



Funding: is it time for a CLAF? April 2009

The Bar Council's policy group publishes its proposals

The concept of some form of social fund to support worthy claimants in bringing civil claims is hardly new – the concept has been mooted over the past 20 years with the Bar Council first proposing a 'CLAF' (Contingent Legal Aid Fund) in 1998. On 23rd April it returned to the idea with the publication of a discussion paper prepared by a policy group urging an examination of the feasibility of introducing a CLAF (or CLAFs) as part of the reforms being considered by Lord Justice Jackson. This time around the preferred term is CCF (Charitable Contingent Fund)

Whilst the idea is not new the Bar Council policy group (BCPG) considers that the legal landscape is now very different – in 1998 civil legal aid was still available for a wide range of litigation and CFAs were in their infancy. Success fees and ATE premiums were not recoverable and the Law Society recommended a voluntary cap of 25% on any deduction from damages. The growth in the use of CFAs, the huge rise in costs created by recoverability, the 'costs wars', and the emergence of third party funders were all still to come.

Some of these factors lead the BCPG to believe that a CCF is an idea whose time has come. Their proposal has been sent to Jackson LJ and if the report in the Times this week is accurate it seems he just might agree.

The proposal

As always with any costs proposal the devil is in the detail. The BCPG has made it clear that it is not delving into the minutiae of the proposals at this stage, and no financial modelling has been undertaken. In brief, the proposal this time is for a not-for-profit fund to be set up using 'seed-corn' funding from the City, including from law firms, with no public money involved. Deserving claimants would be able to apply for financial support from the fund for any type of case, potentially subject to a means test and, where appropriate, a payment up-front. In return for its support the fund would receive a contribution over and above normal recoverable costs, either from the claimant, the defendant, or both, to enable it to fund further cases.

The BCPG takes the view that such a fund could not exist alongside a costs regime with recoverable success fees and ATE premiums and advocates that the entitlement to recovery to both should be abolished as part of the reforms. It describes that as the "quid pro quo" and argues that this would give claimants an incentive to keep their costs low and remove a source of satellite litigation. However, it does not advocate this change in respect of personal injury or clinical negligence cases for the time being as "there are risks in upsetting the current regime".

It is not clear if successful defendants would be able to recover their costs from the fund. The proposal raises the possibility of costs shifting being capped or removed.

Preventing successful defendants from recovering costs would make the scheme cheaper and “provide an incentive to settle”. This is an important issue when considering the contributions to be made by the parties in supported cases: if successful defendants’ costs were recoverable the contributions payable by losing defendants would be likely to be much higher. The possibility of unsuccessful claimants being personally liable to defendants for a sum not exceeding their up-front CCF contribution is floated, the aim being to promote good behaviour by claimants.

Funding

It is clear that initial funding would be required from the private section and whilst the BCPG confirms that it “does not underestimate the difficult issues this raises” it prefers at this stage to focus on the scheme and look in more detail at the on-going funding from cases. Several possible options are outlined:

- The simplest - the successful claimant pays a percentage (perhaps fixed) of damages to the fund in addition to costs (met by the defendant in the usual way)
- Payment of a proportion of damages by the losing party as an additional contribution. This option has the benefit of certainty without the risk of satellite litigation. Graded discounts could be given for early settlement although a warning is given that in other jurisdictions with CCFs this has led to collusion between the parties resulting in larger payments to claimants and reduced contributions to the fund, hampering the objective of access to justice.
- A further costs contribution from the losing party on top of normal costs
- Payment of a “success fee” as a percentage of the claimant’s costs by the defendant – this is not the BCPG’s preferred route.

As a matter of principle the BCPG believes that it is not unreasonable to expect assisted claimants to pay something for the support they receive and in those circumstances it believes an unsuccessful defendant should also be required to contribute. This raises particular issues in personal injury cases, as inevitably it would mean the claimant suffering a reduction in damages. The proposal highlights the problem, particularly in catastrophic cases, and indicates that whilst there would be no bar in principle to a personal injury claimant making a contribution to the fund from capital or periodic payments “the idea would attract opposition” and “the net loss to the damages would have to be kept at a manageable level”.

Although in the proposal a CCF is felt suitable for all types of case, Guy Mansfield QC from the BCPG, speaking to The Times this week, envisaged any CCF being introduced gradually, starting with professional negligence and breach of contract and possibly moving to personal injury and medical negligence at a later stage. The proposal acknowledges that there may be “practical risks in changing overnight the funding streams for clinical negligence and PI litigation”.

CFAs

The proposal outlines that CFAs would continue to exist alongside CCFs but with non-recoverable success fees and premiums as set out above, and possibly limitations on the percentage of damages which clients could be charged. An obligation on

lawyers could be introduced to require them to explore the availability of CCF funding and give full information on the options before offering a CFA.

Management of the CCFs

The BCPG is clear that the Legal Services Commission would not be the right body to manage a CCF. Instead, it proposes that insurers' skills would be required to evaluate risks and manage claims, and suggests the P&I Clubs as a model. Practical propositions would be needed to assist the CCFs' cash flow and incentivise lawyers and clients. Lawyers may be paid only at the end of cases, as with Legal Aid. Lawyers may be offered 'success fees' or suffer reductions in their fees dependant upon winning or losing cases.

Compulsory BTE insurance

The BCPG does not believe that CCFs can provide the whole solution to funding and in addition it proposes that consideration be given to legislation making claimants' legal expenses an extra part of compulsory insurance of public liability risks.

Under the proposal those required to take out such cover, including drivers, employers, occupiers, and providers of public services, would be required to 'add-on' cover to provide legal expenses cover for claims for injuries suffered by themselves, their employees, and those injured on their premises. In due course the providers of professional services could also be included. Thus, premiums would be gathered from a wide pool and individual premiums would be low. It is assumed that the CFA regulations would continue to provide that a CFA would not be appropriate where BTE insurance was available. Therefore, it would put legal expenses insurers in the driving seat in a far greater number of claims than at present. Obviously in those cases losing defendants would pay neither uplift nor ATE premium. Whilst the insurance policies would provide additional tax revenue for the Treasury it is perceived that there would be a cost to the State in so far as it is an employer and an occupier.

The BCPG suspects that the insurance industry may oppose compulsory insurance cover as a matter of principle but it feels that when compared with the CFA regime (with costs uplifts) or legal aid (with no recoverable costs) the insurance industry may "recognise the merits of the proposal and welcome it".

This proposal is full of ideas, many of which would significantly change the face of civil litigation and the legal market. Lord Justice Jackson's provisional report giving his views on costs reform following his initial consultation is due very shortly and awaited with keen interest.

Shirley Denyer, Director of Information

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