

# The advantages and disadvantages of conditional fee arrangements for legal aid



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The conditional fee arrangement was introduced by the Access to Justice Act (AJA) 1999, as an attempt to transfer legal funding from the treasury to the private sector. This occurred as a result of an increasing and ridiculous growth in the cost of legal aid, namely from a few hundred million to well over 2.1 billion pounds from the 1980s to 2000. Moreover, it was not because demand was growing. Rather, number of cases relying on legal aid had decreased.

Due to the need to control budget, Conditional fee arrangements are used to fund many civil cases which legal aid now excludes, and the issues brought about by conditional fee arrangements have been debated over the last decade. The conditional fee arrangements are sometime known as 'no win, no fee' agreements, which are not used for family or criminal matters, but can be used in many types of civil action. The no win no fee concept was first introduced in the UK under the Solicitors Conditional Fee Agreements act in 1995.

The primary reason for the no win no fee system was to make sure that individuals who did not qualify for legal aid could still make personal injury claims, regardless of their personal situation. Section 58 of the Courts and Legal Services Act (CLSA) 1990 permitted the Lord Chancellor to introduce conditional fee arrangements. By 2000 legal aid was actually abolished for personal injury claims, resulting in the no win no fee personal injury claim system being the normal system that most claims work under.

The beauty of the policy is that if you do not win your case, you are not required to pay any sort of fees to your no win no fee solicitor. Instead, the insurance will cover any costs and expenses of all parties involved, including

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your no win no fee lawyer. This allows you the safety and security of knowing that even if you are someone who is financially struggling, you still have the right to make a claim, and you will not have to pay if you for some reason lose your case. If you happen to win your case, you will automatically be compensated for 100 per cent of the fees attached to the personal injury claim.

The purpose of the system is to make sure that everyone involved is covered by the insurance companies. The only fees which are potentially applicable to a person filing a claim are exceptional circumstances or medical negligence cases, which will need to be discussed in advance with your lawyer. Admittedly, based on my research, the only groups of individuals who have really benefitted from this scheme are the lawyers, the claims management companies (CMCs), the banks and the insurance companies, which, is typically the supplier base for this system.

In contrast, the consumers themselves have little but complaints, even though the Conditional Fee Arrangement were targeted to helping them in the first place. The introduction of Lord Justice Jackson's report this year 2010 is new and the effects have not been visible in the current market, though we may look at the theoretical and legal implications that such an upheaval in the Conditional Fee Arrangement this would bring. A major benefit of Conditional Fee Agreements is that it allows many people access to justice, and in addition does not have to receive any funding from the Government leaving them free to fund more serious civil cases.

Because of agreements like these many people have been able to take their cases to court, all that is required is that the client buys insurance against <https://assignbuster.com/the-advantages-and-disadvantages-of-conditional-fee-arrangements-for-legal-aid/>

losing a case. If this requirement is met then it is unlikely that the case will not be taken on by a Solicitor. The Solicitor is also likely to work harder on the clients behalf because it has invested interest. This will then result in more competition between Solicitors and as a consequence of this, the client receiving a better service.

A Conditional Fee Arrangement provides access to the courts for those who cannot afford to pay the attorneys fees and costs of civil litigation. Contingency fees also provide a powerful motivation to the attorney to work diligently on the client's case. In other types of litigation where clients pay the attorney by the hour for their time, it makes little economic difference to the attorney whether the client has a successful outcome to the litigation. Finally, because lawyers assume the financial risk of litigation, the number of speculative or unmeritorious cases may be reduced.

In terms of access to justice, Conditional Fee Arrangement have provided for many who could not qualify for legal aid. From 2000-2005 alone, personal injury cases saw a jump in a million consumers seeking redress Conditional Fee Arrangement. This is likely because of a few reasons. For one, the strict means test introduced by the Access to Justice AJA 1999 has led to the middle income group not qualifying for legal aid, but they are not able to afford legal services either. Secondly, the Access to Justice AJA 1999 has taken away certain civil cases from its funding, personal injury as an example.

Thirdly, claims management companies CMCs have been actively educating the masses as to seeking redress for personal injury cases especially, thus promoting a culture that citizens fight for their rights, and the Conditional Fee

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Arrangement is one avenue that they can do it for free. The statistics speak for themselves. Especially in road traffic accidents, sometimes it is not proportional the damage to apply for legal advice but now it is made possible without the burden of bearing those legal costs. Conditional Fee Arrangement has increased accessibility to justice in a way that legal aid with a budget can never provide.

In terms of cost, in particular the success fee, it has been said to be an incentive, the only incentive for lawyers to ever enter into a Conditional Fee Arrangement. A huge risk of not being paid a cent should equally mean that there should be a larger chance to earn more. Lawyers themselves are taking this risk and in order to maintain a supplier base, a success fee is a must. Currently, the success fee stands at any bonus amounting to up to 100% of the normal legal fees. However, it does not mean that it is up to the lawyer's whims and fancies to set the percentage.

This sum is decided in an agreement between the lawyer and the insurance company, based on the chance of success in a case. Opposition to this has argued that the success fee leads to perverse profits, but statistics show otherwise. Since implementation of Conditional Fee Arrangement, two large firms of claims management companies CMCs have gone bankrupt within a short p of 4 years and this makes us wonder whether doing Conditional Fee Arrangement are way more profitable than regular legal work. The advantages can be summarized as:

- Lawyers acting in any case will be confident and determined. They will have had to weigh carefully the chances of success before taking the case as their fee depends on winning.

- There will be freedom from anxiety of having to pay huge fees.
- There will be no need to pay fees in advance.
- There will be no delays or worries with legal aid applications.

A major disadvantage of the Community Legal Service Fund is that they have a budget in which they have to stick to. Of course they cannot be blamed for this, however criticisms have been made about the way they use the funding to fund civil cases.

It is thought that they tend to fund cases that do not necessarily deserve of public money. Once the fund has run out someone who is deserving of the funding may then have to look elsewhere for help and may find themselves again being denied access to justice. Because Conditional Fee Arrangement works on a no win, no fee basis many Solicitors will not want to take on cases that are not likely to be successful and as a result denying the individual access to justice. Because of this certain legal problems such as clinical negligence have to be state funded because they are more likely to be unsuccessful.

Another major disadvantage is that many solicitors who carry out Conditional Fee Arrangement will not take on a case unless the individual has taken out insurance against losing. However many cannot afford the insurance premiums, this again throws up the problem of many people being denied access to justice because of these kind of circumstances. Having said that it has now become harder to gain access to public money in order to fund a civil claim. Two tests have now been introduced, the merits test and the means test.

These tests are used to see if a civil claim deserves to be funded and how likely it is to be successful, this makes it a lot harder for people to get legal aid for civil cases. The quality of justice has been described by the Citizens Advice Bureau CAB as appalling ever since the claims management companies CMCs have started to act as middlemen for lawyers and clients in setting up a Conditional Fee Arrangement in personal injury cases. Claims management companies CMCs use hard-selling marketing tactics which pressures victims into entering into a contract with them.

Often, they start by saying that they do not need to come out with a cent in seeking compensation but later on in some tiny footnotes they would write that the client may be subject to some payment. Essentially, not paying a cent is true, where legal costs is concerned, but damages are not always enough to pay back the interest rates of applying for a bank loan, which was meant to supply the insurance premiums. Because of the straightforwardness of some cases, some lawyers also take advantage of the situation to drag the case so that they may be paid more legal fees.

Many consumers have complained that Conditional Fee Arrangement cases are so inefficient that they find it hard to resume their daily lives. Some straightforward cases were said to take up to months. The one-way cost shifting is also a disadvantage for the defendant. If the defendant has failed to take up before the event insurance BTE, then he might find himself burdened with high legal costs from the other party when he loses. What is worse is that he also has to pay the other party's success fee, which means he could be paying up to 2 times the price of a normal fee.

This is not fair to the defendant. Another issue is that the defendant cannot control the legal costs of the other party and explained earlier this could be abused. Statistics have shown that the market for before the event insurance BTE is still very premature and hence defendants ending up bankrupt as a result of Conditional Fee Arrangements are a reality. Contingency fees do not guarantee civil justice, or even access to the courts. Lawyers sometimes "cherry pick" only the strongest claims which are most likely to succeed. Not all cases are immediately transparent.

Some require extensive investigation before the chances of success can be properly assessed. Such cases might be turned away because even the initial assessment of their strength is costly and risky. Next, we look at the former aims of Conditional Fee Arrangements. Conditional Fee Arrangements were meant to help those who were too poor for legal advice but failed the means test for legal aid. Recent cases such as *Campbell v Mirror Group Newspapers Ltd* have seemed to imply that Conditional Fee Arrangements are available to just about anyone.

This issue was brought up in the London Seminar as they said that for "Hollywood actress Sharon Stone, footballer Ashley Cole, supermodel Naomi Campbell... none of these were seen denied justice on financial ground". While this does not seem to bring about any problems since it is still applied as a Conditional Fee Arrangements, what we are introducing is a whole new culture of people who tries to take advantage of a no-risk system to earn a quick buck. In the case of Campbell, Naomi sued for breach of confidence, and earned 3500.



To note this case, it was also “ mortifying to find that... they (MGM) were made to pay legal costs in the sum of ? 1, 086, 295. 47”. Lastly, on the point of abuse, it seems that lawyers doing Conditional Fee Arrangements are paid better hourly rates than a normal lawyer. Based on statistics, a Conditional Fee Arrangements lawyer easily earns 103-115% of the normal lawyer fee based in London. Because their demand is not cost-led, it is easy to see instances of over-claiming and over charging of fees.

The Jackson Report this year has led to many changes to the Conditional Fee Arrangements scheme and though the effects have not been felt there has been much feedback. For one, the Conditional Fee Amendment Act 2010 aims to reduce the success fee from 100% to 10% maximum. This is something targeted to help the defendant as there has been much feedback that success fees are perverse to a point of landing people into bankruptcy. However, many such as the Law Society and the Manchester Law Society have spoken up for the lawyers saying that the 100% success fee should maintain.

Many lawyers also seem to object to this move. This goes on the grounds that it is important that there are incentives for lawyers to do Conditional Fee Arrangements work. After all, if they lose the case, they are not paid, and these lawyers are really gambling out there. Based on my opinion, what this amendment does will cause severe repercussions. This will not stop the problem of cherry-picking. Rather, it will result in more cherry-picking because there is a tendency to do almost no-risk work.

Also, this would mean that many people would lose the option to enter into a Conditional Fee Arrangements as supplier base would probably decrease due <https://assignbuster.com/the-advantages-and-disadvantages-of-conditional-fee-arrangements-for-legal-aid/>

to less sure-win cases. Next, to look at the problem of dragging cases to increase profits, this might actually persist and get worse in order to earn more. Hence I would feel that this is an effort, despite its good intentions, that would be difficult to bear fruit. Secondly, there is a proposal to shift costs from the defendant to the claimant. Rather than bearing the full cost, it is suggested that the success fee be paid by the claimant.

Courts have shown an apprehensive attitude towards this as the adversarial system has always been one that has a principle that the losers should pay the winner's cost. This again is a move aimed to help the defendants. However, having this in play would mean that the claimants have less damage to recover. Yet, to look at it from another perspective, this would mean that lawyers can now no longer abuse success fee setting. It would shift the demand of this market to the hands of the claimants. In a way, this provides competition, keeping success fees low and efficient.

It would also solve the problem of case dragging, since lawyers would be pressured by claimants not to take so much time. Although this means more lawyers would exit the market because of low profits, I would feel that it is still an advantage as it increases efficiency and cost. In conclusion, there are many disadvantages and little advantages of the old Conditional Fee Arrangements system as I have researched and analyzed but the new reforms by the Jackson Report might actually be able to solve some of those disadvantages so that Conditional Fee Arrangements become a good substitute for legal aid.