

No win no fee: ethics?

by Martyn Day

The SALS report comes at an opportune moment. Increasing attention regarding the operations of some of the organisations involved in mass advertising of CFA arrangements, the recent changes brought about by Parliament in the system, and the growing impact of the *Access to Justice Act 1999* in terms of the withholding of legal aid from actions, has all meant that law firms up and down the country are having to come to grips with the ways that CFAs work and how this impacts on relations with clients, defendants, insurers and the Courts. The lessons that specialist practices learned two or three years ago are lessons that are now being pressed home in all those other forms that are trying to take on board the CFA culture.

The SALS working party has been absolutely right to identify the potential conflict in relations between solicitors/barristers and their clients as a result of the 'no win no fee' system. Undoubtedly, the potential for the lawyer encouraging an early settlement to ensure payment of their fees is a real one. However, I think it would be wrong to exaggerate that concern or to suggest that this is new. Clearly, the fact that lawyers are paid on an hourly-rate basis has always led to the suspicion amongst the lay world that we delay the resolution of cases as a way of ensuring that our fees are maximised. However, notwithstanding this is a criticism that could be held to apply, I can think of few occasions when that has been a real worry in cases that I have taken over from other solicitors or indeed generally in terms of my experience as a practitioner for more than 20 years.


When it comes to the 'no win no fee' scheme, specialist lawyers rely on their reputation to ensure that new cases come forward. Early and cheap settlement would be one way of ensuring that any such reputation was quite quickly destroyed. It is amazing how word of mouth gets round in any community, and a disgruntled client can be a PR disaster for a lawyer.

One other point on the issue of the tension between the client and the legal team relates to the fact that in some ways the pressures on the lawyer rather balance each other out. We retain the hourly rate system that continues to encourage the idea of lengthening cases, whereas the CFA system encourages lawyers to cut cases short to ensure receipt of fees.

The SALS report talks about the need for various 'control mechanisms' operating in relation to CFAs. It seems to me that having any sort of bureaucracy involved in a system should only occur when absolutely necessary. In this instance, the adversarial system ensures a degree of equality of arms between the two parties and, therefore, there is no real need to impose any sort of control. This I do not think is sufficiently taken on board by the working party. For

example, it is suggested that 'proper training in risk assessment should be given to the legal professions'. The fact is that lawyers up and down the country are undergoing risk training, whether 'on the job' or by going on courses. Every time a case that is taken on under the CFA system is won or lost is 'training' for the lawyer who made that decision. As the weeks, months and years go by, and more and more decisions are taken, the more that individual learns. That is not to suggest that training is not a good idea, but to make the point that there is a natural momentum behind lawyers undertaking such training which probably means that there is no need for an external body to force the pace.

Having said that, a good point raised by the working party – and the one I feel is likely to gain close scrutiny – relates to the fees that the solicitors can charge the claimant under the CFA. Now that the success fee and insurance premium can be charged against the defendant in any action, the client's concerns about these issues are next to nil. The remaining key question for the client is the extent to which the 'solicitor and own client' element of the bill remains. It is traditionally said that lawyers receive 70 percent of the claimant's costs from the defendant at the end of a successful action. The pressure for the legal team to bear the remaining 30 percent has been increasing in recent years as competition heats up. Increasingly, firms in the personal injury world are making such a deal explicit at the beginning of the case rather than simply agreeing to dispense with such sums at the end. Whether any direct pressure to achieve this is either achievable or necessary is not totally clear at this point, but is very much an issue that lawyers are now looking at and having to come to a decision about, in terms of the package they present to the client at the beginning of any new case.

Overall, the report provides a useful insight into the ethical concerns that surround the conditional fee scheme, but there are a number of occasions when it would seem that it has not taken fully on board the legislative changes in recent times allowing for the premium and success fee to be claimed from the defendants. Further, the style of the report seems to be written from the reluctant eye of that part of the profession whose enthusiasm for CFAs has always been lukewarm at best. The report is thought provoking and valuable for all lawyers who are concerned to ensure that the proper relationship exists between the client and their legal team, and certainly once I had the chance to go through it in some detail I immediately emailed my partners to raise with them a number of the points made. It is a report that all lawyers in the field should read. 

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