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CONDITIONAL FEES
Working with experts in
"no win no fee" cases
by Keith Carter

Working with experts in 'no win no fee' cases

Keith Carter discusses some of the options available

AN INCREASE in conditional fees is inevitable. In its wake solicitors can no longer just be good lawyers, they need to be business managers and risk assessors. 'No fee' as a result of 'no win' involves some hard decision making, possibly without information from experts.

This article discusses the role of non-medical quantum experts in 'no win no fee cases', particularly in the initial stages when lawyers need to determine key factors. It discusses some possible ways forward under the new regime, pointing out the positive and negative points of each approach.

The dilemma however is that experts must remain impartial so any fee ought not to be linked to their assessment as to a case's strengths or weaknesses. Some of the options are set out in the box opposite

Summary

Overall, 'no win no fee' is still in its infancy and many aspects need to be given greater consideration for it to provide a viable system. To be successful, not only must 'no win no fee' provide access to justice for plaintiffs, but the regime should also recognise the business pressures facing solicitors and the importance of expert witnesses remaining completely impartial.

The most likely development in the short term will be specific individual arrangements between solicitors and the experts they normally use. Although whether this is workable, or indeed beneficial into the long term future, is questionable largely because of the need for experts' neutrality.

As a response, at Keith Carter & Associates, informal advice is offered in combination with a preliminary report which would be used if the case went ahead. Such a report would then count as initial research and fee'd at the end of the case.

The inevitable increase in 'no win no fee' demands a defined approach which meets the needs of plaintiffs, the legal profession and expert witnesses. It is too important to be allowed to develop on an adhoc basis between individual practices and their selected experts ■

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1. Informal telephone conversation between solicitor and expert witness to gain opinion of expert.

Strength: Quick response, probably acceptable if solicitor is only seeking initial feedback from expert, to be followed up by more detailed analysis. Works best when solicitor/expert have previously worked together.

Problem: Initial discussion may indicate strong case. Subsequent detailed analysis from expert may highlight problems. Could compromise independent nature of expert. Potential vested interest in advising case to go ahead, particularly if expert is trying to build up work.

2. Preliminary report from expert witness. Set at a nominal fee.

Strength: Quick response, probably acceptable if solicitor is only seeking initial feedback from expert, to be followed up by more detailed analysis. Works best when solicitor/witness have previously worked together.

Problem: Initial consideration may indicate strong case. More in-depth research could highlight problems and weaknesses.
Compromises access to justice. Limited time spent on a case and restricted research may identify problems which more in-depth consideration overturns.

3. Independent arrangement between solicitor and chosen experts. Solicitor pays a retainer – requests preliminary reports as necessary.

Strength: Gives security to expert and solicitor. Plaintiff receives appropriate attention

Problem: May be difficult for smaller firms of solicitors to establish such ties with experts(?)

4. Provide panel of experts by professional association, offering advice service to solicitors (as suggested by Lord Woolf).

Strength: Provides assured level of expertise via professional association.

Problem: Should the expert who gives initial assessment be excluded from that case thereafter?

5. Kitty to fund roster of experts. Participating experts provide independent reading of papers and give opinion on strength of case for which a nominal fee is received.

Strength: Kitty of funds would guarantee payment to expert and secure their impartial opinion.
Particularly relevant for borderline cases.

Problem: To agree fair method of funding kitty. Likely to be contested.

6. Insurance for disbursements.

Strength: Helps plaintiff as it reduces some of the financial uncertainty.

Problem: Still a gamble as solicitor must decide whether it's worth going ahead with case