]

The County Courts

The County Courts in Northern Ireland encompass courts staffed by District Judges and courts staffed by County Court judges. The District Judges' Court deals with defended claims worth up to £5,000, with claims up to £15,000 falling within the jurisdiction of the County Court.[32] Proceedings are commenced by way of "civil bill", a process unique to Ireland.

The CJRG considered the Northern Ireland County Courts to be broadly equivalent to Lord Woolf's recommendations for a fast track. Lord Woolf, who, in a keynote address at the "Access to Justice" conference held in Belfast in June 1998 questioned whether the fast track could have any useful application in Northern Ireland, supported it in this proposition.

The most striking similarity between the County Court and Lord Woolf's recommended fast track was, of course, the limited financial jurisdiction. Perhaps more significantly, however, the County Court had long enjoyed a system of statutory fixed costs, concise "pleadings" and effective case management – all salient features of the recommended fast track.

In rejecting the fast track model of case management the CJRG asserted its support for case management "where necessary". The CJRG stated:

> "Judicial monitoring of the progress of a case expedites litigation and ensures that cases going for trial have been properly prepared; case management promotes certainty and encourages parity between otherwise unequal parties. While delay might not in itself add to the cost of litigation in the county court (on account of the fixed scale for inter party costs), inefficiency and improper preparation are anathema to a

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[31] Interim report paragraph 7.41.

[32] The Small Claims Court deals with cases up to £2,000, although its jurisdiction is limited in other respects.

> modern civil justice system which aims to maximise and facilitate access to justice."[33]

The CJRG concluded that the objectives of fast track case management were met by the "certificate of readiness" system in place in the County Courts. Simple in construction, the system relies upon the parties informing the court by way of certification that a case is ready to proceed. If the certificate is not lodged within 6 months of the notice of intention to defend the case is automatically referred to the judge for directions. The CJRG summed up the system thus:

> "Proceedings are monitored from the service of the notice of intention to defend. Discovery, if desired, is obtained by prescribed notice and must be complied with within a fixed timescale, while the exchange of medical and other evidence is automatic. The timing of both requests for and replies to particulars is controlled. In the event of non co-operation, orders are available from the court, sometimes on an almost summary basis, and are supported by sanctions not only in terms of costs but also potentially affecting the future running of the case and the evidence that may be called. The parties are given a period of six months from the notice of intention to defend in order to prepare their cases. If the plaintiff has not submitted a Certificate of Readiness to the court before the end of six months, the matter will then be listed before the judge or district judge. At the resulting hearing the judge may make whatever order he or she considers appropriate. This system has proved to be effective in practice in concentrating the minds of litigants but, unlike the automatic dismissal of cases (which has been tried and failed in England and Wales), the certificate of readiness call-over enables the court to deal with each case on its merits."[34]

Post allocation case management in the fast track may be considered under three heads:

(a) The 30 week progression; The CJRG rejected the 30 week timetable system for reasons of speed and complexity. In Northern Ireland the progression of County Court cases to disposal was found on average to be quicker than that prescribed under the fast track. Paragraph 8.39 of the CJRG's interim report noted that the average time between notice of intention to defend (served within 3 weeks of service of the civil bill) and disposal was 38.9 weeks. The 30 week fast track timetable only started post allocation, which itself could only take place post service of the defence. The average time between service of proceedings to trial for cases dealt with in Belfast Recorder's Court in May 1998 was 44.6 weeks. The CJRG established that the English equivalent would allow parties the opportunity to take anything up to 60 weeks from service to disposal. Furthermore, challenges to case management directions by way of further application to

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[33] Interim report paragraph 8.31.
[34] Interim report paragraph 8.33.

the court or appeal may result in prevarication and expense. A point not raised by the CJRG but worthy of consideration is the potential impact of pre-action protocols on the Northern Ireland timetable. It would be hoped that the time between issue and disposal might shorten further due to early co-operation, exchange of evidence and issue clarification.

(b) The listing questionnaire; Under the Civil Procedure Rules a listing questionnaire offers a further opportunity to issue case management directions and fix or confirm a date for trial. In some cases the court will convene a listing hearing. Needless to say, further directions carry the risk of further challenge by way of application to redirect or appeal. The CJRG was doubtful about the utility of fixing a firm date at too early a point. While recognising that a fixed date might assist preparation the CJRG considered that the present listing arrangements in the County Court (whereby a date is set by liaison between the parties and the court office) presented a more realistic model.[35] The Interim Report stated: "The system is pragmatic enough to recognise that vicissitudes emerge from time to time that compel the need for flexibility. The parties are only offered a date upon expressing their readiness to proceed and as a result of the certificate of readiness system they are denied the opportunity to prevaricate case preparation. Moreover, parties can fairly accurately predict the time they will have to wait before being offered a date in their particular district. This enables the parties, by that time properly acquainted with any practical difficulties in the case, to fix a date that is suitable for themselves and their witnesses. The system also recognises that on occasion, through no fault of the litigants or their representatives, cases cannot proceed as quickly as might be hoped. They are, however, kept under scrutiny, this avoiding the possibility that one party is delaying in order to exploit another."[36]

(c) The trial timetable; Having already rejected the suggestion that cases be allocated to "track" depending on complexity rather than value, and having questioned the English approach to evidence-in-chief by witness statement, the CJRG expressed concern about the unreality, and possible injustice, of imposing time constraints on County Court proceedings. In one of its more robust assertions the CJRG stated: "To artificially restrict evidence in the name of brevity is to deny proper access to justice….While the Group is conscious of the need to facilitate the public, it is not convinced that fixed dates and case timetables are workable in practice. Efficient day-to-day case disposal depends upon communication and co-operation between the judiciary, court staff, lawyers and court users."[37]

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[35] Interim report paragraph 8.41.
[36] Interim report paragraph 8.41.
[37] Interim report paragraphs 4.42-43.

The High Court

The CJRG identified the lack of case management as the major weakness of the Queen's Bench Division of the High Court.[38] The court lacked any *independent* control of proceedings from the date on which the defendant entered an appearance until the case was set down for trial.[39] In other words, in the absence of action by one of the parties, cases may drift indefinitely without censure. On being set down for trial cases are entered into a provisional list which may be called over on a number of occasions before a trial date is fixed. Where listing difficulties arise the listing officer refers the case to the senior Queen's Bench Judge who will make appropriate directions. Despite the absence of management, however, in 1997 cases were disposed of 52 weeks earlier than equivalent cases in England and Wales.

The CJRG's recommendations as to case management in the High Court fell into three categories: importing the certificate of readiness, general case management power and case management after setting down. In addition, the recommendation to include inter party scale costs in the Supreme Court Rules should provide a disincentive to prevarication.[40]

Importing the certificate of readiness

Based on positive experiences in the County Courts, Commercial List and Chancery Division, the CJRG was persuaded that case management could make a contribution to the High Court. Faced with the choice between the multi-track and the "certificate of readiness" system in the County Courts the CJRG recommended the latter. Having analysed the proposed procedure under the multi-track the CJRG stated:

> "Under the proposed multi-track in England and Wales, it will not be unusual for proceedings to come under judicial scrutiny on several occasions before trial. Case management will start with allocation, a process which will, on occasion, necessitate a hearing and may be subject to review. On allocation, the court may give directions which in themselves may be open to appeal or variation…Even in those cases where directions are given, the court may arrange for a case management conference. Such a conference will require careful preparation by legal representatives and should be attended by a lawyer who is expected to be sufficiently acquainted with the case to be able to make decisions as to issues and evidence. The Group is concerned that such a conference will inevitably add to the expense of litigation – and that legal representatives may be asked to narrow or admit issues irrevocably or make potentially significant decisions in such an environment and before trial."[41]

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[38] Interim report paragraph 9.28.
[39] The CJRG recognised that the court could intervene on an application by a party.
[40] Final report recommendation 49.
[41] Interim report paragraph 9.30.

In summary, the CJRG stated its High Court case management objectives as follows:

> "…the Group is unenthusiastic about the degree and nature of case management involved in the proposed multi-track in England and Wales. Accordingly, it proposes the incorporation of a system of case management in Northern Ireland that will:
>
> - encourage litigants to conduct proceedings efficiently, fairly and expeditiously;
> - provide the court with a stronger supervisory function without encouraging unnecessary or costly judicial intervention;
> - encourage compliance with rule-based timetables; and
> - be flexible enough to recognise the vicissitudes of litigation."[42]

The CJRG modified the County Court certificate of readiness system by recommending that parties be allowed a period of 9 months between defence and set down. The 9 month period is to be considered the outer limit for set down and the CJRG further recommended that the time for filing should only be open to extension with leave of the court, thus ensuring that slippage cannot arise at that stage. If the case is not set down within the requisite period it will automatically be listed before the senior Queen's Bench Judge for directions. The parties would then be expected to explain the progress of the case and the judge would have power to make any order he considers appropriate.[43]

The general case management power

A relatively inconspicuous, but potentially significant, recommendation of the CJRG was to allow the High Court a general case management power arising of its own motion or by a party on the basis that management is necessary for expeditious disposal of the proceedings.[44] The (inherent) power of the court to intervene is made much more specific, but more importantly, the CJRG recommended that Practice Directions indicate the circumstances in which case management under this head may arise. To some extent this may be seen as a concession to the more proactive case management arising under the multi-track. The recommendation is sufficiently open to allow Practice Directions to specify entire categories of proceedings which may require more invasive or immediate management.

Case management after setting down

The CJRG drew attention to the lack of case management until after setting down but was positive about case scrutiny after that point. Reflecting the approach taken to listing in the County Courts, the CJRG considered the listing mechanisms to be satisfactory. A case that drifts will be subject to

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[42] Interim report paragraph 9.31.
[43] Final report recommendation 44.
[44] Interim report paragraph 9.40. Final report recommendation 46.

judicial scrutiny, but not before the parties are given an opportunity to arrange matters for themselves.[45]

ADDITIONAL RECOMMENDATIONS INFLUENCING THE FUTURE OF CASE MANAGEMENT IN NORTHERN IRELAND

The CJRG reports rejected omnipresent judicial case management in favour of litigant based management, backed up by recourse to the courts. In deciding against a patriarchal approach the CJRG places faith in the legal community. That decision was made possible by evidence suggesting that the civil justice system in Northern Ireland was not dogged by the same degree of complexity, expense or delay as in England and Wales. An analysis of what drives cases to conclusion in Northern Ireland should dwell upon the advantage of fixed costs which offer no financial incentive to prevaricate. Mention should also be made of existing case management, and in particular the certificate of readiness system in the County Courts. Although it could not be measured, most of us would probably like to think that the small, close knit and geographically confined legal community contributes to a level of co-operation that might not be possible in another environment.

While the CJRG may have rejected Woolf style case management it made a number of recommendations aimed at ensuring that cases are effectively managed. The introduction of a certificate of readiness system and rule based costs into the High Court are explicit examples, but perhaps the most effective incentives are contained in the CJRCs general recommendations concerning the future of the civil justice system. In particular:

(a) The overriding objective: In its final report the CJRG introduced a recommendation for the incorporation of an overriding objective into the Rules of the Supreme Court and County Court Rules. The express aim of the objective is to "provide a touchstone by which the parties and the court can base and judge good practice while setting the agenda of co-operation and communication that will run consistently throughout the Rules."[46] The overriding objective encapsulates the spirit of the civil justice reforms and the courts in England have not been slow to seize upon it. Indeed, one commentator has suggested that in England there has been an over reliance on the overriding objective with the risk of inadequate and underdeveloped analysis of other aspects of the Rules.[47] In Northern Ireland the overriding objective will not only set an agenda of co-operation and proportionality but may provide useful leverage in achieving effective case management.

(b) Pre-action protocols: The CJRG enthusiastically endorsed the adoption of pre-action protocols to provide parties with a

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[45] Final report recommendation 47.
[46] Final report paragraph 12.
[47] See, for example, the commentary at paragraph 1.3.2 of "Civil Procedure" Volume 1, Spring 2002, (The White Book) (*Sweet and Maxwell*).

framework of appropriate steps to be taken prior to issue of proceedings. Protocols should herald a new attitude to civil justice in Northern Ireland with emphasis upon co-operation between the parties, clarity and openness. The CJRG hoped that pre-action protocols would result in a civil justice environment in which the issue of proceedings is a last resort. Furthermore, where proceedings must be issued the parties will already have sufficient information at their disposal to facilitate efficient resolution. The CJRG reflected upon the "negotiation culture" that exists in Northern Ireland and concluded that pre-action protocols could build upon this in order to achieve more efficient resolution. The availability of cogent information, provision of basic discovery, consideration of expert evidence and opportunity to pursue alternative dispute resolution should leave parties better equipped at an early stage in the process and thus free to make informed decisions.

(c) Sanctions: The CJRG noted that a benevolent approach existed towards procedural transgressions in Northern Ireland. While this was, to some extent, admirable and avoided an overly officious approach the CJRG was committed to the view that breach should not necessarily be perceived as an inconsequential norm of litigation.[48] The CJRG recommended that the breach of rules, practice directions and protocols should be met with effective, automatic and relevant sanctions. It also concluded that courts should have a more general discretion to examine how the parties have conducted themselves during litigation. In other words sanctions will underwrite not just compliance with the rules but also the spirit of the reforms as encapsulated in the overriding objective.

(d) Summary judgment: The group recommended an enhanced form of summary judgment in both the High Court and County Court arising upon the application of a party or on the motion of the court, based upon a single test: the absence of a realistic prospect of success. The recommendation provides an opportunity for weak cases to be taken out of the system and, indirectly, provides an incentive towards realistic and timely evaluation.[49]

(e) Offers to settle: The CJRG recommended adoption of a system of payment into court/offers to settle based on the model provided by part 36 of the Civil Procedure Rules. In short, the recommendation was aimed at inviting consideration of early settlement, with both defendant and plaintiff able to formally set down their position and with sanctions attendant upon subsequent failure by the other party to beat that position.[50]

(f) Information technology: The CJRG was keen to promote the use of information technology in civil justice. This may ultimately prove to be the most influential reform, with potential to be felt at

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[48] See final report paragraph 124
[49] Final report recommendation 57.
[50] Final report recommendations 55 and 56.

every stage from initial exchange of information to service of proceedings and virtual hearings. The easier it is to facilitate the needs of the parties the more likely it is that cases will be run effectively.[51]

CONCLUSION –

Preserving the Status Quo – Factors Underlying the CJRG's Approach to Case Management

The CJRG audit of the civil justice system concluded that case management was unnecessary in the Small Claims Court, satisfactory in the County Court and required in the High Court. The preceding discussion illustrates that while adopting a fundamentally different approach to the means of achievement the CJRG recognised and accepted the objectives informing case management. It is too early to assess the success of the case management reforms in England and Wales. The Lord Chancellor's Department has commissioned research by Nottingham Law School into this area and publication is expected in early 2003. An early study published by the Lord Chancellor's Department in March 2001 was cautiously positive but did not pretend to offer a complete analysis.[52] Undoubtedly the most comprehensive research to date was recently produced by the Law Society and Civil Justice Council. The report did not concentrate on post issue matters, but did make the following interesting observations on case management:

> "…interviewees frequently highlighted perceived failings within the courts. This was particularly true of those involved in clinical negligence litigation, which is heavily court based, but similar points were repeated by those involved in housing disrepair and, to a lesser extent, personal injury litigation. Respondents criticised the courts for inefficiency and delay, suggesting that some courts were unable to list applications quickly enough for procedural timetables to have much bite. Case management was far more positively received in London than outside, where there were problems with providing experienced judges and apparently inconsistent decisions."[53]

A number of underlying factors may be said to underwrite the CJRG's conclusions. First and foremost the CJRG found that the existing system was working well even when set against the targets used in the Woolf review. To adopt intensive case management to deal with a small minority of bad cases would have been disproportionate. Moreover, deficiencies in the present

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[51] Final report recommendations 73-77.

[52] *Emerging Findings. An early evaluation of the Civil Justice Reforms*. (LCD, March 2001).

[53] *More Civil Justice? The impact of the Woolf reforms on pre-action behaviour*. (The Law Society and Civil Justice Council, May 2002). A number of similar observations have been made in practitioner journals. See, for example – Jeremy Fleming, "Trying Woolf" Law Society's Guardian Gazette, (2000) Vol 97 No 17 p 18; Richard Harrison, "The state of the revolution" (2000) 150 NLJ 541; David di Mambro, "The aftermath of Woolf" (June 1999) sourced at Butterworths online, www.butterworths.com, commentary on civil procedure.

system may be adequately addressed through other recommendations falling outside those directly on case management. The CJRG was obliged to consider the cost of litigation in Northern Ireland. The jurisdiction is fortunate to have a tradition of fixed costs and the CJRG was keen to avoid compromising the successful aspects of the system. Intensive case management cannot be delivered without cost: work is created for the parties and court and judicial time is expended. The expense involved in intensive case management appeared to the CJRG to be disproportionate to the doubtful benefits accruing.

COMPLEXITY, DELAY AND COST – THE COUNTY COURTS IN NORTHERN IRELAND

His Honour Judge Hart QC, Recorder of Belfast and Chairman of the Northern Ireland County Court Rules Committee

Complexity of court procedures, delays in bringing cases to a resolution, and the costs associated with litigation are matters that have been examined and debated over many decades. When Lord Woolf was asked to review the rules and procedures of the civil courts in England and Wales in 1994 this followed no fewer than 60 reports on various aspects of civil practice and procedure published since 1851.[1] Lord Woolf's reports have brought about a fundamental reshaping and restructuring of the procedures of the civil justice system in England and Wales. It was therefore inevitable that the civil justice system in Northern Ireland, which closely resembles that of England and Wales prior to the implementation of the Woolf reforms, should be subjected to a similar process of review. This took place under the auspices of the Civil Justice Reform Group appointed by the Lord Chancellor in February 1998 under the chairmanship of Lord Justice Campbell. The interim and final reports of the Group have been discussed elsewhere and therefore it is unnecessary to refer to them in detail.[2] This article considers the issues of complexity, delay and cost in the county courts in Northern Ireland, but before dealing with these topics it is perhaps appropriate to say something about the origin and characteristics of the county courts.

Although the name and structures of the county courts in Northern Ireland imply that they are the same as the county courts in England and Wales, there have long been two fundamental differences between the county courts in Northern Ireland and their counterparts elsewhere in the United Kingdom. The first is that the procedures of the county courts in Ireland have historically been much simpler, based as they are on the "civil bill", a summary procedure which, it would seem, was originally developed by the judges of assize and had become well established in Ireland by the mid seventeenth century.[3] The second is that since the creation of the county courts in Ireland in their modern form in 1877,[4] the costs of litigation have been regulated by a fixed inter party costs regime under which costs follow the event with the judge having virtually no discretion over the award of costs, and which specifies the costs allowed for solicitor and counsel, so avoiding the need for taxation in all but a handful of cases. These costs are fixed by the County Court Rules Committee and approved by the Lord Chancellor, have statutory force, and take the form of a series of bands

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[1] *The Civil Justice Reform Group Interim Report* (April 1999), para 3.1.

[2] See Capper, "Keeping Woolf from the Door-the Reform of Civil Procedure in Northern Ireland" (1999) 50 *NILQ* 434, and "Final Report of the Civil Justice Reform Group – Still Keeping Woolf from the Door" (2000) 51 *NILQ* 619.

[3] D S Greer, "The Development of Civil Bill Procedure in Ireland" in J F McEldowney and P O'Higgins (eds), *The Common Law Tradition: Essays in Irish Legal History* (Dublin, 1990), pp 27-59.

[4] By the County Officers and Courts (Ir) Act, 1877.

related to the amount awarded in the case of the plaintiff, or claimed in the case of the defendant. A significant recent development has been the creation of a simple, pragmatic, effective and proportionate system of judicial case-management that requires the court to intervene only in the minority of cases that do not proceed to trial within prescribed time limits, which is significantly different to the system of judicial consideration and allocation of every case, however small, which is a feature of the post Woolf litigation landscape in England and Wales.

The simplicity of the proceedings and the fixed scale costs system were described by Lord MacDermott half a century ago:

> "In the first place, the procedure is simple and comparatively inexpensive. The civil bill contains a short statement of the relief sought and the nature of the claim. It is served by an official of the court called a process server, and if the defendant wants to defend he or his solicitor so intimates at the office the Clerk of the Crown and Peace. There are no interlocutory proceedings and no pleadings (save in a few special cases), and the case is heard in its turn, on the day indicated in the civil bill or as near thereto as the state of the list allows. The procedure on appeal is equally simple and is a complete rehearing. The costs chargeable throughout are on a fixed scale. This, the absence of interlocutory applications, and the fact that the County Court Judge has no discretion to award costs according to the event, enable the litigant to ascertain, in advance and fairly closely, what his commitments will be, win or lose."[5]

Before considering whether these comments are still valid it may be appropriate to briefly describe the present day structure of the county courts, their jurisdiction and the volume of business for which they are responsible. Although it is common to refer to "the County Court" as if it was a single, unified, court like the High Court, this is not strictly accurate. Northern Ireland is divided into seven county court divisions, each of which comprises a group of petty sessions districts, which are in turn based upon the 26 district council areas. For example, the Belfast Recorder's Court (as the county court for the division of Belfast is called) covers Belfast City Council, Newtownabbey Borough Council and Carrickfergus District Council areas. Of the 15 county court judges, four are permanently assigned to Belfast, and one to each of the six divisions outside Belfast. The five remaining judges are peripatetic and allocated to the various divisions as required. The county court jurisdiction is defined in monetary terms, and broadly speaking includes all causes of actions where the amount claimed is up to £15,000, although in certain categories such as equity, title or probate cases the jurisdiction extends to property with a value of up to £45,000.

Four full-time district judges also exercise jurisdiction in the county courts. Their jurisdiction is twofold, first of all they have a civil bill jurisdiction,

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[5] "Law and Practice in Northern Ireland" (1953) 10 *NILQ* 47 at p 67.

which has recently been increased to £5,000,[6] and in addition they preside over the small claims court, whose jurisdiction has also been recently increased to £2,000.[7] One of the district judges is assigned to the division of Belfast and his three colleagues are each responsible for two of the six divisions outside Belfast. In addition to the full-time county court and district judges there are a number of deputy county court judges and deputy district judges. The full-time district judges have all been appointed as deputy county court judges.

Whilst the district judges are concerned exclusively with non-criminal matters, this is not the case as far as county court judges are concerned, who devote a great deal of their time to criminal and other business. In 2000 40% of the days sat by county court judges were spent on indictable business in the Crown Court.[8] In addition they are responsible for hearing appeals from the magistrates' courts in both criminal and civil matters; licensing cases; criminal injury [9] and criminal damage appeals, and devote a substantial and increasing proportion of their time to work under the Children (Northern Ireland) Order 1995. In 2000 1005 days were spent on Crown Court work by county court judges, on 228 days the majority of the court's time was devoted to Children Order cases, with a further 71 days where Children Order work was the minority of the court's time.[10] The effect of these demands upon the time of the county court judges is such that a substantial proportion of ordinary civil business is dealt with by deputy county court judges (who are analogous to recorders or deputy recorders in England and Wales) who sat for 428 days in 2000, compared to 1512 days sat by county court judges, 22% of the total. However, as the 1512 days spent on civil business by county court judges includes time devoted to magistrates' courts appeals, licensing cases and criminal injury appeals which are not normally dealt with by deputy judges, it can be seen that the proportion of ordinary civil bill work heard by deputies is appreciably higher than the statistics for days sat by deputy judges would suggest.

Progressive increases in the monetary jurisdiction of the county courts in recent years have resulted in a substantial transfer of litigation from the High Court. This was particularly marked when the jurisdiction, which had been fixed at £5,000 in 1982, was increased to £10,000 in 1992 and to £15,000 in 1993. The following statistics demonstrate how significant the effect of these jurisdictional increases has been. In 1992 a total of 8143 defended civil bills were dealt with in the county courts, compared to 4368 actions in the Queen's Bench and Chancery divisions of the High Court.[11] By 2000 16027 defended civil bills were dealt with in the county court, compared to 2141 Queen's Bench, Commercial and Chancery actions in the High Court.[12] When one bears in mind that in 2000 the district judges also dealt with 9441

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6 From 5 September 2001 by the County Courts (Financial Limits) Order (NI) 2001, SRNI (2001) 67.
7 From 19 March 2001, *ibid*.
8 *Northern Ireland Judicial Statistics 2000*.
9 Although this has been replaced by a tariff system from 1 May 2002 under the Criminal Injuries (NI) Order 2002.
10 *Northern Ireland Judicial Statistics 2000.*
11 *Northern Ireland Judicial Statistics 1992.*
12 *Northern Ireland Judicial Statistics 2000.*

undefended, and 1289 defended, small claims, it can be seen that the county courts, and the small claims courts which are administered by the county court staff, are now the most important courts in terms of volumes of business within the civil justice system in Northern Ireland. Whilst the importance of the small claims courts is clear from these figures, this paper is confined to the working of the county courts.

The last decade has not only seen a very substantial increase in the volume of litigation dealt with by the county courts, but this has been accompanied by a considerable increase in the complexity of many categories of business as the increase in the monetary jurisdiction of the court brings more difficult cases within their ambit, notably professional and clinical negligence, building cases and allegations of discrimination under various statutes, such as the Fair Employment and Treatment (Northern Ireland) Order 1998.

How then do the county courts in Northern Ireland fare when dealing with the interrelated problems of complexity, delay and cost? Although it has been suggested that "Progress and an increase in the financial limits have not allowed the jurisdiction to remain comparatively inexpensive or its procedures simple",[13] nevertheless the simplicity of the pleadings referred to by Lord MacDermott has been preserved to a considerable extent. Proceedings are still instituted by the plaintiff issuing a civil bill, which remains a simple document in which the plaintiff claims a specific sum, say £7,500, and sets out the nature of his claim in a few sentences as in a general endorsement on a writ of summons. The defendant indicates that he will contest the case by filing a notice of intention to defend. This does not take the form of a specific denial of each of the plaintiff's claims as in the High Court, but is the equivalent to an appearance in the High Court. It has the effect of putting every aspect of the plaintiff's claim in issue, as the defendant is not obliged, save in extremely limited circumstances, to traverse the plaintiff's claim. On the contrary, the plaintiff must approach the case on the assumption that all aspects of his case have to be proved unless the defendant has admitted any aspects of the claim in open correspondence. This is not necessarily a disadvantage, as Lord MacDermott pointed out:

> "When one is not quite certain what the arguments on the other side will be one is usually more alert to investigate the situation comprehensively and to go into Court prepared for any eventuality which a thorough knowledge of the facts and the relevant law may foreshadow. And as a case well made up is generally presented better and more briefly, this stimulus to preparation benefits the court and the litigant as well as the art of advocacy."[14]

The only further step required by the Rules in every case is that the plaintiff lodge a certificate of readiness stating that the case is ready for hearing and that no interlocutory issues remain outstanding. When this is lodged with the court office the court fixes a date for hearing. In Belfast this is usually four weeks ahead, although outside Belfast where courts do not sit continuously a longer period may elapse.

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[13] *Bell v Dungannon Meats* [1996] NI 604 per Campbell J.
[14] *Supra* n 5.

However, in a great many, though by no means all, cases the defendant will serve a notice for further and better particulars on the plaintiff, and the replies delivered by the plaintiff define in greater detail the plaintiff's claim, thereby serving the same purpose as the statement of claim and replies to notice for further and better particulars in the High Court. In many cases the plaintiff will now seek discovery from the defendant by way of an order from the chief clerk. Interrogatories are infrequent. There has undoubtedly been a substantial increase in the number of cases where discovery is sought, and in interlocutory applications to the court, particularly in the past decade. The most common applications to the court are:

1) by the defendant to compel delivery of replies to the notice for particulars by the plaintiff;

2) by the plaintiff to compel compliance with an order for discovery directed to the defendant;

3) by the defendant for disclosure of the plaintiff's medical notes and records; and

4) by the plaintiff for inspection of the scene of the accident by an engineer.

The greater readiness of the parties to resort to interlocutory applications can be seen by the increase of such applications from 3013 in 1997 to 4091 in 2000.[15] Whilst it has to be accepted that the frequency with which discovery is sought and the burden which this places on the opposite party (usually the defendant), and the practice of serving a notice for particulars, means that the pre-trial procedures are often neither as simple, nor as inexpensive, as they were in 1953, nevertheless the procedures of the county courts are still much simpler than in the High Court. It has to be recognised that when larger amounts are at stake the factual and legal issues will often be of greater complexity than was the case in the past when the jurisdiction was lower, and it is necessary to define the plaintiff's case in a fashion that allows the defendant properly to meet that case. Resorting to a notice for particulars is therefore entirely appropriate in all but the most straightforward cases, and provides a simpler, cheaper but equally effective method of defining the issues than a statement of claim followed by a notice for particulars and replies.

Whilst the increase in the volume of interlocutory applications might be thought to demonstrate the growth of an undesirable form of satellite litigation, this would be an unduly simplistic conclusion for several reasons. First of all, as we shall see, time limits are imposed for the conduct of litigation by the court rules, and a failure by the plaintiff to give replies and so define his case, or by the defendant to give discovery in response to a court order, cannot be ignored by the other side as the clock is ticking inexorably towards a hearing. Whilst it is undesirable that any interlocutory application has to be brought to obtain relief, such applications nevertheless perform an essential function in the case management of the proceedings by the parties, and by the court, to ensure that cases are brought to trial without

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[15] *Northern Ireland Judicial Statistics 2000.*

delay whenever possible. Secondly, the costs allowed for such applications are extremely modest, which is a disincentive to unnecessary applications.

It is appropriate now to turn to the speed with which proceedings can be dealt with in the county courts. It is common for commentators to refer to "the law's delays" as if these were all the fault of the court. However, it has to be appreciated that a court can only control the pace of litigation through its general procedures, or orders in specific cases, once proceedings have been instituted by the plaintiff. Nevertheless, all too often in the past many cases were not brought to trial as speedily as they ought to have been, and the county courts were no exception. In recent years there have been considerable improvements in the way in which the county courts manage the progress of litigation, improvements which came about as a result of initiatives developed by the county court judges themselves in the early 1990s. These changes have brought much more timely, robust and effective management of litigation in the county courts, with substantial reductions in avoidable delays as a result. This has been achieved by introducing a requirement that the plaintiff serve a certificate of readiness before the case can be set down for hearing, and combining this with a mechanism whereby a failure to lodge the certificate of readiness within the six month period provided by the Rules results in the matter being automatically listed before the judge for further directions, with the court assuming control of the management of the case thereafter.

In the early 1990s the Northern Ireland Court Service set up a working party of practitioners and court officials under the chairmanship of His Honour Judge Russell QC to review a number of aspects of the civil bill system. In 1993 the working party suggested that a number of changes should be made, in particular that provision should be made for the parties to notify the court when a case was ready for hearing by filing a certificate of readiness. At the initiative of the Council of Her Majesty's County Court Judges in Northern Ireland, who were concerned this did not provide a means to enable the court to deal with cases where there were avoidable delays in lodging a certificate of readiness, this proposal was modified to include a requirement that if the certificate of readiness was not lodged by the plaintiff within six months of the lodging of the notice of intention to defend by the defendant, the case would be automatically referred to the judge, who could then give such directions as were necessary to ensure that the case proceeded to trial, including fixing the date for the hearing or dismissing the case. Whilst the judges accepted that there was a need for judicial oversight and control, they considered that the parties should be given a reasonable period of time to prepare for the hearing, and only if they had failed to do so within that period should judicial oversight and control become necessary. As a result of these discussions the County Court Rules were amended by the introduction of Order 8 Rule 3(2):

> "In any proceedings in which a notice of intention to defend has been served the Chief Clerk shall, if no certificate of readiness has been delivered to him within a period of six months immediately following the date of service of the notice of intention to defend, list the proceedings before the judge and notify the parties accordingly and the judge may issue such directions concerning the future conduct of any such proceedings as he considers appropriate including, in

> particular, an order that the proceedings be stayed or dismissed."

The period of six months was selected by the judges on the basis of best practice, and represented a pragmatic decision as to what should be allowed as a reasonable period of time after the issue of proceedings before the case would be ready for hearing. Once the notice of intention to defend is lodged it is entered on computer by the court staff and the case is automatically listed for mention if the certificate of readiness has not been lodged in court within six months. The parties are then notified by the court office to appear before the judge, who then holds what is generally referred to as a certificate of readiness callover at which the parties appear and explain why the case is not ready for hearing. Depending upon the reason advanced for the delay in lodging the certificate of readiness, the court will either adjourn the matter to a later date for further review, make any necessary interlocutory order, or set the case down for hearing on a specific date which is sufficiently far in advance to allow the parties time to resolve the outstanding issues. If the case is set down the parties will be given a hearing date and the certificate of readiness has then to be lodged, usually within 14 days. If the plaintiff's solicitor does not appear, or the certificate of readiness is not lodged within the required time, they are again notified to appear before the judge at a later date, and a failure to appear or to satisfactorily explain why the certificate of readiness has not been lodged will normally result in the civil bill being dismissed, although this draconian step has only to be taken in a handful of cases.

This system has the great merit that it only requires judicial oversight and control over those cases which do not proceed to hearing within the time limits provided by the Rules, whilst providing a simple mechanism to enable the judge to case-manage the remainder. Whilst the number of civil bills controlled in this fashion varies from time to time, a minority require judicial intervention. For example, at Belfast Recorder's Court at the end of June 2001 there were 303 cases where no certificate of readiness had been lodged after six months, compared to 1171 where certificates of readiness had been lodged and dates had been given for hearing. In the same court at the end of April 2002 the number of cases where there was no certificate of readiness after six months was 238, compared to 727 with a certificate of readiness which had been set down for hearing, the difference between the number of cases with a certificate of readiness being due to a substantial fall in the number of civil bills entering the system in the latter part of 2001.

The certificate of readiness procedure has been widely accepted and welcomed by the legal profession and was commended by the Civil Justice Reform Group:

> "The Group has no doubt that this system, if properly followed and applied, provides an efficient and pragmatic compromise between judicial intervention and control in every case, and the traditional (and ineffectual) policy of complete reliance upon the observance by the parties of rules of court and the time limits set out in such rules. It is far less demanding of judicial time, and much more flexible, than the universal system of judicial control based upon the 'procedural judge' that has been considered necessary in England and Wales. It avoids the

> imposition of costs upon litigants in every case, but preserves the ability of the judge to manage the case so as to ensure that it is brought to trial as rapidly and effectively as possible in the event that the parties do not prepare the case for trial within 6 months from the case coming into the judicial system."[16]

Indeed, the Civil Justice Reform Group recommended that a similar system should be adopted in the Queen's Bench and Chancery Divisions of the High Court. Nevertheless, it also recognised that it "is essential for the efficient and consistent application of the system that the assigned judge for each [county court] division exercise personal control over the callover of cases where the certificate of readiness has not been lodged within 6 months."[17] Delegation of this task to a district judge, or a court official, runs the risk that case-management decisions will not be taken with the same degree of authority as should be the case where the decision is made by the assigned judge for the division concerned. It is only where the judge who has ultimate responsibility for the disposition of the business makes such decisions that the system will function as effectively as possible, a view implicitly endorsed by the Civil Justice Reform Group in its recommendation that where the case is not set down for trial within the prescribed period in either the Queen's Bench or Chancery divisions "the matter should be automatically listed before the Senior Queen's Bench judge or the Chancery judge, as appropriate".[18]

The cost of legal proceedings is always a source of controversy. In his Interim Report Lord Woolf began the chapter dealing with costs by saying that "The problem of costs is the most serious problem besetting our litigation system."[19] In his final report he said that his recommendations were intended to:

> "(a) reduce the scale of costs by controlling what is required of the parties and the conduct of proceedings;
>
> (b) make the amount of costs more predictable;
>
> (c) make costs more proportionate to the nature of the dispute;
>
> (d) make the court's powers to make orders as to costs a more effective incentive for responsible behaviour and a more compelling deterrent against unreasonable behaviour;
>
> (e) provide litigants with more information as to costs so that they can exercise greater control of the expenses which are incurred by their lawyers on their behalf." [20]

The inter-party costs regime in the county courts is governed by Order 55 of the County Court Rules and its characteristics were described by Sir Robert Carswell LCJ in *Re C & H Jefferson*:

> "The structure of the provisions relating to costs is that in the very large majority of cases scale fees are payable both

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16 *Final report*, para 65.
17 *Ibid*.
18 *Final report*, para 96.
19 *Access to Justice, Final Report*, p 78.
20 *Ibid*, pp 78-79.

> between party and party and between solicitor and client. They are fixed from time to time by the County Court Rules Committee and have statutory force. When the scales are applied there is no element of discretion and taxation of costs and fees is not required. They are largely related to the amount of stake in the proceedings and operate on the swings and roundabouts principle: in some cases solicitors and counsel may be fairly handsomely paid for a case which has not involved at great expenditure of time and effort, in others they may have to do a great deal of work for very modest reward. The virtue of fixed scales is two fold. If the scales are fixed at a suitable level proceedings in the County Court can be conducted at reasonable cost, while giving a reasonable return to the practitioners who conduct them. At the same time the costs of litigation is predictable because it is capable of fairly precise calculation and a prospective litigant may ascertain his financial commitment before he launches proceedings."

Later he referred to the county court as ". . . a court in respect of whose proceedings the costs and fees should be both moderate and ascertainable." [21]

It will be seen from these remarks that the county court system of fixed scale costs meets several of Lord Woolf's objectives. Lord Woolf recognised that "The only way to limit the costs of a case is to limit the amount of work that a solicitor has to do on the case".[22] By fixing the costs at a suitable level related to the amount claimed the scales ensure that the costs are proportionate to the amounts involved, and that there is no reward for lawyers who conduct litigation in an ineffective or extravagant fashion, because if they spend more time on the preparation of the case than is allowed by the appropriate scale they cannot recover those costs.

A further virtue of the fixed scale costs system is that it avoids the need for taxation, itself a time-consuming process which inevitably creates further expense because of the time spent in preparing the bills for taxation, judicial time spent in determining the costs and the financial cost to the lawyers who do not receive the fees they are entitled to for an appreciable period after the conclusion of the case, and therefore are having to carry the cost of funding the litigation, not just their own costs but the outlays in the form of expert witnesses' fees and court fees which have been incurred on behalf of their clients. This is of particular significance in Northern Ireland where plaintiffs are not expected to meet the costs of litigation until the end of the case. As scales embody the swings and roundabouts principle it is inevitable that they cannot provide for the circumstances of every individual case, but provided the overall returns to practitioners are fair and reasonable the very considerable advantages of fixed scales to both the public and the legal profession are obvious.

However, because of the increased jurisdiction of the county courts and the increasing complexity of county court litigation, for some time the legal profession has argued that the costs allowed by the scales do not provide fair

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[21] [1998] NI 404 at p 409.
[22] *Access to Justice, Final Report*, p 26

and reasonable remuneration, and have sought changes in the scales. It became apparent to the Rules Committee from submissions made to the Civil Justice Reform Group that there were areas of concern which required to be addressed, and the Rules Committee indicated to the profession in August 1999 that it proposed to conduct a major review of the county court cost structure once the government's response to the Civil Justice Reform Group's final report was known. The Lord Chancellor announced his broad acceptance of the recommendations of the Civil Justice Reform Group on 16 January 2001, and shortly thereafter the Rules Committee embarked upon a major review of the county court costs structure. Following the precedent of the Civil Justice Reform Group the Rules Committee decided to seek views from a wider range of consultees than had been customary in the past and, having extended the time for submissions at the request of a number of professional bodies, has carried out an intensive, comprehensive and thorough review of every aspect of the scales and the relevant rules over several months, and at the time of writing its deliberations are almost complete.

However, much of the cost of litigation in Northern Ireland, as elsewhere, is not solely due to the legal costs incurred but to the costs incurred by the parties retaining expert witnesses, often when the necessity for doing so is questionable. This has been a cause for judicial concern for some time. In *Liddle* v *Middleton*[23] Stuart Smith LJ observed:

> "There has been a regrettable tendency in recent years in personal injury cases, both road traffic and industrial accidents, for parties to enlist the services of experts, whether they are necessary or not. When they are not necessary, they simply add to the already high costs of litigation and the length of the trial. In industrial accidents an expert may well be needed to inspect complicated machinery or to give evidence of practice and safety procedure. But in road traffic accidents it is the exception rather than the rule that expert witnesses are required."

These comments are equally apposite in Northern Ireland and have to be borne in mind in a number of contexts. First of all, where an application is made for inspection under Order 14 Rule 9(1) the Court has a discretion whether to grant inspection as it is required to be satisfied that the inspection "may be necessary or expedient for the purpose of obtaining full information or evidence." Those deciding whether to retain a consulting engineer, and the court in deciding whether or not to grant an order for inspection, should consider carefully the issue(s) to which the evidence of the expert witness is thought to be relevant to see whether the facts which need to be proved in support of the plaintiff's case can be established in a more economical and equally satisfactory manner than by retaining a consulting engineer to carry out an inspection of the location of the accident, preparing a plan, and taking photographs.

However, even where an inspection has been justifiably carried out and an engineer has prepared a report, efforts should be made to avoid incurring the

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[23] [1995] PIQR 36.

costs of the engineer's attendance by seeking agreement that the report be admitted in evidence without the maker attending. Such efforts seem to be rarely made, or if they are made, to be successful. If necessary an application should be made to the court under Order 24 Rule 2B(3) to have the report of the expert witness admitted if the witness is not available on the date fixed for hearing. Such orders are now commonly made in the county courts and help to reduce the cost of litigation, as well as avoiding unnecessary adjournments.

Under Order 55 Rule 6 of the County Court Rules the judge in the county court exercises the power of the taxing master in respect of witnesses' expenses. If there is a dispute as to whether it was appropriate to either engage an engineer (or other expert witness), or to call the witness at the trial, or as to the fees to be allowed to the witness, the court may well take the view that some or all of the costs of a consulting engineer may not be properly allowable against the losing party, even if the consulting engineer was retained on counsel's direction, on the basis that it was not reasonable to incur such costs because they were neither necessary nor proper to establish the successful party's case if the facts sought to be proved by the engineer could have been established in a more economical fashion.

It would be wrong to suggest that the unnecessary attendance of professional witnesses only arises where engineers are involved, and in recent years there has been a much greater readiness on the part of county court judges to resort to Order 24 Rule 2B(3) to admit the evidence of medical witnesses whose reports cannot be agreed. Whilst there will clearly be cases where it is necessary for the court to hear the oral evidence of medical experts who are in dispute as to the cause or extent of a plaintiff's injuries to do justice to the parties, nevertheless where a thorough and comprehensive report has been prepared justice can generally be done by admitting the report in evidence, thereby avoiding the additional expense incurred by the parties in requiring the attendance of the doctor(s), and the consequent dislocation of the work of the hard-pressed medical profession in the National Health Service.

Nevertheless, there remain a number of areas where the costs of expert witnesses require to be addressed. In its Final Report the Civil Justice Reform Group addressed this issue:

> "The Group has consistently emphasised the importance of proportionality in civil litigation. It would appear that the greatest threat to proportionality in the County Courts is not the cost of the legal fees but rather the cost of expert witnesses, in particular engineers. Although informal scale fees have been agreed for such witnesses though liaison between the Legal Aid Department and the professional bodies, these often dictate hourly rates rather than block amounts with the result that it is not unusual for expert's fees to be entirely disproportionate to the value of the claim. The Group hopes that this class of cost will diminish as the result of its other proposals, such as its encouragement of the use of joint experts and the use of written as opposed to oral evidence. However, it has concluded that more fundamental action is required to address this long established problem. Accordingly, the Group recommends that the County Court Rules Committee ought to

> have regard to the provision of scale fees for experts, to be formulated after consultation with the relevant professional bodies." [24]

The Rules Committee will, no doubt, wish to consider this question when it completes its review of the existing costs scales.

From this review of the working of the county courts in Northern Ireland it will be apparent that whilst their procedures may no longer embody the pristine simplicity of half a century ago, in large measure this is because their jurisdiction and workload have greatly increased. Nevertheless their procedures are still relatively simple, and they continue to enjoy a system of fixed costs which confers real advantages on both the public and the legal profession. A simple but effective system of case management has been devised and put in place, and is applied only to the minority of cases which fail to proceed to trial within a reasonable time frame. Although the contribution of the county courts to combating the problems of complexity, delay and cost in the civil justice system in Northern Ireland has been considerable, it would be foolish to assume that the system is perfect in every respect and cannot be improved. Much remains to be done. Those recommendations of the Civil Justice Reform Group which directly relate to the county courts, or will have an impact on civil litigation generally, such as the adoption of pre-action protocols and changes in the rules governing discovery, have still to be implemented. The Rules Committee will have to grapple with the complex issue of costs of expert witnesses, either by encouraging the use of agreed experts, a development which appears to be one of the early successes of the Woolf reforms in England and Wales, or by developing scales of costs for expert witnesses, or both. The listing of civil cases; the effective use of judicial time; the impact of other categories of work upon the time available for county court judges to hear civil bill business, and the need for the widespread use of deputy judges as a result, are just some of the areas where changes may be necessary in order to ensure that the county courts continue to provide a high level of service to the litigants who resort to them.

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[24] Final Report, para 82.

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[1] these were the principal case types the Group had in mind when designing its recommendations about judicial case management.[2] 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[3] 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.[4] 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.[5]

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

2 See Interim Report paras 9.28-9.40; Final Report paras 96-100.

3 SR 2001/111.

4 The test is whether the applicant shows "reasonable grounds for taking, defending or being a party" to legal proceedings.

5 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.[6] 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.[7] 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.[8] 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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[6] 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.

[7] At para 1.3.

[8] 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[9] and as the Scottish Executive is currently minded to do.[10]

(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.[11] 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.[12]

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[9] *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.

[10] In the debate in the Scottish Parliament on 8th 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#Col10166.

[11] This was suggested at para 8.9 of the 1999 consultation paper.

[12] 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 8th 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.[13] In the debate in the Scottish Parliament on this report (13th 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.[14] 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[15] 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, than when Legal Aid was first introduced the clear majority of the population were covered. The objective was that it should

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[13] *Report on Legal Aid Inquiry* (SP Paper 437) www.scottish.parliament.uk/official_report/cttee/just1-01/jlr01-08-01.htm at para 40.

[14] *Supra* n 10.

[15] 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[16] 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.[17] 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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[16] 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 12th 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.

[17] 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[18] 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,[19]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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[18] At para 8.9.

[19] 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.[20] 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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[20] *Supra* n 16.

disbursements due on CFA cases on an ongoing basis.[21] 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[22] and the size of the AEI premium.[23] 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.[24]

(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.[25] It is also reflected in very high success fees which are

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[21] 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.

[22] See *Callery* v *Gray* [2001] 3 All E.R. 833.

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

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

[25] 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.[26] 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.[27]

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).

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

[27] *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."[28]

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.[29] 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.[30]

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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[28] *Supra* n 24 at para 3.52.

[29] *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.

[30] *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[31] 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[32]

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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[31] *Supra* n 19.
[32] *Ibid* at paras 1.6-1.9.

(c) Compulsory CLAF?[33]

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?[34]

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[35]

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[36]

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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[33] *Ibid* at paras 1.10-1.13.
[34] *Ibid* at paras 1.14-1.15.
[35] *Ibid* at paras 1.16-1.19.
[36] *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[37]

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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[37] *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.[38] 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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[38] 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.

CFAS: A WEIGHTLESS REFORM OF LEGAL AID?

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Conditional Fee Arrangements (CFAs), an anglicised species of contingency fees, are a relatively recent addition to the civil justice system of England and Wales. They have opened up the world of legal services to new sources of funding, particularly insurance backed funding, and have also been the basis for the withdrawal of significant areas of personal injury work from the legal aid scheme. The government has claimed that, "conditional fees have already greatly extended access to justice. With conditional fees, people can take good cases, in the certain knowledge that [they] will not be left out of pocket if they lose (except by the amount of any insurance premium)."[1]

CFAs have been with us since 1995 as a complement to the legal aid scheme for those clients who did not qualify for state funded help.[2] Under a CFA, a solicitor usually acts on the basis that, if his client loses the case, the solicitor will be paid nothing. If the solicitor succeeds, her normal fees are paid with an "uplift" or "success fee". The success fee is based on a percentage of a solicitor's costs, rather than the U.S.-style contingency fee system which is based on the level of damages awarded to a client. An added complication in this system arises from our 'costs follow the event' rules. Although a CFA can protect a client against paying their own lawyers' costs, in the event that they lose their case, they would not be protected against payment of the other side's costs. To meet the potentially serious implications of this, the insurance market was encouraged to develop 'after the event' (AEI) insurance policies that could be taken out at the time the CFA was agreed and which would protect the client against such losses.

More recently, the Access to Justice Act 1999 (the AJA) has sought to extend and deepen the importance of CFAs in two main ways. Firstly, most personal injury cases were excluded from the scope of the new legal aid scheme.[3] This was on the assumption that the market for personal injury funding was ready to be supplied almost totally by CFAs and the insurance industry. It was also seen as a beachhead for the replacement of other parts of the civil legal aid scheme by CFAs, as the CFA market matured. In this sense, CFAs were no longer complementary to the legal aid scheme; in certain areas of law, they were to replace it. Secondly, would-be CFA clients were to be further encouraged to take CFA cases by reducing the costs of such agreements in two ways. Under the pre-AJA scheme, a successful claimant would pay the lawyer's success fees out of their damages and they

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[1] Lord Chancellor's Department (1999), *Modernising Justice*, hereafter, the *White Paper*, para 2.43.

[2] Prior to Schedule 15 of the Access to Justice Act 1999, there was a statutory bar on taking the availability of CFAs into account in deciding whether to fund civil cases.

[3] "Services consisting of the provision of help (beyond the provision of general information about the law and the legal system and the availability of legal services) in relation to- (a) allegations of negligently caused injury, death or damage to property, apart from allegations relating to clinical negligence," cannot be funded by the Legal Services Commission. Schedule 2, para. 1, AJA 1999.

might have to pay the insurance premium, either out of damages or from the outset of the case. The 1999 Act made success fees and insurance premiums recoverable in large-part from the other side in the event that a CFA-client was successful in their claim.

This was seen as a crucial step towards making the market work. By adapting the normal costs-follow-the-event rules of the jurisdiction and translating these into a privately-funded version of the legal aid cost rules (because the claimant is typically protected from costs awards), it provides an interesting attempt to squeeze public provision of legal services into a private model approach. The replacement of legal aid was justified on the basis of the decline in legal aid eligibility at a time when the legal aid budget was increasingly seen as unaffordable.[4] Implicit in this claim is the idea that CFAs are *more* affordable. CFAs were also seen as contributing to the efficiency and effectiveness of court procedures by encouraging lawyers to weed out weak cases and settle strong ones.[5] This apparently elegant reinvention of legal aid as a privately funded, and managed, phenomenon is the subject of this article. It considers whether the claims made for CFAs are likely to match the reality of the claims made for our insurance-backed scheme. In particular, in saying that CFAs 'work' there are three important claims being made:

- CFAs extend access to justice;
- in a way that is as, or more affordable, than legal aid; and,
- which promotes efficient but effective justice.

It is these claims which are the principal concern of this article. A system which shifts public costs for litigation to a private market has the political virtue of apparent costlessness – to borrow a phrase from the economics literature – a weightless reform of the legal aid system. Has that been achieved?

A Basic Description Of The Insurance Situation

The market for CFAs in England and Wales is strongly dependent on the existence of "After the Event Insurance" (AEI).[6] Clients who are advised to bring claims under CFAs can take out insurance cover against the risk of being ordered to pay their opponents' costs. Sometimes this cover extends to their own disbursements (experts' fees and so on). This generally leaves only their own solicitors' fees not covered, a risk which is borne by their solicitors under the CFAs. There are also after the event insurance policies, which include cover for the client's own lawyer costs, but these arrangements are typically not CFAs, and so fall outside the scope of this article.

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[4] LCD (1998) *Conditional Fees A Lord Chancellor's Department Consultation Paper* (LCD, London March 1998).

[5] *Ibid*.

[6] After the Event Insurance is to be contrasted with insurance policies for legal expenses which precede the knowledge of a legal claim, for example, as part of holiday insurance or property insurance cover.

The insurance market for CFAs is new, and immature. Two insurers started providing AEI in connection with CFAs in 1995, one in 1996, one in 1997, and five in 1998.[7] The rest entered the market more recently. There are now reported to be over 60 insurers, claims management companies and similar organisations involved in AEI.[8] The products vary in terms of the cover that they provide. There may be financial limits on the level of cover (so cover might extent only to £10,000 of the opponent's costs, or £50,000 or £100,000 for example), the types of cost which are covered (are disbursements covered, for example?) and the types of case that they cover. Most schemes concentrate on personal injury litigation, and deal with sub-species of such litigation, road traffic and employers' liability cases for example, under different premium scales. Premiums vary considerably, with some schemes having fixed rates for predictable cases (such as road traffic accidents), and other premiums being based on a variable percentage of the sum insured, up to 40% of the potential costs liability (often for medical negligence cases).

Callery v *Gray (No 2)* provides some indication of premium levels on one of the main schemes, and more generally:

> ". . . under the Law Society approved Accident Line Protect Scheme (sold by Abbey Legal Protection Limited) the current premiums (including IPT) for different classes of CFI are as follows: road accident claims (RTA), £315 fast track, and £693 multi- track; occupational disease £892.50 fast track and £3,045 multi track; other claims £682.50, fast track and £2,520 multi track.
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> . . . A search of www.thejudge.co.uk conducted by the Association of Personal Injury Lawyers (APIL) shows the range of RTACFI to be £210 to £1,050 for the fast track and £210 to £1,837 for the multi-track. These figures, which are inclusive of IPT, are for policies which have differing limits of indemnity. The £210 premiums are for AMICUS policies which have a limit of indemnity of £100,000. The £1,050 premium is for a Wren policy and the £1,837 is for a Temple policy (which is described further in paragraph 65, below); both of these policies have a limit of indemnity of £50,000."[9]

There are two main types of AEI policy in use with CFAs. Policies are either:

- individually underwritten, or
- issued under delegated authority.

Under delegated authority schemes the insurers assess a solicitor's firm and, if the firm becomes a member of the insurer's scheme, whenever the firm

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[7] These descriptions of insurance providers are largely taken from (1999) 1 Litigation Funding, pp 12-13. See also, P. O'Mahoney *et al*, (1999) Conditional Fees: Law and Practice (Sweet and Maxwell London).

[8] See the report of Master O'Hare appended to *Callery* v *Gray* (No.2) [2001] 1 W.L.R. 2142, C.A. para 9.

[9] Master O'Hare's report to the Court of Appeal, paras 14 and 24, in *Callery* v *Gray (No 2)* [2001] 1 W.L.R. 2142, C.A.

takes a case under a CFA, cover is automatic. Firms are usually required to sign exclusivity agreements whereby they are not permitted to send cases to other insurers. They must insure all their CFA, speculative and non-contentious contingency fee cases with the insurer. This is designed to prevent adverse selection, whereby the firm would not bother incurring the expense of insurance on its better cases on the assumption that such expenditure was unnecessary. This would mean that the insurer was asked to insure only the riskier cases, leading to higher premiums and more adverse selection.

Individually underwritten policies are issued on a case by case basis. Firms make an application on their client's behalf and sometimes pay an application fee themselves. The insurance companies then assess the merits of the application (often in-house) before deciding whether to grant cover and on what terms.

Even with insurance, CFAs bring with them a number of potential costs, some of which may need to be borne up-front by the client, or by the solicitor's firm.

- The cost of the premium (although this may be payable at the end of the case and only if a case is successful, under 'magic bullet' schemes);
- An application fee (possibly);
- Barristers' fees and solicitors' disbursements incurred in the course of the case and before the case is completed (although barristers may themselves be instructed on a CFA);
- The cost of borrowing. A firm conducting CFA work will have a number of costs which it bears whilst it is running a CFA case. If it pays the premium and disbursements for the client, for example, and recovers these when the case is completed, it will nevertheless have borne a cost in terms of carrying that cost for the life of the case. Similarly, there is a cost in terms of the work which it incurs on a case (the work in progress), but which is not billed until the end of the case. These costs are collectively known as the cost of borrowing.

These costs have the potential to discourage either clients or firms from taking on CFA work. As already noted, the insurance schemes have begun to develop solutions to some of these problems, such as allowing the insurance premium to be paid at the end of a case, and only on cases that are successful. Given that reasonable insurance premiums are recoverable from the losing party (subject to limitations and exceptions),[10] the insurance aspects of CFA schemes have the potential to operate at little or no cost to claimants. Some costs remain to be borne by firms, notably the cost of borrowing and the risk of not getting paid themselves should the case not succeed.

It is these costs that a solicitor can seek to recover in the 'uplift' on costs charged when a case is successful. The current limit on uplifts is 100% of basic costs. Therefore, in theory, a lawyer can charge double their normal costs for successful cases. The basis for allowing a 100% uplift was that it

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[10] *Callery* v *Gray (No. 1)* [2001] 3 All E.R. 833, C.A.

would allow lawyers to take on cases approaching a 50:50 chance of success on a basis that reflected their risk. As has already been noted however, the uplift can reflect both this risk and the cost of borrowing. These must be specified separately. Only the uplift attributable to risk is recoverable from the losing party. Any uplift for the cost of borrowing is payable by the client. Thus, recoverability is not total. Clients may well end up paying 'cost of borrowing' uplifts were their cases are successful particularly if courts control the level of success fees recoverable from losing parties as they have begun to do. Thus, the Court of Appeal recently laid down a guideline for straightforward personal injury road traffic claims that a 'risk' uplift of 20% would be likely to be reasonable.[11]

Having outlined the way that CFAs work and their relationship to the insurance market, it is now possible to consider the more fundamental questions posed.

Do CFAs Extend Access To Justice?

Had the government not decided to replace aspects of the legal aid scheme with CFAs, this question would not need to be asked. A CFA scheme which is used by some clients and which complements a legal aid scheme must increase access to justice whether or not CFAs have other faults. But given that many thousands of people who would have qualified for legal aid now have to attempt to pursue cases by CFAs, there is an interesting question-mark over the efficacy of CFAs as an extender of access to justice. The question can be answered in a number of ways.

Firstly, are those who would have qualified for legal aid under the old scheme equally (or more) likely to be able to get access to CFAs? Some insurance schemes claim to allow cases if they have prospects of success marginally higher than 50%. In theory, this would be similar to the old legal aid scheme. However other data on the actual approach of firms and insurers suggests the reality may be somewhat different from the theory. For example, the prospects of success expected of firms operating conditional fee agreements under delegated authority schemes need to be considerably higher than the prospects of success under the legal aid scheme. Some firms quote success rates as high as 98% and insurers understandably expect high success rates (reported to be 95%). The Legal Services Commission's general funding code for non-personal injury cases shows that prospects of success can be as low as 50-60% if the damages to be won are sufficiently higher than the costs that would be incurred. Pleasance has shown that even road traffic personal injury cases under the legal aid scheme had a success rate of over 80%.[12] Other types of personal injury litigation had lower levels of success. It seems likely that it will be more difficult to get funding for a personal injury claim under a CFA (where *de facto* the chances of success would appear to need to be high enough for firms to get overall success rates of 95% and above) than it would be for the case to be funded under the old legal aid scheme or under the LSC's legal aid funding code (if personal injury were not excluded). There are other indications of the way in which

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[11] *Ibid*.

[12] Pleasance (1998) *Personal Injury Litigation in Practice* (LABRU, London) p 10.

individual cases are less likely to be funded now. For example, insurers are reportedly reluctant to fund cases where a defence has been filed.[13]

The evidence points to fewer legally aidable cases getting CFA funding, but it also points to specific types of case being more difficult to fund. The government's own commissioned research predicted a degree of specialisation on more severe cases would be more profitable than high volume, low-margin work and that this profitability might be improved by applying more stringent merits tests to such claims.[14] In other words, it predicted access would narrow to higher margin, bigger cases. It similarly pointed out that CFA funded, "personal injury litigation can make a significant positive contribution to the overall profitability of a firm of solicitors. This is true on the assumption that clients will be unable to meet over half (60%) of costs up front, and it remains true, albeit at slightly lower levels of profitability, even if clients can meet none of the costs up front."[15] Again, this means that firms would be more inclined to deal with clients who can pay the costs of borrowing up front. Access might be narrowed most acutely for 'legally aidable' clients. Shapland *et al* conducted a study of a small number of actual law firms conducting personal injury work and sought to project the impact of the legal aid reforms on the basis of financial information and information on case-handling gained through interview and a review of the firms' accounts.[16] For current purposes the main findings were: specific problems with CFAs for cases where there were significant questions of liability and serious injury where there was likely to be considerable investigative cost and effort, emphasising in particular industrial disease cases and complex accidents at work.[17] Again, this suggested that for these types of case, access would narrow.

These arguments can be mitigated in two main ways. One way is to suggest that the tightening up of the merits test is desirable in any event, as it means that only 'good' cases are taken forward. This point is dealt with more fully below. A second argument is more pragmatic. This argument would accept that CFAs have excluded some cases which would have been funded previously in legal aid, but argue that more people have benefited than have lost out from the reforms. Thus, it might be said that the number of people who would not have qualified for legal aid, who nonetheless could not afford a lawyer, but who would now proceed under a CFA, outweighs the number of legally aidable clients who could not get CFA funding.

Ultimately, this comes down to numbers. Data on the impact of CFAs on the number of people helped by CFAs, comparing the pre and post legal aid reform periods, is poor. We simply cannot say if the increase in take up of CFAs has overtaken the reduction in legal aid funding. It is clear that big providers of CFA and CFA-like services have developed systems of mass advertising and delivery[18] and these have led to higher levels of claiming

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13 Master O'Hares Report in *Callery* v *Gray* (No 2) *supra* n 9, para 26
14 KPMG (1998), *Conditional Fees Business Case* (LCD, London).
15 *Ibid* p 2.
16 Shapland *et al* (1998), *Affording Civil Litigation* (Law Society, London).
17 *Ibid* at ix.
18 The Accident Group (a network for solicitors firms doing CFA work) is estimated to account for 14% of the market for personal injury claims and appears to be the

than previously, and so higher levels of access to justice. CFAs may well have helped more people than they hindered. The difficult question which remains unanswered is whether it was necessary to abolish legal aid for personal injury work to achieve this gain. Unless the CFA market was so weak that it needed its main rival, the legal aid fund, to be abolished, then it could be persuasively argued that a legal aid fund operating alongside a CFA scheme would have achieved higher levels of access to justice than the current scheme. In other words, the benefits of CFAs to 'middle income' clients could have been achieved without the abolition of legal aid.

A final way of dealing with the diminution of access argument is to point out that any diminution in the overall levels of access to lawyers for personal injury claimants has been compensated for by an increase in access in other areas of the law. The money saved from the legal aid scheme by excluding personal injury could be redistributed to other areas of legal need. The government estimated that this money was in the region of £32 million.[19] Putting aside whether this money was in fact introduced back into the legal aid budget, this is an apparently small part of the overall legal aid budget (between 2 and 3%); though a large proportion of the money spent on legal help in social welfare law areas. Whether the access benefits of redistributing that sum to (say) immigration advice would be worth any loss in personal injury law access is very hard to say. Evaluating which would have a greater benefit in social and/or economic terms is almost impossible, particularly on current data.

CFAs Are As, Or More Affordable, Than Legal Aid

Because CFAs do not have to cost the client anything if the lawyer waives certain charges and the insurance arrangements are structured in a certain way, then from a claimant perspective, CFAs look like a very good deal. Similarly, the public purse, or at least the legal aid pocket of it, is not called upon for most personal injury cases. So, from the LCD and Treasury perspective, CFAs also look like a very good deal. But that leaves open the question of whether CFAs, and the costs associated with them, represent better value for money than the old legal aid scheme. Ultimately, any additional costs of claims are met out of increased insurance premiums.

Is it possible to understand whether the CFA scheme is more expensive than the old legal aid scheme would be? Arguably it is, although any such estimate is based on quite crude data about the costs of legal aid cases and even poorer information about CFA cases. In 1996/97 the Legal Aid Board (as it then was) had about 81,000 legal aid certificates; the total cost of these cases was £273 million, of which the net cost to the fund was £48 million.[20] The cost of funding these cases was £593 per case to the Legal Aid Board

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largest provider of insurance backed CFAs. It currently estimates getting between 9,000 and 12,500 claims a month.

[19] The costs savings to the Legal Aid Fund of removing all personal injury cases from the legal aid scheme were originally estimated as being in the region of £37 million. Parliamentary answer, Geoff Hoon MP, Minister of State LCD (2nd February 1999). See (1999) 1 Litigation Funding 12.

[20] P. Pleasance (1998), *supra* n 12, pp 9-10.

and £2,778 per case to the insurance companies (excluding any damages paid).

If one looks at the costs of funding the same cases on CFAs, it is necessary to make a number of assumptions. Let us assume that the average premium paid per case is £350 (based on the figures given in *Callery v Gray* for the cheaper Accident Line Protect policy for RTA fast track cases). Let us also assume that the premium is only paid in 90% of cases (as a magic bullet type scheme). On these assumptions, which may be generous in the CFA scheme's favour, the premium costs are considerably lower than the net costs to the Legal Aid Board (about £26 million compared with £48 million, even before the Board's administration costs are added in). If we assume also that the same cases would raise the same amount of ordinary profit costs (£273 less £48 million), then we need also to add a success fee for such cases. If we assume the success fee for straightforward RTA cases suggested in *Callery v Gray* then claimants would usually claim (upwards of) 20% of their profit costs. On these calculations, the CFA scheme would cost £296 million and the legal aid scheme £273 million (plus the Legal Aid Board's administration costs), a difference of £23 million (or £278 per case).

However, a significant proportion of the insurance premiums paid out by insurance companies when they lose cases will be repaid to these insurance companies when they recover their costs against unsuccessful claimants' AEI insurance policies. If we were to assume that 75% of the insurance premiums were farmed back to insurers in costs payments then the difference between the CFA and legal aid scheme costs reduces significantly to about £6 million. That reduction would increase further were legal aid administration costs factored into the equation.

Were all these assumptions to hold true, then CFAs would seem to be only marginally more expensive than the legal aid scheme. It is probably fair to assume however, that such assumptions will not hold. Insurance premiums are often higher and the 20% uplift figure is the figure supported by the courts for the simplest cases. Higher uplifts are likely to add significantly to the costs of CFAs in other cases. Each 10% increase in the average uplift is likely to make the funding of a cohort of CFA cases of comparable size to the old legal aid scheme about £22 million more expensive than the equivalent system of legal aid; an increase in costs of about £275 per case.

	Legal Aid scheme		**CFA equivalent**	
81,000 Cases	of which the LSC paid	£48,000,000	Insurance premiums on 90% of all cases' £350	£25,515,000
	and insurers paid basic costs of	£225,000,000	And insurers pay same basic costs	£225,000,000
			Plus uplift (@ 20%)	£45,000,000
	Total cost	**£273,000,000**		**£295,515,000**
	Difference			£22,515,000
			Less costs recovered from AEI (75% of £25 million)	£18,750,000
			Extra cost of CFA equivalent	£6,378,750

In cost terms, the result of CFA reforms seems to be to shift the existing cost of funding personal injury litigation away from the state towards insurers and their policy holders. In public policy terms this has the benefit of making the 'polluter' (here largely motorists) pay more of the cost of their tort (through increased insurance premiums). An interesting side-effect of this reform is the increase in cost, over and above the original costs of the legal aid scheme, which have been caused by AEI insurance premiums and CFA uplifts. CFAs are more expensive, not cheaper.

CFAs Promote Efficient But Effective Justice?

A key aspect of CFAs is the discipline that commercial forces may exert on personal injury litigation. This discipline takes a number of forms but two main ones are of interest. The first is the claim that only 'good' cases will be taken under CFAs. The second is that CFAs will help promote sensible settlement.

The Moral Hazard Problem – Ensuring Only 'Good' Cases Are Taken

A criticism of legal aid funded litigation is that it encourages the taking of cases with poor prospects of success, because neither the claimant nor their lawyer bears sufficient risk of the case losing, creating a 'moral hazard'. Because CFAs require lawyers (and sometimes clients) to bear more risk,

this moral hazard is reduced. This argument has allowed government to claim that only 'good' cases can proceed under CFAs.

The claim that only good claims will be taken under CFAs obviously defines 'good' in a peculiarly economic sense. The theory is that CFAs discipline solicitors to take cases where the prospects of success are high, because if they do not, then they will lose too much of their costs to be successful. There are two main problems with this theory. One is that the definition of what constitutes sufficiently high prospects of success may be particularly high. Insurers are reported to expect high success rates (about 95% is the figure usually quoted) from solicitors on their delegated insurer schemes, and are prepared to strike firms off their solicitor panels if the lower limit is not achieved. Not surprisingly, because their survival in the insurance market and profitability depends upon it, insurers put their own commercial interests first in their approach to risk assessment. Thus, the definition of a 'good' case may actually mean 'a very good case indeed'. Compare a 95% success rates with the 80% achieved under legal aid on road traffic cases for example,[21] and you get a sense of the number of cases which would be strong but not strong enough to get a CFA.

A second problem is that a risk-based/economic based theory of litigation relies on firms behaving in an economically rational way. It also tends to rely on a notion of a reasonably sized firm able to bear a certain amount of risk with equanimity. There is however evidence that firms may be more risk-averse than they should be if they were totally rational.[22] Shapland's study emphasises that firms' individual approach to billing and their own financial profiles could have a significant effect on the viability of conditional fee arrangements for those firms.[23] Defendant behaviour and local conditions (such as the cost of expert reports) could significantly affect the profitability of CFA work.[24] Thus the notion of risk, which determines when a case is 'good' might be highly specific to the firm assessing the risk rather than the prospects of a case being taken on. The cool discipline of economics is in fact a much more arbitrary affair, particularly if one remembers that clients do not appear to shop around for CFAs.[25] Another report provides some insight into the handling of CFAs by solicitors' firms.[26] It shows considerable variability in the existence and quality of risk assessment in firms.[27] The quality and variability of risk assessments (in so far as made properly or at all) raise concerns about the competence of solicitor firms to assess cases for CFA funding and thus to act in their clients' best interests. The notion of a 'good' case in an adversarial justice system is an inevitably controversial phenomenon. Good could mean arguable, winnable, likely to win or a near certainty. It could also mean

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[21] *Ibid* at p 10
[22] See, for example S. Yarrow, *Just Rewards: the outcome of conditional fee cases* (Nuffield, London, 2000).
[23] Shapland *et al supra* n 15 at ix.
[24] *Ibid* p 84.
[25] S. Yarrow and P. Abrams, *Nothing to lose? Clients' experiences of using condtional fees* (Nuffield, London, 1999).
[26] BDO Stoy Hayward, *Conditional Fee Arrangements, A survey compiled by BDO Stoy Hayward* (February 1999).
[27] *Ibid* p 4.

something quite different. A 'good' case could be one where the interests involved are so important that they need to be heard. CFAs work purely on the economic model – do the risks merit the rewards? – not on any broader notion of justice. Even the economic criterion is one which may not fit with any certainty. What looks like one firm's good case, looks like another's bad case.

The Lack Of Settlement Problem

The commercial discipline of CFAs may also have a beneficial effect on the conduct of cases. A criticism of the legal aid scheme was that the legally aided lawyer, with a guaranteed cheque from the Legal Services' Commission, and a client who had nothing to lose, was under no incentive to settle. This was a simplification. Legal aid lawyers would usually get paid higher hourly rates if they settled than if they relied on the legal aid fund, and clients had the last settlement offer to lose if they pushed things too far. Nevertheless, CFA lawyers, with a stronger direct interest in achieving some settlement, are under a stronger economic incentive to settle the case. The 'commercial discipline' argument suggests that this leads to appropriate levels of settlement.

This is perhaps the most difficult aspect of the CFA reforms to assess. It assumes that because both the lawyer and client are under some pressure to settle, their interests are aligned and the very fact of settlement is appropriate. This may not be the case. It depends on the incentives and risks of lawyers and clients being perfectly aligned. There are, however, some obvious differences. The client is typically a one-shotter interested in one transaction. The lawyer spreads risk and reward over an entire caseload. Furthermore a client's interest is in damages. Lawyers do not have a direct interest in the level of damages the client receives, because the CFA success fee is set by reference to the lawyers' basic costs *not* the damages. This has some benefits. The risk that lawyers will take big damages cases, do minimal work, but nonetheless claim a large success fee from the damages is removed. Similarly, the lawyer has incentives to do more work where this is going to lead to an improved offer for the client, as their extra costs will be recoverable. But there is some evidence that lawyer and client incentives may sometimes get out of kilter. Lawyers in personal injury practice appear to be beginning to recognise that they need to have a steady stream of quick and easy cases to keep a practice running.[28] Thus a lawyer may be more interested in cashflow than their client and thus tempted to try and settle cases quickly. Certainly a settlement means they get paid something, whereas pushing on might mean getting paid nothing. Another factor is the context in which the risks of settlement are assessed. It is often assumed that a firm assesses the risks of rejecting a settlement offer in terms of the overall interests of the firm. It can spread the risk of losing more widely, take the risks of pushing on, incur more costs and make more money in the long run. The difficulty with this theory is that bigger firms often operate on the basis of individual fee earner targets. Thus individual fee earners are kept under pressure to keep fees coming in. Promotion, or even job security, may

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[28] T. Goriely, P. Abrams and R. Moorhead, *More Civil Justice?* (Law Society, London, 2002).

depend upon it. Fee earners treated in this way may be more inclined to settle to keep their bills delivered figures high. A final factor of some importance is the insurers' position. Whilst lawyer and client have a degree of similarity of interest which may mitigate the desire to under-settle, the insurance companies do not. They do not get paid more if the case is pushed farther, nor do they have any interest in the level of damages recouped. All they want is for the case to settle, so that they do not have to meet a large bill for the other side's costs should the case lose.

These arguments problematise the commercial discipline thesis, but they do not totally destroy it. They point to the potential for the lawyer's interest to conflict with the client's interests. Certain aspects of the CFA scheme, notably the role of the insurer, are more obviously antithetical to the client's interests. The lawyer-client conflict is more subtle. Sometimes the financial incentives on lawyers will boost client damages, sometimes they will shrink damages. In others, the incentives may be neutral. Insurers have the potential to exert a chilling effect, hence a concern that any such system will operate to a client's detriment when compared with other methods of funding. Nevertheless, the main point of this critique is that the apparent clarity of financial incentives is in reality much more uncertain.

SUMMARY AND CONCLUSIONS

This article has concentrated on critiquing the three fundamental claims made for CFAs. In terms of whether CFAs have extended access to justice, it appears likely that in straightforward personal injury cases for middle-income clients who were previously unable to claim legal aid, CFAs will have extended access to justice quite significantly. For clients who would have qualified for legal aid, however, the coupling of CFAs with the removal of legal aid for most personally injury actions has probably reduced access to justice. Although it is possible that the money saved on personal injury actions has been redistributed to other areas of the legal aid budget, thus creating a net gain in access to justice, the likely result of the reforms is that for formerly legally aidable clients, legal representation is now available for fewer cases than previously. Conversely, although it seems unlikely, it is at least arguable that it was necessary to remove legal aid to stimulate the legal expenses insurance market sufficiently to provide the levels of access which CFAs currently afford to the formerly legally aidable and middle-income clients.

The second argument was that CFAs are more affordable than legal aid. Essentially, however, what the CFA reforms have done is shift the public expenditure cost of personal injury litigation on to insurers and insurance policy holders. Only if insurance premiums and success fees are kept very low will the cost of CFA funded litigation be similar to the cost of legal aid funded personal injury litigation. The likelihood is that CFA funded litigation will be considerably more expensive than legal aid funded litigation. A significant advantage to the government, of course, is that these costs are borne privately, rather than through public expenditure. Motorists and other insurance policy holders will pay more, taxpayers will pay less. Whilst this has the advantage of shifting more of the cost-burden of litigation onto the activities of tortfeasors, the overall burden of personal injury litigation costs will probably be higher.

The third argument is that CFAs promote more efficient but effective justice because they reduce the moral hazard of litigation funding by ensuring only "good cases" are taken forward and they encourage a commercial discipline which makes it more likely that cases will settle expeditiously. This, however, means that the notion of a "good case" is a narrowly economic one. "Good" means cases with very strong prospects of success as judged by solicitors' firms and insurers. Defendant behaviour, the cost of running cases, the profitability of individual firms and the risk and profit profiles of insurance companies are all likely to determine what constitutes a "good case". Broader notions of justice and public interest are thus demoted behind the bottom line of firms and insurance companies. Similarly, the argument that commercial discipline will lead to more appropriate settlement is problematic. The economic incentives of lawyers, clients and insurance companies would need to be in near perfect alignment were commercial discipline itself to lead to appropriate levels of settlement. There is a risk, in particular, that clients funded under CFA agreements will get lower levels of settlements than they would have done had they been clients funded under other types of fee arrangements.

There are other criticisms that can be made of CFA agreements. Their complexity baffles clients (and even lawyers).[29] Partly, this is caused by the continuing existence of the indemnity principle. Clients may be locked into agreements which define a "win" in a way which would not accord with common sense notions of what a win means. They may also find themselves locked into agreements which they cannot get out of,[30] or facing bills for the non-recoverable part of CFA uplifts.[31] Recoverability means that usually neither the claimant lawyer nor the client bear the cost of insurance policies. This in turn probably means there is effectively no competitive market for insurance premiums. Similarly, because the risk part of the conditional fee uplift is not borne by the client, there is no market control of the uplift. This means that increases in the cost of CFAs are likely to be policed solely by the courts. It is questionable whether the courts are, or feel, able to do this task adequately.[32] There are other problems, such as the relationship between CFA after the event insurance and other forms of legal expenses insurance which may be cheaper.[33] Similarly, question marks have been raised over whether AEI premiums can be deferred under so called magic bullet schemes.[34]

It is to be hoped and expected that, as the system matures, some of the difficulties of CFAs and the insurance market will reduce. It will be very difficult, however, to gain appropriate control over uplifts and insurance premiums without restricting further the willingness of firms and insurance companies to take meretricious cases. A system which fragments and commercialises risk also hides from public gaze the necessary information to

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[29] See Yarrow and Abrams *supra* n 24.

[30] See The Society of Advanced Legal Studies, *The Ethics of Conditional Fee Arrangements* (SALS, London, 2001) and Yarrow and Abrams *ibid.*

[31] Lawyers can recover an uplift from their clients if it relates to the cost of borrowing, rather than the risk on their case.

[32] See *Callery* v *Gray (Nos 1 & 2) supra* n 8 and n 10.

[33] *Sarwar* v *Alam* [2002] 1 WLR 125.

[34] *Tilby* v *Perfect Pizza* (28th February 2002, unreported).

understand how the scheme is operating and whether it operates in the public interest. CFAs are not a disastrous reform, they continue to provide a degree of access to justice for large numbers of people, but they are not a weightless alternative to the legal aid scheme.

LEGAL AID REFORM : A VIEW FROM THE VOLUNTARY SECTOR

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INTRODUCTION

The legal aid reform programme and civil justice review have injected a much needed impetus into the debate on access to civil justice for people on low incomes.

Legal aid reform, in particular, has the potential to promote the concepts of planning, co-ordination, quality, added accountability and research into outcomes to the delivery of civil legal services. It will also provide a sharper focus on the financially disadvantaged. A key part of the debate will be shifting attention onto customers rather than providers of services. A cautionary note, nonetheless, needs to be sounded in that other parts of legal aid reform are likely to have a negative impact on the financially disadvantaged. Moreover, paying more attention to social welfare areas of law without addressing financial eligibility for legal aid, access to representation at tribunals and a sufficient budget to sustain civil legal aid services may undermine the aim of targeting legal aid where it is most needed. The recent publication of the draft Access to Justice (NI) Order 2002 still leaves anyone with an interest in how change will operate in practice tantalisingly short of detail.

This article sets out the work of the voluntary sector and examines developments in legal aid in England and Wales, including the idea of a community legal service and its implications for Northern Ireland. It also assesses the impact legal aid reform and specific aspects of the civil justice review will have on the financially disadvantaged.

Voluntary Sector Advice Giving Agencies: The State Of The Sector

The development of voluntary sector advice from the 1970s onwards was motivated by a desire to take a broader and more strategic approach to providing legal services in disadvantaged communities than that offered within private legal practice. As a result, alongside traditional legal advice and information, voluntary sector advice agencies undertook social security benefit take-up campaigns, social policy work, legal education and information initiatives through poster campaigns, classes and seminars. In addition, a campaigning approach was adopted to ensure that service delivery fed into calls for legislative and policy reform. This work was overtly aimed at improving the social conditions of disadvantaged local communities.

During the 1990s, a more coherent community development strategy was articulated by many advice agencies with an emphasis on the involvement and participation of disadvantaged local people in the delivery of services. Even more recently, a debate has emerged on the role that good quality,

accessible legal advice and representation can play as part of any strategy to tackle social exclusion and alleviate urban deprivation and rural isolation.[1] At the same time, however, the additional demands placed on advice agencies have moved them increasingly towards delivering individual advice and representation.

This increase in demand has been caused by a number of factors. Ongoing changes to social welfare law coupled with an inexorable increase in complexity (social security is just one stark example) have made resolving legal problems without the assistance of an independent third party more difficult. In addition, government and public bodies have increasingly sought the views of the voluntary sector when developing and implementing policy changes. This work, largely absorbed within existing resources, left limited time to develop more pro-active and collective legal responses to social problems. Paradoxically, this change makes the voluntary sector more attractive to government as a provider of legal services. Retaining a balance between traditional approaches focussed on the individual and other more strategic and innovative ways of tackling legal and social problems is one of the seminal challenges to the voluntary sector as legal reform evolves.

Mapping the voluntary sector is not easy. There are local advice agencies providing general advice (for example, local Citizens Advice Bureaux) whilst others specialise in a specific area (Foyle Homeless Action and its housing work and the recent development of local advice provision through Victim Support (NI) are good illustrations). Local advice agencies often employ staff in specific areas of law (for example, Limavady Community Development Initiative, East Belfast Independent Advice Centre, and Citizens Advice Bureaux in Craigavon, Newtownards and Dungannon all have money advisers). Regional organisations provide subject specific specialist advice (for example, the Law Centre covers employment, housing, immigration, social security and community care) whilst other regional organisations cater for particular social groups (Help the Aged provide an advice line for older people, Gingerbread, an advice and information service for lone parents). Advice agencies can be part of a bigger organisation with a variety of other functions instead of concentrating solely on advice giving (Age Concern, Northern Ireland Council for Ethnic Minorities, Women's Aid and advice agencies attached to community resource centres in Belfast and Derry are just some examples). Regional organisations also provide services to support local advice giving networks. There are effectively two networks - the Citizens Advice Bureaux, and the independent advice sector.

There are 28 local Citizen Advice Bureaux in Northern Ireland. Many local CABx also provide advice from outreach centres. Local bureaux provide advice and information across most areas of law through a combination of paid staff and volunteers. Local bureaux are also involved in specific subject based work.

The cornerstone of the Citizens Advice Bureaux's work is its information system providing legal information across a comprehensive range of subjects

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[1] A recent example is *Legal Aid Advice Services. A Pathway out of Social Exclusion*, a paper by the Lord Chancellor's Department and Law Centre Federation (November 2001).

which is available in a CD-ROM as well as paper format. The information is UK wide, supplemented by information provided by the Northern Ireland Association of Citizens Advice Bureaux (NIACAB). This information is updated monthly. Considerable emphasis is placed on the system during the training of voluntary and paid advisers.

Local CABx work is supported regionally by the NIACAB which provides technical and operational support and services (for example, recruitment and selection, social policy, training) as well as its own advice initiatives, specifically an advice line to deal with problems obtaining the national minimum wage and specialist consultancy on social security law and tribunal advocacy.

The Association of Independent Advice Centres (AIAC) represents the interests of independent advice agencies other than local CABx. With 83 members, it provides support to a diverse range of advice agencies ranging from local advice agencies in Omagh, Craigavon, Newry, Derry, Limavady, Belfast and Enniskillen through to regional organisations including Disability Action, Housing Rights Service and Northern Ireland Council for Ethnic Minorities. AIAC provides a range of support services to enhance quality standards and management of member agencies and offers Non-Vocational Qualification training, information technology, information and policy support.

The Law Centre also operates from a membership base. Unlike its regional counterparts, NIACAB and AIAC, it does not operate as a network to lobby for specific members' interests. Instead, it is a provider of services (an advice line, casework and representation on referral, training, publications and information) to a membership of over 500 organisations encompassing solicitors' firms, probation and social services offices, trade unions, political parties, tenants' associations, occupational welfare organisations as well as voluntary sector advice agencies.

All three organisations share a number of common approaches, particularly the development of information technology to deliver services, the accreditation of training and a commitment to working in partnership with other organisations. The three organisations also make up the Advice Services Alliance, an umbrella body that lobbies for the needs of voluntary sector advice services.

The most recent overview of the sector was produced in an invaluable report commissioned by the Legal Aid Advisory Committee.[2] In this report, the authors noted that the advice sector had doubled its output in less than ten years, dealing with over 480,000 enquiries in 1999.[3]

A breakdown of the areas of law dealt with showed social security as far and away the largest area of work, covering 54% of all enquiries, followed by

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[2] Laura Lundy and Ruth Glenn, *Advice Services in Northern Ireland, a report for the Lord Chancellor's Legal Aid Advisory Committee for Northern Ireland* (School of Law, Queen's University Belfast, 1999).

[3] *Good Advice – How does Northern Ireland measure up?* (1990) (General Consumer Council for Northern Ireland) estimated the number of enquiries dealt with by the advice sector in 1990 as 240,162 (p11). *Advice Services in Northern Ireland* assessed that 480,371 enquiries were dealt with in 1999 (p 23).

housing 9%, consumer 8%, employment 5%, family and children 4%, community care 3%, debt 2% and immigration 1%. Other areas of law covered the remaining 15% of enquiries.

Most advice organisations were found to provide representation at social security appeal tribunals, whilst in contrast, relatively few provided similar assistance at industrial tribunals, the small claims court, before the immigration adjudicator and social security commissioners.

Funding for voluntary sector advice services was assessed as amounting to £5.4m in 1999. There were a variety of sources of funding, including the Department for Social Development, European funding (under European Regional Development Funds and peace monies), Health and Social Services Trusts, local district councils, National Lottery Charities Board (now the Community Fund) and charitable trusts. Much of this funding was, however, project based and finite. Lundy and Glenn's research found that 57.3% of all funding was temporary, which created uncertainties that militated against long-term planning and created a higher level of staff turnover. This particular problem has grown more acute with local advice organisations currently facing a crisis following the reduction in funding from European sources and a contraction in grant aid available through the Community Fund.[4] The research also conducted a comparison of the cost per enquiry between the advice sector in Northern Ireland and England and Wales. Drawing on figures from the Lord Chancellor's Department White Paper Modernising Justice (1998), the assessed cost of dealing with an individual enquiry was £11.24 in Northern Ireland and £15.00 in England and Wales. It is against this backdrop that developments in legal aid in both England and Wales and Northern Ireland must be examined.

Legal Aid Reform in England and Wales

An initial reading of the draft Access to Justice (NI) Order 2002 provides a strong sense of déjà vu. Reform is, in effect, following a well trodden path. In England and Wales the last ten years have seen government move away from a demand led approach to legal aid towards a more strategic model of delivering services. The key drivers have been financial and managerial. Government has introduced cost controls, quality assurance and a degree of planning for legal services.

The legal aid scheme has effectively been divided in two. Criminal legal aid, provided through a criminal defence service, remains demand led, whilst civil legal aid, re-branded as a community legal service, moved inexorably towards a cash-limited approach. Initially civil legal advice and assistance was undertaken through franchising arrangements with solicitors' practices and the voluntary sector in tandem with the traditional demand led approach. Eventually, a move was made to an almost entirely contractual scheme following implementation of the Access to Justice Act 1999. Contracts provided government, through the (then) Legal Aid Board, with a measure of control previously unavailable to paymasters of legal aid.

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[4] In May 2002, Belfast City Council provided £93,162 in order to protect eighteen advice posts in the short term (see *AIAC News* April 2002).

This control stems from a variety of different sources. First, contracts for services set out required standards from providers. Working through the Legal Aid Franchise Quality Assurance Standards (LAFQAS), the Legal Aid Board devised a systems led approach to measuring quality by ensuring that specific personnel policies, file review and supervision systems, client care and business planning arrangements were in place. The LAFQAS model underpinned the development of kite marks as a central pillar of quality under the Community Legal Service. These approaches have proved technocratic and failed to develop a dynamic approach to measuring the quality of advice and casework through, for example, peer review, outcome measures and satisfaction surveys. It is interesting to note that the Institute of Advanced Legal Studies research report on the Contracting of Civil, Non Family Advice and Assistance pilot covering 100 firms of solicitors and 43 advice agencies found that voluntary sector advice agencies took significantly longer to deliver services than private practice counterparts but achieved higher levels of quality.[5]

One by-product of these developments was that the Law Society in England and Wales was spurred into action, with specialist panels being introduced in a number of fields including childcare work and mental health review tribunal representation. Moreover, the creation of the Office of Immigration Services Commissioner as the first UK wide independent body to regulate quality control of legal services added another dimension to this debate. Quality standards are no longer a matter solely for the profession and funders of legal aid services.

A second new measure of control was provided through planning and prioritising services. To establish priorities, a Funding Code was devised and regularly updated to reflect a framework of importance set by the Lord Chancellor's Department. Specific priority was to be given to social welfare legal issues (housing, employment, immigration, social security) over other areas. The Funding Code has proved complex and unwieldy. More impact on re-ordering expenditure was made by excluding personal injury, business claims and other areas from legal aid altogether. These changes have, to date, made only limited in-roads into re-configuring legal aid expenditure towards social welfare law. Moreover, the transfer of personal injury actions to conditional fee arrangements has arguably worsened the position of the financially disadvantaged, and the removal of business claims has taken away important legal support for those catapulted into poverty as a result of the loss of a small business. In harness with re-ordering priorities, the Legal Aid Board put considerable energy into setting up community legal service partnerships to set local and regional priorities.

The partnerships were designed to bring together funders and providers of legal services, to audit existing services, and then highlight gaps and overlaps in provision and services.

Starting with a pilot of six partnerships in 1999, there are now around 200 partnerships operating across England and Wales.

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[5] Richard Moorhead et al, *Quality and costs: final research report on the contracting of non-family, civil advice and assistance pilot*. (Institute of Advanced Legal Studies, 2001).

The success of such partnerships is mixed. Specific initiatives can be pinpointed as arising from the partnerships (for example, the recent opening of the Devon Law Centre in Plymouth and a number of information and communication technology projects to deliver advice) and there are encouraging signs that the Legal Services Commission is piloting new ways of delivering services.[6] At the same time, expectations of a more coherent joined-up approach to legal services have remained largely unfulfilled. Moreover, the hope that the planning process would give a fillip to funding from other sources towards comprehensive legal services with national coverage has not been realised.

Exerting financial control, giving quality a central place in delivery of legal aid, and introducing a greater measure of coherence have all been achieved as a result of legal aid reform. Nonetheless, substantial gaps in legal services remain, particularly in tribunal representation, whilst changes in delivery have not been matched with improvements to the legal aid means-test. The failure to tackle these issues means that the vision of more effective targeting of legal services towards the poor has seen only modest gains. What lessons does this experience bring to bear on the voluntary sector and professions as we embark on legal aid reform in Northern Ireland?

Legal Aid Reform in Northern Ireland

The draft Access to Justice (NI) Order 2002 sets out a framework for change, leaving much of the fine detail to be sketched in by regulations, directions, powers and guidance vested in the Lord Chancellor and the new Legal Services Commission. The legislative canvas is broad, leaving the Lord Chancellor, in particular, and the Legal Services Commission, flexibility and considerable scope in deciding what steps are to be taken towards delivering the community legal service and controlling the civil legal aid budget. This approach mirrors that taken by the Access to Justice Act 1999, which paved the way for reform in England and Wales.

This flexibility is likely to prove a mirage. In effect, many of the proposed changes have already been tried and tested in England and Wales. The argument from both branches of the legal profession that Northern Ireland's jurisdiction is unique, calling for local solutions to local problems, has cut no ice with the Lord Chancellor. As a result, delivery of the community legal service largely through contracts, the introduction of conditional fee arrangements and a criminal defence service are all likely to happen in the short or medium term. The Funding Code, quality service measures and arrangements for dealing with exceptionally expensive cases are all likely to borrow heavily from existing approaches in place for England and Wales. In addition, some of the powers contained in the draft Order, of particular concern to the profession, are being held in reserve if initial cost control mechanisms prove ineffective. There will be scope for some divergence, but this is likely to be at the margins.

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[6] The Community Legal Service has just issued *The Partnership Innovation Budget: Proposals for the Second Round of Grants*. A central part of the document is to encourage community legal education and develop links between legal advice providers and community groups.

Moreover, the Legal Services Commission's first task will be to improve turnaround times for processing applications and payments, ending backlogs and delivering a service commensurate with that delivered in England, Wales and Scotland. Tackling this formidable challenge, combined with the limited groundwork done in advance of the commencement of the Legal Services Commission, increases the prospect of the new Commission looking for ideas utilised elsewhere in developing much of its initial thinking. By illustration, it would have been helpful to have undertaken initial work on quality standards by activating the working party on the issue promised in the Decisions Paper The Way Ahead in September 2000. Further, developing a research programme, within or accessible to, the current legal aid department could have produced significant material of value to the new Commission. The Lord Chancellor's Department has a research capacity of its own which has been particularly productive over the past few years. The counter to this criticism is that the new Commission should be given a clean slate to develop its own ideas. The problem, however, for the Commission, is that it will inherit a full agenda from a standing start. A body of existing work focusing on Northern Ireland for the new Commission to draw on would have been a decided advantage.

Nonetheless, there is a lot to be welcomed in the changes being brought forward. First, is the fact that legal services and legal aid are now generating a debate. For too long, legal aid has been a cloistered discussion between a small number of players within government and the profession. This debate will hopefully widen the range of those involved in discussions to encompass the voluntary sector, trade unions, political parties, consumer bodies and, most important of all, those who actually receive legal aid services. A shift of emphasis on to consumers can only be a good thing, reminding all of us about the purpose of legal aid and why it was initially introduced.

For consumers using the community legal service, there will be issues of retaining reasonable choice and access to a legal adviser. Exercising such choice will require consumers to possess a level of information that currently does not exist about who specialises in specific services. At present, the useful legal aid list of solicitors and their specialisms has not been updated for six years.

A debate on providing legal services to the poor through legal aid does not exclude issues of particular interest to providers. It is difficult to look beyond a mixed economy of providers from the private and voluntary sector in the long term. However, the current configuration of private solicitor firms is likely to change over time, with fewer sole practitioner and small practices, particularly if contracts and exacting quality standards are introduced. The ramifications of such a change and its impact on consumer choice and access to services constitute an important debate for the Law Society in particular as well as for other interested groups.

The debate on legal aid may also create space to examine other critical issues. Alternatives to existing delivery of services should be opened up in due course, particularly alternative dispute resolution, public interest litigation and the use of new technology to provide services. The latter carries a small warning inasmuch as technological innovations, while improving access to legal information, bring along with them the danger of widening social exclusion for those without access to computers or who

suffer language, or literacy problems. A focus on consumers will hopefully lead into the discussion of the role legal services can play in tackling social exclusion and disadvantage.

An additional advantage to legal aid reform will be the creation of the Legal Services Commission itself. An independent body delivering legal aid will enable both parts of the profession to engage in a more robust public debate should service delivery fall short of expectations. Further, the make up of the new Commission will hopefully contain skills and experience gained from a diverse range of backgrounds, including the consumer perspective.

Placing quality standards at the forefront of delivery of service is welcome. Currently, there is no way of knowing whether the quality of advice given, for example, under the green form scheme is consistently good, bad or indifferent. Individual firms may have their own in-house quality controls and use of externally verifiable quality schemes is growing. The Home Charter Scheme run by the Law Society and the Children's Order panel are other examples of quality standards being promoted. The overall picture, however, is one of piecemeal and ad-hoc developments falling short of comprehensive coverage.

For the voluntary sector, quality standards and external performance indicators are a familiar concept. They come hand in hand with service delivery agreements currently negotiated with government departments and other funders. External evaluation is also a regular feature of life in the voluntary sector. For example, in the past six years the Law Centre has had a full organisational review by Price Waterhouse Coopers and reviews of two projects by external organisations to determine whether funding for pilot projects should be mainstreamed. Local Citizen Advice Bureaux work within a quality standards framework and casework recording systems that operate on a United Kingdom wide basis. The Association of Independent Advice Centres has also channelled considerable energies into developing quality standards and accrediting the work of advisers. This does not mean that all quality issues have been addressed, rather, that there is a foundation on which approaches to quality can be built. An issue for the voluntary sector will be ensuring that the Commission's own approach complements existing methods already adopted.

The emphasis on planning of legal services within the draft Access to Justice (NI) Order is also encouraging. Funding sources for legal advice in the voluntary sector are diverse. Five government departments, health and social services boards, health and social services trusts, district councils, Community Fund, charitable trusts, Inland Revenue, Home Office and the European Union all fund voluntary sector advice. The legal profession is commercially funded by clients, businesses, insurance companies, and legal aid monies. There is nothing inherently wrong with this mix of finance within both sectors, providing there is a mechanism to allow an overview to ensure coherence and identify gaps and unnecessary overlaps in services.

Within government in Northern Ireland no department takes a lead responsibility towards ensuring such coherence within the voluntary sector advice services, although there are signs of change. For example, the Department of Enterprise, Trade and Industry has recently released its draft consumer strategy document outlining its desire for a more joined-up

approach within government to debt and consumer advice.[7] The Department for Social Development, responsible for the voluntary sector, social security, urban regeneration and housing, is committed to reviewing its advice and information strategy albeit confined solely to its own responsibilities.

Moreover, at present, delivery of legal services by the voluntary sector and legal profession has remained largely separate. There is often good local liaison, but little formal contact. Historically, services delivered between the two sectors have entailed limited overlap. This is beginning to break down. In Belfast and Derry, solicitor firms are beginning to employ para-legal staff to undertake social security, debt and other social welfare legal advice. This change is likely to be accelerated by legal aid reform though it is harder to envisage the voluntary sector moving into areas of advice and litigation more traditionally associated with private practice.

Developing an overview of current provision is likely to push the Legal Services Commission to once again look across the Irish Sea to the work of Community Legal Service Partnerships in England and Wales. Without some mechanism or research into planning, the move towards drawing in the voluntary sector is likely to lead to additional funding without heralding a more visionary approach.

Gaps in legal service provision can already be identified. Mental health is an obvious area where few solicitors or barristers have developed expertise and where people with mental health problems and their carers are not properly served by existing services. Environmental law, a rapidly evolving area, is also likely to benefit from any audit identifying gaps in specialist provision. Further, such an exercise can begin to look at alternative ways of delivering services including Alternative Dispute Resolution.[8] More problematic will be the approach to dealing with overlap in provision. In practice, what may happen is that changes introduced elsewhere through the Funding Code, quality standards initiatives and registration requirements for legal aid providers may ameliorate the extent of this dilemma.

One lesson emerging from an analysis of legal aid reform is the need for more formal liaison between the legal profession and the voluntary sector. The Law Society and Bar Council have resources and an entrée to government and other key opinion formers that the voluntary sector can only envy. At the same time, any public foray by the legal profession into the debate on legal aid is hamstrung by the public perception that the profession is looking after its own interests and not those of consumers. In contrast, the voluntary sector is not handicapped by any such ambivalence. The question arises as to whether there are common interests to sustain such an alliance. In broad terms, on questions of level of funding for legal aid, a more generous means-test, and an antipathy towards conditional fee arrangements for personal injury actions, there is clearly considerable scope for co-operation.

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[7] A *draft consumer strategy consultation* by the Minister for Enterprise, Trade and Investment, issued March 2002

[8] Alternative Dispute Resolution may become even more important following the Court of Appeal decision in England, *Cowl and others* v *Plymouth City Council*, The Times 8 January 2002). The judgment placed particular emphasis on the need to engage in ADR and avoid court action whenever possible.

This positive assessment of change could, however, be undermined unless other aspects of legal aid and civil justice are properly addressed. Financial eligibility for legal aid has tightened in real terms. The proportion of people entitled to civil legal aid has declined over the past twenty years. In England and Wales, the proportion of the population potentially entitled to civil legal aid has dropped from the high watermark of 78% in 1979 to less than 50% by the mid 1990s. Since then this decline has continued inexorably. No equivalent figures appear to have been published for Northern Ireland, nonetheless, it is now clear that full entitlement to civil legal aid is effectively a mark of poverty. People in work and on low incomes and older people with modest savings and small occupational pensions can now find themselves faced with a prohibitive legal aid contribution which places legal services out of reach (see Box 1 for a recent Law Centre case that graphically illustrates the problem).

In addition, outside of those on specific benefits passported to free green form legal advice and assistance, few others can qualify on financial grounds.

Box 1: Civil legal aid assessment May 2002

Mr and Mrs A are aged 82 and 67 and applied for civil legal aid. Mr and Mrs A have savings of £5866. The couple have a total income of £137.43 a week consisting of Mrs A's pension of £88.39, Mrs A's pension of £30.58 and Mr A's occupational pension of £18.46.

Total income is £18.33 a week above the minimum income guarantee (recognised level of entitlement to income support).

Mr and Mrs A were required to pay a contribution of £3741 by way of an initial instalment of £2940 followed by 11 monthly instalments of £72.75.

A review of financial eligibility for legal aid is overdue. A radical new approach is needed to expand the number of people who are entitled to publicly funded legal services. Government has taken a number of initiatives to boost the financial circumstances of low income families, including the introduction of tax credits. Paradoxically, this has led to less access to legally aided publicly funded services. In addition, recognition of the impact of modest savings and occupational pensions on entitlement to means-tested benefits is being recognised and addressed by government. No such parallel initiative is in place to preserve entitlement to legal aid. The predicament for legal aid reform is that services targeted on social welfare areas of law may miss the mark altogether. It is often the low paid or those in other circumstances just above benefit level who are seriously at risk of debt, housing re-possession, employment problems etcetera.

A close relation of financial eligibility is the question of funding for legal aid as a whole. A legitimate concern with those providing legal services is that reform will herald cost reductions as well as cost controls of legally aided services. If new and imaginative approaches to delivering legal services are to be championed, gaps in services to be effectively filled and in-roads to be made in targeting social welfare law, sufficient funding must be provided.

Bearing in mind the priority given to health and education in public spending rounds, making the case for properly funded legal aid services will not be easy. A task for all those involved and interested in legal services including the new Legal Services Commission will be to sell the virtues of access to justice.

A further dimension to the legal services debate will be the approach of the Lord Chancellor's Department to tribunal representation following the publication of the Leggatt review.[9] A response is expected during this summer. The review recommended that its proposal should be fully examined in Northern Ireland. To date, a watching brief has been maintained by government departments with no pro-active public debate being initiated. The Leggatt proposals favoured an overarching, more co-ordinated approach to administration of tribunals vested in the Lord Chancellor's Department, which would have responsibility for implementing information technology and other reforms comprehensively across all tribunals. What Leggatt did not fully answer was the dilemma that almost all tribunals require third party assistance (lay or legal representation depending on the circumstances) due to the complexity and importance of the issues involved. If legal aid is to be a piece in the jigsaw which provides effective legal services to the financially disadvantaged then, imaginative solutions to the need for representation at tribunals or reform of the current tribunals system will need to be crafted.

A final area for scrutiny is support for people taking or defending claims at the small claims court. The increase in the financial limit to £2,000 following the civil justice review still leaves the limit substantially below the £5,000, for example, limit operating in England and Wales. A financial claim of £1500 is extremely significant for a person on low income. Any attempt to move the limit upwards without addressing access to advice, assistance and in some cases representation, will create a vacuum in access to justice. Research into the impact of the change in the financial limit on settlements and applicants' perception of the small claims court would be an extremely useful starting point. The Legal Services Commission will need to look at innovative and cost effective ways of funding legal support in the small claims court. This is an area in which the voluntary sector may have a particular role to play.

CONCLUSION

Legal aid reform presents opportunities and challenges for the voluntary sector and legal profession. Shaping as well as responding to change will be a challenge to both sectors. For the voluntary sector, legal aid reform

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[9] *Tribunals for Users* (the "Leggatt" Report, 2001).

represents a concrete recognition that advice agencies are part of legal services with a legitimate voice in the debate on improving access to justice. Ensuring this debate leads to the best possible legal services for financially disadvantaged consumers is the prize still to be won.

AN EXCELLENT SERVICE AND A CATALYST FOR CHANGE?[1]

THE FUTURE PROVISION OF CRIMINAL DEFENCE SERVICES IN NORTHERN IRELAND

His Honour Judge David Smyth QC [2]

When first invited to write on "Criminal Legal Aid; the Future" it was suggested that I should examine the potential impact of criminal legal aid reforms now enshrined in the proposed draft Access to Justice (Northern Ireland) Order 2002. In particular it was suggested that I should examine the abolition of the Appropriate Authority,[3] the extension of fixed standard fees, and the possible introduction of special contracts for complex cases and (perhaps) for different categories of criminal work. A further suggestion was made that, while setting the article in the context of the Criminal Justice Review and the Auld Report in England, I should look further afield to potential reforms presaged in the new draft Order, such as criminal defender systems.

This brief will be partly followed. The draft Order enables many things to be introduced, including salaried defence services. Understandably and sensibly the Government has decided to give as wide a scope as possible to the new Legal Services Commission for Northern Ireland in the manner in which it fulfils its duty to provide criminal advice and assistance and criminal representation here.

The Commission is empowered to enter into contracts, make payments, loans or grants to providers of services, and to employ persons to provide such services directly, subject to a code. There is, in addition, a power given to the Commission[4] to establish separate bodies to provide any or all of these

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[1] *Criminal Defence Service*, Consultation Paper June 2000, Lord Chancellor's Department. The Lord Chancellor expects a salaried public defender service to "set an example of excellent service and be a catalyst for change within the wider criminal defence and legal services community".

[2] County Court Judge for Antrim, Chair Lord Chancellor's Legal Aid Advisory Committee for Northern Ireland.

[3] The somewhat peculiarly named body responsible currently for assessing the level of criminal legal aid payments in Northern Ireland, appointed by the Lord Chancellor and composed of both senior members of the legal profession (in particular, eminent criminal practitioners) and lay members. The Authority sits as a committee composed of a solicitor, barrister and a layperson drawn from this body. It is established by the Criminal Proceedings (Costs) Rules (Northern Ireland) 1992.

[4] Which, in April 2003, will take over those powers currently exercised by the Appropriate Authority and, as the Lord Chancellor's agent, by the Legal Aid Department of the Law Society of Northern Ireland. The Order in Council is to be laid in November 2002. This being Northern Ireland and because of the ongoing process of devolution here the Lord Chancellor has embarked on a process of

services. Public defender services by salaried Commission employees can certainly be introduced here and, because of a specific provision that allows different areas (and different descriptions of cases) in Northern Ireland to be treated differently, pilot projects can be introduced[5]. It is, however, difficult to predict with any accuracy what the future intentions of the Government are in this area.

Whilst the Government may have its own, fairly well defined, objectives, these can at the moment only be the subject of, at best, intelligent guesses. The Order itself does not tie the Government down to any particular way of proceeding. Quite the contrary, it gives a very wide scope both as to the nature of criminal services (making formal provision for these to include detention proceedings[6] and bringing the Police And Criminal Evidence Order (PACE) advice within the ambit of criminal defence services[7]) and also as to the ways in which such services should be provided and funded. Contracts are now widely used in England and Wales and are to be extended to proceedings in the Crown Court. However, there are a number of uncertainties. What is happening in England and Wales, whilst it is hard to assess exactly, may not prove a good exemplar for Northern Ireland. There is scope for treating Northern Ireland differently[8]. The existence of a local Assembly[9] and, in some respects, our different culture both as regards the distribution of legal services in the small towns that comprise most of Northern Ireland and our sectarian problems may have implications for the availability not just of competent assistance but of a sufficient choice of representation[10]. It is arguable, at the very least, that this is in itself part of the concept of access to justice.

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consultation on the Order that includes the Northern Ireland Assembly and the Northern Ireland Select Committee at Westminster (due to conclude towards the end of July 2002).

5 Article 23(4)(a) and (b) and Article 24(6)(a) and (b) of the draft Order.

6 Article 25(c).

7 Article 23 which provides for publicly funded advice of both arrested persons and "volunteers" at police stations. Such advice shall be as the Commission "considers appropriate". To date in Northern Ireland such advice has been provided by a solicitor unlike the situation in England and Wales where a non-qualified person can attend to advise a suspect. It has predictably been a source of controversy that persons undertaking this difficult and non-sociable task have not been "up to the job".

8 "Simply put the Government's stated intention is to modernise the administration and provision of publicly funded legal services in Northern Ireland by delivering local solutions to local problems. As my Ministerial predecessors have stated, this is a listening Government". David Lock, Parliamentary Secretary, Lord Chancellor's Department, Foreword to *The Way Ahead – Legal Aid Reform in Northern Ireland* Cm 4849 (Belfast 2000), echoing the words of the Lord Chancellor addressing the Bar of Northern Ireland in 1999.

9 Scotland, although it has been experimenting in Edinburgh with a pilot salaried public defender project, has not gone down the route of contracting.

10 There is some rather anecdotal suggestion that there has been a contraction of choice in some towns in England as some firms forsake criminal work in favour of other more rewarding areas of work and those awarded contracts by the Commission are excluded from these due to vicissitudes extraneous to their criminal practices.

This article, because of the uncertainties referred to, is therefore something of a quick gallop through the main provisions of the Order and a more in depth examination of certain aspects of these using what I hope is an intelligent guess as to what the medium term future holds for us in Northern Ireland.

Fixed Fees and Quality Control?

The budget is not to be capped. Unlike the civil (and the family budget) it is to be "demand led". Having established that, it has to be recognised that the structure of the Order and the definition of Remuneration Orders permits considerable scope for the Lord Chancellor, subject to consultation with the Lord Chief Justice and the principal professional bodies, to determine rates and the level of skills required to provide different categories of criminal services.[11] It is not hard to see that the Government contemplates the much wider use of fixed fees as a way of exerting financial control on an otherwise demand led budget. The scope for assessment of individual cases is going to be vastly reduced.

It remains to be seen whether this has the desired effect but there is scope not just for a retreat from the assessment of individual cases but also from fixed hourly rates (struck at different levels for different skills) to fixed fees. This in itself will have an effect that is, in part, easy to predict.[12] It will encourage specialisation and discourage those firms that are not substantially geared to criminal defence work. Of course a lot depends on the level at which fees are set. Swings can compensate for roundabouts. There may well be economies of scale.[13] My own view is that this will have a largely beneficial effect but it is, as it is in many areas, a matter of balance.[14] The degree of specialisation already present in Belfast together with the greater incentive to concentrate on criminal work provided by fixed fees may well suggest that a system of contracts could be, at least partially, introduced in the near future. It seems that the time scale will permit the Northern Ireland Court Service to

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[11] Articles 24(3)(a) and 47 give the Lord Chancellor important and wide ranging powers to make Remuneration Orders.

[12] During 2001/2002 14,645 criminal cases appeared before Belfast Magistrates' Court and Belfast Youth Courts. 90% of these cases were dealt with by 15 solicitors' firms based in Belfast in the main but employing 100 solicitors and 150 other staff in 39 offices throughout Northern Ireland.

[13] The rate of increase of legal aid expenditure in Northern Ireland has been most marked by the recent rises in criminal legal aid expenditure. See any recent *Legal Aid Annual Report* (London, the Stationary Office).

[14] Expenditure on criminal legal aid per capita is still lower in Northern Ireland than in either England or Scotland (see *Legal Aid Annual Reports ibid* and accompanying reports of the Lord Chancellor's Legal Aid Advisory Committee for Northern Ireland) but there has been a very appreciable rise over the last number of years. In 1996/97 the bill was £14.3m and in 2000/01 £22.8m. The average solicitor's bill went up by 17.02% in the last two years and counsel's by 1.63% but this was after a massive rise in the previous year, largely as a result of the Appropriate Authority increasing fees to a level more in keeping with that in England and Wales.

assess what is happening both in Scotland and England before it takes any fundamental decision on the introduction of contracts of whatever kind.[15]

Interestingly the Order contains an enabling power for a separate body to administer criminal defence services[16] but there appears to be little likelihood that this will happen in what is a comparatively small jurisdiction. If criminal defence services and civil expand along very different lines, however, the power is there.

The Law Society would probably say that quality control is best exercised by competition and, for that to operate properly, there must be, at the very least, some element of choice. A poor job will be punished by the client going elsewhere the next time if not immediately. The Government's position is not so sanguine. To an understandable extent the Government's thinking has been influenced by its experience in England. The Ministers ultimately responsible for the approval of policy are Westminster based. England and Wales is in the throes of completing a complex and radical reformation of publicly funded legal aid services. This has included the widespread introduction of contracts for the provision of criminal services, franchising and the implementation of a franchise model code. It also happens that most of the research has been conducted there (including significant research by and on behalf of the Lord Chancellor's Department (LCD) and Legal Services Commission research units). It is not surprising that English experience should be writ large over the Government's thinking.

There is provision for a code of conduct for employees, either of the Commission who are engaged in the provision of criminal defence services or employees of any body established by the Commission. It is clear that the new scheme will require solicitors wishing to do legal aid work to register and sign up to a code of practice.[17] Where contracts are used for general or specialist criminal defence services clauses relating to quality standards will be contained in those contracts.[18]

Fixed fees were introduced in Scotland in April 1999 against the opposition of the Scottish Law Society (whose members perhaps do more of the representation of clients at Scottish lower courts than the members of the Faculty of Advocates do).[19] The underlying rationale of the introduction of

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[15] In Scotland the average cost of a case fell to £906 in 2000/01 and overall expenditure from £44.9m to £40.4, a drop of 10%. This was "[L]ikely to be due to the introduction of fixed payments for the majority of summary cases, with the average summary case costing £652 compared with £769 in 1999/2000". See *Legal Studies Research Findings No 19*, Scottish Office. Interestingly Canadian research provides some evidence of strategic billing suggesting that private solicitors are more expensive because cases take longer and that they can be encouraged to spend longer on cases depending on how they are paid. (Manitoba and Alberta studies).

[16] Art 5(1).

[17] See the provisions of Art 37 relating to the register of persons providing services.

[18] See *The Way Ahead – Legal Aid Reform in Northern Ireland*, Cm 4849 (Belfast, 2000). The Government decided to introduce a Registration Scheme and Code of Practice similar to the Scottish quality control system as opposed to the English and Welsh franchise model.

[19] Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999. The Scottish Office was concerned that there had been a 65% rise over 10 years in real terms in

fixed fees was to reduce and control the criminal legal aid budget.[20] At least in part and so far, this has been achieved. As one Scottish solicitor put it in a private solicitor interview:

> "As a matter of principle, I still object to it, but we could live with fixed fees, because I can now see that the swings and roundabouts argument probably does work."[21]

Of course this scheme of fixed payments (£500 for Sheriff Court cases, for example) has the virtue of simplicity. Billing becomes much less complex and time consuming. It, however, still is designed to control and reduce the amount of public money going to solicitors who represent clients charged with a criminal offence. The initial result was a drop in the average cost of a summary case under the fixed payment regime from £820 to £769.[22] In a year when, contrary to immediately past years, the total number of criminal legal aid applications in Scotland went up slightly, expenditure on criminal legal aid fell steeply. The picture was maintained in the following year when the average cost of a summary case fell to £652 and summary criminal legal aid expenditure fell by 10% to £40.4m.

It remains to be seen whether the intention underlying the introduction of fixed fees for summary cases will be achieved in the long term. There are always ways in which, quite legitimately, costs can be maximised in a fixed staged tariff system as well as in an itemised "time and line" system but, in the author's view the Northern Ireland Court Service will be monitoring very closely what happens in Scotland with its fixed fee system in summary courts and what happens in England and Wales where the system of contracts is being further extended.

One thing is clear and that is that, while the timescale for the implementation of the new system and of the new Legal Services Commission is quite tight, the Government is wisely in no mood to hurry along a particular route. The Remuneration Order will be a first step to be taken by the Lord Chancellor. It, and the introduction of fixed fees, will presumably precede or immediately follow the taking over by the new Commission of its functions in April 2003. The Commission is charged with informing itself of the need for and the quality of criminal defence services in Northern Ireland.

No doubt, in deciding what levels at which these fees should be struck and what different stages should be allowed for, the Northern Ireland Court Service and the new Research Department of the Commission will properly evaluate, on the one hand, the need to adequately recompense work done by sufficiently competent professionals and, and on the other, the need to ensure that there is a sufficient pool from within which the right to choose one's

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the average cost per case. See consultation letter from the Scottish Office, 12th October 1998.

[20] The intention was to reduce the then budget from £53m by £10m. Scottish Office Press Release, 13th October 1998.

[21] Evaluation of the Edinburgh Public Defenders Solicitors Scheme, Scottish Office, September 2001, at p 21.

[22] *Scottish Legal Aid Board Annual Report 2001*. Solemn cases where fixed payments do not apply saw an 18% rise in costs, summary case where fixed costs largely apply saw a 6% reduction in costs.

representative can properly be exercised. This right to choose is enshrined in article 30 but this provision also gives particular powers to the Commission to determine the number, description and seniority of representatives.

It does not need to be emphasised here how important the issues of competent representation, the level of that representation, the choice and independence (both actual and perceived) of representation as well as the adequacy of forensic resources to both prosecution and defence are to us in Northern Ireland.[23] Perhaps, without being in any way controversial, I could say that one of the mainstays of the rule of law in Northern Ireland, a community with severe problems, has been the competence and availability of its legal profession to both defence and prosecution. Whatever else happens, I am reasonably confident that the Government and the new Legal Services Commission will appreciate the value of this equality of arms and ensure that it continues.

Of course the great danger of any new funding system and any change to an existing funding system is that it may well have adverse consequences, some of which are difficult to foresee. It has been recognised that any judicare or publicly funded legal aid system may provide perverse incentives to lawyers to continue cases.[24] For instance, there should be every financial incentive to negotiate a realistic plea as well as to do adequate and timely preparation. There should be no financial incentive to perversely continue cases. It is a fraught matter as to where the line should be drawn between a system of funding that provides adequate recompense for work properly and competently undertaken and a system which encourages something that has been euphemistically described as "strategic billing". I will expand on the hidden costs of this when I comment upon the merits of the future development here of a salaried public defender service.

One of the great benefits that our system provides is that it ensures that persons being questioned by the police in police stations or detention centres are provided with professional representation. The benefits of the Police and Criminal Evidence (Northern Ireland) Order 1988 have ensured that there is an effective code for, amongst other things, the questioning of suspects by the police and their access to advice. This has to be borne in mind by anyone

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[23] Recognised by article 30(6), which provides a safeguard against an individual's choice of representative being restricted to employees of the Commission or bodies established by the Commission to employ salaried defence lawyers.

[24] Private Lawyers spend more time on case than staffers. See the Manitoba study quoted in *Legal Studies Findings No 19* n 15 *supra*. See also Edinburgh Evaluation Study n 21 *supra*. The alleged perverse incentives contained within Scottish criminal legal aid have been the subject of considerable debate. There is both concern that the complex system there encourages late pleas and does not provide adequate support for those pleading guilty and appearing straight from custody, but, as in so many things, Scotland is different. Our problem is that whilst there has been considerable public and private research and evaluation in both England and Scotland there has been next to none here. There are however remarkable similarities between the criminal practice scene in Belfast and Edinburgh, where, as in Belfast, 15 firms do the bulk of summary work are overwhelmingly dependant on legal aid and are still "small" in size. One difference is possibly that there is a greater specialisation between criminal and civil legal aid practices in Edinburgh.

who is assessing the public defender and judicare systems in other countries but particularly in the United States. NYPD Blue is not that far from the mark. Whilst persons in police custody there do have a right to a phone call and to be seen by a lawyer my understanding is that the public defender or publicly funded counsel does not get assigned until after the suspect has left the Precinct.

Strangely perhaps, the system is similar in Scotland. Defence solicitors do not have a right to be present during police interviews. Solicitors there do most of the representation in the Sheriff Courts but they do not regard attendance at a police station as a central part of their job. If they go to a police station it is for short interviews to facilitate a client and, in a sense, to provide moral support. The situation in England and Wales is vastly different. The major study of criminal defence work in England and Wales makes it clear that firms employ large numbers of paralegals. This is not the situation in Scotland, nor is it the picture here. While more clerks may sit behind counsel than in Scotland the use of paralegals is by no means as developed as it is in England where clerks are assigned to undertake different stages of a case.[25]

There could be many reasons for this but one which perhaps makes Northern Ireland more similar to Scotland is that any representative entering a police station to fulfil duties under PACE must be a qualified solicitor. Unlike their English counterparts Northern Irish firms do not and should not employ non-professional staff of varying skills and ages to cover the long, unsocial hours of police station advice. In many respects ours is a "Rolls Royce" service and it costs. In many respects it sets standards that must be the envy of the Common Law world, if not also of other jurisdictions. The draft Order transfers advice and assistance that formerly funded such professional trips to police stations to the (non-capped) criminal defence services. While the Order appears to ensure, through a grant of representation, at the very least, a minimum of a solicitor, there is no such requirement that a professionally qualified person should provide the advice and assistance for an individual arrested and held in custody at a police station.[26] It may be that in practice not all those who attend to provide advice and assistance to those in custody at police stations in Northern Ireland are professionally qualified but the present system remunerates the attendance of solicitors and it is, in the vast majority of cases, solicitors who undertake this difficult, somewhat unsociable, and, to my mind, vital activity.

Public Defender Systems and Contracts?

This leads on to the last aspect of the prospective Order with which this article will deal. One of the most controversial provisions of the Access to Justice Act 1999 (which our draft Order in many respects closely follows) was that it allowed a salaried criminal defence service to be set up in England and Wales. Like the pilot project in Edinburgh it is now being piloted in four centres with another two to open shortly.[27] The time scale for

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[25] McConville *et al* 194.

[26] Articles 23 and 30.

[27] In May 2001 Liverpool, Middlesborough, and Swansea opened. Birmingham opened in July 2001 to be followed this year by Cheltenham and another location

evaluation is tight. A report is to be submitted by September 2004 on data collected after April 2003.

It is perhaps not surprising, given this background, that the power to commence a salaried defence service is writ large in the new Order for Northern Ireland. It was not highlighted in the Northern Ireland Court Service's consultation document, *Public Benefit and the Public Purse – Legal Aid Reform in Northern Ireland*. In paragraph 12.21 views were invited on taking powers to enable the administrative body to employ salaried defenders to represent defendants. It is unlikely that many, if any, of the 29 bodies with whom those responsible for the drafting of the Order met expressed a positive view either about the need for or the beneficial effect of introducing salaried public defenders. Despite this, and perhaps understandably given what has been happening on the mainland, the power for the Legal Services Commission (LSC) to employ salaried lawyers for this purpose was one of four decisions formally included under the heading "Criminal Legal Aid" in the decisions paper, *The Way Ahead – the Future of Legal Aid in Northern Ireland*, published by the Court Service in response to the consultation process.[28]

It is not entirely certain whether it will be activated here but it is anticipated by some members of the Law Society that, if a Public Defenders Office is piloted, it would operate initially in the Belfast City area and cover the four main designated police stations in connection with PACE work and representation on summary matters before Belfast Magistrates' Court.[29] It seems reasonably clear that there has been some discussion with relevant professional bodies about this. The view of the Lord Chancellor's Advisory Committee on Legal Aid in Northern Ireland has been hostile to the concept of introducing a Public Defender Scheme (PDS) here. The Committee's view was that the primary motive behind such a move was the desire to reduce or control the rate of increase of public expenditure on criminal legal aid in Northern Ireland – not in itself an ignoble aim. The Committee could not see any benefits in terms of increased quality of service in the introduction of a PDS here and was unaware of the existence of any evidence that the quality of service provided, albeit at some expense, by existing criminal legal aid in Northern Ireland was lacking. It also felt that a successful criminal defence service would not fulfil the Government's pre-requisite of controlling and reducing costs.[30]

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later this year. It will be evaluated by a team from the Institute of Legal Research at Warwick University and the Institute of Advanced Legal Studies headed by Professor Lee Bridges. *Methods for Evaluating the Public Defender Service* (a consultation document, School of Law, University of Warwick, February 2002).

[28] Para 77. "The Government will take powers for the LSC to employ salaried lawyers either in-house or as a separate entity to conduct criminal defence work. The powers will include setting criteria under which such lawyers will be used. The Government will consult before such powers would be exercised, including the operation of a pilot scheme". CM 4849 (Belfast, 2000).

[29] For this I am grateful to Brian Archer, a solicitor member of the Lord Chancellor's Legal Aid Advisory Committee for Northern Ireland.

[30] Submission by LAAC to LCD on *Criminal Defence Service* (LCD CP 9/00, June 2000).

My own view is that, whilst value for money and the control of cost are very relevant considerations, the greater use of fixed fees with uplifts for exceptional cases will prove to be the best way of ensuring that these objectives are met whilst still ensuring that the interests of justice are being kept to the fore. The LCLAAC[31] argued that the need for practitioners to retain their clients and attract new ones by virtue of a reputation for quality service is the best kind of competitive pressure in this area. This was said in the context of the Government's proposal to consider the use of contracts in criminal legal aid but it applies with even greater force to a Criminal Defence Service. However the possibility of a PDS being piloted here is worthy of further scrutiny and consultation. Obviously this process will be informed by what is happening in Edinburgh, the new pilots in England and, also, by what is not happening in Dublin.[32] There the Criminal Legal Aid Review committee, headed by Judge Buchanan, concluded, having conducted extensive consultations and costed various models, that the existing private practitioner system should not be either replaced or supplemented by the introduction of a PDS:

> "Having regard to the pertinent question of cost, which, it ought to be stated was the impetus for this investigation, we believe that the (legal aid) Scheme as it is currently structured and operates, is less expensive than any of the alternative models profiled and costed in this Report."[33]

This would also be informed by the LSC's study of local conditions, pursuant to its duty under article 6. Every so often, and again perhaps for understandable reasons, a politician alleges that some criminal defence lawyers cosy up to their clients and, by implication, arrange alibis, suborn witnesses, provide defences and, as James Morton said do "all the other things of which good legal thrillers are made".[34] It comes as no surprise that this suggestion has been made in Northern Ireland. It has however not been said often and, given the central role of the legal profession in both prosecuting and defending, that is perhaps the real surprise.

Lawyers who either prosecute or defend have a difficult and, quite often, very unpopular job to perform. Given the nature of defence work and the more personal relationship and trust that must exist between the professional and the client, this job is more difficult for the defender than the prosecutor. Sometimes judges are accused of being naïve but all I can say is that I have never been aware of any serious professional concern about this sort of problem in Northern Ireland. Nor has there ever been any hard evidence or any evidence produced to substantiate such an allegation. The LSC surely must, as will the Government, take into account that, whatever the merits of a Criminal Defence Service for England and Wales or Scotland, the citizen's freedom to choose an independent lawyer adequately remunerated from the

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[31] The Response of the Lord Chancellor's Advisory Committee on Legal Aid in Northern Ireland (LCLAAC) to the Government's Consultation Paper on the Reform of Legal Aid (Belfast, 1999).

[32] *Criminal Legal Aid Review Committee First Report*, (Dublin Stationary Office, 1999).

[33] *Ibid* p 75.

[34] NLJ, March 2001.

public purse has been of immense significance in maintaining the rule of law in this jurisdiction over the last 32 years. The Criminal Justice Review did not cover legal aid matters in much detail but the general tenor of its recommendations and its proposals to transfer responsibility for all prosecutions from the Police to a new Public Prosecution Service for Northern Ireland can be taken as a clear sign that independence from the State should be a core value of the criminal justice system in this jurisdiction.

This is not to say that such independence cannot be secured in a PDS in the same way as the position and authority of the Director of Public Prosecutions ensures this in the field of prosecuting.[35] That can be done but one is not comparing like completely with like. A Criminal Defence Service in Northern Ireland, no matter how well it is funded in terms of financial and human resources and no matter how well buttressed it is from the State by an independent head and by a Commission, would almost certainly be seen to be an arm of the State by many shades of political opinion and by individual potential clients in Northern Ireland. And perception can almost be as important as reality in Northern Ireland.

It is now clear that, if it is progressed in Northern Ireland, the Public Defender's Office (PDO) will operate in competition with private practitioners. The right of choice as regards representative that originated in Diplock days has now been enshrined in article 30. The initial attempt, in Edinburgh, to enforce the direction of those whose birth dates were in January and February towards the PDSO was such a failure that it had to be ended, after 21 months, in July 2000. Not only did it, at least partly, skew the evaluation figures, it, by forcibly abstracting one sixth of the lower courts work from a close network of fairly specialised criminal private practices in Edinburgh, ensured that clients and professionals were going to be hostile to the advent of the PDSO in a way that even a dedicated, and fairly thick skinned, "staffer" would find difficult. It must be unique that star signs should determine entry into a publicly funded judicare system.

That will not happen here. If the new Commission finds the kind of financial and human resources to set up a PDO in Belfast it will have to compete on an even playing field with private practice. If that happens, I am quite certain that, based on experience elsewhere in the United Kingdom, the attitude of the professions will be neutral at worst and helpful at best. A lot will depend on the calibre, experience and commitment of those staffing the PDO and, in particular, its head. It requires, and no doubt will receive, adequate financial resources. The head of the pilot scheme in Liverpool, Richard Whitehead, will take a cut in his income from what he might have expected in private practice. However, the salary for a head of office there is, at £55,000, proportionate to the level of skill and experience that could be expected

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[35] The importance of this has been emphasised many times. In the United States the most effective and respected systems possess an independent body, such as a Commission, acting as a buffer between the Government and the service. Without it services are exposed to political pressure and are more susceptible to funding cuts. Indigent defence in a system where many prosecutors and even judges are subject to election can suffer at the hands of taxpayers who can directly calculate how much of their money is being spent on Defenders. See *Public Defenders; Learning From the United States Experience.* (Justice, London, 2001).

given that fee considerations are removed from the equation that must affect every solicitor in private practice. Mr Whitehead said recently:

> "Solicitors see the public defenders as one way to make progress in their own careers. The constraints of making a profit can be removed and you can actually get on with the job."[36]

A deputy "staffer" receives a salary of £30,000 to £35,000. It is not just the salary that pays the professional staff that is important, so too are the arrangements for establishing the office, the financing and providing of adequate support staff and facilities, and the arrangements that are made to provide for those essential disbursements required to ensure the interests of justice are advanced in individual trials. Who decides what disbursements should be incurred? Often a private practitioner has to obtain a specific authority from the Legal Aid Authority for such expenditure. Is this process made any easier or any more difficult if the PDS is an emanation of the funding Authority, the new LSC? The major potential benefit that a sizeable PDS office could have is that there may well be economies of scale. The provision of IT, of wider office services, of a library and of such opportunities as having earlier links with other agencies such as Probation and social services are not minor, fringe benefits but could be part of a "holistic" approach to defence services.[37]

The first evaluation report on the Edinburgh PDSO was published last September.[38] It makes interesting reading. Nothing more will be recited here than the principal conclusions. It is sufficient to say that, in almost every respect, the jury is still well and truly out.

After an initial unfortunate start the PDSO became an accepted part of the somewhat closed shop of those defending in the lower courts in Edinburgh. To a certain extent PDSO cases tended to resolve earlier. There was a slight, though still significant, increase in its conviction/plea rate. There seemed to be a link between the tendency of the PDSO to resolve its cases earlier and its slightly higher conviction rate. An interesting phenomenon, and not apparently connected with anything in the actual case, is that there was a tendency for cases of those who were born in January and February to plead guilty earlier than those whose birth dates were in November or December. The authors of the report attributed this to how solicitors were paid![39] There was no appreciable difference in sentence outcome. Client satisfaction was, however, markedly different. The authors recorded:

> "The levels of trust and satisfaction expressed by directed (i.e. involuntary) PDSO clients were consistently lower than those expressed by clients using private practitioners. Directed clients were less likely to say that their solicitor had done a "very good job" in listening to what they had to say; telling

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[36] *The Independent* 15th May 2001.

[37] The provision and use of IT has been assessed as being of vital importance in the United States. Its availability is one of the criteria for assessment of PD projects by the American Bar Association and others. See Justice n 35 *supra*.

[38] See n 21 *supra*.

[39] *Ibid* p 5.

> them what was happening; being there when they wanted them; or having enough time for them. They were less likely to agree strongly that the solicitor had told the court their side of the story or treated them as though they mattered. Of particular concern was the fact that only 39% agreed strongly that their solicitor "had really stood up for their rights" compared with 71% of private solicitor clients".

Of course these clients had no choice. They could not vote with their feet and go elsewhere unless they had received a formal Scottish Legal Aid Board waiver. Might this be an argument in favour of the power of consumer choice even where the consumer is not paying for the service!

Perhaps of more concern both generally and to the report's authors was that, in a study of those who chose the PDSO after direction had ceased, volunteers were still less likely to agree strongly that the PDSO had "really stood up for their rights". They were also markedly less likely to say that they would use that firm again than those who were clients of a private practice.[40] Of even greater significance than these matters that are, after all difficult to quantify and to assess, is whether the PDSO provided value for money. Cost effectiveness was the first, and foremost, criterion. Unfortunately for the evaluation, the Scottish Legal Aid Board in 1999 implemented a system of fixed fees that seems to have had the result of sharply reducing average summary case costs. The average cost per case of the PDSO was, on one set of assumptions, £65 dearer than the average case cost in private practice. It is true that that difference is not considerable but, if cost effectiveness was to be a yardstick for either the maintenance or extension of the project, the authors of the evaluation judged that case numbers would have to be increased by 15% or the office would have to lose one of its lawyers. This would be with all the accompanying uncertainty as to what effect the consequent increase in work load would have on outcomes, which, at the moment, seem to be little different from those of cases going through the Scottish private system.[41]

Underlying all that is happening in England and Wales (the introduction of contracts for the delivery of most criminal legal aid services, from April 2001, and the launch of the experimental public defender pilot projects) has been the perception by Government that not only has criminal legal aid expenditure, an essentially demand led budget, got to be controlled but also that the introduction of various initiatives to improve the quality of criminal legal services is either desirable or else necessary. It is not obvious that the latter is the case in Northern Ireland. Criminal legal aid in England and Wales involves an expenditure in excess of £800m a year and in the view of one eminent commentator, Professor Bridges, encompasses what is probably

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[40] *Ibid*.

[41] The relationship between resources and workload and the consequent impact on quality of work and outcomes is widely recognised. See Justice Report n 35 *supra*; Lee Bridges "Recent Developments in Criminal Legal Aid in England and Wales – Contracting, Quality and the Public Defender Experiment", Melbourne ILAG 2001.

the most comprehensive system of state-funded legal assistance to criminal suspects and defendants in the world.[42]

Northern Ireland seems, for some reason, to be cheaper in terms of expenditure per capita than either England or Scotland.[43] Despite this a service at least equal to that provided in England exists in Northern Ireland. There are always anecdotal stories about poor quality of representation, lawyers being under-prepared, counsel being changed at the last minute and, possibly, being hopelessly inexperienced, but in a system that has seen a through-put of cases that would have taxed any other jurisdiction of its size there appears to be a remarkable lack of public concern in this regard. In the light of a lack of any public perception that there is a significant problem and of the lack of any hard evidence that there is a significant problem of poor quality of representation of suspects here it would seem to be foolish in the extreme for either contracts as they are being developed in England and Wales or salaried public defenders to be introduced here without a proven and demonstrable need for change being established.

The Government, which deserves credit for the funding of the present legal aid system, should wait until the new LSC has bedded down and has addressed its duties under article 6. It is required to both inform itself of the need for criminal defence services, and the quality of such services. It then is charged with the task of how best that need should be met. The mainland experience will obviously be watched closely and a sufficient number of years allowed to elapse (perhaps unlike Scotland) before the impact of the introduction of fixed fees upon costs and quality can be properly assessed.

The system of contracting introduced in April 2001 in England and Wales has sensibly not attempted to impose a rigid fixed price either on the contract as a whole or on individual cases. It has not even sought to limit expenditure on individual aspects of cases (e.g. PACE). It does not limit case-loads and allows contracting firms to uplift contract prices in some cases. It allows monthly payments based on past experience (last year's work). It allows solicitors to continue to claim for work done under the previous system of hourly rates and fixed fees (e.g. for telephone calls). It is a very different beast from that of fixed fees. It certainly is very, very different from the present position in Scotland that seems, at least in part, to be achieving the aims the Scottish Office set.[44]

The effects this will have on freedom of choice, the availability of firms prepared and capable of undertaking contracts, the difficulties of proper quality monitoring (as opposed to monitoring good "housekeeping") are all matters of present speculation and will be subject to future evaluation. It seems, however, that the system is far from simple. Billing complexities and the recording of work done may tend to favour larger firms. Larger firms may be more sophisticated in the type of case management and the routine delegation of tasks such as police station advice to non-solicitor staff. It is possible that this may mean that bigger firms can make economies of scale and be better able to exploit the funding opportunities available to them. It is

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[42] *Ibid.*
[43] See recent *Legal Aid Annual Reports* with accompanying LCLAAC reports.
[44] See various recent annual reports of the Scottish Legal Aid Board.

however a moot point whether these benefits will accrue to the Legal Aid Fund or to the firm itself. It is also a moot point as to what if any impact this will have on quality of service (and how that can be properly assessed). No doubt, special arrangements will have to be made for some cases here. There will probably have to be a way that some cases are taken out of "fixed" fees. These will presumably be rare enough. Some cases might profitably be the subject of individual contracts between the providers and the LSC, especially potentially long running serious fraud cases and multi-defendant cases. Here, yet again, the experience of those on the mainland will be useful. Very considerable research has already been done by the LSC and LCD on criminal costs and the next couple of years will permit what is happening there to be evaluated by the new LSC. This is one of the reasons why a research Department should commence work as soon as possible, perhaps initially under the Legal Aid Department of the Law Society.

I think I shall best conclude this, admittedly somewhat speculative article, by revisiting the Scottish PDSO in Edinburgh. I said above that there was a marginal cost disadvantage when PDSO average case costs were compared with those going through the private system. These were slightly lower. There is however a more hidden saving:

> "Resolving cases earlier has the potential to save legal aid (and thus taxpayer) costs – though the PDSO would need to secure further increases in work (or make further reductions to staffing levels) for this potential to be realised. It also reduces court and prosecution costs. Fewer witnesses are inconvenienced. Clients are spared the wait and worry of repeated court appearances and are less likely to be held in detention pending the resolution of their case."[45]

The savings to courts (6%) and to the Procurator Fiscal (5%) are capable of some measurement. The savings in cost of unnecessary attendance by witnesses at "cracked trials" are not so easily capable of such quantifiable assessment. They are, however, very real. There was a very significant difference between the PDSO and private firms as regards "cracked" or adjourned trials. In broad terms in a sample of 100 cases the private firms had 44 cancelled trials involving 175 wasted visits by witnesses while by contrast the PDSO produced 31 ineffective trials affecting attendance by a total of 123 witnesses.[46] This is something which must also be put into the balance when the overall cost effectiveness of a criminal defence service is being evaluated.

If a system of salaried defenders is to be piloted here it will have to compete with private practice. In my view, that is the best yardstick by which to judge the new service. If it succeeds, it will do so competitively and may become a benchmark for private providers. It requires to be well resourced, patently independent, and buttressed from the State. It needs to be operated by persons of calibre, of some experience and who are capable of commanding respect, persons of ability to whom salary and job security are not the sole attractions of the job. It would help if the head of the PDS is, not

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[45] See n 21 *supra* p 7
[46] *Ibid*.

only a capable, but a charismatic leader. Put this way, the public defender service could be both complementary to private practice and could have some of the virtues that a public-spirited ethos provides. Does this sit easily with cost control and value for money? That, I am afraid, remains to be seen.

Sometimes it is said that Northern Ireland tends to follow, rather slavishly perhaps, what is happening on the mainland. However, one of the advantages of being a small jurisdiction is that one gets time for reflection. We tend to follow. But let us hope that it gives us the opportunity to pick the best and to reject the worst.