New report: scrap legal aid and reform CFAs [1]

Written by **Blog Editor** [2] | Thursday 26 August 2010

- Our latest briefing paper, by lawyer and medical practitioner Anthony Barton, says that civil legal aid should be abolished for most compensation schemes.
- It argues that Britain?s legal aid system ? the most generous in the world ? is fundamentally flawed. By putting claimants in a no-lose position and defendants in a no-win situation (defendants cannot recover legal costs, even if they are successful), legal aid encourages risk-free speculative litigation.
- Given the rise of Conditional Fee arrangements (CFAs), commonly known as ?no-win, no-fee?, civil legal aid is no longer necessary.
- However, current CFA arrangements are subject to some of the same problems as civil legal aid. At present, the balance of risk in litigation is biased in favour of claimants. This encourages excessive civil litigation and disproportionate costs.
- The main drivers of this risk imbalance are the additional costs of litigation ? specifically, lawyers? success fees and after the event (ATE) insurance.
- Success fees: The claimant?s lawyer can charge an additional success fee up to 100% of the legal costs if the case wins and nothing if the case loses. The level of this fee is set by the claimant, even though it is only ever paid by the defendant. There is therefore a clear incentive to maximize success fees.
- ATE insurance: In principle, claimants are liable for the defendant?s costs if their litigation is unsuccessful. However, ATE insurance covers claimants? exposure to such costs liability. As with success fees, the cost of ATE insurance premiums are determined by the claimant but borne by unsuccessful defendants. The ATE insurance premium is usually waived is a claim is unsuccessful. Again, this insulates claimants from risk, while driving up the costs imposed on defendants.
- Lady Justice Smith, in the Court of Appeal, has recognized that the current system allows would-be claimants to ?litigate weak cases without any risk themselves?.
- Lord Justice Jackson?s Review of Civil Litigation Costs proposes that recoverability of the success fee and ATE insurance should be abolished, so that they are borne by the claimant. However, he also proposes the introduction of one-way cost shifting so that costs are borne by unsuccessful defendants, but not by unsuccessful claimants. This would open the floodgates to risk-free, speculative litigation. His proposals should be rejected.
- The ASI report proposes that the level of additional costs ? specifically success fees and after the event (ATE) insurance ? recoverable from unsuccessful defendants should be capped. This would deter claimants from bringing weak cases with no risk to themselves, while preserving access to justice in the absence of civil legal aid.
- These reforms would go some way towards giving Britain a system of funding access to justice that is simple, robust, fair, accessible, affordable, and with costs proportionate to the damages at

stake.

Download a copy of the briefing paper (PDF) here [3].

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