## No Win No Fee: Liability Insurers Beware Pt. V.

*By F.N. Eaglestone*

In this series of articles the position of claims intermediaries or claims management companies has been referred to rather indirectly, but more recently they have come under the closer scrutiny of the legal profession, including the judiciary.

In the last article reference was made to the Civil Justice Report: Research Study 43. According to this report on page 21 solicitors are said to be negative about claims intermediaries. However, on reading further the comments made by solicitors are critical. Four criticisms are made as follows:

1 Advertising by claims intermediaries bring the profession into disrepute.

2 The referral fees charged by intermediaries to solicitors are high, £500 is mentioned, which makes it unattractive to solicitors.

3 Intermediaries place controls on solicitors, e.g. the solicitor is required to: (a) report back to a claims manager who can be inefficient; (b) seek counsel's advice on quantum which solicitors claim they can do more accurately and quicker than junior barristers; (c) use a specified medical agency.

4 Finally, solicitors worry about whether claims intermediaries act ethically in providing clients with a good deal. One particular concern was the amount of the insurance premium and whether it would be recovered from the defendant.

Despite all these problems the importance of achieving a regular flow of bulk work meant that claims intermediaries were difficult to ignore. Most people thought that these intermediaries in some form were here to stay.

Turning to the judiciary, there is the recent case of *English v Clipston* (2002), heard at Peterborough County Court. This throws some light on the complexities of the system one claims intermediary adopts resulting in the loss of costs to their client prior to appeal.

**The Claim**

13.6.00: Accident – rear end shunt. Claimant sustained whiplash neck injury. Liability never in issue.

20.6.01: Medical Report.

14.8.01: Proceedings issued.

01.12.01: Consent order – agreed general damages – £2,350; special damages – £856.

So this was a low value claim; there was never any dispute about liability and it was settled within 18 months of the accident and within 4 months of the issue of proceedings.

**The issue to be tried**

"Has there been a breach of the Conditional Fee Agreements Regulations 2000 so that the indemnity principle may have been/has been breached?"

Perhaps it should be explained at this point that the indemnity principle here requires that solicitors only claim from the defendant what their client agreed to pay. The problem is that arguably CFA's provide for the client paying nothing.

Specifically, the parties require a decision as to whether or not the provisions of paragraphs 1(3) and 4 of these regulations (CFAR) have been breached by the claimant, or rather by his solicitors.

The important part of para 1(3) is the definition of "legal representative", which means the person providing the advocacy of litigation services to which the conditional fee agreement (CFA) relates.

Para 4 is headed "Information to be given before conditional fee agreements made".

Para 4(1) reads "Before a conditional fee agreement is made legal representative must

(a) inform the client about the following matters, and

(b) if the client requires any further information, advice or other information about any of those matters provide such further information about them as the client may reasonably require."

Para 4(2) which lists those matters and the remainder of paragraph 4 need not be set out at this point (although some parts are mentioned later) *as the decision in this case turned not on the information provided, but on the fact that the person providing the advice to the claimant was not a legal representative as defined nor an agent of such a legal representative.*

**The Accident Group scheme**

The Accident Group (TAG) are the intermediaries in this case. Their process is:–

1 The claimant completes an application form (giving accident details), and a service agreement/declaration form. This document contains an explanation of the scheme and constitutes a proposal for the after the event (ATE) insurance

policy. At this point the claimant is given a copy of the ATE policy underwritten by Lloyd's underwriters, the managers of which are an associate or TAG. It will be immediately apparent that there is no question of the claimant going into the market to obtain the best value ATE policy to suit his needs. The policy provides £25,000 worth of cover for:

(a) Opponents costs and disbursements in the event of failure of the claim.

(b) Own disbursements and counsel's fees, to the extent that they are not recovered against the opponent.

(c) Any deficiency in damages. Put shortly, TAG guarantee that whatever the shortfall between damages and unrecovered costs and disbursements, the claimant will receive a minimum payment of £500.

(d) The premium payable for the policy (which is set at a figure of £840 inclusive of insurance premium tax and the loan interest payable to the finance house who lend the insurance premium to the claimant under a Consumer Credit Act (CCA) regulated agreement) again to the extent that such premium is not recovered from the opponent. Since the loan interest is not recoverable anyway, it is apparently paid by the claimant out of his damages if the claim is successful.

2 Confirmation of acceptance of the application is sent to the claimant, and he then becomes an insured under the block Legal Protection Policy if he pays the premium.

3 The case is handled by TAG's associate company Accident Investigation Ltd (AIL) whose employee interviews the claimant and makes recommendations to TAG on liability and quantum.

4 The complete file is then sent to TAG's vetting solicitors, Rowe and Cohen, who assess whether the case has more than a 50% chance of success and a potential value exceeding £1,500. If Rowe and Cohen approve, the claim is sent to a firm of panel solicitors, which has 48 hours to accept or reject it. Acceptance is subject to the claimant's formal instructions as client of that firm. This is followed by a CFA and a client care letter. Copies of these are sent to TAG. The CFA is concluded by the claimant returning a signed copy of the client care letter.

5 TAG then instructs AIL for one of its employees to contact the claimant and:–

(a) explain the CFA;

(b) obtain his signature to a "Fact Find and Oral Advice Sheet";

(c) explain and obtain his signature to the CCA finance agreement by which the claimant borrows the ATE policy premium from the nominated financial adviser.

6 It was not clear to the court where these documents were sent once signed but it was presumed to be sent by the AIL employee to TAG as the case is then "deemed as accepted" and "Evidence of Insurance" issued. TAG then sends these documents to the panel solicitor.

**The Agency Point**

The above complex procedure is important as in considering the information, further explanation and advice required of the "legal representative" (these are matters mentioned in para 4(2) of CFAR, see earlier in this article, and set out below) there was simply no evidence of the AIL's representative's ability to deal with perhaps searching questions about:–

1 How and in what circumstances a claimant might become liable to pay the solicitor's costs;

2 What circumstances might give rise to a claimant wishing to have the solicitor's costs assessed, and how he should go about it;

3 Whether or not it might be thought an alternative method of financing the litigation might be more appropriate for a claimant and, the reasons for recommending a particular insurance contract if it were thought appropriate that a claimant should have ATE insurance.

However, it is the agency point which lies at the heart of the defendant's objection to the enforceability of the CFA. The court considered that the panel solicitor had no direct contact with the client before he signed up to the CFA, the ATE policy or the CCA loan agreement. The defendant submitted that there was no indirect contract either. It was not the solicitor as "legal representative" who provided the explanation/ advice (if sought) required by the CFAR, but an anonymous (so far as the solicitor was concerned) individual, whom the solicitor had not instructed directly, about whose expertise the solicitor was entirely ignorant, over whom the solicitor had no control, and arguably for whom the solicitor had no responsibility.

As to the statutory framework, section 58 of the Courts and Legal Services Act 1990 (as amended) states that a CFA is an agreement with a person providing *advocacy or litigation services*, which provides for his fees and expenses, or any part of them, to

be payable only in specified circumstances. There is a connection here with para 1(3) of the CFAR mentioned earlier in this article where the person "providing advocacy or litigation services" is called the legal representative. Section 119 of the 1990 Act makes it clear that it is the "authorised litigator" who is granted a right to conduct litigation by his professional body who provides litigation services and who thus is the legal representative. The court did not consider that any of the documents mentioned in TAG's process described above, made AIL an agent of the panel solicitor. Even if the duties of the legal representative are delegable the court only considered this to be to the limited extent of obtaining details of the claimant, of the accident and of the third party and of his insurers, plus if considered necessary, to obtain photographs, witness statements and "locus reports". In fact the court ventured to suggest that the solicitor's professional indemnity insurers may be entitled to avoid policy liability in the event of a claim resulting from any advice tended by the AIL employee. Thus the court decided that the claimant had no right to indemnity for payment of his legal costs from the defendant.

A final comment on this case is that while initially it was expected to go to appeal because of the far-reaching implications of the decision, it is now apparent that a number of cases on the same subject are to be heard together. According to the Law Society Gazette, more than 700 law firms may find "tens and maybe even hundreds of thousands of CFAs invalidated", if the decision on *English v Clipston* is upheld. However, according to the Times of November 28th 2002 a High court ruling by the senior costs judge in 18 test cases decided that delegation by the "legal representative" (either internally or to a duly appointed agent such as a claims company's representative) was permissible. This could mean that the claimant's solicitors have the right to recover their costs. These case were heard under the names *The Accident Group Test Cases Sharratt v London Central Bus Co And Other Cases*. The Times legal editor states that this decision could cost the insurance industry in excess of £1 billion. If true the title of this series of articles is justified. However, the matter will undoubtedly go to the Court of Appeal. So yet again the saga continues.

Incidentally, the Accident Group, one of the major claims company's referred to above, has received some adverse publicity from the BBC's Watchdog television programmes of 13th and 27th November 2002. The basic allegation, denied by the Accident Group, is that due to the targets imposed on the Accident Group's staff they have produced a multitude of false claims. While claims company's operate in a different way to solicitors they are expected to have similar ethics.

**The Court of Appeal case of Halloran v Delaney (2002)**

In this series of articles solicitors' success fees have only been mentioned in passing as the intention is to concentrate on the insurance aspect of CFAs. Solicitors may charge a success fee on top of their normal fees for the risk of taking the claim under this "no win no fee" agreement. However, if the future of these agreements is threatened then as well as the success fee the ATE insurance being the two items recoverable by statute, as a large part of the costs of these agreements will to a great extent come to an end.

The Court of Appeal ruled in this case that in run-of-the-mill personal injury claims where the case settles before proceedings are started, the solicitor's success fee should normally be limited to 5% of their costs. According to Michael Zander, QC, writing in the Times Law Supplement of the 1st October 2002, the effect of this cap on solicitor's willingness to take on cases is likely to be devastating. He says that one firm of solicitors used to take on 90% of potential personal injury cases, but since Halloran's case that has fallen to below 40% They used to turn down one in ten client's; now it is six in ten.

Apparently when Callery and Grey (mentioned in the June 2001 issue of this journal) went to the House of Lords, the Law Lords washed their hands of it saying the problems raised by CFAs should be sorted out by the Court of Appeal. So Professor Zander says leave to appeal on the issues in Halloran's case is unlikely to be given, even though the law lords' confidence in the appeal court's ability to steer a sensible course must now be considered to be misplaced.

Insurers hard hit by floods, asbestos claims and the fall in the stock market shares might now be wondering whether the tide is turning in some small way as regards "no win no fee" costs.

On another matter, the initiative by Lord Phillips and the Civil Justice Council to establish a committee to consider fixed fees for personal injury cases is considered later.

**In re Claims Direct Test Cases.**

From an insurance viewpoint this series of articles seems to be approaching the core of the subject in the recent Court of Appeal decision in *In re Claims Direct Test Cases (2003)*. This case decided that where the premium for a litigation protection insurance policy included sums other than for risk of liability for costs by the underwriter, such sums could not be recovered as part of the premium in a costs order.

The Court of Appeal so held in dismissing an appeal by claimants in test cases against an order made by Master Hurst, senior cost judge, whereby he directed judgment to be entered in costs only proceedings for each claimant for recoverable premium of £621.13. This should be compared with a premium claimed as recoverable of £1,250 plus IPT of £62.50.

Claims Direct together with its subsidiary Medical Legal Support Services Ltd (MLSS) and an insurance intermediary Litigation Protection Ltd (LPL) introduced an after the event insurance scheme, known as a litigation protection insurance policy, backed by Lloyd's underwriters, providing the insured an indemnity in the event its compensation claim for personal injury was dismissed or discontinued. Incidentally, the cover provided included a limit of £50,000, both sides costs, the amount of the insurance premium, and any interest.

The underwriters charged an after the event fee of £140 for each case undertaken. Claims Direct fixed a premium of £1,250, including the underwriter's fee, which represented the total price which a claimant joining the scheme would be liable to pay. Ignoring IPT this premium was made up as follows:

£140 underwriting, £110 brokerage and commission to MLSS, £775 to MLSS for insurance services, and £225 paid by LPL to an MLSS retention fund as a reservoir of money in case of any untoward happening.

Several challenges were made by liability insurers in cases when successful claimants sought to recover as their premium for after the event insurance under section 29 of the Access to Justice Act 1999, the whole of the premium (£1250 plus IPT) for their litigation protection insurance policy.

**The First Issue**

This was stated in the following terms:

Is the sum payable by a claimant properly to be regarded as a premium within the meaning of section 29 of the Access to Justice Act 1999?

Now Claims Direct operated on a similar basis to the Accident Group mentioned earlier in the case of *English v Clipston*. The court said that there was evidence that the underwriters would not have been prepared to underwrite the scheme without proper arrangements being in place for promotion, vetting and claims handling and that they were not able to undertake that work themselves. However, it soon became clear that the court were not prepared to regard the expense of all these activities as premium and recoverable.

It should be appreciated that the panel solicitor paid a fee of £72.50 plus VAT for each case plus at least £395 plus VAT to MLSS in respect of the claims manager's services. Furthermore, doctors paid MLSS £40 per case for any medical advice which was needed and counsel paid £15 to MLSS per case. In the event the claim was settled, the solicitor would claim from the defendant's insurer in addition to his own profit costs, the £72.50 and the £395 paid to MLSS, and any disbursements on the fees of medical experts and counsel.

**The Decision.**

The Court of Appeal followed the senior cost judge's (the Master's) analysis of the position as follows:

There was no real issue about the legitimacy of the premium of £140, the commission to claims direct of £110, or the principle that IPT was allowable in accordance with the wording of section 29 of the 1999 Act. However, underwriters had decided that these figures were wrong as on review they received in 1999 and 2000 £16.6 million extra on 53,282 covers and by this route the Master came to the conclusion that underwriters received a further £311.55 per cover as ATE premium. In any event the two items of £311.55 and £110 were not challenged by the defendants on appeal.

The Master then considered the remainder of the premium, viz the £1000 paid to MLSS. He did not regard the whole of this money paid by a claimant as constituting premium. In broad terms the initial insurance services, ie arranging for the completion of the Claims Direct application form, completion of the credit agreement (to pay for the premium) application form and forwarding these forms were in his mind properly part of the insurance services. On the other hand, obtaining further information required by the panel solicitor, witness statements from clients, witnesses and experts were part of the claims handling process and did not constitute insurance services. Similarly, arranging for the Claims Direct client to attend an appropriate medical examination could not form part of the insurance services.

The Master then referred to figures in the Claims Direct's Prospectus. He said that it appeared that about £400 was being spent on advertising, £75 on irrecoverable VAT, and £425 on services provided by franchisees (claims managers working alongside panels of solicitors, doctors and accountants). It seemed clear from the evidence that the amount actually paid for "insurance services" was £425. Of this £395 was said to be financed by money from the solicitors and the other £30 from

Claims Direct's funds. The defendants had conceded that £30 should be allowed in respect of insurance services, on the basis that their liability insurers were also being asked to pay £395 to the solicitors as a disbursement. The premium element paid towards the insurance services could not, in the Master's view, exceed the £30 to the franchisees paid from Claims Direct's funds. Money paid by the solicitors was not premium. He was satisfied that £30 was not an unreasonable amount to pay for the insurance services which he had described.

Adding together the sums he had held properly to be regarded as premium, £140, £311.55, plus £110 and £30 brought the total recoverable and allowable premium to £591.55 plus £29.58 IPT, giving a grand total of £621.13. The defendants did not appeal against this award.

It was not in the judgment of the Court of Appeal the intention of Parliament when it enacted section 29 of the 1999 Act to overload the recoverable premium by adding to the costs customarily embraced by such a premium the costs which a company like MLSS had to incur if the insurer were to accept the risk at all. In delivering the court's judgment his Lordship said he would look equally askance at the recoverability, in similar circumstances, of a premium of a fire policy which included the cost the insured had to incur in installing and maintaining a sprinkler system as a condition for his insurance cover, or a premium for a household insurance policy which included the cost of installing and maintaining a burglar alarm.

The obligation which the insurer undertook under his contract of insurance with the claimant was to provide an indemnity in the event that the claimant's compensation claim was dismissed or was discontinued.

If and so far as the work done by a claims manager represented an appropriate disbursement for work a solicitor would otherwise have to perform himself, then the cost of that work would probably be recoverable as part of the solicitor's bill.

Accordingly, the Master was correct in not automatically equating the premium under the litigation protection insurance policy to the "premium" referred to in section 29 of the 1999 Act.

**The Second Issue and the Reasonableness of the Premium.**

This second issue reads as follows:

(i) Are any of the benefits purchased by insurance forming part of the Claims Direct scheme collateral or extraneous to such insurance?

(ii) To what extent should the costs of collateral benefits be recoverable?

The Court of Appeal said it was unnecessary to deal separately with this issue, presumably because they had dealt with the points raised in considering the first issue. However, they did say that since the defendants had not challenged the reasonableness of the sum awarded it was also not necessary to say much about this, but they did refer to the Master's explanation as to why he considered a premium of £621.13 to be reasonable and proportionate. He was not given any evidence of comparable or alternative products. Nor was he told the then current rates for ATE insurance policies. He was therefore constrained to take as a starting point the award in *Callery v Gray* of an ATE insurance premium of £350 plus IPT (£367.50) plus a success fee.

In eleven of the cases he was able to identify the actual base costs claimed, and these averaged £2097 per case. A 20% success fee (as in *Callery v Gray*) would yield a figure of £419, while a 5% success fee (as suggested by this court in *Callery* as a preferred alternative) would yield a figure of £105. The Master then added £367.50 to each figure and considered the resultant range of figures between £472.50 and £786.50. He concluded that since his award of £621.13 fell within the middle of the range, it should be regarded as reasonable and proportionate, and the higher figure of £1250 plus IPT would not.

The Court of Appeal confirmed this decision as correct.

**The Costs Forum Supported by Lord Phillips.**

The latest information on this subject is given in a Civil Justice Council (CJC) news item on the internet and in the Times Law Supplement of 25th February 2003. The CJC say that in mid December they achieved consensus on a series of principles and figures that will pave the way for the introduction of a predictable costs regime for the majority of road traffic accident cases, the largest volume of personal injury actions in the civil justice system. An agreed table of costs is produced at the end of this article. The Times article entitled "The battle to bring costs under control" reports a scale of fees which sees claimant solicitors receiving basic costs amounting to a flat fee plus a percentage of the damages which reduces as the damages increase. The result, it says, is that the average base fee will fall from £2,000 to £1,400. Claims will be settled more quickly and there will be certainty as to costs. This system is expected to come into force from Easter.

On a bigger scale, the Times report says, insurance premiums will not be inflated to pay for rising costs. This more or less was decided by the Court of Appeal in *Re Claims Direct Test Cases* detailed earlier.

The CJC gives some more detail as follows:

- The scheme will apply only to road traffic cases up to £10,000 where they exceed the relevant small claims limit.
- The scheme will be restricted to pre-issue of proceedings cases only.
- The success fee uplift should be fixed at 5% of costs.
- Disbursements and Counsel's fees are not included.
- The ATE premium is not included.

This scheme was under discussion by the key stakeholder groups, and it was hoped that a rule and practice direction bringing it into force would be introduced by Statutory Instrument in April or May 2003, subject to the satisfaction of the Civil Procedure Rule Committee.

In fact the scheme was not brought into force until 6th October 2003 according to the Law Society's Gazette. Apparently that Society is hopeful that the scheme will lead to fewer costs disputes and considers that while the scheme only applies to a narrow class of case, it is numerically very significant.

The president of the Association of Personal Injury Lawyers (APIL) expects the meat to be put on the bones of the scheme through costs decisions at district judge and higher levels.

If successful, it seems likely that fixed costs will be extended to other stages of litigation and practice.

It is significant that, coinciding with this introduction of a fixed costs scheme in road traffic accident (RTA) cases, claimant and defendant solicitors have come to an agreement over the level of recoverable success fees in RTA cases, which is also expected to bring them closer to a truce in the costs war. According to the Law Society's Gazette this sets in principle the success fee at 12.5% of basic costs recoverable for all successful claims that are settled out of court. Cases that are tried will attract 100% success fee.

This deal was mediated by the Civil Justice Council (CJC) and was made between the Law Society and representative groups including the APIL, the Forum of Insurance Lawyers and the Motor Accident Solicitors Society.

The Master of the Rolls (Lord Phillips) and CJC chairman said the agreement would ease the claims process for up to 500,000 claims a year – two-thirds of all personal injury cases.

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**A Final Conclusion?**

From an insurance viewpoint the Court of Appeal and Lord Phillips' Forum by reducing costs will satisfy liability insurers. Also this will probably see a reduction in the activities of claims intermediaries and claims companies (the Accident Group have already closed their doors), the numbers of which have increased tremendously over the last two years, as they cannot expect to recover anything like the majority of their expenses. Could this really be the end of this long running saga?

**The Table of Costs**

| ***Damages*** | ***Costs*** | ***Description*** |
|---|---|---|
| *Up to £1,000* | *£1,000* | *£800 + 20% (of damages)* |
| *£2,000* | *£1,200* | *£800 + 20%* |
| *£3,000* | *£1,400* | *£800 + 20%* |
| *£4,000* | *£1,600* | *£800 + 20%* |
| *£5,000* | *£1,800* | *£800 + 20%* |
| *£6,000* | *£1,950* | *£800 + 20%* |
| *£7, 000* | *£2,100* | *£800 + 20% to £5k, 15% thereafter* |
| *£8,000* | *£2,250* | *£800 + 20% to £5k, 15% thereafter* |
| *£9,000* | *£2,400* | *£800 + 20% to £5k, 15% thereafter* |
| *£10,000* | *£2,550* | *£800 + 20% to £5k, 15% thereafter* |