

The funding of personal injury litigation: comparisons over time and across jurisdictions

by Paul Fenn (Nottingham University Business School), Alastair Gray (University of Oxford), Neil Rickman (University of Surrey) and Yasmeen Mansur (Nottingham University Business School)

Executive Summary

- The purpose of this report is to provide evidence on the operation of funding arrangements in several areas of personal injury (PI) litigation in the last few years. The report is intended, in part, to complement our earlier work (Fenn, Gray, Rickman and Carrier, “The Impact of Conditional Fees on the Selection, Handling and Outcomes of Personal Injury Cases” 2002). There, we collected data from a range of PI claims (excluding clinical negligence) that were closed between November 2000 and June 2001. These were analysed in terms of the distribution of various funding arrangements across different types of claim and in terms of their effect on claim outcome and duration.
- The present report provides a new set of data for looking at how funding of these claims has developed and for identifying any significant differences in their operation. In addition, however, we also look (for the first time in detail) at the funding of clinical negligence cases. We make use of a large-scale data set provided by the NHS Litigation Authority (NHSLA), which was established on 20 November 1995 to indemnify NHS bodies against claims for clinical negligence. We can summarise our key findings here:

Personal injury claims other than clinical negligence

- ***Regardless of referral route, conditional fee agreements (CFAs) are now the predominant means of finance for personal injury claims.***

For recently opened cases (i.e. opened between October 2002 and September 2003), CFAs now account for 93% of Accident Management Company (AMC) cases, 99% of trade union cases, 91% of before the event insurance cases (BTEs) and 86% of the “other” caseload. One possible reason for this is the introduction of Collective Conditional Fee Agreements (CCFAs), which allow bulk purchasers of legal services to agree a success fee across high volumes of claims. The additional certainty and reduced transactions cost offered to the referral agent and the solicitor by such an arrangement (particularly in the light of legal aid no longer being available for such claims) seem likely to have played a role here.

- ***The complexity and value of personal injury claims run under CFAs has not changed significantly following recoverability.***

In our previous study, we found that in 80% of all CFA claims there was no or no significant dispute over liability; in the current study we found the equivalent figure to be 78% (CFA and CCFA combined). This difference is not statistically significant. Similarly, in our previous study we found that in 85% of all CFA claims there was no or no significant dispute over causation; in the current study we find the equivalent figure to be 90% (CFA and CCFA combined). Again the difference is not statistically significant.

- ***There are some differences between current funding options in relation to case types.***

Using multivariate analysis to explore case characteristics associated with the various funding options currently available, we found that (non-conditional) BTE funding is associated with “softer” cases (i.e. those where the defendant’s liability is clearer) than either CFA or CCFA cases.

- ***There are some differences in the litigation rate in relation to current funding options.***

Using multivariate analysis to explore the impact of current funding options on the likelihood of legal proceedings after controlling for case characteristics, we found that CCFA cases are nearly 10% more likely to be litigated than other types of claim funding after controlling for measures of case complexity.

- ***There are some differences in the duration to settlement in relation to current funding options.***

Using multivariate analysis to explore the impact of current funding options on settlement delay after controlling for case characteristics, we found that (non-conditional) BTE cases have relatively high settlement hazards, and therefore shorter durations, by comparison with all other forms of case funding, including CFAs.

- ***There are some differences in the legal costs agreed in relation to current funding options.***

Using multivariate analysis to explore the impact of current funding options on legal costs after controlling for case characteristics, we found that CCFA cases had significantly lower base costs than (non-conditional) BTE cases. By contrast, CFA cases had significantly higher total costs than BTE cases (as a consequence, we presume, of the success fees and ATE (after the event) premiums). All other cost comparisons were not statistically significant.

Clinical negligence claims

- ***From our survey of claims recently opened by solicitor firms on the Law Society’s clinical negligence panel, it appears that CFAs have recently become a significant source of funding for new clinical negligence cases, although still in the minority by comparison with those funded by legal aid and private hourly fees.***

The proportion of all cases that were legally aided was 33%¹. The proportion of all new cases in the survey reported in Table 2.7 as being funded by legal aid was 33%². The remaining 67% were almost equally split between CFA cases and those funded in some other way (presumably by private hourly fee). An emerging feature is the increasing proportion of CFA clinical negligence cases referred by Trade Unions; 12% of all open CFA cases were referred by TUs.

¹ It is possible that some of the cases recorded as ‘other’ include legally aided cases. If so, an estimate of 33% legal aid funding could be seen as a lower bound.

- ***By contrast with other personal injury claims, it appears that CFA funding is highly selective in comparison with other funding options.***

The overall picture that emerges from our multivariate analyses of NHS Litigation Authority clinical negligence claim data is one in which CFA funding is associated with relatively high value but relatively low risk clinical negligence claims.

- ***After controlling for the selectiveness highlighted in (2), we find that CFA cases tend to settle later than cases funded by other means (typically legal aid in this context).***

While the NHSLA dataset does not have information on costs, there may be a presumption that longer cases of a given value will have higher costs given the effect of higher duration and, of course, the addition of a success fee.

- To conclude, the pursuit of compensation for personal injury in the broad sense has always been a risky activity because of the evidential requirements imposed by the courts and the consequent possibility of the losing claimant bearing heavy legal costs. In the past, either the government has assumed this risk via legal aid for those cases it assumed meritorious, and the cost of losing cases was borne by the taxpayer, or private clients have assumed risk through the payment of hourly fees (even in the event of a loss). With the advent of CFAs in the 1990s, the risk of losing cases was passed to claimant solicitors, who required a premium to cover the (own cost) risk of losing cases. Initially, this premium was paid by winning claimants via negotiated success fees, and our previous study (Fenn, Gray, Rickman and Carrier, 2002) explored the impact of this policy development on the process and outcomes of personal injury claims. Since then, policy towards CFAs has developed further, with the claimant solicitor's own cost risk premium now paid by the losing defendant; naturally, it is of interest to discover what effect this policy development has had on the litigation landscape.
- Our findings summarised above seem to show on the whole (and notwithstanding the satellite litigation that characterised the period directly after the introduction of recoverability) that the legal services market has adapted quite smoothly to the new developments. Personal injury claims arising from road traffic or work accidents do not appear to be very different in nature or outcome from those run under the previous rules. Nevertheless, the new, predominantly CFA-based landscape has created different divisions based on routes through the system. Cases brought via Trade Unions or BTE insurers may be run differently from those from self-referrals or accident management companies, for example. The key to understanding this new market structure is, we believe, the development of competing bulk purchasing arrangements, and this is likely to need monitoring in future.
- While the clinical negligence legal services market has also developed a CFA component quite rapidly in recent years, this has noticeably been quite selective, with claimant solicitors appearing to be quite careful about the degree of risk they are choosing to assume. We suspect this difference is due to the much more uncertain evidential basis for these claims, which in turn affects both the solicitor's and the ATE insurer's risk management calculations. Perhaps for similar reasons the evidence suggests that clinical negligence cases run as CFAs tend to take longer to settle, when compared on a like-for-like basis.