

Risk Assessment in Conditional Fee Cases

Introduction

Individual barristers and Chambers have had little or no assistance in approaching risk assessment in CFA's. At first sight it appears impossible to help on a matter where the issues are as diverse as the very number of individual cases. There has been no hard evidence available of previous success or failure in assessment so as to consider the risk in any scientific fashion. For, the take up on CFA's has been low until the recent abolition of Legal Aid in all but high cost and clinical negligence cases. In an ideal world there would be by now preliminary underwriting data from which an informed view could be taken for the future. Such data does not exist in any quantity or in a readily accessible form. Software distributors for the Bar's fee collection systems have been slow to improve their products for CFA analysis: even now there is no such commercially available product. It would be a shame if, through lack of the pooling of thought and data by the Bar, a product were to be designed that missed the mark, requiring revision and causing further delay.

The questions

The CFA Panel of the Bar Council's Remuneration and Terms of Work Committee has issued a Guidance Pack (now on the Bar Council's Web Site) on many aspects of CFA practice and procedure, including specimen forms for risk assessment. But how is the form to be approached? How does the perceived chance of success translate into a commercially viable uplift so that the Bar can break even over the longer term? Can CFA's be made to work for the Bar? What are the issues and chances to be covered in a software package to monitor risk assessment in CFA's? The difficulty of the task should not put us off from an attempt.

Epidemiological analogy

The science of epidemiology studies the incidence and distribution of diseases, their control and prevention. It uses statistical theory to analyse data to see what trends can be shown to be significant. In the face of a suspected problem it is possible to start with a *null hypothesis* i.e. utter scepticism. One then waits until, in the end,

statistically significant data emerges to prove a conclusion and only then does one act. However, in the real world this approach is fatally flawed. If there is observable evidence that the river is polluted and, on a reasoned basis using best current understanding, if not proof, the spread of expert opinion considers there is a real chance of the pollution causing a cancer, it is of little practical use to wait for 20 years to see if a statistically significant variation in the incidence of cancer can be found between populations living up and down stream. If the river can be cleaned at reasonable expense the intelligent person acts on the hypothesis derived from direct observation and reasoning, and then monitors the aftermath. In fact modern epidemiology tends to use as its starting point not a *null hypothesis* but rather the boiled down range of expert opinion from which then to examine data for statistical significance. The same overall approach can and should be adopted for the Bar while the opportunity to clean the CFA River still exists.

Method

The writer is a co-opted member of the CFA Panel of the Bar Council and the Personal Injuries Bar Association Executive Committee. He is also a member of Chambers that has entered into about 1500 CFA's since their inception. He has entered into about 100 CFA's himself since 1995 and discussed his own experience with other members of Chambers to gain their perception and to obtain an intuitive grasp of CFA's in practice. In the complete absence of significant statistical data he then went on to consider a reasoned approach to risk assessment comparing the Bar's risk with that of solicitors. The resulting Paper was presented to his Chambers and to the CFA Panel at the Bar Council for consideration. No one argued against its conclusions and therefore, in a limited sort of way, the hypotheses within it took on the mantle of a range of expert opinion on the topic. Admittedly, returning to the polluted river/cancer risk analogy, this process was a poor substitute for the scientific distillation under epidemiological control of the years of combined experience that a group of professors of scientific oncology could bring to bear. It was merely the best that anyone had come up with at that stage and maybe the best that could have been done to reach a reasoned hypothesis from which to begin to study the actual results of CFA's in practice.

Some data obtained

After the Paper was written the writer's senior clerk, independently and without reference to the writer at all, undertook the immensely time-consuming exercise of evaluating Chambers' experience between January 1998 and August 2000, without the aid of computer software, manually going through records on computer. This period is much more relevant to future assessment than the period before 1998, although the period straddles the reforms of the CPR and inferences must be made only in the light of those changes. The senior clerk chose himself the criteria for his assessment, which was limited by the amount of time available for the exercise.

Method of this Paper

In order that readers can see the hypotheses and the data for themselves, both to challenge the hypotheses and to form their own conclusions on the data, the remainder of this Paper will reproduce the earlier Paper in its original form. Readers will note and forgive references to matters relevant to CFA's before the reforms of the Access to Justice Act 1999, which came into force with no little confusion after 1st April 2000. It is more important to produce it in its original form, rather than to update it, so that hindsight cannot influence the hypotheses that were set out. Some extrapolation will then be attempted to see how the original hypotheses have fared in the light of the data and some practical observations made. The raw data is appended to this Paper, in anonymous form and in no order of seniority in Chambers. It represents a small beginning to the study of CFA's and no claim is made that any truly statistically significant data has been produced. It may be statistically significant but a statistician has not tested it. It can perhaps be put better, that the data is used simply and tentatively to test the original hypotheses of the early Paper on a layman's footing.

Invitation to help

The writer, the CFA Panel of the Bar Council and the Personal Injuries Bar Association positively invite amplification and criticism of the hypotheses and the submission of tabular data, in similar form to that appended in the short term, from other sets of Chambers. It can be treated on a confidential basis. In this way the Bar's experience of CFA's can be moved forward on a collective basis and the

hypotheses can be established against which computer software can be written to test the real experience of the Bar in future.

The Original Paper

CFA Risk Assessment: a Comparison of the Risk of Solicitors and the Bar

This paper addresses a largely ignored, but nevertheless real difference between the risk run by the Bar and Solicitors under Conditional Fee Agreements. While advice from the Bar Council has always been for members of the Bar to carry out their own risk assessment, chambers, and particularly young members, have carried an immense pressure in practice to agree to the same uplift as that between the solicitor and lay client. If there is a fundamental difference in the risk run by the different sides of the Profession it follows, where the uplift agreed is identical, that one or both must have got it wrong. There can be no rule of thumb to risk assessment. While this paper can provide no easy answer, it is designed to provoke further thought on this vitally important topic.

Assuming as a basic principle that risk assessment is to aim at neither profit nor loss on basic fees over a lengthy period taking the good with the bad, risk assessment can be reduced to achieving a balance between three factors:

- 1. The chance of “success” (whether in settlement or at trial)**
- 2. The size of potential “return” (success fees) against “loss” (basic fees)**
- 3. The spread of risk/financial strength of the practice or individual**

This paper concentrates on the first and second factors. Reduced to bare essentials, CFA risk assessment deals with the basic principles of the gambler, or underwriter, in a novel and highly volatile setting. This volatility should not be underestimated.

A basic book

The complexity of what is required in terms of CFA risk assessment is put into sharp relief if we consider how easy is the bookmaker’s task by comparison.

Let us take a perfectly handicapped 5-horse race. Each horse has an equal chance (20%). The theoretical price of each is 4-1. The bookmaker, in order to make a profit, opens each horse at 7-2 (3 ½ -1). If bets are taken evenly on the horses he will make a profit of 11% whichever wins. However, he takes a heavy bet on Troy. He wants no more money on him and shortens the odds to 2-1, which is unattractive compared with the book on offer next door. He lengthens his odds on the other horses to attract business. In the end the book closes before the race begins at the “starting” prices, which, if the bookmaker has attracted balanced custom by manipulating the odds, should still give him a profit of 8% whichever horse wins. In practice he will rarely achieve a perfectly balanced book, but over a season he will be ahead.

	Theoretical price/chance		Opening price/chance		Starting price/chance
1 Troy	4-1	20%	7-2	22.2%	2-1 33.3%
2 Shergar	4-1	20%	7-2	22.2%	7-2 22.2%
3 Mill Reef	4-1	20%	7-2	22.2%	4-1 20 %
4 Golden Fleece	4-1	20%	7-2	22.2%	9-2 18.2%
5 Dancing Brave	<u>4-1</u>	<u>20%</u>	<u>7-2</u>	<u>22.2%</u>	<u>6-1 14.3%</u>
Total		100%		111%	108 %

There are important points to notice in a basic book.

1. The punter can never decrease his stake once it is placed.
2. While the bookmaker’s balanced odds may vary before the start to reflect the differing bets he has taken, the real odds of the horses do not, or hardly, change at all while the book is open.

3. Once the race starts and the real odds begin to change, no one can increase their stake.
4. There is no ethical dimension. It is take it or leave it.

The CFA book

Let us suppose that a solicitor has 5 cases, each of which is assessed at first interview at a basic chance of success of 80%. Each client there and then signs an agreement at an uplift of 25%. This is the same uplift as taken from a straightforward application of the Ready Reckoner Table on the suggested Risk Assessment Form for the Bar. From that moment the horses are running. The book cannot be balanced by trying to attract money and altering the odds on the other four cases if one becomes an unsafe gamble at the agreed odds. Nor can the lawyer attempt to balance the book with other cases, outside the batch, in which he has already entered an agreement. He cannot even try to balance his book in future CFA agreements, because this would lead to impropriety against an individual lay client. All he can do is to try to assess his risk once and for all at the outset. This is a very poor substitute for the bookmaker's ability to balance his book. It is comforting for solicitors to know that, if they are above the overall success figure required by Accident Line Protect of 95%, it is difficult to lose overall. That is no comfort at all to the Bar, as we shall see.

The problems do not stop at the odds beginning to change shortly after the bet is placed without a meaningful opportunity to make, let alone balance, a book. As well as the true odds shifting from the moment the client signs up, so does the stake. The bookmaker takes a fixed stake usually at fixed odds. The lawyer also has to deal with the fact that what turn out to be his best runners are the ones with the lowest stake, and the poorer runners, on which he is more likely to lose, carry the highest stake. The easy cases will almost certainly settle, and quite likely at a time when the basic costs are relatively low. The success fee will be correspondingly low in real terms. The cases in which the risk is high are the ones most likely to go to trial. If won, they will make a good profit, but if lost, it could mean disaster. It is broadly a fair assumption that insurers will try to settle cases if they really have the 80% chance of success at which we originally assessed our batch. Even if we all know of exceptions, the cases that finally go to trial are overwhelmingly likely to be in a 50-

60% bracket of success by that stage, whatever the original risk assessment may have been.

Let us examine the effect of cases in the same batch settling at different stages and the one theoretical “loser” turning out to be a 50% chance at trial. We will stick with our five cases at an original assessment of 80% success, and hence a 25% basic uplift, and from the perspective of the solicitor initially. That the figures are theoretical and may not reflect actual costs recovered in practice does not matter; the point of principle will emerge later.

	Basic costs	Cumulative total	Success fee	Cumulative total
1 Donoghue	£1000	£1000	£250	£250
2 Stevenson	£2000	£3000	£500	£750
3 Hunt	£3000	£6000	£750	£1500
4 Severs	£4000	£10000	£1000	£2500
5 Wells	£5000	£15000	£1250	£3750

The cumulative total of basic costs is £15000 if all cases happen to win/settle at the differing stages corresponding to the various levels of costs. However, what if the first four settle and the fifth is really a 50:50 chance at trial and fights? There is a 50:50 chance of raking the pool with the basic costs of £15000, plus success fees of £3750, which is profit. The equal chance is that we will recover only the basic costs of the first four cases, £10,000, plus the success fees in those cases of £2500. Here there is a net loss of £2500 from the basic costs of the five cases of £15000. If it were a certainty that the first four would settle at the above fees, it would be a good bet – a 50:50 chance on a profit of £3750 as against a loss of £2500. These are odds

of **3-2 on**, clearly very profitable in the long run. But nothing is a certainty when the stakes as well as the chances change.

Let us vary the example, in the light of the CPR, protocols and the drive away from litigation, together with the lowering of costs generally. If the insurers take their opportunity to settle the four cases earlier, as they increasingly should with lower basic costs, and the District Judge knocks £500 off the basic costs of the fifth, we may have to pawn our children.

	Basic costs	Cumulative total	Success fee	Cumulative total
1 Donoghue	£500	£500	£125	£125
2 Stevenson	£1000	£1500	£250	£375
3 Hunt	£1250	£2750	£312.50	£687.50
4 Severs	£1500	£4250	£375	£1062.50
5 Wells	£4500	£8750	£1125	£2187.50

If **Wells** fights as a 50:50 chance and the others settle at the above levels of basic costs, the bet is reversed. If all five win we will recover £8750 basic costs, plus £2187.50 success fees as profit. If **Wells** loses, we will only recover £4250 basic costs and £1062.50 success fees, a shortfall on the overall basic costs of £3437.50. These are odds of about **3-2 against** and no business can sustain such odds for any length of time. As the basic costs of cases are driven down, the whole point of the Woolf reforms, if the costs of settled cases are driven down disproportionately compared with costs of those tried, the balance of previous risk assessment is upset.

It may not be the case that, with the front-loading of costs required under the CPR, the costs of settled cases will be reduced disproportionately, but lawyers should certainly

be monitoring the risk in as scientific a fashion as they can. Comparatively subtle shifts in both chances of success and costs recovered can have a surprising effect. However the main point of putting perhaps a counter-factual situation on solicitors' costs is to hammer home a fundamental difference between the risk barristers run and that of solicitors.

The barrister's risk is very much disproportionate towards tried as against settled cases. The solicitor's potential nightmare scenario, above, is the barrister's present actual nightmare scenario if he continues to be tied into the solicitor's original risk assessment.

Let us again look at our example of five cases with an uplift of 25% and the likely fees of the barrister in a routine personal injuries action. Assume that in all cases the barrister settles a statement of case at £75, but two cases settle before any further involvement. In the other three there is a conference at a fee of £150. Two more settle before trial. In one case, as ever the one that turns out to be the 50:50 chance, there is a trial and the brief fee is £750.

	Basic costs	Cumulative total	Success fee	Cumulative total
1 Donoghue	£75	£75	£18.75	£18.75
2 Stevenson	£75	£150	£18.75	£37.50
3 Hunt	£225	£375	£56.25	£93.75
4 Severs	£225	£600	£56.25	£150
5 Wells	£975	£1575	£243.75	£393.75

If the trial wins, the barrister will recover £1575 basic fees, plus success fees of £393.75 that is profit. If the trial loses, he will recover only £600 basic fees, with £150 of success fees to set against the loss of basic fees. The net loss of basic fees is

£825. This is against a 50:50 chance of gaining £393.75. These odds, slightly worse than 2-1 against, are simply appalling. **In fact, if this is how the cases emerge for the barrister, he requires an overall uplift of very nearly 50% on each to make it an even money bet, when the solicitor's original straight estimation of the chances of success of each led to a 25% uplift.** If the first four cases settle with paperwork and some conferences, Counsel requires odds of 2-1 on at trial to break even at the 25% uplift. This takes no account of some cases that will fall below the 50% threshold and have to be abandoned.

Whatever may have happened in the past, cases should predominantly come on to trial now in the 50-60% bracket of success. Proper use of Claimant's Part 36 offers and all the trappings of the CPR in terms of meetings of experts should see to that. Previous approaches to risk assessment could lead to ruin. The Bar must improve at it. Those handling large numbers of CFA cases at the same uplift as solicitors have only survived because of statements of case in numbers, and considerable good fortune in terms of insurers' incompetence. Barristers must appreciate that if the case looks attractive at an 80% chance at the beginning, the commercial uplift just to break even, and assuming paperwork and pre-trial conferences is not 25% but somewhere between 35-50%. Precisely where in that bracket cannot be ascertained until an audit of the work is carried out. Solicitors must appreciate why it is that counsel needs to charge a higher uplift, and obese feline images must not come to mind. If there is to be little paperwork in the light of reforms, and counsel is basically to advise on evidence and fight the trial, the CFA will have to be entered into at an uplift that is then commercially viable i.e. 100% on the remaining 50:50 case. If there is paperwork and early advisory work, the uplift can be less, but cannot approximate to the solicitor's original assessment. Solicitors already make costs and success fees to put aside on the cases that settle under the protocols, before the Bar gets a look in.

Conclusion

1. It is a fundamental mistake to equate the uplift to break even with a straight application of the chances of success of a case, unless the risk assessment is carried out with full instructions on the eve of trial.

2. While it may be possible in “bespoke” CFA’s, for high value commercial and medical negligence actions, to have an agreement on graduated success fees that increase as the case proceeds, it is entirely unrealistic in the enormous number of rank and file actions. It may be possible, in similar high value cases, to enter into a series of C.F.A. agreements covering different stages of the litigation. However, again, it is entirely unrealistic to expect such arrangements in huge numbers of basic cases. The current uninformed perception of solicitors and the public expects the barrister to be tied in to the overall agreement when he is first asked to advise. There is thus only one opportunity to assess the risk at the outset, which must cater for all the contingencies. The chance of success as then perceived is but one of the factors in that assessment.

3. The obvious way out is to provide for the specialist services of the Bar as a disbursement within the framework of the policy of insurance. Oddly, this line has yet to find favour. Ultimately, as the current reforms bite and solicitors take over much of the lower and medium value work from the Bar, it may be the only way to get decent barristers to do the work.

4. The Bar can probably manage under the old ad hoc arrangements until the Access to Justice Act 1999 comes into force and the insurers start to pay the uplift and the premium.

5. The Bar should prepare solicitors and lay clients for the fact that, in the near future, if they want the skill of counsel to argue the case, the uplift will be higher than the solicitor’s agreement with the lay client.

6. Under the Access to Justice Act 1999 it should not matter to the solicitor or the lay client what counsel’s uplift is. The Bar should be ready to support the claimed success fee by reference to contemporaneous risk assessment, but also, when it comes to justifying a higher level of success fee, providing arguments along the lines of the above examples.

7. Solicitors and barristers alike should make a supreme effort to get basic “underwriting” data upon which decisions can be made and to justify what the judiciary may, at first glance, see as excessive uplifts when challenged. I do not underestimate the difficulty of the task. Nevertheless, data should be collected by “case type”. The original assessment along with the actual risk perceived just before trial or settlement should be noted. The basic costs recovered and the success fees can then be added, to get tables rather like the examples above. In the long run our accuracy at risk assessment can be measured and our approach altered in the light of experience. The data could be collected and used in other ways, for instance by reference to the bracket of risk in the original assessment. It may be that risks at certain levels tend to be habitually under or over-estimated. Again, we can correct our mistakes.

8. One thing is certain. If we tie ourselves in to the original uplift of the solicitor, whatever the commercial pressures on our clerks to attract business, we run a huge risk. It is one which the solicitor is evidently unwilling to run given the level at which he has agreed his own uplift. Only if the solicitor’s uplift is too generous is it a viable long-term bet for the Bar. But the solicitor’s uplift is itself to be subject to challenge; and it is unethical for the Bar to be party to inflated uplifts. We should distance ourselves from the solicitor’s assessment, and from now on do our own.

14 February 2000.

The new data

The writer, the CFA Panel and PIBA are grateful for the permission of the Head of Chambers and the Personal Injuries and Professional Negligence Group at 28 St. John Street, Manchester to reproduce the data at the foot of this Paper. However, in order to make sense of the position a detailed description of the nature of the practice is required which should ideally, but has not been, subjected to statistical analysis itself. The limitations in the data should not be underestimated; but operating with mixed assets is an occupational hazard of any attempt to analyse CFA’s in uncharted waters.

The Chambers

28 St. John Street is a mixed common law set averaging about 45 members over the period January 1998-August 2000. It has a long history of conducting personal injuries litigation and principally on the side of the Claimant. There were 20 members of the Personal Injuries and Professional Negligence Group during the period.

9 members of the Group (those accepting over 20 cases) accounted for 85% of the CFA cases accepted (436 of the 508). 8 of those 9 counted PI as their main if not exclusive specialty. 1 member accepted 133 such cases alone. The second highest total was of 84 cases and the 7 other members making up the 85% accepted between 21-41 cases. 4 members accepted between 10-20 cases and the remainder 1-4 cases.

The ethos and profile

The ethos in Chambers from 1995 was to commit to CFA's as a group to see if they could be made to work. The 9 members who constituted 85% of the database during the period were juniors and all truly specialised in Claimant PI work for their varying levels of call and experience. In the middle and junior end of Chambers, the number of cases accepted on a CFA basis largely reflected the overall number of all personal injuries and clinical negligence cases accepted by an individual. Higher up Chambers, where more clinical negligence cases were accepted, the overall proportion of CFA work to an individual's practice was much lower. It is extremely important to realise that a high majority of the cases taken on in the 15% population accepting only 1-20 cases were in fact taken on by niche specialists who had little need to look for CFA work. The 15% population did not represent "dabblers" in terms of the overall number of cases accepted by them.

The solicitor client base was largely that of specialist Claimant's firms in PI, or firms with specialist departments, but covering all levels and types of work from running down accidents, disease cases, trippers, accidents in the workplace etc. Competence was, of course, variable but from the standpoint of specialism. On the whole it was relatively high, often outstanding. Just as the Chambers' profile was for specialism,

so the solicitors' profile was not based on "dabblers". Extrapolation of the experience at 28 St John Street across all chambers and solicitors must bear this mind.

Attitude to risk assessment

The early attitude to risk assessment could hardly be said to have been scientific and largely constituted acceptance of the same uplift as that of the solicitor. Generally this was the stipulated term of the solicitor and Chambers' perception in the period 1995-1998 was that overall the uplifts being charged in the infancy of CFA's were sufficiently high for Chambers to break even on the same uplift as the solicitor. In the broadest sense this is what happened, although a small loss was made largely as a result of the turn in the tide on deafness work and limitation in those claims in the mid 1990's. However, as time went by and solicitors became more experienced in assessing uplifts (or started to use them as marketing tools to attract business), it became the writer's perception that the uplifts then being suggested by solicitors were insufficient for the Bar to break even: hence the writing of the above Paper which was presented in an earlier draft in November 1999 to the Chambers' solicitor client base. After that date Chambers has moved gradually to being more proactive on risk assessment and slower to accept simply the solicitor's assessment. However this remained an uphill struggle until the Access to Justice reforms and the full formulation of the CPR, which did not come until the summer of 2000. Hence, the data covering January 1998-August 2000 is based to all intents and purposes on accepting the solicitor's uplift.

Initial rejection and later discontinuance

It will be seen from the appended table that only 37 cases were refused initially while 508 were accepted. This will probably be viewed by most as a staggeringly high rate of acceptance but reflects the specialist nature of the solicitor client base and Chambers. Of the 508 cases accepted during the period 247 (49%) have been completed within the parameter of cases completed and *fees actually paid*, which was the method of the survey given the lack of customised software. 20 cases have been discontinued so far, nearly 10% of the completed cases which is not a high proportion but still a significant one when it comes to overall risk assessment. The writer's perception is that while there is often an early fall out rate, the rate flattens during the

conduct of the remainder of the interlocutory proceedings until close to trial when difficult decisions again stand to be taken. The drop out rate is unlikely to be less than 10% of the 51% of cases still to be completed and it will be statistically the more significant given the comparatively higher fees that will stand to be waived at later stages of proceedings. The comparatively low rates for discontinuance also reflect the high number of cases as well as the specialism: only with the volume and experience can one really begin to accept the rough with the smooth and avoid being overcautious.

Paperwork

Another important feature of the Chambers' profile during the period was that in the large majority of the cases barristers had the early paperwork and a proper opportunity to advise before committing to trial. Base fees accrued and uplifts were generated on this work, short of the risk of trial itself. In recent months, there is a noticeable movement towards solicitors drafting their own statements of case, taking their own views on a case and still expecting counsel to be prepared to take those that do not settle for trial on CFA. Gradually solicitors are beginning to understand that we cannot accept such CFA's on anything like the uplift originally assessed by them. Resistance is still being met and "favours" expected, though as pre-April 2000 agreements between solicitor and client move out of the system, in which the client still has to find the uplift, the situation should improve.

Overview across the whole Group

The turnover of recovered base fees in the completed cases has been £65,423.24. It has generated success fees of £15,579.44. In the course of that generation £20,255.40 base fees have been waived through defeats and abandoned cases. There has thus been a loss of £4,675.96 on the total of base fees of £85,678.64, assuming that the lost base fees would have been recovered entirely, whether by agreement or on detailed assessment. Taking a broad brush by discounting that loss for the vagaries of recovery by 10%, the loss is something in the region of £4,200 or 5% of the turn over of base fees. This has been achieved on an average uplift of 36% across the accepted cases, which is likely to have been so close to that of the solicitors' overall rate of uplift in the same cases to make no difference when comparing them.

Detailed lessons

Success : defeat ratio at trial and profitability

Examination of the figures shows that of the completed cases (247) only 16 have been fought and lost at trial and 20 discontinued before trials, giving only 36 failures in 247 cases. An unreasoned intuition would lead one to suppose that if 211 cases had come to *success* compared with only 36 to *failure* there ought to be a substantial profit. The hypothesis in the earlier paper, which strongly weights success or failure *at trial* as ultimately determinative of profitability for the Bar, is supported on any view. Assuming that little in the way of base fees was lost in the 20 discontinued cases before the major cost of the trial (say, sufficient to account for the £4,200 loss in broad terms, so as to make the remainder of the analysis break even), effectively 16 defeats after a trial undid all the good work of 26 victories after a trial and 185 settlements.

Ratio of success at trial itself

It is also interesting to observe that the success : failure ratio *at trial* [for present purposes *after the delivery of the brief* because the figures were not analysed for those settling] itself was 26:16, indicating that the actual success rate *at trial* was 62%, only slightly above the hypothesis of cases coming on to trial in the 50-60% bracket of success that was used in the original Paper. Again, we should bear in mind the specialist profile of all concerned and there can be little doubt that, without that edge, losses would have been more substantial. A 62% success rate *at trial* (essentially good litigation on both sides) led to an overall loss even with 185 settlements into the bargain. The old days when Defendants often went to Court unprepared and to settle appear to be over.

Likely result of the remaining cases

There is further and good reason to be comparatively gloomy for the remaining cases to be completed in the batch.

The analysis indicates that difficult and lengthy trials upset the figures to an enormous degree. One individual barrister had just such a misfortune: of 21 cases coming to a conclusion he had successfully settled 19, fought 2 losing only 1, and discontinued 0. So little had he made in profit on the settling cases, and it was always likely that of the 2 trials he would lose the longer more difficult one with the most riding on it, that he waived £5,204 base fees and recovered only £908 uplift with £4,842 base fees. The net effect was to cut his base fees by nearly half over all 21 cases for the sake of one defeat.

It is complex, and not yet susceptible to even tentative analysis from the figures, but there is more than Murphy's Law to the losing of the long/expensive rather than the short/cheap trial and the knock on effects it has in terms of the balance of uplift and loss generated. Firstly, it is not surprising that the cases originally assessed by the barrister as being the easier cases in fact turn out, even if not settled, to be slightly easier than the remainder. While more likely to win them, there will be less to bank by way of uplift on those base fees because the percentage uplift will have been set at a lower rate, irrespective of the length of the trial. In addition, the settlement of a case always lies in the hands of the insurer who, if the wind changes, can bail out and reduce his exposure to costs and the Claimant's barrister's entitlement to base fees and hence uplift to bank. The Claimant's barrister's opportunity to settle is governed not just by the insurer's decision but by the Claimant's own view and the need to maintain the highest ethical standards. The longer the trial the stronger will be the insurer's position over a wide batch of cases. Experience shows that, for a Claimant in routine PI litigation, brevity and control of the trial lead to success. By the time the case enters its third or even its second day, the Claimant often has an uphill struggle. As a generality, the longer the trial the more likely the Claimant is to lose. [In cases settling short of an actual hearing but after delivery of the brief, any uplift carries less weight because the brief fee is usually abated. It is a mistake to believe that *trials* will look after themselves if 100% is allowed for the Bar.]

Leaving aside individual misfortune (coming about with no lack of skill or loss of nerve to the detriment of the lay client) projected results for the remaining 261 cases (51%) must surely be less good than for the completed ones. If loss of profitability is

heavily related to loss at trial, intuition and reason suggest that if the cases have not settled or fought in early course, they tend to comprise what have turned into the more difficult cases and with the most costs riding on success or defeat. The data shows that in the unpaid cases, where many have yet to be tried, the costs already outstrip those of the paid cases. These are the very cases set out in the hypothesis of the earlier Paper – the nightmare where the worst runners turn out to carry the highest stake. The Bar is not bedevilled by bad risk assessment in terms of establishing the then chances of success. The problem is that even good early risk assessment still leaves the Bar with the worst runners at the end – the one's that have not settled.

The 85% majority experience – the true lessons

Readers will remember that the 15% population taking the fewest cases were largely not dabblers in terms of skill and experience but in fact constituted the most highly refined population in terms of the proportion of cases accepted by them. Their refusal and discontinuance rates were not substantially different from the overall population but they were approached to do CFA's on an infrequent basis. Such a population, 15% in 28 St. John Street, would be a much smaller fraction of the entire population of the Bar who potentially stand to do PI litigation on CFA. The true lessons for the Bar (and those for 28 St. John Street now that CFA litigation is of much higher turnover) are to be found in the results of the 85% population.

If the figures for the 85% population are extracted for analysis on their own, the picture is bleaker still on the basis of the same uplift as the solicitor. The base fees generated by the population were £44,556.68 (68% of the total base fees from 85% of the total case numbers). They were thus generating lower base fees (and hence less uplift to bank) by comparison with the 15% population. In order to do this they waived £19,280.40 base fees (total banked and waived base fees £63,837.08) against uplifts of £11,011.06. There was a loss of £8,269.34 on a turnover of base fees of £63,837.08. Discounting the loss by 10% for the vagaries of recovery of fees, the loss is £7,442.41 or **11.66% of turnover**. This percentage is **2.33 times higher than the entire population**, leaving out the most refined but previously low turnover population. **Even when the application of the cap, no longer applicable, is born in mind, the loss is probably in the region of 10%.**

The practical lessons for risk assessment in routine PI litigation

The only way to break even if tied in to an early risk assessment is to make allowances for the nature of the adverse risk and/or to be very careful indeed in committing to borderline cases at the outset *or those where experience shows that the trial is likely to be of comparatively long duration compared with the generality of the barrister's risk profile.* In the sphere of PI work experience shows that cases of repetitive straining injury take much longer to try than most other PI cases. Likewise, stress at work cases. Both are cases where insurers are more likely to fight than to settle however the Claimant's team view the merits. It is much less risky, although it would require nerves of steel, to have a practice entirely made up of RSI cases, where all cases are likely to carry the same stake at trial for success or failure, than to take on a handful of difficult cases that entirely upset the risk assessment of the majority remaining. It is suicidal to do so at less than 100% uplift however the merits are viewed.

The plain fact is that some types of PI litigation, even where the merits can truly be said to be over 50%, are unlitigable on CFA, even with a 100% uplift, from the point of view of an individual barrister with a mixed PI practice who simply wants to balance his profile of risk. The data, coupled with experience, show that to give way to pressure from a solicitor to take the odd difficult cases, for old time's sake or the sake of continuing business, is a big mistake from the point of view of balancing risk and overall profitability. Sentiment and marketing have their place but no one should be under any illusion as to the consequences. These are cases (perhaps where solicitors are under pressure from a Trades Union under a collective agreement requiring all cases with merits over 50% to be taken or where the solicitor has made a mistake in initial risk assessment) where enlightened firms realise that the only way to litigate is to increase their own uplift slightly across the practice, which they can do relatively easily, and then carry counsel as a disbursement in the few cases of this type. The writer knows no barristers with the temperament or inclination to run RSI cases exclusively (and for the Claimant), or other such combination of high-risk cases all the time. If this sort of litigation and analogous types in other spheres of practice are to remain cost effective for the Bar one of the suggestions from the original Paper

for Counsel's fees to be treated as a disbursement is consistent with the data and reasoned analysis. Readers can extrapolate into their own practices for similar types of case and be on the look out for them.

Unresolved theoretical problem on detailed assessment

There remains a practical problem, intertwined with an ethical problem, in assessing the uplift. How will the Courts approach the need to spread the risk? An individual barrister because of his own risk profile may need to fix a different uplift from another barrister in order to balance his profile to break even. One barrister's 70% uplift RSI case is another's 100% case and another's outright refusal. Will the Courts order the paying party to pay all the higher uplift, or leave it to the Claimant to contribute the final slice, which could be substantial? Or will the barrister not be paid so that he refuses a similar case next time? Is the barrister ultimately to prove his risk profile to justify his need of a particular uplift (something currently impossible and surely not desirable at any time)? Will the Courts allow the slight uplifting of what would otherwise be lower uplifts across lower risk classes of litigation to fund, in a rough and ready way the more difficult and lengthy cases, but those nevertheless with a greater than 50% chance of success? Is there really any room under CFA litigation for cases in the 50-60% chance of success bracket (or even the 50-66% bracket) when they disrupt so badly the viability of the whole? If a rough and ready, but fair way cannot be found for both solicitors and barristers to balance the book there are serious implications for *access to justice*. The problem is particularly acute for the Bar and deserving cases may well be turned down if a narrow view is taken of the detailed assessment of uplifts.

Conclusion

It would nevertheless be a big mistake to think that CFA's are unworkable. Indeed, experience and the collected data shows that they are far from that. By and large this has been successful litigation in an experimental phase of the new regime. What is required is to realise that:

- 1. If the risk is to be born by the Bar early in the litigation (and only then if paper work and advisory fees are to be available) the uplift needs to be**

higher than that of the solicitor in routine PI litigation. 4 factors combine to support the hypothesis in the earlier Paper.

- ◆ There has been a loss of about 10% shown in the majority and more representative population data at 28 St. John Street, based on essentially the same uplift as the solicitor.
- ◆ The 10% loss was based on what will probably turn into the less risky batch: time will tell but reasoning suggests it strongly.
- ◆ Solicitors' uplifts will now be challenged by insurers much more readily and this can only drive down the solicitors' own assessment of uplift in the future, widening the gap required for the Bar to break even still further.
- ◆ It should be remembered that the data was based on a specialist profile, both of barrister and solicitor. Generalists, both barrister and solicitor, will not find it easy to achieve the same results in absolute terms. Only if the Courts will allow the more generous interpretation to spread risk on detailed assessment will litigation break even. Anything less and there will not be the pool of barristers available to carry out their function in the overwhelming interests of the public.

The conclusion can only be that the overall rate of uplift previously charged at 28 St. John Street cannot be viable for it in future and still less for the Bar as a whole. The hypothesis leading to a success rate for a barrister of between 35-50% for the same CFA assessed by the solicitor at 25%, entered early and with paperwork, appears to be holding good. The Ready Reckoner on the Bar risk assessment form is useful as a starting point only. As Lord Diplock said about the computation of damages for future losses: there is only one certainty, the award will either be too high or too low. The same is true of early risk assessment and the Bar is left with the cases where the risk deteriorates. Risk assessment that does not allow for this almost universal truth, never mind hypothesis, is doomed to fail even in the short to medium term.

2. **If solicitors are to do their own paper work and form their own view on the merits, there is nothing in it at all for the Bar to commit itself until just before trial. A proper uplift commensurate the risk at trial irrespective of the solicitor's uplift should then be charged.** It does not matter to the lay client what the uplift is for CFA's first entered into after 1st April 2000 – there are adequate safeguards against the unscrupulous in the Rules for detailed assessment.

If, but probably only if, this approach is adopted to minimise the risk in potentially troublesome cases, the uplift in agreements that are entered into early in the litigation can approximate to the bottom end of the bracket given by way of example above.

3. **Comparatively lengthy and/or high-risk cases *compared with an individual barrister's current risk profile* are contra-indicated unless he/she positively wants to gamble. Even then, and in line with most forms of betting, *the bank presently appears to have the edge over the barrister in the long run.*** In any event such cases are for the experienced and specialist only, and then with reasoned analysis and full knowledge of the dangers. The sooner solicitors realise that if they want specialist counsel to argue these cases they should retain them as a disbursement the better.

Final comment

The writer is aware that the above attempt at analysis is crude and probably woefully short of anything approaching a statistically cogent thesis. The data from 28 St. John Street, we may be told, proves nothing significant. And yet it reinforces the belief that the original hypotheses are not so wrong that they should be abandoned in favour of some other system of belief as a basis for current action.

28 St. John Street continues to run a substantial CFA practice and intends to continue in the longer term, applying the lessons of the past, learned at a time when Legal Aid and Union Funding covered the vast majority of the work. It is important for other chambers without that easy learning curve to apply the lessons quickly.

There is no doubt that the hypotheses will require refinement in the light of data that should become available in the fullness of time. It should monitor at least the risk across types of case, values of case and levels of original assessment of uplift. Chambers can monitor their assessment and outcome in comparison with the solicitor's uplift. Individuals and Chambers should be provided with their own current risk profile against which to measure the decisions that must be made. It seems less important to assess a theoretical uplift immediately before trial or settlement, as envisaged in the original Paper. The above data will give a much more robust analysis through the ratio of trials won to those lost, as developed in the above text. Perhaps a system of graduated success fees, rejected as unworkable in the original Paper, could in fact be worked up into a scheme of more general application, in line with base fees in other fields of work.

All Chambers and members of the Bar should take part in providing the data. A seminar is urgently required to debate CFA's across the experience of the whole Bar, so as to ensure that the software currently under production provides the correct fields to test the best current hypotheses. Those actually doing CFA's have only rarely been propelled forward to serve on committees and all those with experience should now come together.

But decisions on risk and attempts to justify uplifts on detailed assessment must be made now, not in the future. The CFA River appears not so much polluted as having dangerous stretches. An attempt to avoid those stretches, based on reasoned belief tested as best it presently can, is better than trusting to luck and the current.

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[Minimally amended (parts in square brackets): 5 November 2003]

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