



JUDICIARY OF
ENGLAND AND WALES

CONTINGENCY LEGAL AID FUND AND SUPPLEMENTARY LEGAL AID FUND

SECOND LECTURE BY LORD JUSTICE JACKSON IN THE IMPLEMENTATION
PROGRAMME

PROFESSIONAL NEGLIGENCE BAR ASSOCIATION SEMINAR

8 OCTOBER 2011

παντα δε γιγνομενος πειρησεται, 'οσσ' 'επι γαιαν
'ερπετα γιγνονται και 'υδωρ και θεσπιδας πυρ.¹

1. INTRODUCTION

1.1 Implementation of Costs Review reforms. The Government has indicated broad support for the recommendations made in the Costs Review Final Report. The Judicial Executive Board has also expressed support for those recommendations. Legislation relating to conditional fee agreements (CFAs), after the event (“ATE”) insurance, contingency fees, Part 36 offers and related matters is now before Parliament. If approved by Parliament, that legislation might come into force late next year, possibly in October 2012. With that target date in mind, work is now proceeding on the implementation of other Costs Review recommendations which do not require primary legislation.

1.2 Programme of lectures. In the hope of assisting both the profession and court users generally, I am giving a series of lectures devoted to individual aspects of the implementation process. The first lecture, focused on legal aid, CFAs and ATE insurance, was delivered at Cambridge on 5th September.² Future lectures are planned on expert evidence³ and case management.⁴

1.3 Focus of this lecture. In this lecture to the Professional Negligence Bar Association (“PNBA”) I want to concentrate on the question of creating a contingency legal fund (“CLAF”) or possibly more than one such fund and a Supplementary Legal Aid Scheme (“SLAS”). It is only now (when the abolition of recoverable success fees has been announced) that such a venture becomes possible.

¹ Odyssey, book 4, lines 417-418: “He [Proteus] will change into the forms of all manner of creatures on earth – and even water and fire.”

² <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lj-jackson-speech-legalaidetlecture.pdf>. This is referred to as “the Cambridge lecture”.

³ At the Bond Solon Annual Expert Witness Conference on 11th November 2011

⁴ At the Judicial Institute, University College London on 22nd November 2011

1.4 The paragraphs of this lecture have been numbered for ease of reference on future occasions.

2. BACKGROUND

2.1 Definitions. Both a CLAF and a SLAS are self funding schemes, which have been proposed as methods of funding litigation in the event that the present regime for CFAs is changed. The normal beneficiary of such a scheme is the claimant, although it could on occasion be used by a defendant (e.g. where a builder sues a householder for payment and the householder raises a counterclaim for defects). In this lecture I shall always refer to the party supported by a CLAF or SLAS as “claimant”, without repeating this qualification. The essential feature of a CLAF is that once it is established it is expected to stand on its own feet and be fully self-financing. A SLAS on the other hand is a self-funding mechanism which is built into or added onto an existing publicly funded legal aid scheme, and administered by the relevant legal aid authority.

2.2 History. In 1978 Justice published its original proposals for a CLAF. Twenty one years later in 1997, in the run-up to the Access to Justice Act 1999 (“the 1999 Act”) and removal of personal injury cases from the scope of legal aid, a range of proposals for CLAFs were made by the Bar Council, the Law Society and the Consumer Association.⁵ None of these proposals were implemented, as the Government chose instead to promote and enhance CFAs under the 1999 Act reforms. However, provisions were included within the 1999 Act to provide for a CLAF or SLAS scheme: see s. 58B of the Courts and Legal Services Act 1990, which was inserted by s. 28 of the 1999 Act. These provisions have not yet been implemented, but they could be. Proposals for a SLAS emerged more recently, in particular from reports by the Civil Justice Council in 2005 and 2007.

2.3 The Bar’s CLAF Group. In November 2008 the General Management Committee of the Bar Council established a Policy Advisory Group (“PAG”) and also the first sub-group of PAG, to be known as “the CLAF Group”. Guy Mansfield QC is chairman of the CLAF Group. The remit of the CLAF Group was and is to inquire into the possibilities of creating a CLAF. The CLAF Group produced a preliminary report⁶ proposing the creation of a number of charitable contingent funds (“CCFs”), which would operate in different areas of litigation. The CLAF Group published a further report⁷ on 31st July 2009, amplifying its original proposals. The CLAF Group accepted that no large scale CLAF could be established, which would take over as the principal means of funding personal injury claims etc. It also identified a series of issues which would need to be addressed in relation to setting up smaller CLAFs: in particular, the level of contribution from successful claimants; how to meet adverse costs; initial funding and the returns required by investors in the CLAF.

2.4 Costs Review Final Report. I received a large number of conflicting submissions on this issue during the consultation phase of the Costs Review.⁸ I attempted to devise a workable financial model for a CLAF with the assistance of my accountant judicial assistant, but was unsuccessful. This was in part because there were numerous other issues to address in a short timescale and the resources of the Costs Review were limited (two judicial assistants, one clerk and myself). The fact remains, however, that a number of CLAFs and one SLAS have been successfully established in overseas jurisdictions,⁹ albeit on a relatively small

⁵ See “CLAF – An idea whose time has come”, Bar Council 1997; “Proposals to link legal aid and conditional fees”, Law Society 1997; CA Policy Paper on CLAF, 1997.

⁶ *The Merits of a Contingent Legal Aid Fund: Discussion Paper*, dated 27th February 2009

⁷ Entitled *Second Discussion Paper*

⁸ See the Costs Review Final Report, chapter 13, section 2.

⁹ For a summary of these overseas schemes, see the Costs Review Preliminary Report, chapter 19. The most well known scheme is the Hong Kong SLAS, the figures for which are set out in paras 2.2 and 2.3 of chapter 19.

scale. My final recommendation on this issue (recommendation 16 out of 109 recommendations) was:

“Financial modelling should be undertaken to ascertain the viability of one or more CLAFs or a SLAS after, and subject to, any decisions announced by Government in respect of the other recommendations of this report.”

2.5 Ministry of Justice Consultation Papers. On 15th November 2010 the Ministry of Justice (“MoJ”) published Consultation Paper CP 13/10 in respect of one tranche of the Costs Review proposals and Consultation Paper CP 12/10 in respect of legal aid reform. In section 2.6 of CP 13/10 the MoJ expressed support for the establishment of a SLAS. In paras 9.27 to 9.39 of CP 12/10 developed its proposals for a SLAS and commented on the possibility of a CLAF being established. The MoJ expressed concern that a CLAF may only be able to support a small number of cases and these would need to have high prospects of success.

2.6 MoJ’s decisions following consultation. The MoJ announced its decisions in relation to CP 13/10 on 29th March 2011. The MoJ accepted the Costs Review proposals in respect of CFAs, contingency fees and ATE insurance, subject to one small modification.¹⁰ The MoJ did not comment further on the issue of establishing a SLAS, no doubt because this had not been the subject of any specific question in the consultation paper. The MoJ announced its decisions in relation to CP 12/10 on 21st June 2011. The most important decisions involved cutbacks in the scope of legal aid.¹¹ In relation to the question of SLAS, the MoJ stated:

“We will introduce a Supplementary Legal Aid Scheme, under which a fixed percentage of 25% the client’s damages (but excluding damages for future care and loss) awarded in the legally aided proceedings (including proceedings funded under the exceptional funding mechanism) is repaid to the legal aid fund.”

2.7 Bar Council/UCL seminar. On 21st June 2011 a seminar¹² was held at University College London, chaired by Professor Dame Hazel Genn, specifically to discuss the question of a CLAF. The speakers were Peter Lodder QC (chairman of the Bar), Guy Mansfield QC (chairman of the CLAF Group) and Bob Young of Europe Economics, who is researching into the viability of a CLAF or CLAFs on behalf of the Bar. Mr Young presented his findings so far which were cautiously optimistic. The general view of those who attended was that this project should be pursued. Small scale CLAFs might make a modest contribution by funding at least some litigants. The Chancellor of the High Court stressed that as legal aid was not available for cases in the Chancery Division and as CFAs were seldom used, there was a demand for a CLAF in many areas, for example proceedings in the Patents County Court, small value property disputes and other general chancery cases. A solicitor from one major clinical negligence firm suggested that contributions to the CLAF should come from the solicitors’ costs, not the client’s damages. He pointed out that in past times solicitors in legally aid cases used to contribute 10% of costs recovered to the Legal Aid Fund. Professor Martin Chalkley¹³ (who has done much work for the Bar over the years) argued that funding of the CLAF should not be related to the level of costs. Any system which rewards on a costs basis drives up costs and is bad. He added that CFAs are “the worst possible system” because of their propensity to drive up costs.

2.8 Professor Moorhead expressed support for CLAFs, but commented that after October 2012 they would have to “walk a tightrope” between Ontario style contingency fees and reformed CFAs. He pointed out that a smaller group of cases would be easier to manage in terms of risk. Also it would have to be considered whether claimants approaching the CLAF

¹⁰ As to that modification, see pages 6 to 11 of the Cambridge lecture.

¹¹ As to which, see pages 2-3 and 8-11 of the Cambridge lecture.

¹² Jointly organised by the Bar and UCL

¹³ University of Dundee

should pay an application fee.

2.9 Anthony Speaight QC addressed the issue of adverse costs. He suggested that CCFs might be given a favourable wind by a number of legislative reforms. In particular, consideration might be given to exempting CCFs (because of their charitable status) from liability for adverse costs.

2.10 Mr Young's further work. I understand from informal discussion with members of the CLAF Group that Mr Young has done further work since the seminar. He considers that small CLAFs are likely to be viable operating in fields outside personal injury and clinical negligence. His exclusion of personal injury and clinical negligence cases is provisional. He may also see a role for CLAFs funding disbursements. His final conclusions are awaited.

3. COMMENT

(i) SLAS

3.1 The question of whether and on what terms to set up a SLAS is of course a matter for Government, not the profession or the judiciary.

3.2 The MoJ's proposals are welcome. I welcome the fact that a SLAS is going to be set up. Indeed every new funding option is to be welcomed. I would, however, comment on the 25% deduction. This is going to be a fixed deduction in every instance, not a maximum deduction as is proposed in the case of personal injury CFAs. Thus the full deduction will be made, even if the case settles almost immediately. Secondly, a comparison might be made with the Hong Kong SLAS. Under that scheme the deduction is 6% of damages¹⁴ if the case is settled before delivery of the brief for trial and 10% of damages if the case goes beyond that stage.

3.3 Hope. I express the hope that once the MoJ's proposed SLAS has been established it may prove practicable to operate on the basis of a lower deduction, at least in respect of cases which settle early. Also, of course, such a sliding scale provides an additional incentive to accept any reasonable settlement offer.

(ii) CLAF

3.4 A CLAF or CLAFs should be viable. In my view, in the light of all that has developed since publication of the Costs Review Final Report, it really ought to be possible to set up one or more viable CLAFs. Recent research suggests this. There is clearly a strong will amongst many in the legal profession to make such a scheme work. Furthermore the Hong Kong SLAS functions successfully on CLAF principles, without any subsidy from the Hong Kong Legal Aid Department. Indeed it does so on the basis of fairly modest deductions from damages and despite supporting some losing cases: See para 2.3 of chapter 18 of the Costs Review Preliminary Report.¹⁵

3.5 Small scale – at least for now. In the first instance, clearly any CLAF would operate on a small scale and possibly in a closely defined area. That, however, is not a valid objection to setting up one or more CLAFs. Every additional option for litigation funding is to be welcomed. People who do not wish to use an available CLAF need not do so.

3.6 Co-existence with other funding mechanisms. I do not see how the existence of one or

¹⁴ i.e. all damages, including damages for future care and loss

¹⁵ At the time of my visit to Hong Kong Legal Aid Authority the SLAS had just lost a heavy employer's liability case involving a lengthy trial.

more CLAFs would undermine other funding mechanisms, such as reformed CFAs, contingency fees, third party funding or the SLAS. Competition can only be healthy. If in a particular case the CLAF proposes to take a smaller slice of damages than the SLAS, this might have beneficial consequences.

3.7 Should personal injury cases be shut out? I am not convinced that personal injury cases should be excluded from the purview of CLAFs. If such schemes are initially established in non-personal injury areas, this question should be looked at again. It will be recalled that the Hong Kong CLAF supports personal injury, clinical and dental negligence cases.

3.8 Contributions to costs out of damages. There can be no objection in principle to claimants making some contribution to costs out of their damages. Historically this has always been the case. The principle of full restitution is embedded in the law of damages, not the law of costs.¹⁶

3.9 CLAFs come in many forms. CLAFs have a Protean quality. They come in all forms. They may cover both costs and disbursements;¹⁷ they may cover costs but not disbursements;¹⁸ they may cover disbursements but not costs.¹⁹ They may or may not accept liability for adverse costs.²⁰ For a fuller taxonomy of the different CLAFs which have evolved around the world, please see chapter 18 of the Costs Review Preliminary Report. Sometimes CLAFs can operate in conjunction with other funding mechanisms. It is therefore necessary for those who develop CLAFs to think creatively. It may be, for example, that if a number of CLAFs are set up, some would offer a complete package and others would offer partial support.

3.10 These are matters for the profession. The individual Costs Review recommendations are directed to many different bodies: Government, Parliament, Rule Committee, Judicial College, Law Society, Bar, National Health Service Litigation Authority (recommendation 28), personal injury solicitors (recommendation 23), the Civil Justice Council, etc etc. It is a matter for each of these bodies to decide whether to accept or reject the recommendations directed to it. In relation to the issues now under discussion, the question of SLAS is entirely a matter for the LSC and the MoJ. The question of CLAF is entirely a matter for the profession. I have gone as far as I properly can in expressing support for the endeavour. It is now over to you.

4. CONCLUSION

4.1 Given the changed landscape which (subject to Parliament's approval) will exist after October 2012, the time is now ripe for action. If the Bar Council decides to move from the drawing board to implementation, I hope that the specialist bar associations will see fit to lend their support.

4.2 Obviously it must be a matter for the Law Society (which has many other calls on its resources) whether it wishes to participate. I would not presume to suggest what view the Law Society should take.

4.3 As members of the PNBA, all of you are regularly conducting or defending professional liability claims. I suspect that many claimants in such cases would be perfectly willing to

¹⁶ See the Cambridge lecture, page 5.

¹⁷ As does the Hong Kong SLAS

¹⁸ As does the Ontario Class Proceedings Fund; this fund also meets adverse costs if the case is lost.

¹⁹ As does Law Aid in Victoria

²⁰ If a CLAF is to be set up on an economic model which assumes no liability for adverse costs, some statutory protection may be required, along the lines suggested by Mr Speaight QC at the Bar Council/ UCL seminar.

accept a deduction from damages in order to gain the financial backing of a CLAF. Some of those cases may have excellent prospects of success and attract high awards of damages. If third party funders, who are most certainly not charitable bodies, can prosper in the way they do, it would be somewhat strange if a non-profit making CLAF is unable to stay afloat.

Rupert Jackson

8th October 2011

Please note that speeches published on this website reflect the individual judicial office-holder's personal views, unless otherwise stated. If you have any queries please contact the Judicial Communications Office.
