JUDICIARY OF ENGLAND AND WALES

THE CASE FOR A CLAF

KEYNOTE SPEECH BY LORD JUSTICE JACKSON AT THE SOLICITORS' COSTS CONFERENCE

2 FEBRUARY 2016

1. INTRODUCTION

1.1 This lecture.[1] The purpose of this lecture is to propose that a contingent legal aid fund be established. The obvious bodies to do this are the Law Society, the Bar Council and CILEx acting jointly. I therefore invite them to consider this proposal.

1.2 Definitions. In this lecture I use the following abbreviations:
"ATE" means after-the-event insurance.
"CFA" means conditional fee agreement.
"CILEx" means the Chartered Institute of Legal Executives.
"CLAF" means contingent legal aid fund.
"DBA" means damages-based agreement.
"FR" or "Final Report" means Review of Civil Litigation Costs Final Report
"LASPO" means the Legal Aid, Sentencing and Punishment of Offenders Act 2012.
"PR" or "Preliminary Report" means Review of Civil Litigation Costs Preliminary Report.
"QOCS" means qualified one-way costs shifting.
"SLAS" means supplementary legal aid scheme.
"TPF" means third party funding.
"1999 Act" means the Access to Justice Act 1999.

1.3 Initiative of Lady Justice Hallett. Hallett LJ, a former chairman of the Bar, has always been a staunch supporter of the case for establishing a CLAF. She has recently suggested to me that the time has come to look again at this issue. I agree and am most grateful for her encouragement.

2. BACKGROUND

2.1 What is a CLAF or a SLAS? Both a CLAF and a SLAS are self funding schemes, which have been proposed as methods of funding litigation. The scheme pays the claimant's costs, win or lose. If the claimant succeeds, the CLAF recovers its costs from the other party and also a share of the proceeds of the action. The normal beneficiaries of such a scheme are claimants, although the scheme could also support counterclaiming defendants. The essential feature of a CLAF is that once it is

[1] I am grateful to my judicial assistant, Stephen Clark, for his considerable assistance during the preparation of this paper.

established it is expected to stand on its own feet and be fully self-financing. A SLAS on the other hand is a self-funding mechanism which is built into or added onto an existing publicly funded legal aid scheme, and administered by the relevant legal aid authority.

2.2 History. In 1978 JUSTICE published its original proposals for a CLAF. Twenty one years later in 1997, in the run-up to the 1999 Act and removal of personal injury cases from the scope of legal aid, a range of proposals for CLAFs were made by the Bar Council, the Law Society and the Consumers Association.[2] None of these proposals were implemented, as the Government chose instead to promote and enhance CFAs under the 1999 Act reforms. However, provisions were included within the 1999 Act to provide for a CLAF or SLAS scheme: see section 58B of the Courts and Legal Services Act 1990, which was inserted by section 28 of the 1999 Act. These provisions have not yet been implemented, but they could be. Proposals for a SLAS emerged again in reports by the Civil Justice Council in 2005 and 2007.

2.3 The Bar's CLAF Group: 2008-9. In November 2008 the General Management Committee of the Bar Council established a Policy Advisory Group ("PAG") and also the first sub-group of PAG, to be known as "the CLAF Group". Guy Mansfield QC was chairman of the CLAF Group. The remit of the CLAF Group was to inquire into the possibilities of creating a CLAF. The CLAF Group produced a preliminary report[3] proposing the creation of a number of charitable contingent funds ("CCFs"), which would operate in different areas of litigation. The CLAF Group published a further report[4] on 31st July 2009, amplifying its original proposals. The CLAF Group accepted that no large scale CLAF could be established, which would take over as the principal means of funding personal injury claims etc. It also identified a series of issues which would need to be addressed in relation to setting up smaller CLAFs: in particular, the level of contribution from successful claimants; how to meet adverse costs; initial funding and the returns required by investors in the CLAF.

2.4 My Final Report: January 2010. I received a large number of conflicting submissions on this issue during the consultation phase of the Costs Review.[5] I attempted to devise a workable financial model for a CLAF with the assistance of my accountant judicial assistant, but was unsuccessful. This was in part because there were numerous other issues to address in a short timescale and the resources of the Costs Review were limited (two judicial assistants, one clerk and myself). The fact remains, however, that a number of CLAFs and one SLAS have been successfully established in overseas jurisdictions, albeit on a relatively small scale. These will be discussed in section 3 below. My final recommendation on this issue (recommendation 16 out of 109 recommendations) was:

> "Financial modelling should be undertaken to ascertain the viability of one or more CLAFs or a SLAS after, and subject to, any decisions announced by Government in respect of the other recommendations of this report."

2.5 The possibility of a SLAS fades out. The Government initially expressed interest in developing a SLAS.[6] The Ministry of Justice has not, however, pursued that option. The idea seems to have faded out. There are now other demands upon the department's limited resources.

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[2] See "CLAF – An idea whose time has come", Bar Council 1997; "Proposals to link legal aid and conditional fees", Law Society 1997; CA Policy Paper on CLAF, 1997.
[3] *The Merits of a Contingent Legal Aid Fund: Discussion Paper*, dated 27th February 2009
[4] Entitled *Second Discussion Paper*
[5] See the Costs Review Final Report, chapter 13, section 2.
[6] See CP 13/10 section 2.6.

2.6 UCL/Bar Council "CLAF" seminar on in June 2011. On 21st June 2011 a seminar[7] was held at University College London, chaired by Professor Dame Hazel Genn, specifically to discuss the question of a CLAF. The speakers were Peter Lodder QC (then chairman of the Bar), Guy Mansfield QC (chairman of the CLAF Group) and Bob Young of Europe Economics, who was researching into the viability of a CLAF or CLAFs on behalf of the Bar. Mr Young presented his findings so far, which were cautiously optimistic. The general view of those who attended was that this project should be pursued. Small scale CLAFs might make a modest contribution by funding at least some litigants. The Chancellor of the High Court stressed that as legal aid was not available for cases in the Chancery Division and as CFAs were seldom used, there was a demand for a CLAF in many areas, for example proceedings in the Patents County Court, small value property disputes and other general chancery cases. A solicitor from one major clinical negligence firm suggested that contributions to the CLAF should come from the solicitors' costs, not the client's damages. He pointed out that in past times solicitors in legally aided cases used to contribute 10% of costs recovered to the Legal Aid Fund. Professor Martin Chalkley[8] (who had done much work for the Bar over the years) argued that funding of the CLAF should not be related to the level of costs incurred. Any system which rewarded on a 'costs incurred' basis drove up costs and was to be avoided.

2.7 Other speakers at the seminar. Professor Moorhead expressed support for CLAFs, but commented that after implementation of the FR reforms they would have to "walk a tightrope" between DBAs and reformed CFAs. He pointed out that a smaller group of cases would be easier to manage in terms of risk. Also it would have to be considered whether claimants approaching the CLAF should pay an application fee. Anthony Speaight QC addressed the issue of adverse costs. He suggested that CLAFs might be given a favourable wind by a number of legislative reforms. In particular, consideration might be given to exempting CLAFs (because of their charitable status) from liability for adverse costs.

2.8 CLAF project then went into abeyance. I understand from Guy Mansfield QC that the CLAF project went into abeyance after 2011. Understandably the profession wanted to see what the scene would be after the FR reforms had been implemented and after any legal aid cutbacks had taken effect.

2.9 Subsequent developments. Most of the FR recommendations have now been implemented. CFA success fees and ATE premiums have ceased to be recoverable. LASPO permits the use of DBAs, but for a number of reasons (discussed elsewhere) the uptake of DBAs has been low. There has been a raft of case management and costs management reforms. QOCS has been introduced for personal injury cases. Most unfortunately (and contrary to my advice in the FR at page 70 para 4.1), there have been drastic cutbacks in civil legal aid. There has been a steady growth in third party funding of civil litigation, which is in line with the proposals in FR chapter 11. When taken collectively, all these developments indicate that the time is now ripe for reviving the CLAF proposal.

3. THE POSITION OVERSEAS

(i) Hong Kong

[7] Jointly organised by the Bar and UCL
[8] University of Dundee

3.1 The Hong Kong SLAS. The most famous self funding scheme is that operated by the Hong Kong Legal Aid Department, established in 1984. It is a SLAS in the true sense, funded by a levy on damages recovered. The levy is 10%[9] in respect of cases that proceed to trial and 6% in respect of cases settled before the brief for trial is delivered. Whilst applicants to the SLAS are means-tested the eligibility limits are higher than those which apply in the Ordinary Legal Aid Scheme ("OLAS").[10] The SLAS scheme was started up with a $1 million Hong Kong dollar loan (subsequently repaid) provided by the Jockey Club (which has a similar role to lottery funding in the UK). The scheme has been running profitably, in the sense of covering both its expenditure and administration costs, for 31 years. The scheme covers a range of personal injury cases from road traffic to clinical and dental negligence.[11]

3.2 Statistics. For the historic figures, please see chapter 18 of the Preliminary Report. Since the publication of that report Hong Kong's SLAS has continued to flourish and attracts a broad range of strong support from the Legislative Council, HK Bar Association and Law Society. Nevertheless the SLAS remains a small part of the overall legal aid scheme in Hong Kong. The following figures demonstrate the relative size of the OLAS and the SLAS:

	2012		**2013**		**2014**	
Civil cases (OLAS & SLAS)	OLAS	SLAS	OLAS	SLAS	OLAS	SLAS
Applications received	16 332	201	15 494	197	16 050	238
Refused –						
merits	5 178	32	5 117	21	5 541	42
means	788	0	795	5	911	1
both merits and means	110	0	136	1	134	1
Refused total	5 856	32	5 776	25	6 318	42
Certificates granted	8 028	143	7 239	147	7 351	175

These figures were given by the Legal Aid Department in response to a request by the Legislative Council's Panel on Administration of Justice and Legal Services.[12]

3.3 Expanded remit. In November 2012, the SLAS was expanded to cover an additional range of civil claims – in particular, additional categories of professional negligence. The Legislative Council authorised an injection of HK$100 million as additional funds to support the expansion of the scheme. As at the end May 2014, the reserves of the Supplementary Legal Aid Fund were $189.5 million.

3.4 Proposed further expansion. In the wake of the 2012 expansion, the Legal Aid Services Council set up a Working Group on Expansion of the SLAS with a view to

[9] This figure was originally 12%, but was reduced to 10% in 2005.
[10] According to figures provided at a meeting with the Hong Kong Legal Aid Department in March 2009, approximately 50% of households are eligible for ordinary legal aid; approximately 70% of households are eligible for support from the SLAS.
[11] Originally the SLAS only covered personal injury claims. In 1995, however, with the aid of a HK $27 million grant from the Hong Kong Government, the scheme was expanded to cover claims for medical, dental and legal negligence.
[12] LC Paper No. CB(4) 1511/14-15(01)

reporting on an additional expansion of the SLAS as well as related issues, such as raising the financial eligibility limits for the SLAS as well as the OLAS. A preliminary report of this working group has been sent to the Hong Kong Bar Association and Law Society, who gave their feedback on 18 November 2015. A final report may be forthcoming later this year.

(ii) South Australia

3.5 SALAF. The South Australia Litigation Assistance Fund ("SALAF") was set up in July 1992 with a seeding grant of Aus $1 million. Applications for assistance are considered by an Assessment Panel of the SALAF. If an application for assistance is approved, the SALAF pays the assisted party's costs on an ordinary solicitor/client basis. In the event of success, the SALAF (a) recovers costs from the defendant and (b) deducts 15% of the judgment or settlement sum. If the assisted party is unsuccessful, the SALAF does not meet any costs order made in favour of the defendant. The SALAF has now operated successfully for some 26 years.

(iii) Western Australia

3.6 The Civil Litigation Assistance Scheme. In 2009 Western Australia established a "Civil Litigation Assistance Scheme", a self-sustaining civil litigation fund administered by Legal Aid Western Australia. It supports plaintiffs who are unable to pay the cost of civil proceedings and who would not otherwise be eligible for a grant of legal aid. The Scheme was set up with an initial cash injection of AU$1 million with the hope that, over time, it would grow and enable more members of the public to be assisted.

3.7 Eligibility for support. Applications must be made by a lawyer willing to act for the plaintiff. Members of the public cannot make a direct application to the Scheme. Provided a successful application is made (passing a merits and means test), the plaintiff will be covered for legal fees and disbursements (fees are fixed at a rate of $250 per hour). The means threshold is notably lower than the South Australian scheme – an applicant's gross family income must not exceed AU$80,000 per annum and their assets must be of a "reasonable value".

3.8 Financial arrangement between the Scheme and supported parties. The condition of being supported by the Scheme is that successful parties must pay into the fund all costs recovered and 20% of any damages awarded. If the applicant is unsuccessful with their litigation, then they will not be required to make any payment to the Scheme, but may be responsible for the other party's costs.

(iv) Other Australian states

3.9 Disbursements only. Victoria, Tasmania and Northern Territory all have schemes which cover disbursements only. These are less relevant for present purposes. For an account of the "Law Aid" scheme in Victoria, please see PR page 181 paragraphs 2.13 and 2.14. Those paragraphs are still accurate.

4. WHERE NEXT FOR ENGLAND AND WALES?

4.1 The growth of third party funding. In the last few years there has been a huge increase in the volume of third party funding. Many articles in the legal press bear witness to this development. See, for example, "Third Sector" in the Law Society

Gazette of 16th November 2015 at pages 12-14. The reasons for the expansion of third party funding include:
(i) CFA success fees and ATE premiums are no longer recoverable under costs orders.[13] This means that CFAs no longer stand out as the most profitable way to fund civil claims.
(ii) There is a growing appreciation within the legal community that TPF is not officious meddling in someone else's litigation. On the contrary, when conducted properly, it is now recognised as a 'respectable' method of funding civil litigation. It is in the public interest that there should be as many funding options as possible open to litigants.
(iii) Properly managed TPF not only assists litigants in appropriate cases. It also generates good returns for shareholders.
(iv) The introduction of costs management (which litigation funders warmly welcomed) makes it much easier for funders to assess risks and benefits.

4.2 So what? Why should a CLAF work now? The success of third party funding illustrates just how well a CLAF might do. If the Law Society, CILEx and the Bar Council are willing jointly to promote the establishment of a CLAF, it would in effect operate as a not-for-profit third party funder. It could support:
(i) Some 'ordinary' commercial or other cases, assessed in much the same way as litigation funders assess new claims;
(ii) Some 'deserving' cases. By this I mean claims for individuals or firms of modest means, where the likely level of damages is not such as to attract one of the established litigation funders.

4.3 The difference between a CLAF and other third party funders. Unlike other funders, the CLAF would not have owners or shareholders creaming off the profits. Instead it would plough all profits back into (a) building up reserves and (b) future litigation funding. The CLAF would be an independent body established by the legal profession in the public interest. Its function would be to promote access to justice.

4.4 Who should administer the CLAF? The Bar, the Law Society and CILEx would need to appoint experienced managers. There is no shortage of such people in the City.

4.5 Who should select the cases to be supported? In the past many barristers and solicitors gave up a modest amount of time to sit on committees which considered applications for legal aid. It would be possible to revive that system. An alternative and perhaps preferable approach would be for the CLAF to employ experienced lawyers, who would evaluate and grade the claims. Ideally the CLAF's costs of evaluation should be recoverable. The evaluation costs could be a fixed sum, determined by reference to the amount finally recovered. It is essential that the cohort of cases supported by the CLAF should be within the discretion of the managers. There should be no entitlement to support as of right, subject to means and merits. This will enable a cautious start up approach to be taken and will avoid flooding the scheme with applications.

4.6 Where would seed-corn funding come from? If the governments and the professions in other jurisdictions have managed to find seed-corn funding, surely England and Wales can do the same? There are a number of possibilities:
(i) Possibly the UK National Lottery might be as generous as the Jockey Club was in

[13] Success fees and ATE premiums are still recoverable in insolvency litigation, but the Government has announced that this will end in April 2016.

Hong Kong. Possibly some charitable foundations would see the merit of the present proposal. Some individual lawyers might be willing to make gift aid donations.
(ii) The UK Government, which has reduced legal aid, might be willing to put up some initial capital for a CLAF.
(iii) The CLAF might raise capital by means of fixed interest coupons or quasi-debentures. Quasi-debentures would offer a more than average return on a bond but would expose the bond-holder to the risks of the CLAF being unprofitable, thereby sharing both risk and reward on the seed capital. I understand that such an arrangement would not prejudice the not-for-profit status of the fund.

4.7 But who would invest in the CLAF? Here are two possibilities:
(i) Individual barristers, solicitors or other professionals may be willing to buy bonds of say £10,000 if they have confidence in the management of the scheme. They would note that (a) investors in certain third party funders have done well and (b) the CLAF does not have any shareholders clamouring for dividends. In this way the lawyers would be contributing to a much needed scheme, while receiving a reasonable return for only a modest risk.
(ii) A bank or similar institution might assemble a "partnership" of institutional type investors, such as pension funds. Each would put in money, buying a bond with a fixed lifetime and decent percentage annual return, in the expectation that after say 10 years the original capital would be returned because the fund would then be in a position to do so. Thus £50 million could be raised by persuading 10 investors each to put up £5 million.

4.8 If the claimant loses, should the CLAF be liable for adverse costs? There are two views on this question. One view is that a not-for-profit funder acting in the public interest should have protection against adverse costs to the same extent as the Legal Aid Agency. Likewise assisted parties should have protection against adverse costs to the same extent as legally aided parties enjoy under section 11 of the 1999 Act. Anthony Speaight QC proposed that this at the 2011 seminar discussed above. The alternative view is that there should be liability for adverse costs on normal principles. This would be an additional incentive for the CLAF to choose cases wisely. Also it would avoid causing injustice to 'innocent' parties. I can see the force of both arguments. This is really a policy decision for others. If the Government is minded to give the CLAF special protection against adverse costs, this would require consultation and probably legislation. Also it would delay the process of setting up a CLAF.

4.9 What happens if there is liability for adverse costs? It is not satisfactory to leave litigants of modest means with meritorious cases at the risk of adverse costs. In personal injury cases (because of QOCS) adverse costs orders are rare and are only made in exceptional circumstances.[14] The claimant or his ATE insurer should bear the residual risk of adverse costs in those cases. In other cases there would have to be an agreement between the CLAF and the claimant as to what costs risk each is accepting. If the CLAF takes on the adverse costs risk, then the percentage of damages to which it is entitled (if the case is won) should be higher.

4.10 How should the CLAF protect itself against the adverse costs risk? The CLAF might take out block or case-by-case ATE cover. Alternatively, the CLAF could self-insure up to a certain point. The CLAF would need a combination of (a) reinsurance above specific levels and (b) catastrophe insurance in the event that adverse costs in

[14] E.g. *Zurich Insurance v Bain*, Newcastle County Court, 4th June 2015: fundamentally dishonest personal injury claim, so claimant ordered to pay defendant's costs.

any year exceed the specified catastrophe level. I understand from Justin Fenwick QC (who was chairman of the Bar Mutual Indemnity Fund for 14 years) that there are a variety of options along these lines which might be appropriate.

4.11 Effect of costs management. The new discipline of costs management will make it much easier for the CLAF to assess the adverse costs risk and to keep tabs on that risk as the action proceeds. Of course, costs management may in the future become a discretionary rather than mandatory procedure. That was recommended in my Final Report[15] and Harbour Lecture[16] and is intimated in Briggs' LJ's Interim Report[17]. In that event, I imagine that the CLAF will usually invite the court to costs manage. Where claimants with meritorious cases are seeking costs management, the defendants are unlikely to oppose. In any event the court may well accede to such applications, even if they are opposed.

4.12 Suppose fixed costs are introduced? The Government has recently announced an intention to fix the costs of lower value clinical negligence cases. That may not be a wise move in isolation. There is, however, a strong case for introducing fixed costs across the whole of the fast track and in the lower reaches of the multi-track, as I proposed in the Insolvency Practitioners Association Annual Lecture on 28th January 2016.[18] This reform would be beneficial to the CLAF in many respects. There would be certainty as to the adverse costs risk. Also the CLAF would avoid all the expense of costs management and costs assessment.

4.13 Conclusion. May I respectfully invite the Law Society, the Bar Council and CILEx to consider setting up a joint working party to take forward the CLAF proposal? Also perhaps the Government could consider (a) bringing into effect section 58B of the Courts and Legal Services Act 1990 and (b) giving any appropriate words of encouragement for this venture.

Rupert Jackson 2 February 2016

[15] See chapter 40 and recommendation 91.
[16] https://www.judiciary.gov.uk/announcements/harbour-lecture-by-lord-justice-jackson-confronting-costs-management/ at paragraphs 4.1 to 4.6.
[17] December 2015: see para 3.8.
[18] https://www.judiciary.gov.uk/wp-content/uploads/2016/01/fixedcostslecture-1.pdf.