

Conditional Fee Agreements: best practice

no win - no fee - limiting the cost of claims to taxpayers



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acknowledgements

The Conditional Fee Agreements best practice guide has been prepared by Zurich Municipal (ZM) in conjunction with the Local Government Association (LGA). Zurich Municipal and the LGA would like to thank solicitors Barlow, Lyde and Gilbert and the Department for Constitutional Affairs for their input.

1 outline of problem

Local authorities (LAs) are feeling the financial pinch due to a continuing trend in spurious compensation claims. Research conducted by the Local Government Association (LGA) and Zurich Municipal showed that 68 per cent of councils have experienced an increase in the number of tenuous claims they have received since the introduction of conditional fee agreements (CFAs).

A conditional fee agreement is a funding arrangement between a claimant and their solicitors where the solicitors agrees to act on a 'no win, no fee' basis. Under the CFA the solicitor can claim a success fee, which is an agreed percentage over and above their normal costs. Subject to regulations introduced in April 2000, the success fee has been recoverable from the defendant if the case is won.

Responses from 212 councils in England and Wales reveal that 85 per cent of LAs say conditional fee arrangements have increased their annual costs. As a result, 42 per cent of authorities say that they are in the process of developing detailed risk management procedures and 20 per cent have recently introduced such a policy. A quarter (25 per cent) say that they have long established practices in place.

But what can councils do to regain control? This best practice guide looks at how to tackle the problem, ensuring that CFAs mean access to justice for those on low incomes, rather than an unfettered growth in the number of dubious claims, an issue recently investigated by the Better Regulation Task Force report *Better Routes to Redress* (May 2004). Since the implementation of legislation in April 2000, positive benefits include LAs taking a more pro-active approach to monitoring services, improving their standards to try to minimise compensation claims, and reducing allegations due to better risk management policies and procedures.

2 worst practice

Councils and authorities can have an impact on the financial outcome of a case involving CFAs. There are plenty of examples of worst practice and organisations should be aware of the dangers. Here are a few potential pitfalls:

- The authority does not comply with the personal injury Pre-action Protocol, resulting in solicitors being able to charge a higher success fee.
- The authority denies liability then subsequently changes the plea, allowing the solicitors to rack up more base costs and higher success fees.
- The authority refuses to disclose documents that are clearly relevant to the issues and would support a denial of liability. This allows solicitors to generate a higher success fee and court costs.
- The authority denies liability where the evidence is not robust or credible enough.
- The authority is not being pro-active in responding to the claimant's solicitors. This adds to the overall amount as it allows them to generate additional base costs through reminder letters.

The following examples provide illustrations of how some of these might occur.

Local authority A

A local council was faced with a personal injury claim backed by a CFA. It did not have a robust inspection system yet the council chose to deny liability and delay disclosing relevant documents to the claimants solicitors.

The result was that the Claimant was ultimately successful and the legal costs payable were significantly higher than they would otherwise have been.

A success fee of 60 per cent was permitted and the 'after the event' insurance premium of £500 was payable.

Housing Association X

A housing association submitted such poor documentation on a tenant claim that by the time the paperwork had been sorted out 90 days had elapsed.

The housing association then elected to deny liability on the basis of evidence from a contractor, which turned out to be unsustainable and after a long argument with the solicitors, the claim was paid.

The additional legal costs included a Pre Action Discovery application and a success fee of 70 per cent.

Local authority Z

When faced with a 'trip claim', a local authority took so long to confirm whether the land on which the incident occurred was under its control, that by then the 90 day period had elapsed.

It also chose to maintain an argument for contributory negligence which was eventually conceded. The claimant's solicitors had generated £600 by making a Pre Action Discovery Application because the 90 day time limit had expired and no admission or denial had been made.

The unsuccessful argument over 10 per cent contributory negligence allowed a success fee of 40 per cent to be claimed. Because liability was not admitted earlier, it was not possible to argue against a reduction in the success fee.

3 best practice

The picture is not completely negative. Authorities also have the power to impact on CFA cases in a positive way by implementing best practice.

Take an incident where a claimant trips on the highway and falls over what appears to be a hazard, sustaining an injury. The local authority responsible has to check their records to find out if regular inspections have taken place and visit the site of the accident to take photographs. Following its investigations it appears that there has not been any regular inspections and the photographs showed there is a large and obvious defect in the pavement. A decision has to be made about whether to allege contributory negligence.

From the letter of claim it is noted that the claimant has a fractured clavicle and has been off work for some time. It is also anticipated that there would probably be some care claimed and other miscellaneous special damages.

The claimant's solicitors act under a conditional fee agreement with a success fee and insurance premium. While it is thought that contributory negligence could probably be successfully argued against the claimant, it is unlikely to be more than 10 per cent to 20 per cent.

Therefore taking an initial view on the likely value of the claim, probably falling within the Fast Track system (claims up to £15,000) and not worth more than £10,000, the decision is made to admit liability. The claimant's solicitors are then asked to confirm that they have re-assessed the success fee in light of the admission. They make no response to this request.

When the matter eventually settled for £10,000 damages, the costs are submitted with a 60 per cent success fee. The success fee is calculated as a percentage of the costs. The defendants take issue with the success fee and negotiates it down to 20 per cent. The costs are therefore agreed as follows:

Base costs	-	£5,000
20 per cent success fee	-	£1,000
VAT	-	£1,050
Disbursements	-	£1,500
(inc insurance premium)		
Total	-	£8,550

Had a case for contributory negligence been pursued the claimant's solicitors would have incurred larger base ('normal') costs, investigating the liability. They would also have been able to successfully argue the success fee of 60 per cent. This would result in costs of approximately:

Base costs	-	£ 7,000
60 per cent success fee	-	£ 4,200
VAT	-	£ 1,960
Disbursements	-	£ 1,500
Total	-	£14,660

This would have been an increase in costs of more than £6,000, whereas the maximum 20 per cent saving made on a successful claim of contributory negligence would only have been £2,000.

Therefore by pursuing the claimant for contributory negligence, it could have cost an additional £4,000.

NB Different considerations may arise according to the circumstances of each case.

4 from the lawyers perspective

A claimant can also take out 'after the event' insurance to cover paying the defendant's costs should they lose. Any premium paid for this insurance is also recoverable from the defendant. There have been a number of court cases brought by Zurich Municipal and other industry members to decide the amount of reasonable success fees and insurance premiums that can be recovered in certain scenarios (see opposite). These cases have now become precedent.

The paying party's representatives are entitled to see the conditional fee agreement to check that the applicable regulations have been complied with. However the courts are not keen for technical challenges to be put forward and most have been resolved.

It is possible for the claimant's solicitors to delegate both the pre-CFA advice and the signing of the agreement to a non-legally qualified person. However, this must be subject to proper supervision, and evidence is often sought to show this.

As part of the advice initially given, the claimant's representative must consider whether there are alternative methods of funding the claim other than a conditional fee agreement, for example, does the claimant have legal expenses cover with any policies of insurance?

If the CFA regulations have been breached then the Court of Appeal has said that the test is:

'Has the particular departure from a regulation or requirement ..., either on its own or in conjunction with any other departure in the case, had a materially adverse effect either upon the protection afforded to the client or upon the proper administration of justice?'

For example, failure to advise a claimant on the availability of Legal Aid was a breach of the regulations which meant that the conditional fee agreement was unenforceable.

Unions are also able to enter into collective conditional fee agreements on behalf of their members to fund claims.

The department for Constitutional Affairs is bringing forward its proposals to amend CFA regulations and it is likely that a new simplified set of requirements will be in place by the end of the year.

5 court cases

A number of court cases have taken place which are now used as guidelines for the amount that the claimant's representative can submit to the unsuccessful party in relation to premiums and success fees.

For example, for road traffic accidents (RTAs), the level of premium ranges from £350 (*Callery v Gray*) to £621 (*Claims Direct*).

The success fee depends on whether the case reaches court. It is set at 12.5 per cent in respect of any case which concludes before trial (unless exceptional circumstances) as in the Civil Justice Council RTA Success Fee Mediation Agreement 3 December 2003¹. For any case which concludes at trial, the value can be up to 100 per cent. However, following a number of cases which have now become precedent, success fees have been negotiated down and the following used as guidelines:

Road traffic accident – 20 per cent
(*Callery v Gray*)

Housing Disrepair – 20-25 per cent
(*Bowen –v- Bridgend*)

Tripping – 100 per cent but reduction to 50 per cent or even 25 per cent on admission of liability
(*Lea –v- Cheshire County Council*)

Employers Liability – 75 per cent
(*Wells –v- Sussex Ambulance Service*²)

Note: Future mediation will take place around success fees for public liability insurance and Zurich Municipal has organised for local authority representatives to be part of these discussions.

¹ For RTAs after 6 October 2003 up to £10,000 in force from 1 March 2004

² Appeal 5 May 2004

06 dos and don'ts

do

- Upon receipt of the Letter of Claim notify insurers.
- Ask the claimant's solicitors how the claim was funded before the CFA was entered into (if appropriate).
- Ask the claimant's solicitors if this is the first CFA entered into by the claimant (if appropriate).
- Check that the notification of funding arrangement complies with the new practice direction in that it also gives the address of the insurers and the policy number.
- Ask the claimant's solicitors if they have advised their client about other methods of funding the claim.
- Investigate the claim as quickly as possible.
- Make a decision on liability within three months in accordance with the Personal Injury Pre-Action Protocol.
- Once liability admitted/agreed (if applicable) ask the claimant's solicitors to re-assess the success fee.
- Always consider the economics of the case. If the likely reduction in damages for arguing liability/contributory negligence will be less than the cost implication of a higher success fee is it worth keeping liability/contributory negligence alive? The implications are set out in this table:

Whether to pursue liability /contributory negligence – the economics:

	Conceding	Keep fighting
Costs & success fee	↓	↑
Damages	↑?	↓?

- Once experts are nominated, try to agree them as quickly as possible in order to get the medical evidence and to ascertain an early indication of the value of the claim to help in considering the economics of the claim.

don't

- Delay in gathering information to assess liability.
- Deny/dispute liability where not appropriate.

contacts

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