

CONDITIONAL FEES
– A Change to the Litigation Landscape?
by Nick Sinfield

What is the rationale behind conditional fees?

England and Wales and our Irish counterparts are without doubt very litigious. However contrary to popular belief, that litigious nature may not be on the rise at this moment in time, as recent statistics from the Lord Chancellors office demonstrate:

1995 - 153,624 writs

1997 - 121,446 writs

1995 - 2.44m County Court claims

1997 - 2.20m County Court claims

However, even though these statistics show a decline in claims, they also show that we are of a litigious nature and, it goes without saying, that litigation costs many, many, millions of pounds to bring and defend. The entities who principally share that exposure are the Government and Insurers. The Government get hit by their legal aid bill (which of course is passed on to the tax payers) and insurers (who are also tax payers) get hit paying the costs of insurance law firms defending such claims, and usually the costs of plaintiff lawyers.

The Legal Aid Board has been hit badly with both thousands of relatively small claims, and large pharmaceutical claims, which have cost millions, but which have ultimately been abandoned. It is those large drug product liability actions which were dropped that were perhaps the genesis or the catalyst for dramatic change.

It is in this light, that I believe the real issue is the Government's badly veiled intent to transfer the risks of paying plaintiff costs via legal aid, and also defence costs where the litigation has been unsuccessful. It's a transfer of risk.

However, what does the Government say is the rationale? The Lord Chancellor, Lord Irvine, said in October 1997 "the suggested extension of conditional fees for most civil proceedings would, at last, give middle income Britain a real opportunity to enforce its rights in Court. The poor, the rich and the merely "comfortable" should enjoy an equality of access to legal advice and representation ... those between the very poor and the very rich are the overwhelming majority of people in the country". The issue I take with that statement, is that in my view there is no doubt that conditional fees is the beginning of the total withdrawal of legal aid. If I am right, the

rationale put forward by the Government about being able to give middle income Britain an opportunity to have greater access to legal advice, was disingenuous, because middle England was probably never entitled to legal aid in any event, and his statement veils the fact that what this is about is risk transfer.

I see it as being akin to what has happened with regard to pensions. In the early '80's, the Government appreciated that they would not be able to fund state pensions with an increasingly ageing population. They decided to transfer the cost, as they do now, to an insurance market. They encouraged, they implored, and they gave incentives for people to take out personal pensions. We all know this led to the pensions mis-selling saga, and I have no doubt that the Government is almost wholly responsible for that debacle. Perversely, a significant share of remedying that mess, now falls upon an additional insurance market, the Professional Indemnity market.

How can the risk transfer be achieved?

What are Conditional Fees?

What do CFAs embrace? The first thing that springs to mind is the American experience and contingency fees. Our conditional fee is really a permitted variety of a contingency fee, but it is quite distinct.

The Law Society describes the *contingency fee* as any sum, whether it is fixed or calculated as a percentage of the damages, which is payable only in the event that the client wins their case.

Conditional fees, described by the Conditional Fees Regulations 1995, are arrangements where a lawyer may get no fee if he loses the case, but gets his normal fee if he wins. "No win, no fee". *Additionally*, what's permitted, is a form of success fee on top of that normal fee by way of a bonus if the case is won. The maximum bonus allowed is a sum equivalent to the normal fee. In other words, the lawyer if he wins could get twice his fee. If the lawyer does a deal where he gets more than twice his fee, that would be illegal; in terms of it would be unenforceable if it was not paid.

So, what's in the pipeline?

If a plaintiff has the benefit of a conditional fee arrangement with his lawyer, and he wins his case, he gets his damages and has to pay his solicitor a fee plus a bonus. At this moment in time the defendant, or rather the defendant's insurers, do *not* have to pay that bonus.

However, our friend the Lord Chancellor has made it expressly clear that he is going to ask Parliament to change the law in this aspect, so that the losers, and believe me insurers are the losers here, will have to pay that bonus or uplift the plaintiff has to pay to his lawyer, pursuant to the CFA. This is then made even worse, by the proposal that if post event insurance was taken out by the plaintiff, the defendant, or rather their insurer, pays the premium too.

I have not gone into any particular detail as to the classes of risks where this might impact most, but clearly personal injury, or EL, PL and Motor are heavily involved. I know from my own firm's experience that the defence costs of those sorts of claims are gigantic for the industry mainly due to the volume of claims. Consider then, that the costs that the EL market pays to its defence lawyers is roughly half that that a plaintiff's solicitor gets in a successful matter at this moment in time. Now, as a further slap across both defence lawyer and insurer's face, that plaintiff's lawyer is going to have a nice fillet on top, which *you* will have to pay.

How is this really going to impact upon insurers?

If you really think about it, conditional fees can only really impact the insurance market in a limited number of ways.

1. If conditional fees do revitalise the nations propensity to sue, or bring claims, *or*
2. The impact of the increase in plaintiff costs (due to having to pay the uplift and insurance premium) is significant. The impact of this, it seems to me is entirely dependent upon the answer to the first question, namely will there be more claims.
3. Can these downsides be set off with new opportunities? Can insurers eliminate the problems by exploiting new markets with regard to legal expense insurers, providing cover for the plaintiff in respect of defence costs, or increasing premiums on the types of policies bought by respective defendants, such as Professional Indemnity, EL/PL and so forth.

In relation to this aspect, before I turn back to the first issue, I can only speculate without an analysis of the sort that perhaps a management consultancy might be engaged upon. My own instinctive view, is that the types of organisations that are providing post event insurance like Abbey Legal Protection, First Assist, Law Club Legal Protection, DAS, and Hambro, whilst some of them maybe subsidiaries of some of the large composites, are specialised insurers whose ambit is quite narrow.

I find it also difficult to see that there would be a great deal of profit generated by, in effect, betting on all horses by providing the types of covers the plaintiff and defendants might buy. I also, in today's market, find it difficult to see that an increase in premiums, particularly say Professional Indemnity premiums, is a sustainable escape route.

Returning to the basic issue are there going to be more claims? The gut reaction has to be, "of course". It is also easier to go down an Armageddon route to grab a headline or be sensational, but I genuinely do not believe that it will lead to any significant increase in litigation.

Whilst as a firm, we have undertaken some serious investigation into this issue, a great deal ultimately of the evidence we have compiled inevitably turns out to be anecdotal or drawn from sources which you cannot cross-examine.

The results of the research which we carried out were that in one case a firm had undertaken 59 cases on a conditional fee basis, and won all but 4. The losses incurred by the firm on those 4 however, eradicated any profit or gain made on the 55 won. This small snippet of information evidences the fact that having a large book of cases on a conditional fee arrangement basis, is a high risk strategy for any firm, large or small. The risk obviously increases the smaller the firm.

We have seen how the tobacco giants have crushed Leigh Day & Co. in the smoking cases, and brought about an argument from the firm not to litigate for claimants again in such cases. Leigh Day acting on a "no win no fee" basis lost £2m or more of their own money. This should spell out to the Government that their stated aims will not be achieved.

We have also contacted a number of US attorneys who generally work as defence counsel for the US and London market. In respect of recovery work, all confirmed that the US market rarely instructs them on a conditional fee basis, both because of historical inertia, and because they consider that such arrangements pervert the relationship between client and legal counsel. We found no instance where conditional fees represented more than 5% of gross fee income.

Back to the UK experience. We found that even those plaintiff personal injury law firms with a relatively high degree of experience in conditional fee arrangements, vetted cases to considerable lengths before agreeing to work on the conditional no fee no win basis. Lawyers don't like taking risks, they prefer advising about them.

But most of all, my views are driven by the fact that I consider that the British nation is probably even more litigious than the US now. One of the real driving forces of the perceived "sue everything in sight" nature of Americans is the fact that there is no cost penalty for losing in the sense of having to pay your opponents costs. Here, we have always had cost penalties, but still sued in vast numbers, even those who the Lord Chancellor believes are bereft of an ability to get legal advice and representation, Middle England.

So, whilst there may be an initial moderate increase, perhaps due to experimentation, I simply do not believe that this nation will become more litigious, beyond its already exceptionally litigious nature.

In fact, with the withdrawal of legal aid, there could even be a drop in litigation, because solicitors will not be prepared to take risks which, inherently, are not theirs to take. The jam of enhanced fees may not be enough.

I appreciate there are all sorts of variables, and that the risk of conditional fees for the plaintiffs themselves may be eliminated by buying insurance, but the thing with legal aid was that it was, and is, easy. The plaintiff lawyer always gets paid, the plaintiff had little or no risk of having to pay defence costs if he lost. Contrast conditional fees. The plaintiff either has to incur an expense by purchasing insurance, or take a risk to have to pay defence costs if he loses. He also has to find a solicitor willing to take a risk, take a chance.

Who knows, but CFA's, supposedly designed to open up access to justice, may end up actually making those gates a little harder to open for the plaintiff, not just for Middle England, but what the Lord Chancellor must have meant by "the poor".

Conclusion

I don't believe that there will be a flood of litigation because:

1. The previous legal aided "poor" must now find a solicitor to take a chance.
2. The "poor" will be exposed to defence costs or pay an insurance premium.
3. Middle England already sues, and Middle England will have to find risk taking solicitors.
4. Lawyers will not, or should not, take on board too many cases, for fear of bankruptcy themselves.
5. The U.S. is not synonymous. In the U.S. there is a higher status given to personal rights and no defence cost risk.

I can only conclude that I don't believe that conditional, or perhaps in the future contingency fees, are an appropriate way to open the gates of justice. This is about transfer of risk to the insurance marketplace.

Nick Sinfield, Davies Arnold Cooper

This paper is based on a talk given to the Association last Autumn.