No Win, No Fee - Liability Insurers Beware Pt. IV.

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1 The story so far

This article is the latest of a series of four on this topic. The first, which appeared in the February 2001 issue of this Journal, covered the historical appearance of "no win, no fee" schemes in the UK and explained that a small minority of insurers gave the cover required. The majority of liability insurers then found that they were called upon "by a back door" to pay among other costs the "after the event" premium for an insurance that they originally wished to avoid. The second article appeared in the June 2001 issue and looked at the attitude the courts might take, bearing in mind the Costs Practice Directions on this subject, and reviewed two legal cases heard at that time. The third article, which appeared in the December 2001 issue, concerned the cases of *Sarwar v Alam* and *Wells v Hall*, illustrating how very similar circumstances can result in different decisions.

2 This Article

It is important for liability insurers to understand fully the decision of the Court of Appeal in *Sarwar v Alam* [2002], 1WLR 125, if they have to decide when they might have to pay the other side's costs, in the shape of the insurance premium for a policy covering legal expenses, and when they can refuse to make such payment. The last part of this article is a summary of some of the commentary and recent decisions that have followed *Sarwar*.

3 A summary of the terminology

Probably the following reminder of the terms used will be helpful:-

BTE means a before the event insurance, which is usually either the legal expenses section of an annual policy such as the motor or householder's policy or a legal expenses policy standing alone for which, unless there are any unusual features, the cost is unlikely to exceed £20. Lord Woolf in *Callery v Gray* [2002] 1 WLR 2000 (also page 44 of the June 2001 issue of this Journal) noted that in 1998 the Government disclosed that over 17 million people were now paying premiums for BTE cover at a trivial cost to themselves and that the Government was then keen to encourage the wider use of legal expenses insurance. The court in *Sarwar* were also told of another two ways that BTE insurance is now available, namely, as part of an employment package (or of the benefits of

membership of a trade union or a professional body) and as part of a credit card agreement or charge card service.

ATE means an after the event insurance taken out specifically in support of a Conditional Fee Arrangement (see below) and the premium for which is recoverable under section 29 of the Access to Justice Act 1999. Section 29 reads:-

"Where in any proceedings a costs order is made in favour of any party who has taken out an insurance policy against the risk of incurring a liability in those proceedings, the costs payable to him may, subject in the case of court proceedings to rules of court, include costs in respect of the premium of the policy."

Now it might be thought that any BTE insurance is within these words, but BTE cover is taken out against a wider future risk of legal proceedings (see page 43 of the June 2001 issue of this Journal), which might be necessary, and not against the cost of existing proceedings, which is the specific purpose of ATE insurance.

CFA means a conditional fee agreement with a person providing advocacy or litigation services which provides for fees and expenses, or parts of them, to be payable only in specific circumstances, whether or not it provides for a success fee as mentioned in section 58 (2) (b) of the Courts and Legal Services Act 1990.

4 The facts and essential issues in Sarwar v Alam

It may be remembered that the claimant was a passenger in a car driven by the defendant. The claimant's solicitors by letter asked him whether he had any legal expenses insurance (LEI). He said he had not, so ATE insurance was taken out. It is the premium for this policy that is in dispute (the main claim being settled without proceedings), as the defendant's motor policy gave LEI cover to passengers. So the claimant had this cover although he did not know it. It will be appreciated that LEI includes both BTE and ATE insurances mentioned earlier. The court of first instance took the view that the claimant's solicitors should have checked the driver's insurance and that it was unreasonable to take out ATE insurance without doing so. The Court of Appeal reversed this decision, as explained later.

It is interesting to note that the following parties made representations to the Court of Appeal in *Sarwar*:-

The Law Society, the Association of Personal Injury Lawyers (APIL), the Association of British Insurers (ABI), the Forum of Insurance Lawyers (FOIL), the Motor Accident Solicitors Society (MASS), the Liability Insurers' Group, the ATE Group, DAS Legal Expenses Insurance Co Ltd, the Trades Union Congress. This list indicates the importance of this case to the insurance and legal worlds, as, apart from the ABI, DAS, the Law Society and the TUC, which are well known to insurance readers:-

APIL's membership includes about 5,000 solicitors, barristers, legal executives and academics who are predominantly concerned with injured claimants.

FOIL's members act predominantly or exclusively for liability insurers.

MASS has 175 member firms handling about 500,000 motor accident claims each year.

Liability Insurers' Group's members represent 88% of the total gross premium value of the motor insurance market and about 75% of the general liability market.

ATE Group contains 15 ATE insurance interests.

The court in *Sarwar* recorded conflicting concerns about BTE and ATE cover. It said that the issues at the heart of this appeal are of great concern not only to the immediate parties but also all the intervenors (see the list above). Liability insurers believe that if BTE is available for these small motor accident claims the claimants should use it, and not saddle them with the cost (upheld in *Callery*) of an ATE and a success fee uplift. BTE insurers wish to hold onto and expand their business. ATE insurers are worried that if they lose business to BTE insurers, their premiums may have to rise or they may have to go out of business altogether. The ABI believes that in a case like the present the BTE insurer should be given precedence. It believes, however that there is a market for both BTE and ATE insurance, which should complement but not duplicate each other, and that each should be allowed to develop in response to public demand.

In the circumstances under discussion it should be remembered that the plaintiff must succeed in his claim or it must be settled on terms that the defendant pays the claimant's costs. Thus the general rule is that a successful litigant in civil proceedings is entitled to his costs, i.e., costs follow the decision. However, they are always at the discretion of the court and there may be statutory or other restrictions on its award of costs. Furthermore until section 29, mentioned

above, insurance premiums had not been recoverable as costs because they were expenses incurred in the past which are irrecoverable, as stated in *Sarwar*.

5 The Decision of the Court of Appeal in Sarwar

The Court of Appeal decision in *Sarwar v Alam* provides as follows:-

1. In most road traffic cases involving relatively low damages (£5,000 was mentioned in this case), if a satisfactory BTE cover was available to the claimant, it should be used. This means that if an ATE insurance was also taken out, the premium for this latter insurance would not be recoverable. See *Wells v Hall* (2001) mentioned on page 19 of the June 2002 of this journal, which, according to the solicitors involved, is not going to appeal so presumably the decision has been accepted as following the Court of Appeal's decision in *Sarwar*. The relevance of the £5,000 figure appears to be a method of ensuring that in higher cases the BTE insurance is adequate in its cover and indemnity limit before any existing ATE insurance premium could be regarded as irrecoverable.
2. A satisfactory BTE cover available mentioned in 1 above would include any of the following:-
   (a) The claimant's own motor, household (with legal expenses extensions) or stand alone legal expenses insurance cover (if any);
   (b) The claimant's spouse or partner's insurances as in (a) above.

This assumes that in (a) and (b) the cover and limit of indemnity are adequate.

This restricted view of the claimant's family should be noted as the court went on to say that the claimant's solicitor is not expected to embark on a treasure hunt seeking to see the insurance policies of every member of the claimant's family in case by chance they contain relevant BTE cover which the claimant might use. It would seem desirable, the Court said, for solicitors to develop the practice of sending a standard form letter, requesting a sight of the documents mentioned in (a) and (b) above, to the client in advance of the first interview. At the interview the solicitor should also ask the client whether his/her liability for costs may be paid by another person, for example an employer or trade union. The court said that if these simple steps were taken, they ought to reduce the burden and extent of the enquiries about which some of the intervenors expressed concern. Consequently if BTE cover is available, if the motor accident claim is likely to be less than about £5,000, and if there are no features of the

cover that make it inappropriate (for instance, if there are a number of potential claimants and the policy cover is only, say, £25,000) the solicitor should refer the client to the BTE insurer without further ado.

3. The claimant's solicitor's enquiries about his client's existing BTE cover should be proportionate to the value of the claim, which means that this and the availability of the ATE cover at a modest cost would restrict the extent to which it would be reasonable for his time to be spent in investigating alternative sources of insurance. Perhaps it should be said that, while the courts views on this aspect are very helpful, there are still opportunities for different views to be taken of the same circumstances.

4. When acting for a passenger claimant, the solicitor should ask his client to obtain a copy of the driver's insurance policy if that was reasonably practicable. If the driver's policy stated that the BTE cover could only be used with his consent the solicitor should ask his client to obtain such consent. However the court went on to say that it would not be reasonable to expect a passenger to use BTE cover under the driver's policy where the driver's insurer would have full conduct and control of any claim, thereby denying him the opportunity of instructing a solicitor of his choice. As all liability policies contain such a "conduct and control" condition there seems little point in going through this procedure. In fact in *Sarwar's* case the claimant succeeded in recovering the ATE premium in these circumstances.

5. The court considered carefully the submissions they received from the ATE Group and the TUC. The former was naturally anxious that they should make no decision which might prejudice the development of the fledgling ATE market and drive up ATE premiums to a level which might impede access to justice. APIL also shared this worry. The TUC was anxious that they should not imperil the dedicated services trade unions and their panel lawyers offer to their members. In the context of the simple small claims with which this judgment is concerned the court did not consider that either of these considerations should impel them to impose on defendants and their liability insurers a burden of costs which is disproportionate to both the value and the lack of complexity of the claim. The court accepted the submissions of the Liability Insurers' Group that it is not in the interests of motorists or the general public that motor liability insurers should have to make unnecessary disbursements which raise premium costs.

The Court of Appeal did not consider that there is anything in this judgment which is inconsistent with the judgment in *Callery*. In *Callery* Lord Woolf said that the court considered that it would normally be reasonable for a CFA to be concluded and ATE cover taken out on the occasion that the claimant first instructed his solicitors. In *Callery* the court was not invited to consider the implications of the solicitors' client care code or the possible availability of BTE cover. If the client is able to comply with the request contained in the suggested letter which he/she receives before the first interview (see 2 above) then there is no reason why the course suggested in *Callery* should not be adopted as soon as the solicitor is satisfied that no appropriate BTE cover is available. If this inquiry cannot be satisfactorily resolved at that first interview the steps mentioned in the *Callery* judgment should not be taken until further inquiries into the availability of BTE cover as are reasonable and proportionate to the value of the claim have been concluded.

Developments and Commentary after the Decision in Sarwar v Alam

The view of the Master of the Rolls

Mr Justice Cook, the author of Cook On Costs has commented on this topic, but there has now appeared a commentary by an even more eminent authority in the legal world, none other than the Master of the Rolls, Lord Phillips, the Head of the Civil Judiciary.

In the April 2002 issue of "Counsel", the journal of the Bar of England and Wales, Stephanie Hawthorne, the Editor of that journal, records her interview with Lord Phillips. While agreeing that Lord Woolf's reforms, in general were working well, when asked whether there is anything he would change, Lord Phillips said "The problem area is undoubtedly costs."

He went on to say that this is not a direct consequence of the Woolf reforms. It is a part of the Woolf approach that costs should be assessed with more attention to the individual incidents of the litigation and as to whether people have been reasonable or unreasonable at various stages of it. So, the exercise of assessing costs is now more complex, but the real problem, in the view of Lord Phillips *has been the changing nature of the way litigation is funded.*

Lord Phillips declined to describe the current position as "chaos" but he describes a battle between the various interests. The new methods of funding have attracted a new industry of those who proactively assist claimants and encourage them to litigate. He noted that the Court of Appeal tries to deal

swiftly with any test cases, but remarked that there is definitely the need to simplify the task of assessing costs. He said the Civil Justice Council, which he chairs, has set up a committee to look urgently at the costs issue. He hopes that this committee will report back within the year.

In re Claims Direct Test Cases (2002).

So Lord Phillips clearly agrees with Mr Justice Cook that the matter is serious, but, as you would expect, is not quite as forthright in his remarks, nor prepared to provide a solution at that stage, as the judge was. Of course the judge is in the front line of the battle whereas the Master of the Rolls is not, and this was illustrated by the Court of Appeal decision (The Times, 4/4/02), in the case of *In re Claims Direct Test Cases*. Claims Direct plc was seeking, inter alia, the determination of two issues:

(i) whether sums paid for the after-the-event policy constituted insurance premiums within section 29 of the Access to Justice Act 1999, and

(ii) how the reasonableness of the premiums was to be determined, to guide the judge in determining the preliminary issues in the first tranche of issues between the successful claimants who had engaged the services of Claims Direct in litigation and various insurers.

The Master of the Rolls said it was not appropriate for the Court of Appeal to decide or to give guidance to assist in deciding any of the issues before the costs judge. The role of the Court of Appeal was exclusively appellate and it should not attempt to resolve issues that had not been considered at first instance.

Consequently where a costs judge carrying out case management on test cases gave directions for the determination of preliminary issues, it was not appropriate for the Court of Appeal to express an opinion as to the substantive issues before the judge, since a desire to resolve issues speedily could not justify the usurpation of the role of the tribunal at first instance.

TV Advertisements

The basic trouble for claimants is that intermediaries, who advertise widely on television for claims, which they pass on to solicitors for a fee, emphasise the no win no fee aspect of the situation. This originally gives the impression that advancing their claim will cost claimants nothing, and this may be true in the vast majority of cases. However, claimants find on taking up the advertisement offer that there is an insurance premium (which can be well over £1,000), which

in a small minority of cases may not be recoverable, and occasionally not even recoverable when damages are awarded to the claimant (see for example *Wells v Hall*). One intermediary in its one to two minute advert does flash up on the TV screen for about five seconds that an insurance premium is required, but it can easily be missed. The few claimants who suffer in this way may consider the advert misleading. Incidentally liability insurers question why they should pay premiums which were effectively funding adverts that were helping dent their profits. However, according to the Times Law Supplement of the 7th May 2002, in the Legal Diary section, research by the Law Society's Accident Line, its personal injury referral service, has found that four in five of the public were unpersuaded by the levels of compensation promised by television adverts or claims companies. This may be true as far as Claims Direct is concerned because the latest information, according to the Times of the 11th July 2002, is that Claims Direct has collapsed into administration after failing to raise the funds it required to stay in business.

The other side of the coin is that these intermediaries are providing some claimants with an opportunity to obtain damages which they otherwise would not have had, or even be aware exist. A lot depends on whether all the risks are fully explained to the claimant, and preferably put in writing, the initial advertisement does not always do so.

The Law Society's and Civil Justice Council's Report

Lord Phillips returned to this topic in a Times article of the 25th April by the legal editor. Lord Phillips voiced his concerns as a report, published by the Law Society and the Civil Justice Council, a watchdog body over the civil justice system, details the first comprehensive research into the Woolf reforms. It is entitled "More Civil Justice? The impact of the Woolf reforms on pre-action behaviour. Research Study 43", and was published in April 2002. Costs according to this report, remain an intractable problem. Lord Phillips is reported as saying:

"The real problem is the arguments over the funding of costs. At the end of the day lawyers are very expensive. If you are going to have a large lawyer input, it will produce very substantial costs. So if you are to reduce costs, you must reduce the time these valuable and expensive lawyers devote to practising litigation."

He also questioned whether all the new agencies that had arrived, such as claims managers, costs negotiators and others offering a range of litigation services, were in fact providing "value added" and value for money. If this remark includes the size of the insurance premiums some of these intermediaries are charging then those liability insurers disputing the costs being charged by some claimants will be heartened. In the Times Law Supplement (30th April 2002) Michael Zander QC, Professor of Law at the London School of Economics, who is reported as the Woolf reforms' fiercest critic, also refers to the Law Society and Civil Justice Council report. He says there is a widespread feeling that costs have become a disaster area – largely because of the problems caused by the "no win no fee" arrangements, but also because of the new discretion over costs that district judges now exercise.

In considering how far these impressions are accurate he refers to the above mentioned report as broadly confirming them. While fewer cases are being started and there are earlier settlements since the reforms were introduced in April 1999, costs have risen through more work having to be done at an earlier stage; and judges are inconsistent in their approach to their new powers.

So we now have the views of a district judge practising in the settlement of costs, the Master of the Rolls, and an academic who all agree that the costs situation leaves a lot to be desired, and two of them indicate a possible solution. Judge Cook would like to see the additional liabilities, which includes the after the event insurance premium, not recoverable as costs. However, it is on turning to the conclusion of the 420 page report referred to by Lord Phillips that we get a more likely solution. The paragraph concerned reads as follows :-

"The initiative by Lord Phillips and the Civil Justice Council to establish a committee to consider fixed fees for personal injury cases in more detail is welcomed. Findings for this study suggest that it should be possible to introduce a fixed fee regime, at least for small fast track personal cases, that would provide claimant solicitors with appropriate remuneration without the current level of disputes over costs."

Hopefully this fixed fee would include the after the event insurance premium as well as the success fee, as the recovery of these items really are the main reason for these disputes.

6 Inline Logistics Ltd v Ucl Logistics Ltd [2002]

This Court of Appeal case which appeared in the Times Law Report, 2 May 2002, shows how the rules of court do not cater for all situations on the recovery of costs. Thus while section 29 of the Access to Justice Act 1999 provides that insurance premiums could be recovered in a costs order, this only applies if the relevant rules of court have been complied with. Now these rules provide that where, as in the present case, a defendant did not have a funding insurance arrangement in place when the defence was served, the insurance premium is only recoverable if the defendant serves notice of the insurance position on the claimant within seven days of the arrangement.

As the defendant had taken out insurance on 5 May, by the time the rules of court came into effect on 3 July, the time for satisfying the notice requirement had passed, as the rules were not retrospective. Furthermore the transitional rules only assisted claimants in these circumstances not defendants. Consequently there were no rules of court applicable to defendants who had entered into insurance arrangements between 1 April and 2 July 2002, except possibly in the case of arrangements entered into within six days of 3 July (not applicable here). It followed that as section 29 came into force on April the insurance premium was recoverable, i.e., the section applied without the rules of court.

Now the interesting point about this case is that it was the defendant who took advantage of section 29, not the claimant, contrary to the usual position. Therefore it is worth looking at the wording of section 29. It reads as follows:

"Where in any proceedings a costs order is made in favour of any party who has taken out an insurance policy against the risk of incurring a liability in those proceedings, the costs payable to him may, subject in the case of court proceedings to rules of court, include costs in respect of the premium of the policy."

Clearly the words "any party who has taken out an insurance policy against the risk of liability in those proceedings" would include the defendant who takes out such insurance.

The House of Lords decision in Callery v Gray (Nos. 1 and 2) [2002] 1 WLR 2000.

To bring matters up to date at the decision that the maximum allowable success fee was 20% in modest and straightforward claims such as the present and the amount of the after the event insurance premium of £350 was not manifestly

disproportionate to the risk and was therefore recoverable. Lord Hoffmann referred to the work of the Civil Justice Council and said "A legislative decision to fix costs at levels calculated to provide adequate access to justice in the most economical way seems to me a more rational approach than to leave the matter to individual costs judges". According to the Law Society's Gazette (6 December 2001) the President of the Law Society also supported the idea of fixed costs, saying he was "sympathetic to any steps which contribute towards sorting out the present appalling mess over costs". However, claimant lawyers take issue with the notion that legal costs are in meltdown and capping them is the answer. We can only await the report of the committee set up by the Civil Justice Council that will consider models for such a scheme, which is due to appear towards the end of the year.

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