

## **NO WIN NO FEE – LIABILITY INSURERS BEWARE II**

*By F.N.Eaglestone*

Following my article on the above subject, which appeared in the February 2001 issue of the BILA Journal, some further information is now available concerning the challenges of legal costs, including the after the event insurance premium, by liability insurers.

### **How will the courts deal with the issues?**

In the Law Society Gazette of 15 December 2000 (page 16) the President of the Association of Personal Injury Lawyers (APIL) asserted that the government had informed the Association that all premiums should be recovered whenever taken out and whenever the case is settled. Following this publication The Parliamentary Secretary, Lord Chancellor's Department, Mr David Locke, in the House of Commons said:

“The Government's policy is that the premium paid for cover against the risk of having to pay legal costs should be recoverable from the losing opponent. That ensures that the damages paid to claims are not unreasonable eroded. In our view, that is the effect of the access to Justice Act 1999. Although the interpretation of individual agreements is a matter for the courts, the Government believe that recoverability includes premiums on policies taken out before proceedings are issued in any particular case” (Hansard).

Furthermore, since the success fee and the insurance premium became recoverable, after the event (AEI) insurers have increased premiums. In fact since 1995 the numbers of such insurers increased about tenfold. More AEI insurers are likely to appear if they can get the general liability insurers to pay their premiums “via the back-door”. Presumably the judiciary will deal with each case according to the evidence and in accordance with the Costs Practice Directions on this subject. For example Litigation Funding give the following information in the November 2000 issue:-

	ABBEY ALP	LAWCLUB Equity	SATURN Conditional Fee Insurance	AMICUS Solus*	EASTGATE Fee Guard*	LITIGATION PROTECTION Conditional Fee Protection Plan
Fast-track accident at work, £25,000 cover	£650	£428.57	£204	£220- £849.52	£155	£500

\* Products are individually underwritten, so difference premium rates may apply

Faced with such evidence courts might consider the more modest figures as their guide. In *Callery v. Grey* (see 2 below) the insurance premium claimed was modest at £350 in a motor case. A greater premium might change the court's view.

Practice Direction, section 11.10 indicates that in deciding whether the cost of insurance cover is reasonable, relevant factors to be taken into account include:

- (a) where the insurance cover is not purchased in support of a conditional fee agreement with a success fee, how its cost compares with the likely cost of funding the case with a conditional fee agreement with a success fee and supporting insurance cover;
- (b) the level and extent of the cover provided;
- (c) the availability of any pre-existing insurance cover;
- (d) whether any part of the premium would be rebated in the event of early settlement;
- (e) the amount of commission payable to the receiving party or his legal representatives or other agents.

As sub-section (a) concerns after the event legal expenses insurance cover not purchased in support of a conditional fee agreement with a success fee, presumably the courts only wish to consider recovery of a premium which is allied to a conditional fee agreement with a success fee. Hence the latter information is required.

Presumably sub-section (c) concerns annual legal expenses insurance cover, that is additional cover over and above the liability cover provided by a basic household (or motor) policy or legal expenses insurance standing alone. Assuming this annual insurance covers, among other risks, the after the event insurance risk, even though it is arranged before the event, are the courts going to take the view that this insurance was not purchased in support of a conditional fee agreement with a success fee and the premium should be disallowed? In any event it seems to be extremely difficult, if not impossible, for the courts to decide what portion of the annual premium they should consider for recover purposes. It will be appreciated that the cover provided by the annual policy is wider as it covers defending actions as well as pursuing actions so far as costs are concerned and it covers damage claims as well as bodily injury claims. Another difficulty is that the annual policy may have an excess and the limit of indemnity may be lower than the after the event insurance. Finally on this point, the claims winning his case may not disclose the existence of this annual policy covering after the event insurance, either because he did not know his policy contained this legal expenses insurance or he did not know it applied. In these circumstances, assuming after the event cover is arranged, and if the claimant's legal expenses annual policy later comes to light and operates to indemnify their insured, would the after the event insurers be willing to cancel their policy without charge? If not there is dual insurance. In my opinion it would certainly be more simple from the court's viewpoint if the annual legal expenses insurance was kept out of the picture, in these circumstances.

Regarding sub-section (e) above it has to be presumed that the party losing the action and having to pay the costs of the other side raises the issue of the opponent receiving commission or the legal representative doing so. Enquiries would then have to be made by the court, as presumably the intention is to deduct this commission from the premium recoverable.

Under the Practice Direction, section 19, any party who wishes to claim an additional liability in respect of a funding arrangement must give any other party information about that claim if he is to recover the additional liability. The term "funding arrangement" includes the after the event insurance policy, and the term "additional liability" includes the insurance premium. There is no requirement to specify the amount of the additional liability separately nor to state how it is calculated until it falls to be assessed. Presumably the information required by this section must be given at the time the claim is made in respect of the main action.