A REPORT BY JUSTICE

CLAF

Proposals for a Contingency Legal Aid Fund

75p net

ISBN 0 9505247 4 3

A REPORT BY JUSTICE

CLAF

Proposals for a Contingency Legal Aid Fund

Based on evidence presented to the Royal Commission on Legal Services

LONDON
JUSTICE
1978

This Report has been prepared and published under the auspices of the JUSTICE Educational and Research Trust

ISBN 0 9505247 4 3

Printed in Great Britain by E & E Plumridge Limited of Linton, Cambridge, England

JUSTICE

British Section of the International Commission of Jurists

THE WORKING PARTY

William Goodhart (Chairman)
Laurence Shurman (Vice-Chairman)
Peter Carter-Ruck
Anthony Cripps, Q.C.
Philip English
Professor R.M. Goode
J.C. Harper
Philip Kimber
Philip Lewis
John Samuels
Tom Sargant
Paul Sieghart
David Sullivan, Q.C.
Charles Wegg-Prosser
Ronald Briggs (Secretary)

This report has been endorsed and approved for publication by the Council of JUSTICE

CONTENTS

INTRODUCTION: What is CLAF ?

1 The objective of the contingency legal aid fund – henceforth referred to as CLAF – which we propose is to provide a means of financing, at no cost to the state, litigants who have arguable claims but who would otherwise be deterred from bringing those claims for fear of the costs they would have to pay if they failed. CLAF enables this to be done without introducing the contingent fee system, familiar in the United States, under which lawyers take a direct share in the proceeds of their clients' litigation.

2 CLAF, in outline, is a fund which would invite applications from prospective litigants. If an application was accepted, CLAF would undertake to pay the costs of the assisted litigant in the event of his failure (and also any costs awarded against him). In return, in the event of the action succeeding or being compromised, CLAF would have the right to a percentage of any damages paid to the assisted litigant or any money or property recovered by him. The deduction would be calculated at a rate sufficient to cover the costs payable out of CLAF in unsuccessful cases, so that the Fund would be self-financing. In effect, therefore, CLAF would be a kind of mutual insurance fund, which would insure each assisted litigant against the risk of his losing the action and having to find both his own and his opponent's costs out of his own pocket. In return, the litigant would pay as a 'premium' a proportion of his winnings if he succeeded – success, of course, including the cases where the litigant's claim is settled as well as those where he wins at the trial.

3 The idea of CLAF was first raised by JUSTICE in our report *The Trial of Motor Accident Cases* in 1966, and is based on a suggestion by Philip Kimber. The proposal was repeated in paragraphs 153-159 of our report *Lawyers and the Legal System* (based on the evidence which we presented to the Royal Commission on Legal Services in 1977), and aroused considerable interest. It was supported by Mr Richard Denby, the current President of the Law Society, in his inaugural address, and by a leading article in *The Times* in October, 1977. The Senate of the Bar, in its evidence to the Royal Commission on Legal Services, put forward very similar proposals for the creation of a fund known as a 'Suitors' Fund' – a name which we have not adopted here because Justice has already used the name 'Suitors' Fund' for a fund which has an entirely different purpose (principally to save litigants from having to bear costs primarily attributable to judicial error) and is funded in an entirely different manner. The JUSTICE proposals for a Suitors' Fund (published in March, 1969), though quite separate from the CLAF proposals, are also based on the insurance principle. Because they are complementary to the CLAF proposals and may be of interest to the Royal Commission they have been attached to our report as an Appendix.

4 Neither the JUSTICE CLAF proposals nor those of the Senate have been, up to now, worked out in any detail. However, because of the interest aroused by these proposals and the fact that the Royal Commission indicated that this was one of the topics on which they wished to hear oral evidence from JUSTICE, JUSTICE decided to set up a working party to try to prepare more detailed proposals, to identify the problems and difficulties involved in CLAF, and so far as possible to suggest solutions for them.

5 The working party had to prepare its report in a very limited period of time, owing to the necessity of getting copies of the report into the hands of the Royal Commission before the date on which the representatives of JUSTICE had been invited to give oral evidence. Following a preliminary meeting in October, the working party held four working meetings in November and December 1977 and January 1978. JUSTICE invited the Law Society and the Senate to nominate representatives to join the working party as observers. The Law Society nominated Peter Carter-Ruck and Charles Wegg-Prosser, who as members of the Council of both the Law Society and JUSTICE, had a dual capacity at the working party meetings. Anthony Hidden Q.C. was the representative of the Senate and Arthur Weir that of the London Solicitors' Litigation Association. We are grateful to all of them for their help. We are also particularly grateful for the assistance given to us by David Edwards, the Legal Aid Secretary of the Law Society, who attended the meetings of the working party in order to answer the questions of the members and to help us with information.

THE NEED FOR CLAF

6 Up to 1949, there was very little provision for legal assistance in civil litigation to people too poor to be able to pay legal fees out of their own pockets. That classic piece of judicial irony, 'the Courts, like the Ritz Hotel, are open to all' (origin uncertain – see Megarry, *Miscellany-at-Law*, p. 254) remained nearly as biting in 1949 as when it was delivered. The Legal Aid Act 1949, however, went some way doing for litigation what the National Health Service did for medicine. Over the following twenty-eight years legal aid, in both civil and criminal cases, has had an almost revolutionary effect on the position of the potential litigant. The poorest member of the public has access to whatever legal assistance he requires in any proceedings which he has reasonable grounds for taking or defending.

7 However, as with the National Health Service, time has begun to show up certain flaws in the system. One is that the proportion of the population eligible for Legal Aid has become steadily smaller. The limits of eligibility are indeed raised from time to time. Thus the 1949 Act set the upper limit of eligibility as being a disposable income of £700 or disposable capital of £500; the present limits (set by the Legal Aid (Financial Conditions) Regulations 1977) are £2,400 and £1,600. The rules for ascertainment of disposable income and disposable capital are complicated

and 'disposable' income and capital may of course be much less than actual net income or capital (for example, the value of an applicant's dwellinghouse and its contents are now wholly excluded in assessing disposable capital). Neither of these limits has kept up with inflation; they represent multiples of less than three and a half times the initial limits, while the cost of living multiplied 4.41 times between 1950 and 1976, with a further substantial increase for 1977. What is more, there has been no attempt to ensure that eligibility limits are raised in line with increases in real earnings. Consequently, since (except for the last two or three years) there has been from 1949 an almost continuous increase in average real earnings, people who would some years ago have qualified for Legal Aid no longer do so. At present, some 44% households qualify for Legal Aid, but if pensioners and single-parent families are excluded the proportion eligible falls to less than 25%. At this level, of course, it excludes not only professional people and small businessmen but most skilled and semi-skilled workers as well.

8 For someone, who is just above the Legal Aid limits, or indeed for someone quite some distance above, unsuccessful litigation, at least in the High Court, can be ruinous. The liability of an unsuccessful party for his own costs and those he is ordered to pay to his opponent can run to several thousand pounds. This must, inevitably, be a serious deterrent to a potential litigant with a claim which is anything short of cast-iron. A man who is told that he has a two to one on chance of success in a claim for £10,000 but may have to pay £4,000 if he loses may well be deterred from litigating because, while he would like to have the £10,000, he would be unable to find £4,000 if he lost without very great hardship.

9 Indeed, even those within the eligibility limits for Legal Aid may be in difficulties if they have to pay contributions. Under the Legal Aid (Financial Conditions) Regulations 1977, an assisted person may be required to pay as a contribution up to one third of the amount by which his disposable income exceeds £760 or the whole of the amount by which his disposable capital exceeds £340. An assisted person required to pay a contribution is in a considerably better position than an unassisted person, since at least there is an upper limit on the amount which he can be required to pay, but even so there is reason to believe that some litigants eligible for Legal Aid are being deterred by the obligation to pay a substantial contribution to the Legal Aid Fund and the risk that if they are successful they will not be able to recover it.

10 Some members of the working party also feel that the Legal Aid requirement that an applicant should show that he has reasonable grounds for taking or defending proceedings in order to obtain a Certificate is too restrictive and excludes cases which ought to be litigated – in particular, cases where the applicant's claim is meritorious but can only succeed in Court as the result of a bold or novel application of the law.

11 There can be little doubt that, at present, significant numbers of

potential litigants are deterred from bringing (or, in a rather smaller number of cases, defending) claims in cases in which they have reasonable chances of success but cannot afford the risk of losing and being ordered to pay the costs of both parties. One answer to this problem, no doubt, is to extend the cover of the state Legal Aid scheme to a level at which only the wealthy few who can truly afford to finance their own litigation are left out. However, in the current atmosphere of financial stringency it may be unrealistic to hope for an immediate and substantial real increase in the level of Legal Aid cover, involving a major reduction in contributions as well as an increase in eligibility levels. We must therefore look at possible alternatives.

12 One possibility is to alter the law so as to permit lawyers to charge contingent fees. In the United States of America where there has never been an effective system of civil legal aid, much litigation – particularly personal injury claims – is handled on a contingent fee basis. In England, however, contingent fees are not allowed. Not only are they contrary to professional etiquette, but an agreement to accept a contingent fee would be champertous. Champerty as a criminal offence was abolished by the Criminal Law Act 1967, but a champertous agreement remains 'unlawful' and therefore unenforceable by civil proceedings. If the law were changed so as to make contingency fee agreements lawful, claimants not now eligible for Legal Aid could employ solicitors and counsel on a contingency fee basis and so protect themselves from having to pay them if the claim failed.

13 A contingency fee system has the virtue of simplicity. It eliminates the need for bureaucracy, and excesses can be curbed by rules imposing an upper limit on the proportion of winnings which can be deducted by the lawyers. There are, however, objections to a contingency fee system. One obvious practical objection is the fact that in England (unlike the U.S.A.) it is the normal practice to order the losing party to pay the costs of the winner. Hence, even if the unsuccessful claimant were relieved from the obligation to pay his own lawyers because they had accepted contingency fees, he would still have to pay the costs of the other party. In addition, although there is not much reason to suppose that the introduction of contingency fees would lead lawyers to act in a manner contrary to the interests of their own clients, there is a real risk that giving lawyers a personal financial interest in the outcome of the case might tempt them to pay less regard to their important duties to the Court (such as duty to give discovery of documents damaging to their client's case). We refer to the interesting and important discussion of this matter by the Court of Appeal in *Wallersteiner v. Moir (No.2)* [1975] Q.B. 373 (in particular, per Buckley LJ at pp. 401-3).

14 One firm of insurance brokers and at least one insurance company have recently introduced insurance policies against the risk of incurring legal costs. These go beyond the well-established motor accident or personal liability policies which cover the cost of defending actions for damages within the scope of the policy by extending cover to the costs

of litigating either as plaintiff or defendant. However, we doubt whether policies of this kind are likely to be taken up by most of the people who might benefit from CLAF. Most members of the public would be unlikely to feel the need for such a policy until a cause of action had arisen – by which time, of course, it would be too late to take out a commercial policy. There are other difficulties, such as restrictions on the free choice of lawyers.

15 The advantage of CLAF is that it fills some of the gaps left by the Legal Aid system (though not all of them – for reasons discussed below, it would be impossible, for example, to extend CLAF cover to most matrimonial litigation) without altering the existing relationship between the client and his lawyer. A person who has suffered damage can afford to litigate because he will not have to meet a bill for costs if he loses. The lawyers, however, will have no personal interest in the outcome of the case because if the client wins they will receive only their normal costs from his winnings and if the client loses they will be paid out of CLAF. In our view, CLAF would fill an important unmet need. It would involve some administrative costs not present in a simple contingency fee system, but we think this is a reasonable price to pay for avoiding the disadvantages of such a system. Although the CLAF scheme has inherent limitations which restrict its availability to certain categories of litigation, we think that within those categories, CLAF can provide a fully satisfactory complement to Legal Aid and need not be looked on as a second-best substitute.

ELIGIBILITY: Persons

16 The question of eligibility for assistance from CLAF can be divided into two separate sections which are largely independent of each other. First, who would be eligible to apply to CLAF? Secondly, what types of litigation would CLAF assist?

17 We do not think it is necessary to impose any lower limit of eligibility for CLAF. In practice, anyone who is eligible both for CLAF and for Legal Aid with a nil contribution would choose the latter, since he would not suffer the CLAF deduction from winnings but would still pay nothing if he lost. Where someone eligible for CLAF would be eligible for Legal Aid but would have to pay a contribution, we think it is reasonable that he should be able to elect between the two, though such an election would have to be made at a very early stage and would have to be irrevocable.

18 The question whether there should be an upper limit is more difficult, and has led to differences of opinion among the working party. A majority of the members consider that, in principle, there should be no upper limit. The arguments are:

(a) that, as CLAF is intended to be self-financing, the rich would not be taking more out of CLAF than they would be putting into it, taking one case with another;

(b) The very few who would not be troubled by having to pay the costs of a substantial action would probably not seek CLAF assistance because they would prefer to avoid the CLAF deduction;

(c) at present levels of taxation, virtually no one can meet the costs of major litigation out of income alone; and

(d) many forms of capital, such as shares in family companies or the applicant's main residence and its contents, cannot be realised without hardship or great inconvenience, and are often very difficult to value.

19 However, we recognise that if state assistance in any form is to be provided for CLAF, the government may think it necessary to impose some upper limit on eligibility for CLAF. If so, we think that the level should be high. The working party has provisionally considered as appropriate maxima in respect of income the figure at which the top rate of income tax becomes payable (currently £21,000 after deducting personal reliefs and allowable charges on income) and in respect of capital £25,000 realisable assets (such as cash, quoted securities, and land not occupied as a principal residence or for business purposes) or £100,000 total net assets. For spouses living together income and capital would be aggregated, and the means of parents would be taken into account in considering applications on behalf of minors.

20 We take the view that an applicant for CLAF should be required to produce a statutory declaration that his income and capital do not exceed the upper limits, and that this statement should normally be accepted without further investigation. If it subsequently transpired that the statement was knowingly false the applicant could be prosecuted for perjury. At present, the delay in granting Legal Aid certificates, which is often very considerable, is due mainly to the time taken to ascertain the applicant's disposable income and disposable capital. An upper limit based on self-assessment would provide considerable savings in both time and administrative cost as compared with the existing Legal Aid procedure. In any event, as CLAF is intended to be largely independent of the state it would not be appropriate to use the machinery of the Supplementary Benefits Commission to ascertain disposable income and disposable capital, and it would be impracticable to create any form of new machinery for the same purpose.

21 Before going on to consider whether CLAF should assist companies and partnerships, it may be useful (though strictly speaking out of sequence) to consider at this point whether CLAF should support business litigation, since most litigation by companies and partnerships falls into this category. Most of us see no reason why it should not. It would certainly be undesirable for CLAF to finance debt-collecting actions, but we think it is very unlikely that CLAF assistance will be frequently sought for this type of action, and if this began to happen steps could be taken to prevent it. However, most of us think that CLAF ought to assist, for example, a small trader who is let down by a supplier, or a small builder whose action for the contract price is disputed on a dubious allegation of defective workmanship.

22 If a sole trader can be assisted by CLAF, why not a company or partnership? It is true that companies have the benefit of limited liability, but this is not sufficient to eliminate hardship. A heavy costs liability at a difficult time may tip a company into liquidation. This may deprive employees of their livelihood; it may also activate personal guarantees given by shareholders. In principle, therefore, we think that CLAF should extend to companies and partnerships as well as to individuals. We think that CLAF assistance should also be available for trustees and executors, subject if necessary to an upper limit based on the size of the trust fund and the means of the beneficiaries. Furthermore, there should be power to give CLAF assistance to trustees in bankruptcy and liquidators. In cases of personal or corporate insolvency the absence of any significant gross assets may make it very difficult for the trustee or liquidator to pursue claims even if the prospects of success are good. This can cause hardship to the bankrupt (who may be delayed in getting his discharge) as well as to creditors.

23 In the case of companies and partnerships, however, we think that there is a need to impose an upper limit of some kind for eligibility even if there is no upper limit for individuals. There is a risk that large commercial organisations with a regular flow of litigation might try to take advantage of CLAF by seeking CLAF assistance for their difficult cases but not for the relatively easy ones. In the absence of a sophisticated risk-weighting system in calculating the CLAF deduction, this could result in such organisations taking out more than they put in. In the case of a company, CLAF eligibility should probably be limited to companies which are close companies for tax purposes, and perhaps further limited by reference to the net assets of the company and its associated companies and/or the means of its shareholders. In the case of a partnership, the upper limit can be fixed by reference to the collective means of the partners or, possibly, to an arbitrary limit based on the number of partners.

ELIGIBILITY: Causes

24 The problem of selecting the type of case which CLAF will assist (assuming the applicant to be personally eligible) is perhaps the most difficult and controversial aspect of the whole scheme. Unfortunately, the nature of the scheme necessarily imposes severe limitations on the type of case which CLAF can assist. The difficulty, in brief, is that since CLAF depends for its finance on deducting a proportion of the winnings of assisted parties it can, essentially, only assist people who, if they succeed, will have winnings from which the CLAF 'premium' can be deducted. This excludes plaintiffs who are not claiming money or property, and almost all defendants.

25 The people who can most obviously be assisted by CLAF are plaintiffs with lump-sum monetary claims – damages or debt. By adopting the Legal Aid device of the statutory charge, CLAF could extend its scope to claims for the recovery or delivery of non-monetary assets. In such a

case, the CLAF deduction would take the form of a charge on the property recovered or delivered. If the property is not readily realisable – for example, in an action for a specific performance of a contract for the sale of a private residence – CLAF could leave the charge outstanding on payment of a fair rate of interest.

26 However, this will still leave outside the scope of CLAF potential plaintiffs who are not claiming money or property, or whose monetary claims are secondary (for example, someone wishing to stop a nuisance or trespass being committed by a neighbour, where nominal damages may be claimed but the real remedy sought is an injunction). In particular, CLAF cannot hope to cover matrimonial proceedings, which represent about 85% of the cases handled by Legal Aid. In theory, CLAF could take on matrimonial cases where a lump sum order or property adjustment order was sought, but we think it would be undesirable for the right to CLAF assistance to depend on whether particular types of ancillary relief were sought, and we think it better that CLAF should exclude matrimonial proceedings altogether.

27 It is also difficult for CLAF to provide much assistance for defendants. In a few cases, help can be provided – in particular, where a defendant has a substantial counterclaim. Again, where the dispute is over title to property or a specific fund of money, the statutory charge can be imposed on property retained by a defendant in the same way as on property recovered by a plaintiff. In some claims relating to title to property, such as probate actions, it can be almost a matter of chance which side actually begins the litigation.

28 We have given thought to the question whether there is any way in which CLAF could assist people in cases where a deduction from a monetary award or a charge on property recovered, delivered or retained is not available ('non-contributory litigants'). One possibility is that the 'premium' should be set at a level which would enable assistance to be provided for non-contributory litigants. Clearly, it would be essential to exclude matrimonial cases, because the Legal Aid statistics make it clear that if matrimonial cases were covered CLAF would be swamped by non-contributory litigants. Even if matrimonial cases are excluded, however, most members of the working party feel that there are objections of principle to extending the scope of CLAF to non-contributory litigants. We do not think that one class of litigant – those with claims for damages, money or property – should be asked to subsidise another class. In a sense, of course, it can be said that the successful CLAF-assisted parties will anyway be subsidising the unsuccessful parties, because the deductions paid out of the winnings of the former will be used to pay the costs of the latter. This, however, is simply the way any risk-insurance scheme works; the premiums paid by drivers who never have accidents are used to compensate the drivers who have the accidents. There would be strong objection if an insurance company gave accident cover to a class of driver who paid *no* premiums, and raised the premiums of its other customers to meet the additional outgoings. This, in effect, is what would happen if CLAF extended cover to non-contributory litigants. If it were possible to

identify some class of non-contributory litigants who could be assisted by CLAF at an insignificant cost to the fund, it might be possible to argue that CLAF should be extended to them. Most of us, however, doubt whether it is practicable to work out any objective means of identifying such a class. Once CLAF is established some experimental schemes could be run to test the idea, and if the rate of deduction initially applied to successful cases yields a surplus, the surplus could be used for that purpose. However, we do not think that it is appropriate for CLAF initially to offer assistance to non-contributory litigants.

29 Other alternatives which have been considered to help non-contributory litigants are a reverse deduction scheme or a stop-loss scheme. A reverse deduction scheme would mean that, where damages were claimed from a defendant, CLAF would pay the defendant's costs if he lost but the defendant would pay some specified sum to CLAF if he won – in other words, the defendant would never have to pay both damages *and* costs. The sum payable to CLAF would generally have to be calculated in some way other than as a percentage of the damages claimed against the defendant, because claims to unliquidated general damages could not otherwise be brought into the scheme. A stop-loss scheme would involve an agreement under which the assisted party would pay a specified sum to CLAF in any event, and CLAF would in return cover the assisted party's liability for costs, whatever it might be. The result would be that the assisted party would know that his liability could not exceed damages plus the specified payment to CLAF. A stop-loss scheme could be extended to litigants in any class of action where costs generally follow the event.

30 Both the reverse deduction scheme and the stop-loss scheme avoid the objection that one class of litigant should not be called upon to subsidise another. They are, however, relatively complicated, and it would not be easy to work out a formula for calculating the payment which would have to be made to CLAF. Neither scheme would work unless the assisted party had enough liquid assets to meet the payment; otherwise, a potential litigant might well prefer an all-or-nothing approach and fight the case at his own risk. We are doubtful whether either of these schemes would have much appeal to potential litigants. One or other of these schemes might well be offered by CLAF on an experimental basis once it is established, but we do not think that it would be appropriate to include either of them in the CLAF scheme in its early stages.

31 We have therefore concluded that, to begin with, CLAF should only be made available for cases where the assisted party will, in the event of success, obtain judgment for a sum of money or obtain, recover or retain specific property which can be charged in favour of CLAF.

32 We are agreed that there ought to be a lower limit on claims below which CLAF would not be expected to provide assistance. There was a consensus that the dividing line should be set at the minimum figure above which County Court costs on Scale 3 can be awarded (currently £500), so that CLAF will be available for claims within County Court Scales 3 and 4 and the High Court. In cases of uncertainty, the applicant should have to satisfy CLAF that there are reasonable grounds for believing that an

award to him *may* exceed the lower limit – not necessarily that it *will* exceed that limit. We do not think that costs on County Court Scales 1 and 2 are likely to cause real hardship to litigate unless they are in any event eligible for Legal Aid with a nil contribution. We think that there are practical arguments for saying because of the uncertainty of the demand CLAF should at the outset be limited to High Court cases. If the demand for CLAF had been overestimated and the administrative staff was underworked, CLAF could then be extended to the County Courts without taking on additional staff. However, we think that there should be a commitment to extend CLAF to the County Courts as soon as the extent of long-term demand for High Court assistance became apparent – say, within two or three years of the commencement of the scheme. We also think that CLAF should be extended as soon as possible to litigation before tribunals where the claimant is seeking payment of sums equal to or greater than the level for County Court Scale 3. An obvious example is disputes over compensation for compulsory purchase before the Lands Tribunal, but a considerable number of other claims (for example, many claims for compensation for unfair dismissal) would be within the limit.

33 Another important point of principle is the question of how strong a case an applicant would have to show before CLAF would assist him. The starting point for this question is the Legal Aid test, which is: 'A person shall not be given legal aid in connection with any proceedings unless he shows that he has reasonable grounds for taking, defending or being a party thereto, and may also be refused legal aid if it appears unreasonable that he should receive it in the particular circumstances of the case' (Legal Aid Act 1974 Section 7(5)). Should the CLAF test be the same as the Legal Aid test, stricter, or less strict?

34 The majority view of the working party was that, in the initial stages, the CLAF test should be the same as the Legal Aid test. The fact that the Legal Aid test has now been applied for nearly thirty years means that it is widely familiar to the profession and would save the extra complication that would follow from the application of any different test. Those members of the working party who felt that the Legal Aid test, as applied in practice over the years, had tended to exclude litigants with meritorious but difficult cases felt that CLAF should be extended to cover such cases as soon as possible, though they were willing to accept that for practical reasons the Legal Aid test should be relied on at the outset of the scheme. The other members of the working party, while doubtful of the proposition that the Legal Aid test was unduly restrictive, agreed that there was no objection to CLAF in due course being extended to 'difficult' cases, provided that the extra risk involved in taking on such cases was recognised by charging the assisted party an increased 'premium'. It is arguable that, if CLAF assists difficult cases, it would be acting unfairly towards the opposite party who is forced to defend an action for which, *ex hypothesi*, there are less than 'reasonable' grounds. This argument is considerably reduced if, as we propose, CLAF (unlike the Legal Aid Fund) should be required to pay the costs of successful opposing parties. There is, however, an upper limit to the deduction which can reasonably be charged – in the view of most members of the working party it would not be acceptable for CLAF to take more than half of any litigant's damages – and this would to some extent limit CLAF's freedom to assist the difficult cases, since the CLAF administrators would have to be satisfied that the chances of success were not so remote that a fair 'premium' would have to be more than half the recoverable damages. One member of the working party considered that CLAF should assist all eligible litigants who had any prospects of success at all, and should be free to charge any premium, however high, which would fairly reflect those prospects.

35 Since we agree with the Faulks Committee that there is no justification for the continued exclusion of defamation from the Legal Aid Scheme, we are agreed that CLAF should be available in defamation actions. We think it is important that anyone who needs it should be assisted in defending his reputation as well as his property.

THE OPERATION OF CLAF

36 Applicants for CLAF assistance would be required to submit an application form similar to the current Legal Aid application form. We recommend that all applicants should be required to pay a registration fee, which would not be returnable if the application was rejected (though there would probably have to be a preliminary screening process for weeding out obviously ineligible applications – e.g. for matrimonial proceedings – in which case only a nominal charge would be made). We think that the registration fee should be fairly substantial, in order to deter frivolous applications. We think it would probably be desirable to set the registration fee at a level sufficient to cover the whole of the administrative costs of CLAF, leaving the deduction for winnings to cover only the payment by CLAF of litigation costs.

37 The figure of £50 has been suggested as a registration fee. This is high enough to deter frivolous applications but not so high as to deter serious applicants or cause hardship. It also probably represents a fair estimate of the administrative costs of handling a case. We understand that the administrative costs of civil Legal Aid amount to about £6,800,000 a year (not including expenses incurred by the Supplementary Benefits Commission in ascertaining disposable income and capital). In the year 1976/77 just under 200,000 cases were disposed of, which represents an administrative cost of £34 a case. (The figure would be somewhat lower if averaged out among both cases assisted by Legal Aid and cases where certificates had been refused).The administrative costs per case for CLAF might be a little higher, owing to the smaller number of cases handled and the fact that members of the legal profession could not in our view reasonably be expected to provide their services on CLAF committees free, as they do for Legal Aid.

38 Following payment of the registration fee, the application for CLAF assistance would be considered by a committee, which would perform the same function as a Legal Aid local commlttee in deciding whether or not to approve the application. If the application was approved, the applicant would then become entitled to assistance from CLAF and

would be bound to pay the deduction if successful. We have discussed above the criteria for granting the application. We have not yet, however, discussed in any detail the method of calculating the deduction from winnings. There is a tendency to assume that the deduction will be calculated as a percentage of winnings, and indeed, with certain modifications, this is what we recommend. There are, however, other possible methods of calculating the deduction, and we considered at some length the possibility of introducing a risk-weighted scheme (where the amount of the deduction in any individual case would be linked to the anticipated costs of the case and/or its chances of success) as opposed to an across-the-board percentage deduction.

39 One possible method would be to charge a fixed sum, which would be calculated by assessing the probable costs of the proceedings and multiplying that by a fraction representing the estimated chances of losing the action. Thus, is the estimated costs to the applicant if he lost (i.e. his own costs liability plus the party and party costs payable to his opponent) were £6,000, and the chances of losing the case were estimated at one in four, the CLAF charge would be £2,000 (i.e. three winning cases would bring in enough to cover the costs liability on an unsuccessful fourth case). The advantage of a fixed sum deduction over a standard percentage deduction is that it matches the 'premium' more closely to the risk. Prima facia, it seems unfair to charge the same percentage for a case which seems virtually certain to succeed and a case which, though a reasonable case to bring, presents considerable difficulties if success is to be achieved; or, again, to charge the same percentage for a case which turns entirely on a short legal point and a case which involves a large number of witnesses and expensive experts.

40 There are, however, practical objections to a risk-weighted scheme. The principal objection, perhaps, is the very great difficulty (as all practitioners will recognise) of producing an estimate either of the potential costs of any case or of the chances of success with anything like scientific accuracy, so that risk-weighting would inevitably be subjective. Another objection to risk-weighting the 'premium' is that the necessary forecasts could not be made with any degree of confidence until the opposition has had to disclose its hand to some extent; this means that a realistic calculation of the premium could not be made at least until close of pleadings, and often not until discovery had been completed. We think that most applicants would prefer to know their liabilities to CLAF at the outset, before they decide whether to commence proceedings.

41 Similar objections apply to other forms of risk-weighting, such as calculating the deduction as a risk-weighted percentage of winnings rather than a risk-weighted fixed sum. Consequently, although we think that in principle a risk-weighted deduction is preferable to a standard percentage deduction, we also think that the practical difficulty of accurately computing a risk-weighted premium and the need to postpone the computation until well after the commencement of proceedings if even a modicum of accuracy is to be obtained means that a standard percentage deduction is the more practical solution.

42 We do not, however, think that there ought to be a single percentage deductible from winnings whatever the circumstances. In the first place, we think that if CLAF is to assist the 'meritorious long-shot' case – i.e. the case which although strong on merits is too weak in law to satisfy the 'reasonable grounds' test – it would be proper, for that special type of case, to charge a weighted premium. In the second place, it seems clear that, on average, the aggregated costs incurred by both parties represent a higher proportion of a small award of damages than of a large award – as damages go up costs also go up, but at a proportionately lower rate. This suggests that there is a case for charging 'banded' rates of deduction – one percentage for, say, the first £5,000, a lower percentage for the next £5,000, and a still lower percentage thereafter. Finally, we think it is clearly desirable that there should be a reduced deduction if the case is settled before trial, in order to encourage settlements and to recognise the fact that a settlement (except in the case where it is merely a de facto surrender) will eliminate the risk to CLAF of having to meet the costs of the parties. Since heavy costs are incurred in preparing for trial and delivering briefs, we do not think that a similar reduction ought to be offered for settlements after the commencement of the trial.

43 The appropriate rate for the deduction is inevitably speculative. The Senate suggested that the deduction might be 15 per cent in County Court cases and 7½ per cent in High Court cases. We were told that legally-aided litigation in the Queens Bench Division – mostly personal injury cases – involved almost no net cost to the Legal Aid Fund. Initially, it is probably best to err on the side of caution, and to set figures somewhat above those suggested by the Senate. It might be reasonable initially to set the deduction at 20 per cent for the first £5,000, 15 per cent for the next £5,000 and 10 per cent for the excess over £10,000 and at half those amounts for pre-trial settlements.
It is the intention that CLAF deductions and registration fees should be fixed at a level which would keep it in balance (taking one year with another) after providing for the repayment of the loan which it would have to obtain for its initial funding and creation of a suitable reserve. If experience proved that at the initial levels CLAF was running a persistent surplus or deficit either generally or on some category of assisted case the deduction rates, the width of the bands, or the registration fee could be adjusted upwards or downwards as necessary.

44 Once the applicant has been granted assistance (which would normally be before the commencement of proceedings), the litigation would proceed in the normal way and would be conducted (as with Legal Aid) by solicitors and counsel instructed by the assisted party. It would, however, be necessary to monitor the progress of the case, because there would be considered opportunities for abuse of CLAF if, once assistance was granted, there was blanket cover for any costs incurred by the assisted party. Under the Legal Aid (General) Regulations 1971 reg. 12(3), an area committee can discharge a certificate if they consider that the assisted party no longer has reasonable grounds for taking or defending proceedings to be conducted reasonably. The function of the area committees

in monitoring the conduct of Legal Aid litigation is one of the most difficult and important features of the Legal Aid system. We think it would be of great assistance to CLAF if the CLAF monitoring procedure could be based closely on that of Legal Aid and if some of the expertise acquired by Legal Aid personnel could be made available to help CLAF.

45 Some examples of how the monitoring system might work may be useful. In the first place, there might be cases (though probably very infrequent) where it appeared that CLAF assistance had been obtained by the applicant providing deliberately misleading information; in such a case assistance would be cancelled and the assisted party left to bear all the costs. There would much more frequently be cases in which, through no fault or at any rate no deliberate fault of the applicant, what appeared at the outset to be a claim which ought to be litigated turned out at a later stage to be much weaker than it originally seemed. We think that, in cases where it appears at some stage that the best thing for the assisted party to do would be to throw in his hand, CLAF should offer him the alternatives of discontinuing his action (in which case CLAF would meet his liability for costs) or proceeding at his own risk, without CLAF cover. We considered whether CLAF should be enabled to *order* an assisted party to discontinue, but we think that this would be an unnecessary and unreasonable infringement of his personal rights.

46 Equally difficult problems arise, of course, where the opposite party makes a payment into court or offer of settlement. In such a case, a litigant who has been relieved of the risk of costs if he loses may well be tempted to reject offers which he would be well advised to accept if litigating wholly at his own risk. Conversely, refusal of a payment into Court or offer of settlement exposes CLAF to considerable risk if it has to continue its cover of the costs liability of the assisted party. If a CLAF-assisted litigant acts unreasonable in refusing a payment into Court or offer of settlement, we think that CLAF should be entitled to withdraw cover in respect of costs incurred by either party after the refusal. This possibility should in most cases be sufficient to deter most litigants from refusing reasonable payments or offers. As a *quid pro quo*, in the exceptional case of a litigant who proves he was right by continuing the case and obtaining a better judgment or settlement, the CLAF deduction would be calculated by reference to the amount of the original payment into Court or offer.

47 We think that, once a litigant has accepted CLAF assistance, he should not be permitted to renounce it. Otherwise, there is an obvious risk that a litigant who sees victory approaching will renounce assistance in order to avoid having to pay the deduction. To avoid possible frauds on CLAF by assisted litigants we think that CLAF should be entitled to a charge on all money or property recovered or obtained as the result of a judgment or compromise to secure payment of the CLAF deduction. This charge would be protected by methods similar to those under regs. 18 and 19 of the Legal Aid (General) Regulations 1971 in respect of the Law Society's charge under the Legal Aid Act. It would of course be necessary to notify the opposing party that CLAF assistance had been given so that the charge would be protected (and also so that the opposing party knew of his rights against CLAF in the event of his success).

48 Except in the rare case where CLAF assistance is withdrawn, CLAF-assisted proceedings will be conducted in the normal way until they are won, lost, or settled. In cases which are won, CLAF will deduct its percentage from the gross amount of the award and will be responsible for any costs liability of the assisted party, except for the amount (if any) by which his costs on the solicitor and own client basis exceed his costs on the common fund basis. (In practice, the excess will consist of costs incurred unreasonably but with the express or implied approval of the client – see R.S.C. Order 62 rule 28(4) and rule 29). In the normal case where costs follow the event, therefore, CLAF will pay the difference between the assisted party's costs on the common fund basis and his party and party costs recoverable from the other side. We think that, where damages are awarded but it proves impossible to recover them in full, the CLAF deduction should be based on the amount actually recovered and not on the nominal amount of the judgment. We think that in the unusual successful case where the costs payable out of CLAF exceed the percentage deduction (as might happen, for example, where a payment into Court was refused on advice but the plaintiff was awarded a smaller amount at the trial) CLAF ought to be entitled to deduct the full amount of its costs liability from the award. In a scheme designed mainly to protect litigants against the risk of loss we do not think that a successful party ought to make a greater profit from the litigation than if he had never had CLAF assistance.

49 Compromises will be treated in much the same way as cases which succeed in Court. However, to avoid an illogical distinction between compromises where the defendant agrees to pay the plaintiff's party and party costs and cases where each side agrees to pay its own costs but the defendant pays a correspondingly larger negotiated amount, we think that where the terms of compromise require the CLAF-assisted party to pay his own party and party costs CLAF should first deduct an amount equal to those party and party costs from the gross award and should then deduct its percentage from the balance of the award.

50 Where a CLAF-assisted party loses, CLAF will pay the costs of the assisted party on the common fund basis, and will also pay any costs ordered against the assisted party. We are agreed that there is no justification for extending to CLAF the restrictions which the Legal Aid rules impose on the recovery of costs by successful unassisted parties. These restrictions – relaxed as they were by the Legal Aid Act 1961 – are still a source of complaint against the Legal Aid scheme, and although there may be some justification for these restrictions where the Fund from which payment has to be made comes from the taxpayer we see no ground for giving similar protection to CLAF, which is in effect a litigants' mutual insurance fund. For the same reason, we are agreed that the 10% reduction in professional fees paid out of the Legal Aid Fund should not apply to CLAF.

We think that, if CLAF is liable to pay the costs of a defendant who succeeds in an action brought by a CLAF-assisted plaintiff, the provision of CLAF assistance for plaintiffs will not cause any unjustifiable hardship to defendants. If the defendant fails, he cannot complain. If the defendant wins, he will get most of his costs out of CLAF. Although he will

still be worse off than if the action had never been brought, it does not follow that the action would necessarily not have been brought without CLAF assistance; and the defendant with a right to costs against CLAF will be better off than if the plaintiff had been legally aided, or if the plaintiff had litigated at his own risk and been unable to meet the costs liability.

51 Some members of the working party were concerned that the prospect of 'risk-free' litigation opened up by CLAF (i.e. the fact that the litigant will not be out of pocket, win or lose) might lead to a socially undesirable increase in speculative litigation, or to extravagance in the conduct of cases. Others were more doubtful of the existence of a serious risk, given that legally-aided litigants with a nil contribution had in practice had the benefit of risk-free litigation for many years. We discussed the possibility of requiring CLAF-assisted litigants to make some form of contribution in the event of their cases being lost. However, given that one of the aims of CLAF is to relieve the hardship which litigation can cause to claimants without realisable liquid assets, we decided that it would not be proper to require a contribution from an unsuccessful CLAF-assisted party who had not acted unreasonably in the conduct of the case. We concluded that any tendency to speculative or extravagant litigation would probably be sufficiently checked by (a) limiting CLAF's obligation to payment of the assisted party's costs on a common fund basis, leaving him to bear any difference between such costs and his solicitor and own client costs (b) offering a carrot for pre-trial settlements in the form of a reduced rate deduction, and (c) withdrawing CLAF cover in cases where the assisted party was requiring the case to be conducted unreasonably. We agreed that if there were any signs that CLAF was encouraging litigation to an undesirable extent or in undesirable ways the scheme should be modified so as to deal with the problem.

52 We think that where a CLAF-assisted party is successful, it is only fair that, except in very special circumstances, CLAF should assist him as respondent to any appeal brought by his opponent. CLAF would in any event have an interest in doing so in order to protect its deduction. If the JUSTICE recommendations for a Suitors' Fund, set out in the Appendix, were adopted the need for CLAF to assist respondents in appellate courts would be much reduced. Where a CLAF-assisted party was unsuccessful, there would be no automatic right to assistance for an appeal but the party could make a new application for assistance with an appeal.

53 We anticipate that, normally, prospective litigants will apply before the commencement of proceedings. Some, however, may wish to apply at a later date. For example, some plaintiffs may wish to try their luck under Order 14 and only seek CLAF assistance if leave to defend is given. Arguably, such people should not then be eligible for CLAF, on the grounds that if someone seeks help from CLAF and the case has to be fully litigated he ought to give CLAF the chance of taking its deduction if he obtains summary judgment. We think that this may be too harsh a rule. We do not wish to encourage unnecessary applications to CLAF or exclude reasonable applications, and there are certainly cases which at first sight seem unlikely to involve a potentially serious costs liability but where a different picture emerges when the defence is served. We think it would probably

be reasonable to require applicants normally to make their applications within, say, one month of close of pleadings, giving CLAF a discretion to accept later applications where there is adequate explanation for the delay. In any case, of course, CLAF cover would not extend to costs incurred by either party before the application. An election to accept Legal Aid should be final, and CLAF should not consider applications from any person to assist litigation for which he had been granted a Civil Aid certificate. It should, however, be open to CLAF to assist persons whose applications for Legal Aid had been refused or whose certificates had been discharged.

ADMINISTRATION AND FINANCE

54 We have come to the conclusion, as did the Senate, that the Law Society should be invited to administer CLAF. The administration of civil Legal Aid by the Law Society is generally regarded as a considerable success. The proposals for CLAF which we have outlined above borrow many features from Legal Aid – in particular, the 'reasonable grounds' test for eligibility (at least in the initial stages) and, perhaps most important of all, the system of monitoring the conduct of cases to ensure that they are not being carried on extravagantly or unreasonably. For this reason, we think that the Law Society would be the most suitable organisation to take over the administration of CLAF.

55 At the same time, we do not think that CLAF could be wholly integrated into the existing Legal Aid administrative structure. There are certain inherent differences between the aims and outlooks of Legal Aid and CLAF. David Edwards felt that these differences would make it psychologically difficult for the two schemes to be run by the same individuals, and we accept the force of this argument. We recommend, therefore, that CLAF should be set up as a separate organisation under the aegis of the Law Society. Its initial members should include people with experience of Legal Aid administration, and in particular of the monitoring system. It would probably be desirable to appoint consultant actuaries to advise on the actuarial aspects of CLAF.

56 One major uncertainty is the size of the demand, which is relevant both to the size of the administrative staff which will be required and the amount of any initial funding. We have found it impossible to make any precise forecast, as it is not possible from the existing statistics to identify the number of cases eligible for CLAF assistance, and inevitably impossible to ascertain the potential increase in litigation resulting from the introduction of CLAF. We suspect that the take-up of CLAF in the High Court by litigants not eligible for Legal Aid would be very high, and that the take-up among litigants eligible for Legal Aid with a contribution or in the County Courts would be lower but still significant. We think that CLAF would probably be called on to assist some thousands of cases a year.

57 We think that it would be sensible, initially, to set up an administrative organisation based on lower rather than higher estimates of demand for CLAF assistance. It would be much easier to expand a small staff than to cut back on a large one. Although this could lead to initial delays in

the processing of applications, this would not be too serious, given that most applicants would be potential plaintiffs who would be in control of the timing of the commencement of their actions. Preference in the queue could be given to those who had time problems, either because of the approaching end of a limitation period or because they were defendants. Room for manoeuvre could be provided, as we have suggested, by initially excluding County Court litigation and perhaps also assistance to companies, so that the scope of CLAF and could be widened to take up any slack which appeared in the early stages. We do not think that the amount of new litigation resulting from the introduction of CLAF is likely to be beyond the capacity of the legal profession to handle.

58 We think it would be reasonable to have committees of similar composition and with comparable functions to the local and area committees set up for the administration of Legal Aid. Given the fact that CLAF shall assist many fewer cases, however, we think that it would be sufficient for CLAF to have a single central committee performing the functions of the Legal Aid area committees, and perhaps five or six local committees. The members of the Legal Aid committee provide their services almost free. We do not think that the members of the equivalent CLAF committees could be asked to act for purely nominal fees, and we recommend that they should be paid moderate fees for their services, commensurate with fees payable to legal members of tribunals.

59 We think that the impact of CLAF on the Legal Aid scheme is likely to be small. A proportion of those eligible for Legal Aid subject to contribution will opt for CLAF, with a consequent slight saving to the Legal Aid Fund since it will not have to bear the costs of those members of that group whose actions fail. Conversely, the Legal Aid Fund may be called upon to support a few defendants in actions brought by CLAF-assisted plaintiffs who would not have litigated in the absence of CLAF. The great majority of payments out of the Legal Aid Fund result from matrimonial proceedings, on which CLAF will have no impact.

60 We have considered alternative methods of administering CLAF if the Law Society does not wish to take it under its wing. One possibility would be to set it up as an independant public office, comparable to that of the Public Trustee. Another possibility would be to authorise one or more of the major insurance companies to set up a CLAF scheme on a commercial profit-making basis, though this would require substantial alterations in the scheme as proposed above. It would also be possible to give licences to independent non-profit-making organisations to run contingency schemes of one kind or another (for example, the Consumers Association might set up a contingency scheme for consumer claims). While in our view, these various alternatives would all be second best, we think it would be worth considering them seriously if the Law Society were unable or unwilling to administer CLAF.

61 Finally, there is the question of finance. It would be necessary to find a relatively small sum to cover the initial setting up of the scheme. We think that the amount required would be small, because the administrative costs would soon be covered by the registration fees (payable in

advance). As regards the costs liabilities, the receipt would tend to come in before the liabilities fell due, since the strong cases would be settled quickly while the difficult cases would take time to fight. Consequently, it would be unnecessary for CLAF to start with a substantial float to meet costs liabilities. We think that CLAF should become self-financing within the first few months of operation (though it would be desirable to spend a certain amount of money initially on publicising the scheme). CLAF ought to be able to repay any loan required for its initial finance within five years of commencement of operations.

62 We hope that the Government will assist CLAF by lending the money required to launch it. If the Government felt that the need for economy made it impossible to provide public money for this purpose, we think the scheme could still be launched if the Government were prepared to guarantee the liabilities of CLAF. We see no reason to suppose that the Government would ever be called upon to meet the guarantee; the great popularity of contingent fee litigation in the United States at fees much higher than those which we propose indicates that there is almost certainly a substantial market for CLAF among the large part of the population who are not eligible for Legal Aid or are only eligible subject to contribution. The giving of a Government guarantee would, however, make it possible to borrow the money required to set up CLAF at a reasonable rate of interest, and we feel that even in a time of expenditure cuts it is reasonable to ask the Government to lend at least this degree of assistance (in all probability at no cost to itself) to a scheme which confers such considerable benefits on such a substantial proportion of the population as CLAF.

63 It would also be necessary for the Government to assist by introducing the necessary legislation. We believe that very little legislation is required, the only essential matter being an amendment to the law of champerty in terms which will enable CLAF to enforce its agreements with assisted parties. Otherwise, most matters can be dealt with either by CLAF making its own rules of practice (e.g. in determining eligibility) or by the terms of the contracts between CLAF and its assisted parties (e.g. the amount of the deduction). The only other matter in respect of which legislation might in our view be desirable is the proposed charge on awards; there are technical difficulties in creating a charge over a possible future award of damages and legislation would be required to make such a charge effective in some circumstances. We think that CLAF should publish its rules of practice relating to eligibility, but that potential litigants should have no enforceable right to be considered for, or to be granted CLAF assistance.

CONCLUSIONS

We therefore conclude :

(1) The low eligibility limits for Legal Aid (which now covers considerably less than half the population) and the obligations of some assisted parties to make contributions to the Legal Aid Fund deter many people from pursuing justifiable claims. Where claims are pursued, the potential costs liability may cause great hardship if the case is lost and

will be a source of worry while it is being conducted.

(2) The eligibility test for Legal Aid, as applied in practice, may tend to exclude the 'meritorious long-shot' case whcih ought to be fought even if the chances of success seem small.

(3) While a simple contingency fee system could go some way towards curing these problems, it is undesirable that lawyers should be given a direct financial interest in the outcome of their clients' cases.

(4) A Contingency Legal Aid Fund (CLAF) should be set up, which would meet the costs liabilities of unsuccessful assisted parties out of a fund derived from a deduction from the winnings of successful assisted parties.

(5) All individuals should be eligible for CLAF assistance (except possibly for those with income or capital above an upper limit, which should be high and should be self-assessed).

(6) Companies and partnerships should be eligible for CLAF, subject to an upper limit based on size or available assets. CLAF should also be able to assist trustees, executors, trustees in bankruptcy and liquidators.

(7) CLAF should, initially, only assist litigants who, in the event of success, will obtain money judgments from which a deduction can be made or will recover, obtain or preserve specific funds or property which can be subjected to a legal charge.

(8) Once CLAF is established, experiments can be made to discover means by which assistance can be extended to other litigants. The experiments might include direct subsidy out of CLAF (but only where the net cost to CLAF is not likely to be significant) or a stop-loss scheme.

(9) CLAF should start in the High Court, and should be extended as soon as possible to County Court claims in excess of the Scale 3 minimum and to tribunals with power to make equivalent awards.

(10) CLAF should, initially, apply the same 'reasonable grounds' test as Legal Aid in deciding whether to grant assistance. Subsequently, assistance can be experimentally extended to the meritorious long-shots.

(11) Defamation cases should not be excluded from CLAF.

(12) Applicants for CLAF assistance would be required to pay a non-returnable registration fee (£50 is suggested) to cover the administration costs of CLAF.

(13) There should be a time-limit on applications for CLAF assistance (one month after close of pleadings is suggested) with a discretion to extend time. An election to accept Legal Aid rather than CLAF assistance should normally be irrevocable.

(14) Where it appears that there were no longer reasonable grounds for pursuing a CLAF-assisted claim, or if the assisted party was requiring the case to be conducted unreasonably (for example, by unreasonably refusing to accept payment into court or offer of settlement), assistance would be terminated and if the assisted party wished to continue he would thereafter do so at his own risk,CLAF remaining liable for costs up to

the date of termination of assistance if the assisted party lost.

(15) In exceptional circumstances (e.g. where a misleading application had been submitted) CLAF would in addition to withdrawing assistance in respect of future costs be entitled to recover from the assisted party its liability for costs already incurred.

(16) Where a CLAF-assisted party obtained judgment or accepted a settlement, CLAF would take a deduction from his winnings or the value of any property obtained, retained or recovered for him and would pay the excess of his common fund costs over party and party costs and any further costs to be borne by him under the terms of the judgment or agreement. The deduction would be secured by a charge on the award or property.

(17) The deduction should take the form of a banded percentage (i.e. one percentage from the first (say) £5,000 recovered, a lower percentage from the next (say) £5,000, and a still lower from any balance). There should be a lower deduction in the case of pre-trial settlements. The maximum deduction rate probably need not exceed 20%.

(18) If CLAF finances meritorious long-shots, a higher deduction rate should be charged to cover the higher risk. In other cases, although there are theoretical advantages to a risk-weighted as opposed to an across-the-board deduction, the practical difficulties make an across-the-board deduction preferable.

(19) If a CLAF-assisted claim is lost, CLAF would meet the common fund costs of the assisted party and any costs which he was ordered to pay on the normal basis (i.e. there would be no equivalent to the 10% Legal Aid deduction).

(20) CLAF assistance would automatically extend to cover appeals against judgments in favour of CLAF-assisted parties. If an assisted party lost and wished to appeal, he would have to re-apply for assistance with the appeal.

(21) CLAF should if possible be administered by an organisation under the aegis of the Law Society which will be separate from the Legal Aid organisation, though structurally rather similar and on a smaller scale. If the Law Society were unwilling to accept responsibility for setting up CLAF, it could be set up as an independent public office or, possibly, on a commercial basis by one or more of the major insurance companies.

(22) Initially, CLAF should be set up on the basis of cautious estimates of demand, and with some restrictions on availability.

(23) CLAF will require some finance for the commencement of its operations and for initial publicity, but it should become self-financing within a few months.

(24) The Government should either provide the initial finance itself (on the basis that it will be a loan to be repaid within a few years of commencement) or give a guarantee so that a loan can be raised elsewhere at reasonable interest rates. Legislation would be required but it would be short and simple.

APPENDIX

NOTE ON *PROPOSALS FOR A SUITORS' FUND*

1 The original proposals were published by JUSTICE in March, 1969 as a Report by a Sub-Committee on Civil Appeals of the Standing Committee on Civil Justice.

2 The basic idea is to alleviate hardship in appeal cases. If a successful litigant in the court of first instance subsequently loses in the Court of Appeal, it seems unfair that he should have to pay both parties' costs in both courts. The Suitors' Fund would indemnify him against the appeal costs, on the basis that the trial judge should have made the correct decision in the court of first instance.

3 The Suitors' Fund would also indemnify litigants against the additional costs incurred where a new trial was ordered on account of the death or illness of a judge.

4 The Suitors' Fund was conceived as being entirely self-financing by a small additional charge to all litigants on the existing fees for issue of a writ or other process. Litigants would therefore pay their own insurance against judicial error and no government finance would be required at all. The additonal fee envisaged in 1969 was 1/- or 2/6. Even in 1978 we believe that only a modest extra fee would be required – probably not more than about 50p.

5 The proposal is not novel. It is derived from an existing scheme in New South Wales set up as long ago as 1951.

6 In June, 1969 the Lord Chancellor took up various points with JUSTICE – none criticising the general principles – and these were dealt with by the attached Addendum to the original Report.

7 The Bar Council, in their comments at the time, favoured a restricted scheme operating only in respect of appeals to the House of Lords.

8 The Council of the Law Society in July, 1973 favoured the JUSTICE proposals, but suggested financing from public funds rather than from court fees.

9 There was general approval of the scheme in the legal press and elsewhere at the time. Since then no action has been taken to implement it, but the need remains at least as great as before. Bearing in mind that a Suitors' Fund Scheme would be wholly financed by litigants and would require only a small administrative office we recommend that it should be set up now without further delay.

10 The Suitors' Fund Report refers to the Evershed Committee's recommendation that the Attorney General should be entitled to certify the use of public funds to litigate points of law of exceptional public interest, either at first instance or on appeal. JUSTICE considers implementaion of that recommendation is long overdue. Since there might often be cases brought against the Crown, JUSTICE would prefer certification to be by an independent body rather than by the Attorney General. Even if there were such a system of certification it would not significantly diminish the need for a Suitors' Fund Scheme because the majority of appeal cases do not involve points of law of exceptional public interest.

PROPOSALS FOR A SUITORS' FUND

1 INTRODUCTION

(a) Present Hardships and General Proposals

The general rule in civil litigation is that costs follow the event, that is to say the loser is ordered to pay the costs of the winner as well as his own. Whether or not this so-called Indemnity Rule should be altered has been the subject of discussion for many years. It is on the assumption that the rule is not capable of immediate change, that it is now suggested that a fund to be known as the Suitors' Fund might be set up to mitigate hardship occasioned by the rule in cases in which there are one or more appeals.

A simple illustration of hardship under the rule as it now operates might be provided by a small civil action in the High Court brought by P against D. Though the amount in issue may only be £1,000, total taxed costs could easily almost equal that amount, say £400 on either side. If P succeeds, D must pay the £1,000, plus a further £800 representing P's costs, and his own. If D then appeals and succeeds in the Court of Appeal, P who is in no way to blame for the erroneous decision of the trial judge, besides having to pay the £1,000 in issue and the original £800 costs, will have to pay both D's costs on the appeal and his own, say £300 each, or £600 in all. P therefore, in this example, would pay total costs of £1,400 instead of only £800, as would have been the case had the trial judge made the correct decision in the court of first instance.

The individual litigant has often at present to bear the extra costs arising from judicial error, and of course the position may become even worse in the example given if there is a further appeal to the House of Lords. The uncertainty of law, particularly after the enactment of certain types of new legislation, provides ample scope for judicial fallibility. Another situation which may give rise to an appeal is where the judge at first instance is bound by a precedent which can only be over-ruled by the higher court. Also, where there is some accidental breakdown in the system, as, for example, the illness or death of a judge, additional costs may be incurred through no fault of the party responsible for paying them. In all of these instances, the system itself ought to provide the litigant with some insurance against its defects.

A Suitors' Fund, to be financed out of court fees, is proposed as the method of providing the required insurance. Thus in the original example P might recover from the Suitors' Fund the £600 representing the costs of the appeal, but not the remaining £800 costs at first instance, out of the total £1,400 costs which he would have to pay to D.

(b) Existing Suitors' Fund

A Suitors' Fund has been set up in Australia in the State of New South Wales where both the Common Law and the Indemnity Rule apply.

The Fund was set up by the New South Wales Suitor Act 1951 as amended in 1959 and 1965. A similar fund based upon the New South Wales one was set up by the Western Australia Suitors Fund Act 1964. The more important provisions of these Acts are summarised below in Schedule 2, and in preparing this Report regard has been had not only to those Acts, but to the replies to detailed questionnaires concerning their operation which have been obtained from both States. It is worth noting also that in its Final Report in 1953 on the subject of Litigation at the Public Expense, the Evershed Committee on Supreme Court Practice and Procedure at 677(1) recommended that the New South Wales scheme should be kept under observation so that the question might be considered whether a scheme on similar lines should be introduced in this country.

Subsequently the Council of the Law Society in a Memorandum to the Lord Chancellor in 1964 on the Indemnity Rule in Litigation considered the New South Wales Scheme and said that although it went some way towards relieving hardship and if introduced here would be welcomed as an improvement, it did not go far enough (para. 25).

In the proposals that follow, the Australian legislation and experience have been used as a guide. It is thought however that the Suitors' Fund in this country should from the very outset be of wider application than either of the Australian ones.* This could be achieved without difficulty, and would bring about a much greater improvement than was envisaged by the Law Society at the time it considered the New South Wales Scheme.

(c) Other Reforms

The Evershed Committee in its Report also considered the hardship caused by the uncertainty of the law and the need to have points of civil law of exceptional public interest considered by the House of Lords. It was suggested that the Attorney General should have power to certify use of public funds for this purpose in accordance with ordinary appeal procedure. If such a system were developed then litigants whose cases involved such special points of law would not need the assistance of the Suitors' Fund. Such cases would, however, always be a minority; they would reduce to a limited extent but not remove the need for a Suiors' Fund.

2 TYPES OF APPEALS

The simplest manner of defining the types of appeal in which a Respondent might be entitled to indemnity from the Suitors' Fund would be by reference to the Court concerned. Thus, the House of Lords, the Court of Appeal, and the Divisional Court of any Division in its appellate capacity could be specified as courts in which any unsuccessful Respondent could apply for an Indemnity Certificate in respect of costs. In that case, there would be no need to define further the type of appeal concerned. It is, however, possible to make further distinctions between appeals on law and fact, or final and interlocutory appeals. Apart from the difficulties inherent

* See Summary at end of Schedule 2.

in any such distinctions (e.g. appeals are more likely to involve mixed questions of law and fact rather than fact alone), the need for protection against the effects of erroneous decision remains the same in all these types of appeals. Hence, there would seem to be no good reason to make these further distinctions. Appeals, however, at a lower level of the legal system e.g. from Master to Judge in Chambers, or Registrar to County Court Judge, or Magistrate to Quarter Sessions could be excluded from the system at least in the first stages, on the ground that the costs involved at such level are not likely to cause the serious hardship in respect of which the fund is designed to provide protection.

Similar considerations apply to an examination of the position in respect of appeals from Administrative tribunals either by appeal proper or by application for a prerogative order. In so far as the individual litigant is involved in extra costs by reason of an erroneous decision of any such tribunal, there would seem to be no reason why he should not be given the protection of the Suitors' Fund in the Divisional Court or any higher tribunal.

It is proposed that the Suitors' Fund should be available in civil cases only.*

3 TYPES OF LITIGANTS

(a) The Individual Litigant

There would not seem to be any real difficulty in reconciling the protection of the Suitors' Fund with the assistance provided by the Legal Aid Fund. An Indemnity Certificate would entitle the unsuccessful Respondent to an indemnity in respect of any costs which he has been ordered to pay and his own costs of the appeal. A legally aided Respondent with a nil contribution would require no indemnity in respect of his own costs and, since he would not usually be ordered to pay the Appellant's costs, probably none in respect of these costs. If, however, he had a contribution to pay, the Indemnity Certificate would cover such contribution and such order for costs as was made by the court.

(b) The Corporate Litigant

Much consideration has been devoted to the question of whether or not the corporate litigant should have the benefit of the Fund. On the one hand it was felt that it might be desirable to exclude the corporate litigant entirely from the benefit of the scheme in the same way as it is

* So far as the appeals of a convicted person are concerned, the Respondent to such an appeal would be the Crown or some other public body or official who should not, in any event, be entitled to protection from the Fund. In cases in which the Accused is the Respondent, as, for example, appeals by the prosecution by way of case stated from the Magistrates to the Divisional Court, it would seem reasonable to provide protection for the Accused who loses in respect of additional costs incurred by reason of an erroneous decision of the Magistrates. The position closely resembles that in a civil case and compensation should be available to the Accused, but for a criminal matter it would be more appropraite for such compensation to be paid from public funds generally rather than from the Suitors' Fund. For this reason it is considered that criminal cases should be excluded from the Suitors' Fund.

excluded from the Legal Aid scheme. Such an exclusion would have the beneficial effect of limiting the sums which would have to be disbursed by the Fund, and could be justified as being one additional hazard of incorporation. On the other hand all litigants would contribute to the Suitors' Fund, and it seems only equitable that all should be entitled to benefit. If corporate litigants were excluded this might be no hardship to the larger public company, but it might be otherwise with the small family one.

Both Western Australia and New South Wales appear to have opted for a compromise solution by excluding only companies with more than a certain paid up share capital from the protection of the Suitors' Fund. This creates an arbitrary distinction which may well not reflect the financial position of the company at the time of litigation. Possibly a more satisfactory method might be devised by distinguishing between the large corporation not requiring assistance from the Suitors' Fund and the small company entitled to such assistance. It might be provided that the court should have regard to the financial circumstances of the Respondent, be he an individual or a corporate litigant, in determining whether an Indemnity Certificate should be granted. Alternatively, distinction might be made between close companies which would be protected and others which would not. Both of these distinctions would remain arbitrary, and the former would involve the court in an undesirable investigation of the financial position of the Company. Besides, even assuming that some less arbitrary distinction could be made than the Australian one, great difficulties would still be met in the very many cases where insurance companies exercise their right of subrogation. Would they or would they not be included in practice ?

For all these reasons it is recommended that the corporate litigant should have the benefit of the Suitors' Fund and be fully included unless it was found that the Fund could only be adequately financed in its initial stages by an exclusion of the corporate litigant.

(c) **The Crown and Other Public Bodies**

The Crown and Statutory Corporations should be excluded. Possibly certain other public bodies should also be excluded, but not, for instance, the small local authority.

4 INDEMNITY CERTIFICATE SITUATIONS

(a) **Successful Appeals**

(i) Respondent ordered to pay Appellant's costs – the scheme must ensure that any monies advanced from the Fund to the Respondent are used primarily to pay the Appellant's costs. Both of the Australian schemes provide that if there should be any reason to believe that the Respondent is unable or unwilling to pay the costs of the Appellant, the Fund can pay such costs direct. Indeed there seems to be no good reason why the costs should not be paid direct in all cases..*

* A possible conflict between the operation of the Suitors' Fund and the Legal Aid scheme arises in a case in which a non legally aided Appellant is successful against a legally aided Respondent. Normally only a nominal order for costs would be made against the unsuccessful Respondent on the basis of his lack of means, but if a substantial order were made the costs would become payable out of the Suitors' Fund.

(ii) No order as to costs – there may be no order as to costs in a case in which the Appellant succeeds on a ground not raised in the court below. This is not so obviously a case of judicial error being corrected, but there would seem no reason why an Indemnity Certificate should not be granted to the Respondent in respect of his own costs.

(iii) Appellant ordered to pay Respondent's costs – a rare order which would seem, of itself, to provide the Respondent with sufficient protection without the intervention of an Indemnity Certificate.

(iv) An appeal where there is no Respondent – not common, but again a situation where the Fund should be available to pay the Appellant's costs in a successful appeal direct.

(b) **Unsuccessful Appeals**

If a successful Respondent is unable to recover his costs from the Appellant by reason of the Appellant being legally aided, or insolvent, the Respondent may financially be in a worse position than if he were granted an Indemnity Certificate having lost the appeal. The Suitors' Fund, however, should be designed to protect against judicial error, and not against the insolvency of an unsuccessful litigant. Moreover, apart from the possible right to apply for security of costs before the hearing of the Appeal the successful Respondent may now also be awarded costs out of the Legal Aid Fund under the Legal Aid Act 1964. As the courts have exercised their power under this Act very sparingly it is recommended that irrespective of the introduction of a Suitors' Fund scheme, steps should be taken to ensure much wider use of this power.

(c) **Sequence of Appeals**

If an Appeal is merely one in a potential sequence of appeals, provision must be made for the Indemnity Certificate to take effect only after the time for appealing has expired and/or to be vacated should a further appeal be prosecuted.

(d) **Miscellaneous Situations**

The Australian Acts made special reference to the following situations:

(i) Death or illness of a judge necessitating a new trial.

(ii) Cases in which new trials are ordered for reasons not attributable to the act or default of a party seeking an Indemnity Certificate.

It would seem desirable to make a general provision that in any case in which a new trial is ordered any party incurring or being ordered to pay additional costs as a result thereof should be entitled to an Indemnity Certificate, unless the new trial was ordered as a result of some neglect or default on the part of such party.

5 PRACTICAL EXAMPLES

In normal civil litigation, there is the possibility of two appeals, and it seems desirable to trace the manner in which an Indemnity Certificate might be granted in such a sequence.

If P succeeds at first instance, and D appeals to the Court of Appeal, then there are two basic cases.

Case 1, where if D succeeds on appeal, P could apply for an Indemnity Certificate to cover his own costs of the appeal and any costs of the appeal ordered to be paid by him to D (this is the situation illustrated in the introduction).

Case 2, where if D fails on appeal, no application for a Certificate will be made.

In *Case* 1, P may appeal further to the House of Lords, in which case any Certificate granted by the Court of Appeal will be vacated.

In *Case* 1, if the further appeal is successful, D will be able to apply for a Certificate. It may be questioned whether such Certificate should cover only the costs in the House of Lords in which D was unsuccessful or also the costs in the Court of Appeal, in which D had succeeded. Since the purpose of the Suitors' Fund is to provide protection against the uncertainties of the appellate system, it is thought that any Certificate granted should cover all appellate costs incurred at the date of granting.

In *Case* 1, if the further appeal fails, no application for a Certificate in respect of the House of Lords costs will be made. Should P's Certificate in respect of the Court of Appeal costs be re-instated ? If it were not re-instated, P would be penalized for having made the further appeal. It seems desirable to provide that it should be so re-instated.

In *Case* 2, where D fails in the Court of Appeal, D may appeal further.

In *Case* 2, if D fails again on the further appeal, no Certificate will be required.

In *Case* 2, if D succeeds on the further appeal, P should then be entitled to apply for a Certificate to cover all the appellate costs.

6 THE GRANTING OF THE INDEMNITY CERTIFICATE

(a) **By which Court should the Certificate be Granted ?**

The Australian Acts provide for the granting of the Certificate by the Supreme Court even in cases of appeals in other Tribunals. This, however, would seem to be the result of constitutional difficulties, and there would appear to be no reason in the United Kingdom why the court hearing the appeal should not grant the Certificate.

(b) **Should the Grant be Obligatory or Discretionary ?**

The Australian Acts provide that the Court 'may grant' a Certificate, but provide no guide as to the matters to be considered in exercising the discretion. The answers which have been obtained to enquiries submitted to the Australian Funds do not indicate what matters have in fact been taken into account by the Australian Courts. It seems clear that the grant should be discretionary, but it should be considered whether specific reference should be made to the matters taken into account in exercising such discretion, e.g. financial hardship to the Respondent. The general rule might be that the Indemnity Certificate should be granted unless there was good reason to the contrary and that such reason should be stated by the court in making any refusal.

7 COST OF THE FUND

Both the Australian Acts (see Schedule 2) have a maximum limit on the entitlement of a Respondent granted an Indemnity Certificate. In New South Wales, the limit is now $3000 (£1.500): In Western Australia $1000 (£500). Whether limits should be imposed on the Fund depends upon an estimate of the costs likely to be the subject of indemnity, and the money likely to be available for the Fund. Initially, it would seem desirable and more politically acceptable to set a low limit which might vary from Court to Court. For instance, the limit for appeals up to the level of the Court of Appeal and the Divisional Court might be £1,000, and for the House of Lords £2,000 (which would cover the lower court as well).

Should the Fund be provided out of public revenue generally, or out of court fees ? The latter source is used in Australia, and would probably be a more acceptable source at least in the first instance. The litigant would by paying an additional fee, be obtaining some further insurance against the risks of litigation. It may be that an increase in the fee on issuing proceedings would be sufficient to provide a starting capital for the Fund. It is estimated for instance that if 1/- was added to the fee for issuing a writ, plaint or other form of process in the High Court and County Court a sum of £80,000 per annum would be produced. Divided amongst approximately 237 unsuccessful Respondents, which is the number of successful appeals in 1965 (see Schedule 1) there would be available approximately £338 for each unsuccessful Respondent. If the amount added to each writ fee etc. was 2/6, the total annual sum would be increased to £200,000 or about £845 for each Respondent.* It is thought, however, that a more satisfactory and equitable method would be to assign a proportion of general court fees to the Fund. This would involve a very slight increase in all court fees, but would mean that the scheme would be entirely self-financing.

---

* In some appeals there would have been several unsuccessful Respondents, thus reducing the amount available to each on the above mentioned calculation. On the other hand not every unsuccessful Respondent would be included. Another factor not brought in is the administrative cost of the Fund. It is thought this would be small, and could largely be absorbed by existing machinery. Also some actual interest to off-set against administrative costs might be earned by whatever credit balance the Fund had in hand from time to time. The above estimates are therefore very rough ones, but are thought to provide not too unreasonable an indication of what could be made available.

SCHEDULE 1

The Number of Appeals

In 1965 the number of *unsuccessful* appeals were as follows:

House of Lords	10
Court of Appeal	128 (including 8 from courts and tribunals other than the High Court and the County Court)
Divisional Court Chancery Div.	23
Divisional Court Q.B.D.	66 (including 37 from courts of summary jurisdiction)
Divisional Court P.D.A.	10
	237

N.B. (i) The total number of unsuccessful Respondents will exceed the number of appeals, because there will have been more than one Respondent to some appeals.

(ii) The number of Respondents who were legally aided or corporate litigants has not been ascertained.

SCHEDULE 2

The Australian Legislation

1 In New South Wales the Suitors' Fund Act 1951-1965 and in Western Australia the Suitors' Fund Act 1964 provide that where an appeal against a decision of a court on a question of law succeeds, the unsuccessful Respondent who is ordered to pay the Appellant's costs may be granted an Indemnity Certificate on application to a Judge of the Supreme Court.

2 The unsuccessful Respondent in New South Wales is entitled to recover, in addition to the Appellant's costs, either his own taxed costs (not to exceed the Appellant's costs) or, if he prefers not to have his costs taxed, 50% of the Appellant's costs; the maximum payable is now $3,000.

3 In Western Australia the Respondent can recover both the Appellant's costs and his own taxed costs; provided they do not exceed the sum paid to meet the Appellant's costs and subject to a total maximum sum recoverable of $1,000.

4 Both schemes apply to appeals to the Supreme Court, and to appeals from the Supreme Court to the High Court of Australia and to the Privy Council, and to all appeals in a sequence of appeals. In New South Wales the scheme has been extended to cover appeals to the District Courts and to the Industrial Commission of New South Wales. The scheme does not apply in either State to the Crown or to any company with a paid-up capital of $200,000. The grant of an Indemnity Certificate is in the

discretion of the Supreme Court, and there is no appeal against the grant or refusal of a Certificate.

5 The two schemes are financed in rather different ways. The Suitors' Fund in Western Australia is financed by the addition of a small fee, not exceeding two shillings, to the fee payable on a writ of summons when an action is commenced in the Supreme Court, or at the equivalent stage when proceedings are started in the lower courts. Under the New South Wales scheme a proportion of the revenue from all court fees is transferred to the Fund. No fixed levy is added to specific fees, but the result of course is a small increase in the general level of court fees. A different proportion may be fixed for different courts, but the proportion is levied on all fees.

6 Apart from the costs of appeals, the Suitors' Fund in both Western Australia and New South Wales also meets costs incurred by either party to a civil action, or by the Accused in a criminal trial, in certain cases where through no fault of the parties a new trial is ordered or the proceedings are otherwise rendered abortive. The provisions are similar in both States and cover part or whole of the following costs:

(1) Where civil and criminal proceedings are rendered abortive by the death or protracted illness of the Judge, the costs of the proceedings before they were rendered abortive.

(2) Where civil and criminal proceedings are discontinued and a new trial ordered through no fault of the parties, the costs of the proceedings before they were discontinued.

(3) Where a conviction is quashed on appeal on a question of law and a new trial ordered, the costs of the proceedings before the conviction was quashed.

(4) Where a new trial is ordered in a civil action on the ground that the damages awarded in the action were excessive or inadequate, the costs of the motion for the new trial.

Comparative Summary of main variations recommended for a Suitors' Fund for England and Wales

(a) Appeals on question of fact should be included.
(b) The unsuccessful Respondent should be indemnified up to the prescribed limit for all costs of the appeal(s).
(c) Criminal cases should be excluded.
(d) Corporate Litigants should be included.
(e) The Appeal Court should grant the Indemnity Certificate.
(f) The successful Appellant should be paid directly in all cases by the Fund.

March, 1969
12, Crane Court, Fleet Street, E.C.4.

PROPOSALS FOR A SUITORS' FUND

Addendum to a Report by a Sub-Committee on Civil Appeals

A letter received from the Lord Chancellor dated 5 June 1969 in no way comments on or criticises the general principles on which it has been argued that a Suitors' Fund should be set up. The eight comments which are contained in his letter are, however, pertinent and helpful in that they are likely to assist in achieving better definition of the proposed scheme before any attempt is made to draft a bill. Observations on the comments are as follows:

1 *Comment*

Section 3(a) of our Report dealing with Legal Aid overlooks the effect of the Law Society's charge on any damages which the assisted party may recover for costs both at first instance and on appeal.

Observation

It is intended that the Suitors' Fund should be available irrespective of whether one or both parties is legally aided. Two situations arise:

(a) Where the successful appellant is assisted and the respondent is not.

In this case he, and therefore the Legal Aid Fund, will recover costs from the unsuccessful respondent, and the unsuccessful respondent will be indemnified against both the appellant's costs and his own by the Suitors' Fund.

(b) Where both the successful appellant and the unsuccessful respondent are legally aided.

If the unsuccessful respondent has a nil contribution to the legal aid fund there would ordinarily be no order for him to pay the appellant's costs. The appellant's costs would therefore, be satisfied by the Law Society's charge on any damages he received and he would, therefore,be prejudiced by virtue of the fact that the respondent was legally aided. The solution would be for the Court to make the same order as to costs against the legally aided respondent as would have been made against an unassisted respondent so that an Indemnity Certificate would be available for the benefit of the assisted appellant thereby avoiding the need for recourse to the charge on any damages recovered by him. It is thought preferable to arrange matters in this way rather than overload the legal aid fund by putting the legal aid fund to the extra expense which would otherwise be involved in safeguarding the appellant in this instance.

2 *Comment*

The Report gives no examples and makes no mention of the costs incurred on new trials ordered by the appellate Court.

Observation

This is incorrect. In Section 4(d) of the Report there is specific recommendation that in any cases in which a new trial is ordered Indemnity Certificates should be available to cover the hardship of additional costs.

It is believed that the usual order is costs in the cause where there is a new trial, but no detailed information is presently available to this sub-committee. It is desirable to establish more precisely what orders as to costs are usually made in these circumstances. It is also necessary to obtain such statistics as can be made available of the incidence of new trials in order to ascertain their frequency and the amount of costs thrown away etc. On the insufficient information available, it has not been possible to assess the cost to the Suitors' Fund of bringing in a general provision to cover additional costs on new trials not caused by the neglect or default of one party, but the need for such a provision is recognised and accepted.

3 *Comment*

The statistics in the Report on Appellate Courts and in particular on the Divisional Court, do not include cases remitted to the lower Courts.

Observation

This is a valid criticism of the rough costings of the Fund contained in the Report. Thus, the statistics produced by the Lord Chancellor's Department reveal that the number of cases remitted from the Divisional Courts in 1965 was 41. Such cases were not allowed for in the Schedule of the Report. However, under the general rubric of the Report it is proposed that where injustice results remitted cases should be included.

Some details need to be obtained as to what orders for costs are eventually made in these cases (i.e. in the appellate court or below) in order to ascertain the extent of the hardship incurred by the unsuccessful litigant. Probably, though, if it is covered by the Suitors' Fund the cost would not be too great, bearing in mind that the Lord Chancellor's statistics reveal that the average costs in Divisional Courts for both sides total £140 only which for 41 cases would be a figure of £5,740 only, assuming Indemnity Certificates were granted every time.

4 *Comment*

Strictly speaking the costs 'thrown away' by some irregularity are the costs of the initial trial whereas the extra costs incurred when a case is remitted from the Divisional Court with a direction would normally be the cost of the 'remitted hearing'.

Observation

The overriding consideration must be for the Indemnity Certificate to cover where appropriate extra costs incurred by a failure in the system, and it is for that reason that the expression additional costs is used in the last paragraph of Section 4(d) of the Report.

Frequently, the costs of the original trial are by no means thrown

away. For instance, evidence necessarily adduced at length in the original trial, may only be led briefly in the new trial, because it is not contested. Also in some cases the matter may be settled before it is retried in which case the Indemnity Certificate should still be available.

What is suggested is that the Appellate Court should ordinarily make an order for an Indemnity Certificate to cover the costs of the Appeal and additional costs incurred by *either* party as a result of the case being remitted or of the action having to be retried. The actual application of the order would be a matter for the taxingmaster.

5 *Comment*

Schedule 1 of the Report does not include cases where the judgment was 'varied' on appeal or when the appeal was 'otherwise disposed of'.

Observation

The total number of cases 'varied' or 'otherwise disposed of' is given by the Lord Chancellor as 103, although no split between the two categories is shown. Here again more information is really required on the nature of both the cases involved and the order for costs usually made. On the basis that 'varied' covers situations where the appellant has been partly successful it seems desirable that cases 'varied' should be included, but possibly not cases 'otherwise disposed of', which may involve cases withdrawn part heard or without any hearing.

6 *Comment*

The Lord Chancellor has produced detailed comments on the statistics with up-to-date costings of taxed costs on appeals.

Observation

These statistics show that the level of costs is now rather higher than the Committee had thought it to be. On the other hand, for that very reason the ceiling of the proposed Indemnity Certificates seems even more desirable now that it is established that the majority of appeals cost very much less than the few more expensive ones. A ceiling of £3,500 in the House of Lords, £3,000 in the Court of Appeal, and £1,000 elsewhere, would appear to cover all but the most expensive cases.

In accordance with the Committee's original recommendation it is suggested that the Suitors' Fund be raised by a levy on Court fees generally. Thus 6d in the £1 would raise approximately £225,000 and would cover the minimum calculation of the Lord Chancellor's Department for inclusion of cases 'varied' or 'otherwise disposed of', which is estimated at £220,400. There would be a greater margin if the aforementioned ceiling figures were also adopted, and if 'otherwise disposed of' cases were excluded – it being understood that they are included in the estimates of the Lord Chancellor's Department. The one consideration which the Lord Chancellor's Department appears to have omitted is that in some cases there are costs of more than two sides, and it is necessary to check that reference to the costs for both sides in the Lord Chancellor's figures includes total costs of all sides.

JUSTICE PUBLICATIONS

The following reports and memoranda published by JUSTICE may be obtained from the Secretary:

	Non-Members	Members
Published by Stevens & Sons		
The Citizen and his Council – Ombudsmen for Local Government? (1969)	50p	35p
Privacy and the Law	80p	55p
Administration under Law (1971)	75p	50p
Litigants in Person (1971)	£1.00	70p
The Unrepresented Defendant in Magistrates' Courts (1971)	£1.00	70p
The Judiciary (1972)	90p	70p
Compensation for Compulsory Acquisition and Remedies for Planning Restrictions (1973)	£1.00	70p
False Witness (1973) £1.25	£1.25	85p
No Fault on the Roads (1974)	£1.00	75p
Going to Law (1974)	£1.00	75p
Parental Rights and Duties and Custody Suits (1975)	£1.50	£1.00
Published by Charles Knight & Co.		
Complaints against Lawyers (1970)	50p	35p
Published by Barry Rose Publishers		
Going Abroad (1974)	£1.00	70p
*Boards of Visitors (1975)	£1.50	£1.25
Published by JUSTICE		
Insider Trading (1972)	25p	20p
The Redistribution of Criminal Business (1974)	25p	20p
Compensation for Accidents at Work (1975)	25p	20p
The Citizen and the Public Agencies (1976)	£2.00	£1.60
Our Fettered Ombudsman (1977)	£1.50	£1.00
Lawyers and the Legal System (1977)	£1.50	£1.00
Plutonium and Liberty (1978)	75p	60p
CLAF, Proposals for a Contingency Legal Aid Fund	75p	60p
Freedom of Information (1978)	75p	60p

The following reports in the Stevens series are out of print but photostat copies may be obtained from the Secretary on application:

Contempt of Court (1959)	75p
Legal Penalties and the Need for Revaluation (1959)	35p
Preliminary Investigation of Criminal Offences (1960)	60p
The Citizen and the Administration (1961)	£2.00
Compensation for Victims of Crimes of Violence (1962)	75p
Matrimonial Cases and Magistrates' Courts (1963)	40p
Criminal Appeals (1964)	£1.50
The Law and the Press (1965)	£1.25
Trial of Motor Accident Cases (1966)	£1.25
Home Office Reviews of Criminal Convictions (1968)	70p

*Report of Joint Committee with Howard League and N.A.C.R.O.

Home-Made Wills (1971)	30p	30p
The Prosecution Process in England and Wales (1970)	50p	50p
Living It Down (1972)	75p	75p
Evidence of Identity (1974)	60p	60p
Bankruptcy (1975)	£1.25	£1.25

Duplicated Reports and Memoranda

Report of Joint Working Party on Bail	25p	25p
Evidence to the Morris Committee on Jury Service		25p
Evidence to the Widgery Committee on Legal Aid in Criminal Cases		25p
Reports on Planning Enquiries and Appeals		40p
Rights of Minority Shareholders in Small Companies		25p
Civil Appeals: Proposals for a Suitor's Fund		25p
Complaints against the Police		25p
Eleventh Report of Criminal Law Revision Committee (1972)		40p
A Companies Commission		25p
Breach of Confidence		30p
Defamation		30p
Transcript of JUSTICE Conferences on –		
"Eleventh Report of Criminal Law Revision Committee" (1973)		£1.00
"Children and the Law" (1975)		£1.00
"Casualties of the Legal System" (1977)		£1.50

Memoranda by Committee on Evidence

1.	Judgements and Convictions as Evidence	15p
2.	Crown Privilege	15p
3.	Court Witnesses	15p
4.	Character in Criminal Cases	15p
5.	Impeaching One's Own Witness	15p
7.	Redraft of Evidence Act, 1938	15p
8.	Spouses' Privilege	15p
9.	Availability of Prosecution Evidence to the Defence	20p
10.	Discovery of the Evidence Act	15p
11.	Advance Notice of Special Defences	15p
12.	The Interrogation of Suspects	25p
13.	Confessions to Persons other than Police Officers	15p
14.	The Accused as a Witness	15p
15.	Admission of Accused's Record	15p
16.	Hearsay in Criminal Cases	15p

Published by International Commission of Jurists

The Rule of Law and Human Rights (Principles and Definitions)	£2.00
Human Rights in a One-Party State	£1.80
The Decline of Democracy in the Philippines	£1.80
Attacks on Lawyers in Argentina	£1.00

Back numbers of the Journal, Bulletin and Review and special reports of the International Commission of Jurists are also available.

JUSTICE

British Section of the International Commission of Jurists

JUSTICE is an all-party association of lawyers concerned, in the words of its constitution, 'to uphold and strengthen the principles of the Rule of Law in the territories for which the British Parliament is directly or ultimately responsible: in particular, to assist in the administration of justice and in the preservation of the fundamental liberties of the individual'. It is also concerned to assist the International Commission of Jurists in its efforts to promote observance of the Rule of Law throughout the world.

JUSTICE was founded in the Spring of 1957 following a joint effort of leading lawyers of the three political parties to secure fair trials for those accused of treason in Hungary and South Africa. From this co-operation arose the will to found a permanent organisation. A preamble to the constitution lays down that there must be a fair representation of the three political parties on the governing Council, which is composed of barristers, solicitors and teachers of law.

In the twenty-one years of its existence, JUSTICE has become the focal point of public concern for the fair administration of justice and the reform of out-of-date and unjust laws and procedures. It has published authoritative reports on a wide variety of subjects, the majority of which are listed at the end of this report. Many of them have been followed by legislation or other government action. In Commonwealth countries, JUSTICE has played an active part in the effort to safeguard human rights in multi-racial communities, both before and after independence.

Membership of JUSTICE is open to both lawyers and non-lawyers and enquiries should be addressed to the Secretary at 2 Clement's Inn, London, W.C.2. Tel.: 01–405 6018.