Sept 30/80.

DISCUSSION PAPER

COSTS

The issue of costs must be addressed as a policy matter, both with respect to costs awarded against as well as in favour of a clinic's client. In the former case, the clinic funding Regulation provides for a discretionary pay-out of monies by the Clinic Funding Committee on behalf of the applicant client, and, accordingly, written guidelines should be developed within which that discretion can be exercised. In the case of costs being awarded in favour of the client, there is some confusion about who is legally entitled to them: the general Legal Aid Fund, the designated clinic fund, the clinic, or the client. Again, a workable solution must be devised.

A. Costs awarded against the clinic client

S.152 of the new clinic funding Regulation reads:

152(1) - Where proceedings have been taken or defended by a person with the aid of services provided by a clinic and the costs thereof have been awarded by a court against him, he may apply to the Director for payment of the costs so awarded out of the moneys designated for the purposes of this Part.

(2) - Where the person against whom costs have been awarded refuses or fails to apply for payment within a reasonable time, the person to whom such costs are awarded may make the application.

(3) - The Director shall refer an application under subsection (1) or (2) to the Committee, and the Committee shall make such recommendation in respect of the disposition of the application as to it appears just,

/....

including payment in whole or in part out of the moneys designated for the purposes of this Part.

In order to evolve discretionary as well as procedural guidelines to administer this section, it is helpful to examine the English experience, and the views of Ontario's sub-Committee of the Legal Aid Committee which has been administering a similar provision for a number of years.

1. English Law

English legislation provides a discretionary pay-out scheme in the case of costs awarded against legally-assisted parties, but it has codified several pre-requisite conditions which are not included in Ontario's provisions; therefore, any judicial decisions should be read with these in mind. The governing section is as follows:

S.1(1) - Where a party receives legal aid in connection with any proceedings between him and a party not receiving legal aid (in this Act referred to as "the unassisted party") and those proceedings are finally decided in favour of the unassisted party, the court by which the proceedings are so decided may, subject to the provisions of this section, make an Order for the payment to the unassisted party out of the Legal Aid Fund of the whole or any part of the costs incurred by him in those proceedings: (1964 Legal Aid Act, England).

/....

There are obvious distinctions between the English provisions and those in Ontario. For example, the applicant in England must be the unassisted party in whose favour costs were awarded, while in Ontario, both the unassisted and assisted parties may apply. The English courts have therefore not directed their minds specifically to the assisted party, except in relation to the unassisted applicant. As well, the proceedings at first instance in England must have been commenced by the assisted party, even if it is only appeal costs being considered. (S.1(3)(a)). The reasons for this rule were discussed in the House of Commons debates:

> The government's reason for drawing this distinction between proceedings at first instance and on appeal was that any litigant, before starting proceedings, takes into account the risk that, if successful, he may not recover his costs; it would be wrong to put a plaintiff in a stronger position when suing an assisted person than an unassisted one. (H. of C. Deb., p.6, Dec., 1963, col. 1594).

(Note: In this context, resisting a counterclaim has been treated as a separate action).

Finally, the unassisted party must have succeeded in defending the action for which he claims costs; a loss on his part with costs nevertheless awarded in his favour does not suffice (s.1(1)).

Despite the foregoing differences between English and Ontario legislation, the English decisions still offer useful ideas about the basic issues.

a) <u>Who may apply?</u>

This question has been the subject of some litigation: is an applicant eligible for payment out of the fund if his costs are to be indemnified by a third party such as an insurance company (without standing)?

Common law has disallowed the recovery of costs to which a party would otherwise be entitled if that party has, in fact, incurred no costs, perhaps due to retention of an already-salaried solicitor, or a specific agreement (for whatever reason) that the party as client will not be liable to his solicitor. (Gundry v. Sainsbury [910] 1K.B.645) Therefore, the unassisted party in England must have legally incurred the costs before applying for a pay-out. (Legally-assisted parties in Ontario, i.e. those who incur no liability for their solicitors services, are specifically excluded from this common law rule under s.19 of the Legal Aid Act, wherein costs awarded to him or her remain recoverable but belong to The Law Society and are paid into the Legal Aid Fund).

A right to indemnification, however, has been held not to exclude the applicant, in that it is an agreement between the applicant and a third party and, therefore, does not affect the liability between the applicant and his solicitor. (Adams v. London Improved Motor Coach Builders Ltd. [192]] 1 K.B.495, (C.A.); Davies v. Taylor (No. 2) [1974], House of Lords) However, the fact that an applicant is possessed of an indemnification right from a third party, although not precluding him from applying, affects the issue of financial hardship on the part of the unassisted party, a criterion which the Legal Aid sub-Committee specifically utilizes.

b) Financial Hardship

The English lawmakers, as well as OLAP's sub-Committee have adopted a "financial hardship" criterion, although the English legislation dictates its inclusion only with respect to those decisions concerning proceedings at first instance. In the case of Nowotnik v. Nowotnick [1967] P. at p.93; [1965] 3 All E.R.167 (Court of Appeal), Lord Denning interpreted the legislative pre-condition of "severe financial hardship" as follows:

/....

> The words mean what they say - severe financial hardship...What about an ordinary person who is uninsured? If he has ample means of his own, so that he can meet his own costs without having to tighten his belt or restrict his activities in any way - and his capital is not seriously depleted - we would not say that he will suffer severe financial hardship. But if his finances are so nicely balanced that, in order to meet his costs, he has to restrict his activities considerably, or seriously deplete his capital, then we think he would suffer severe financial hardship. [1967] P. at p.102; [1965] 1 All E.R. at p.172

In the later case of Hanning v. Maitland (No. 2) [1970] 1 Q.B. 580; [1970] 1 All E.R.812 (Court of Appeal), the same court decided that their interpretation was too narrow, leaving most applicants without remedy. Lord Denning himself stated that the words "severe financial hardship" were:

> ...construed in Nowotnick so as to give emphasis to the word "severe". But, in the light of experience I do not think they should be construed so strictly. In future, the words should be construed so as to exclude insurance companies; and commercial companies who are in a considerable way of business; and wealthy folks who can meet the costs without feeling it. But they should not be construed so as to exclude people of modest income or modest capital who would find it hard to bear their own costs.

(The English legislation directs that, in the case of an applicant who was acting in a fiduciary or representative capacity, the court may look not only to his financial resources but also the value of the reimbursing estate, property or trust fund, and possibly to the resources of its beneficiaries.)

Further, the English courts are not bound by legislation to consider the financial straits of the unassisted applicant when deciding upon costs at the appellate level and, in fact, do not include it as a criterion:

/....

> The fact that an unassisted party has a good deal of money does not mean that it is not just and equitable to make an order against the Legal Aid Fund. Orders have been made in favour of Building Societies, insurance companies and the like. In the Court of Appeal it is often just and equitable that their costs should be paid if they have been put to expense by an unsuccessful assisted person coming to this court.
> Maynard v. Osmond (No. 2) [1979] 1 W.L.R. 31 at p.34 (Eng. C.A., Lord Denning)

c) "Just and Equitable"

Another criterion taken into account by English courts is whether a pay-out from the public purse would be just and equitable in all the circumstances. Judges have basically looked to the conduct of the applicant as well as the success of the proceedings (both considerations being specifically included in the guidelines of the Legal Aid sub-Committee). However, the cases reflect a distinction between considering first instance, Court of Appeal, and House of Lords proceedings:

i) First Instance

Nowotnick represented a specifically-defined breakdown of the phrase "just and equitable". The court included considerations of the orginal circumstances surrounding the issuing of the certificate, presumably to determine whether the merits should have warranted an action in the first place. Hanning once more overturned Nowotnick in stating that "just and equitable" should be a flexible phrase which could be considered in each new set of circumstances. Further, Hanning specifically rejected the practice of examining the originating circumstances. It was decided that the court should ask itself, among other things, whether the applicant (again, in England, the unassisted defendant) brought on the litigation himself, or whether he could have avoided it.

/....

ii) Appeal

Again, the governing legislation requires, a) that the applicant was the defendant in originating proceedings at first instance, and b), that he was successful (S.1(1)). Therefore, English courts do not address the question of applicant who took to Appellate Court an action which that applicant originally initiated nor do they consider an application where the party lost at the appeal level. Both these cases are by contrast, within the jurisdiction of the Clinic Funding Committee and should be the subject of the general guidelines applied to every other case.

Hanning indicates that something more is needed than simply showing that the successful party was entitled to costs before digging into the public purse. A major example of this is the appeal case which clarifies a point of law, thereby benefitting the public as a whole. In the case of Saunders v. Anglia Building Society, 1 All E.R.243 (House of Lords), Lord Reid states the following: (cited with approval by the Legal Aid sub-Committee).

> I think we must consider separate costs in this House and costs in the Court of Appeal. Cases can only come before this House with leave, and leave is generally given because some general question of law is involved. In this case it enabled the whole vexed matter of non est factum to be re-examined. This seems to me a typical case where the costs of the Building Society as the successful respondent should come out of public funds. But different considerations apply to the Building Society's costs in the Court of Appeal. When the use of public funds in affording Legal Aid has been the direct cause of the successful unassisted party having to incur additional costs, there appears to me to be a very strong case for holding that it is just and equitable that such additional costs should be made good to him out of public funds.

/....

> But in the present case the Building Society was not taken to the Court of Appeal by the legally-aided opponent. It had to go to that court because the decision at first instance was against it. I may say that the action would never have started if the Plaintiff had not had legal aid from the beginning. But that appears to me to be too remote. Although the Building Society has ultimately succeeded it cannot recover its costs at first instance because it is not impecunious. I cannot see any sufficient reason why it should recover from public funds costs which it chose to incur on appealing against an adverse decision at first instance.

Lord Denning also addressed the example of a case in the Superior Courts which clarifies a point of law, but did not differentiate between Court of Appeal and House of Lords:

> Take this particular case. It raised a point of some constitutional importance, namely, whether police constables were entitled to legal representation on a disciplinary charge. No doubt it was right and proper for it to be decided as a point of law. But not at the expense of the Hamshire Police authority only. It affected all police authorities and many other people. When a point of law has to be elucidated like this between litigants, and it goes up to the Court of Appeal or to the House of Lords, it is not right that costs should fall on an individual or a concern. They should fall on a legal aid fund. The fund is particularly appropriate to deal with matters of this kind.

However, Lord Denning continues:

> But I would not confine it to cases which involve important points of law. I think the principle should be extended so as to be of general application. It seems that whenever the legal aid fund takes up cases for assisted persons and brings another party before the courts, then, if the case fails, it is often just and equitable that the legal aid fund should pay the costs of the unassisted party.
> Maynard v. Osmond (No. 2) [1979] 1 W.L.R.31 at p.35.

It is suggested that the mere fact that public moneys has taken through the courts a private party who was ultimately successful is not in itself a reason to reimburse that private party. This would very likely impose an impossible strain on the fund and may very well provide an encouraging atmosphere for the initiation of frivolous actions. Although the success of the private party remains a consideration, it

/....

is only one criterion among several.

2. Sub-Committee of the Legal Aid Committee

The Legal Aid Committee has jurisdiction under S.129, 130 & 131 of the Regulation to pay out costs from the Legal Aid Fund "as to it appears just". These sections are substantially the same as those governing the clinics with the exception that the Legal Aid Committee can dispose of the matter itself whereas the Clinic Funding Committee makes recommendations to the Director. In fact, there is no section in the clinic funding Regulation requiring the Director to follow this recommendation.

Although they exist as two separate funds and decision-making bodies, it seems rational and just for both arms of the Ontario Legal Aid Plan to exercise their discretion in a similar manner and under similar guidelines. This can be accomplished only if the guidelines are flexible enough to reflect the unique circumstances which often characterize clinic cases and do not conflict with or nullify the basic goals of the clinic movement.

Procedurally, the Legal Aid Sub-Committee (presently one person) is apprised of any written application for costs by an investigator on the Plan's staff who prepares an accompanying brief. To date, only three such applications have been allowed by this Sub-Committee; two for the full amount of $200.00 and $350.00 and one for $3,300.00 (the latter being approximately 1/3 of the total request).

It is suggested that similar procedures should be adopted in respect of s.152. Written requests for costs should be forwarded to the clinic funding staff who can then prepare thorough briefs for the consideration of the Clinic Funding Committee. After the Committee reviews these documents, it may dispose of the matter or, alternatively, request an oral hearing to be conducted after which it can determine whether the request will be granted and how much will be paid. (Note: an alternative to the above would be that the individual clinic concerned make all representations and investigations on behalf of the applicant, and present them to the Clinic Funding Committee without intervention by the clinic funding staff.) Especially where the applicant is the unassisted party, the clinic funding staff must be involved because the clinic might find itself in a potential conflict of interest situation.

The decision-making guidelines proposed and adopted by the Legal Aid Committee were compiled with the English experience in mind. They are as follows:

a) In the case of the legally-aided applicant the following should be relevant -

  i) Ability to pay;
  ii) Financial Hardship;
  iii) Conduct of the Applicant;
  vi) Merits of the proceedings.

b) In the case of the non-legally-aided applicant, the Committee recommends the same requirements as above but would require the condition precedent that such applicant establish that he or she has exhausted all other normal remedies without success, or satisfy the Committee that such efforts would be hopeless.

In the case of the non-legally-aided applicant, it is the practice of the Sub-Committee to require the filing of a nulla bona as proof that the judgment creditor has exhausted every avenue before hearing the application. However, in a test case sponsored by a clinic, it would not be equitable for the Plaintiff to be proceeded against (assuming it was not a frivolous and purposeless proceeding), and therefore the Committee should not require this same condition precedent.

/....

If the Plaintiff and the constituency which benefits from the test case are able to contribute financially, the criterion of financial hardship would bring this to light and make it part of the eventual decision. However, in a non-test case, the requirement of a nulla bona being filed can be suitably used as the screening technique envisioned by the Legal Aid Sub-Committee.

By contrast to the English courts which were bound by explicit pre-requisites, both Ontario Legal Aid Plan Committees have wide jurisdiction with respect to applicants, whether assisted or unassisted: each is required to "make such disposition thereof as to it appears just". Yet the main English considerations - financial and equitable - are basically reflected in the Legal Aid Sub-Committee's guidelines, as follows :

a) Ability to Pay; Financial Hardship

Both of the above tests utilize the standard of financial hardship which the Sub-Committee endorsed from Hanning:

> People of modest capital and income who would find it hard to bear their own costs.

Presumably, any legally-assisted person would meet this test, although appropriate documentation may be required to demonstrate the fact to the Committee.

With respect to appellate cases, the Sub-Committee has not followed the English courts' practice of dropping the financial hardship criterion; in that there is no comparable legislative direction to do so as there is in England, it is only required as one of several factors to be weighed together. This departure from English practice is especially necessary in light of the test case nature of many clinic cases which will not be pursued by clinic clients if their fragile economic health will be ignored in any pay-out consideration.

Protection of the public from potentially frivolous actions can be achieved by means of the remaining two guidelines, both of which must be considered in conjuction with the financial criterion before reaching a decision. In the Ontario Divisional Court case of Basil, McFarland, etc. v. The Law Society of Upper Canada, etc. (unreported, November 23/73), Mr. Justice Morand suggested that these general guidelines as a whole were just. He stated:

> "... we cannot assist the applicant herein unless we find that the Legal Aid Committee bound itself to dispose of this case on the ground that the applicant did not show financial hardship. It is our opinion that that is the only ground upon which we would be able to interfere with this decision by the Legal Aid Committee... upon reading the minutes it becomes clear that the Committee did consider the whole criteria which it had laid down and there is no evidence that its decision was not based upon "as to it appears just". (at page 3)

b) Merits of the Case

Where the facts indicate that an assisted Plaintiff had little chance of winning but nevertheless managed to obtain a certificate, the English Courts have generally ordered the payment of costs simply because a member the public has been put to significant expense with public monies for little purpose and therefore, should be reimbursed, especially if the case reached the appellate courts. And yet, the merits of the case might also suggest that monies should be paid out if the assisted person had a good chance of winning, shifting the perspective to the assisted person rather than the judgment creditor (a perspective which does not arise in the English cases). If the assisted person did not pursue his cause frivolously, should he not be helped with the costs if he is financially unable to cope? The only issue is whether this logic should be applicable only to test cases or in all cases. The problem with adopting it in all cases is that the funding pool may be drained by permitting pay-outs in

/....

all losing cases. By giving priority to test cases, the funding pool is less threatened and the rational for pay-outs enhanced.

In the case of clinics, however, the probability of winning is not necessarily the only yard-stick to be applied in considering the "merits" or "purpose" of the case. There are also the following concerns:

c) As noted in the House of Lords and Court of Appeal cases above, when the action clarifies a point of law, thereby benefitting the public as a whole, public funds should be utilized. Although Saunders restricted the award to successful appellants, this was necessary because of the English legislation. The court never addressed the question of whether an unsuccessful appellant/respondent should also qualify. The House of Lords viewpoint was echoed by Mr. Justice Grange in his Report :

> There has been some reluctance to fund group actions in the fee-for-service branch of Legal Aid, notwithstanding a favourable recommendation for issuance of certificates to groups by the Osler task-force, but there has been none on the clinical side. Group actions are a developing field and because clinics are community or special-interest based, such actions are more likely to arise in their affairs. Indeed, the Osler task-force recognized that group actions might be one of the priorities of clinics... a problem does arise, however, if a test case is to be taken either by a group or an individual with a consequent risk of costs. The Osler task-force recommended that the courts themselves should in group proceedings lean to a policy of not imposing costs against an unsuccessful group where a public issue of substance is involved. I would be more inclined to seek to protect the group or individual from a crippling imposition of cost.

/....

ii) When actions are commenced on issues of "poverty law", it frequently happens that the applicable sections have never been interpreted by the Superior Courts. As a result, the first level courts and tribunals often rule against the clinic's clients for want of precedents. Hence, to assess a client's chance at the outset as less than 50/50 may not necessarily be a good reason to avoid the litigation. Secondly, clinics are highly involved with administrative law where there is a great deal of discretion and very little homogeneity in decision-making. For this reason alone it would be difficult to deny a costs payout on the grounds that a clinic advocate could have or should have predicted the loss.

iii) Finally, winning or losing can sometimes be a side issue when the main goal is to obtain high visibility, media support and coalition of the citizenry, all essential lobbying tools (witness the Alberta case of Murdoch v. Murdoch).

Therefore, the merits approach should be viewed in the light of (1) whether it was a test case in the usual sense, i.e. wide-ranging repercussions, especially if the constituency affected is impoverished and therefore unable to bring their own action; (2) whether there was some chance of succeeding; and (3) whether high visibility was a necessary goal.

/....

c) Conduct of the Applicant

When English courts have looked at conduct under the "just and equitable" assessment, they have addressed themselves to some of the following issues:

a) Could the applicant (unassisted defendant) have somehow avoided the proceedings or, in fact, did he bring it on himself. Although this is a relevant test in the ordinary situation, the "test case" applicant would naturally answer in the affirmative, by the very nature of the action. Only in the case where false polarities were created and all means of settlement avoided should the Committee use this as a yardstick in the test case. Naturally, when assessing any reluctance to settle on the part of the clinic, the legitimate goals of precedent-making decisions or high visibility for lobbying purposes must be taken into account.

b) By legislation, the English Courts must look at whether the applicant was the appellant or respondent in appeal matters i.e. who took the impetus. Although the Committee has jurisdiction over both, the issue of which party initiated each level of the proceeding should remain a matter of consideration but will be generally subsumed under the "merits" criterion.

c) The issue of "ambulance chasing" or "abuse of process" i.e. taking the impetus to turn a problem into a litigious proceeding, should be seen in light of a clinic's role

/....

with respect to making a community aware that many of its problems can find solution or partial solution through the courts.

As can be seen from the above analysis, the Clinic Funding Committee can use the same guidelines as does the Legal Aid Committee but its yardstick must vary when the proceeding is something other than a private dispute whose repurcussions affect only the parties concerned.

B. Costs awarded in favour of the Clinic Client:

There is at present confusion with respect to entitlement to costs awarded in favour of clinic clients. Pending resolution of this matter, the Clinic Funding Manager has advised some clinics to keep all costs moneys in a separate bank account. However, this direction is not in accord with Mr. Justice Grange's recommendation:

> A question was raised as to the collection and disposition of costs awarded to a client of a clinic. In my view s.19 of the Act applies and the costs should be collected and paid into the fund pursuant to that section.
>
> (at page 55)

or with s.19 of the Legal Aid Act:

> "The costs awarded in any order heretofore or hereafter made in favour of a person to whom legal aid has been given are recoverable in the same manner and to the same extent as though awarded to a person to whom legal aid has not been given notwithstanding that no amount has been paid or is or will be payable for costs by such legally-aided person in whose favour the order is made, or that costs so ordered are in excess of the total amount paid or payable for costs by such legally-aided person, and all costs paid or payable to such legally-aided person pursuant to any such order are the property of the Law Society, and shall be paid into the Fund".

/....

While s.152 of the Clinic Funding Regulation authorizes the Committee to pay out costs, it appears that costs awarded in favour of clinic clients must be paid into the fee-for-service part of the Fund (as defined in S.5(1)(a)), which states:

> The Law Society shall...establish and maintain a Fund to be known as the Legal Aid Fund into which shall be paid all monies appropriated by the legislature for the Fund, all monies payable by the Law Foundation of Ontario, all costs awarded to recipients of Legal Aid, and all contributions made by recipients of Legal Aid who are required to pay any part of its costs.

Note also s.1(i) which defines "legal aid" as "professional services provided under this Act and the Regulations" which would therefore include clinic services. Thus, the present arrangements appear to require pay-outs for costs from Clinic Funding Committee fund, while payments in must go to the fee-for-service Fund.

costs to clinic fund part of OLAP

endorse this.

It seems reasonable to argue that the clinic fund should be entitled to these moneys in that they result from activities of clinics funded under the clinic funding Regulation. This reasoning suggests that a central fund to which all costs should be forwarded from each clinic is preferable to a fund remaining at the disposal of individual clinics, especially considering that the centralized fund must pay out court costs from its own resources. A further argument for this structure, and perhaps one which is more compelling to the clinics is that a centralized fund can be a source for disbursements as well as costs in the major test cases which benefit clinics as a whole. The dispersal of funds in individual clinics would be hard to justify in light of s.19 of the Legal Aid Act and would also reduce the impact on the clinic movement as a whole in respect of both costs and disbursements for major litigation.

/....

C. Legal Disbursements

Mr. Justice Grange addressed himself to the unpredictable problem of legal disbursements, recommending:

> "That the Committee maintain a separate fund for large disbursements and receive applications from clinics and fund them separately as required for the purpose. Non-exceptional legal disbursements may continue to be dealt with as part of the clinics general budget".

The new Regulation states in S.148(1)(m):

> It is the function of the Committee, and it has power, upon application, to recommend such supplemental payments as the Committee considers advisable to any clinic for exceptional legal disbursements.

agree

It is suggested that these applications be dealt with essentially in the same manner as the costs applications, both with respect to procedures and discretionary guidelines.

Unfortunately, where a clinic has paid disbursements which the client has not reimbursed and where costs have been awarded, the costs must nevertheless be forwarded to the Legal Aid Fund pursuant to s.19. The clinic should then be able to apply to the Committee for retroactive payment of disbursements and its application would then be subject to the same guidelines imposed on any application made prior to payment of disbursements by the clinic.

Grange - all $ into general fund, and should be able to apply to it as well