No Win No Fee – Liability Insurers Beware III

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This is the third in a series of articles for the BILA Journal on No-Win No Fee Arrangements. Parts I and II can be found in the February 2001 and June 2001 issues, respectively.

The application of an annual legal expenses insurance (LEI) to the after the event (ATE) risk and the recovery of the premium, has recently been considered in the case of *Sarwar v. Alam,* 5 July 2001 (unreported), and subsequently in the Court of Appeal.

The facts can be briefly stated and were not in dispute. The claim arose out of a motor accident. The claimant was a passenger in a car driven by the defendant. The claimant's solicitors wrote a letter asking the claimant whether he had any LEI. He said he had not. The solicitors then advised ATE insurance and a policy was put into effect with Temple Legal Protect. It is the premium for this policy which was in dispute. The main claim was settled without proceedings for £2250.

The defendant's solicitors by way of resistance to the claim for recovery of the insurance premium, pointed out that the defendant's motor policy provided LEI for the defendant as well as the driver as it gave this cover to his passengers. It follows that the claimant, although he and his solicitors did not know of it, had LEI under the defendant's policy.

The following points are of significance:-

(a) although the principal motor policy was with the CIS the legal expenses cover was provided by DAS, an entirely separate company. Evidently this was to avoid a conflict of interest had the same insurance company been obliged to indemnify the defendant in relation to the damages and the claimant in relation to costs.

(b) according to the claimant's solicitors the CIS did not charge any additional premium for the DAS cover.

(c) the policy contained the term "We (ie DAS) will be entitled to the full conduct and control of any claim or legal proceedings".

(d) the representation provided by DAS was limited to "panel" solicitors.

The only issue before the court was whether the premium was reasonably incurred. The main relevant parts of the Civil Procedure Rules are Part 44.4(2) which states:

"the Court will resolve any doubt --- as to whether costs were reasonably incurred --- in favour of the paying party.", and Part 44 Practice Direction 11.10 which provides that: "the level and extent of the cover provided", also "the availability of any pre-existing insurance cover", are factors to be taken into account.

The main point argued before the court was that although the claimant did in fact have insurance cover neither he nor his solicitors knew of it and that it was therefore reasonable for them to take out the Temple policy. The counter argument was that the claimant's solicitors, where the claimant was a passenger, should have gone further than merely to ask their own client whether he had LEI. They should have checked the driver's insurance as well and that it was unreasonable to take out the Temple policy without making this check. Whether the driver's policy was suitable and adequate was still a subsidiary point but the core of the matter is the lack of knowledge through inadequate enquiries.

The court favoured the latter argument and considered it clearly desirable that unnecessary insurance premiums are not paid by litigants. This can only be avoided if checks are made for existing insurance before ATE policies are obtained. Therefore the ATE premium was not recoverable.

The significance of points (c) and (d) is that DAS is involved in a conflict of interest as it gives LEI cover for both the claimant (the passenger) and the defendant (the driver) in this particular case, which combined with the additional control which it had over its "panel" solicitors, caused the court some concern. However, the court did not consider this justified rejection of the DAS policy and incurring the additional cost of separate insurance. Had it been known, as it should have been, that this LEI cover was available, it would have been used by a sensible claimant rather than incur an additional premium.

Subsequently the Court of Appeal considered the case. Although the Court agreed with the decision in a relatively small personal injury claim that an existing legal expenses insurance (LEI) satisfactory for a claim of that size, should ordinarily be referred to the relevant LEI insurer, rather than incurring the cost of after the event (ATE) insurance to cover legal costs, this particular case was an exception.

In Sarwar's case the claimant's LEI cover was provided in a policy held by the defendant (the driver's motor policy provided LEI insurance to a passenger in his car, ie to the claimant). Furthermore, this LEI cover contained a stipulation that the insured (the driver) should consent to the passenger having this cover. As a generalisation the Court did not consider it reasonable for the claimant's solicitor

to have to investigate beyond their client's own family area (those living in the same household) in order to check whether a LEI existed for their client, before taking out ATE insurance for his benefit. The solicitor's inquiries should be proportionate to the amount at stake.

The Court of Appeal saw several difficulties which might face the claimant's solicitor who embarked on a treasure hunt, seeking to observe the policies outside of any relevant motor policy, any household policy and any stand-alone LEI policy belonging to the client and/or spouse or partner living in the same household as the client.

In a motor accident claim where the passenger blames the driver, it was not reasonable for the passenger claimant to be required to invoke insurance cover provided by an opponent driver's insurers and entrust them under the terms of the policy with the full conduct and control of his claim against the driver.

The result was that in this particular case the appeal succeeded and the claimant recovered his premium as costs from the defendant.

Wells v. Hall [2001], 8CL52, is a very similar case to *Sarwar v Alam*, and differs only in that the claimant was not a passenger in the negligent driver's car. The claimant was involved in an accident in which his vehicle was struck at the rear by the defendant's vehicle. Otherwise the facts were the same. The action was to recover legal costs, including the ATE premium. It was held that had the claimant been diligent, he could easily have found out in advance of instructing his own solicitors that he had LEI. The court said it ill behoved a claimant to seek to recover the cost of an ATE policy as an additional liability in circumstances where his LEI covered liability for the claimants own costs and any third party costs. The claimant was ordered to pay the defendant's costs of the proceedings under the Civil Procedure Rules since those proceedings had been prematurely issued, negotiation being underway at the date of issue. The claimant had not acted within the spirit of the Rules.

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