PROFILING CIVIL LITIGATION:
THE CASE FOR RESEARCH

Pascoe Pleasence
Sarah Maclean
Alistair Morley

LEGAL AID BOARD RESEARCH UNIT
RESEARCH PAPER 1

December 1996
## Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>1</td>
</tr>
<tr>
<td>1. Executive Summary</td>
<td>2</td>
</tr>
<tr>
<td>2. Personal Injury Litigation: The Story So Far</td>
<td>18</td>
</tr>
<tr>
<td>3. Matrimonial Research: An Outline</td>
<td>44</td>
</tr>
<tr>
<td>4. Block Contracting: Responses and Comments</td>
<td>71</td>
</tr>
<tr>
<td>5. Proposals, Experiments and the Use of Contracting Outside the UK</td>
<td>91</td>
</tr>
<tr>
<td>6. The <em>Profiling</em> Research</td>
<td>111</td>
</tr>
</tbody>
</table>
INTRODUCTION

The Government White Paper, "Striking the Balance - The Future of Legal Aid in England and Wales" (Cm 3305) (Legal Aid White Paper) sets out its intention to introduce a scheme of block contracting for legal aid services in England and Wales.

In order to inform the policy debate and set about a determination of the appropriate method of implementation, the newly formed Legal Aid Board Research Unit has embarked upon a programme of research to explore the nature and distribution of civil legal aid certificated cases.

The programme has started with a study of personal injury and family cases, which together account for around three-quarters of all civil legal aid certificates.

This first Legal Aid Board Research Paper sets out the practical, policy and conceptual framework within which the first phase of the research is being conducted. It is intended to provide an overview of the research context and foundations. It should not be taken, therefore, in whole or part, as constituting a development of Government or Legal Aid Board policy.

The paper is made up of five principal chapters. Chapters two and three set out the principal findings of previous socio-legal research in the areas of personal injury and family law. Chapter four sets out the main elements of the policy debate surrounding the proposals for the introduction of block contracting. Chapter five describes some of the experiences of other jurisdictions of similar contracting schemes. Chapter six sets out the basic purpose and methodology of the research being undertaken.

As is apparent from this work, there has to date been a paucity of empirical research in the field of civil litigation. As Michael Zander recently observed1, this is especially so in relation to costs. We hope that the study detailed in this report will go some way to meeting the urgent need for research in this important area.

---

1. EXECUTIVE SUMMARY

1.1 Personal Injury Litigation: The Story So Far

1.1.1 This chapter summarises the research which has been undertaken to date in the field of personal injury litigation. The structure of the chapter follows the process of personal injury claims, starting from the accidents themselves and continuing through to the disposal of cases brought in the courts.

1.1.2 In 1995-6, 23% of all certificates issued by the Legal Aid Board (and 45% of all non-matrimonial certificates) related to personal injury claims, a total of 87,800.

1.1.3 Millions of people suffer personal injuries each year, yet only a fraction of them pursue a claim, and only a fraction of the claims are decided through active court involvement.

1.1.4 There are numerous reasons why such a large proportion of injured individuals do not bring a claim. Clearly, not all accidental injuries are sustained through the fault of another party. However, a large proportion of those who do regard another party to have been at fault do not bring claims because, for example, to do so would be too much trouble or too difficult. Alternatively, there may be no awareness of the possibility of a claim, or such might be regarded as incommensurate.

1.1.5 Different funding sources are more prominently associated with different types of cases. Trade union funding, for example, is usually associated with work accident cases. Medical negligence cases, on the other hand, would seem to be most often funded by legal aid.

1.1.6 There seem to be significant regional variations in the claim rate. For example, Merseysiders make more than twice as many certificated legal aid claims for personal injuries than those in the North East, and over five times as many as those in London. These figures undoubtedly mask differences in eligibility, legal culture, accident type and risk levels between areas, but certainly seem to be of an order to suggest that the proclivity to claim may vary regionally.

1.1.7 The likelihood of claims being brought varies between different types of accident. For example, many more road accident victims bring a claim than do ‘other’ types of victim. Nearly all claimants make use of solicitors.

1.1.8 The reasons why claimants choose particular solicitors varies greatly. However, most claimants initially instruct a solicitor on the advice of another person - most often friends, relatives or union officials. It
seems that claimants generally instruct the first lawyer they come across or are recommended.

1.1.9 The route by which personal injury claimants arrive at a particular solicitor, and the unlikelihood that a solicitor will turn away a personal injury client with a reasonable case, goes a long way to explain the reasons for the differences between plaintiff and defendant solicitors in personal injury cases.

1.1.10 In contrast to defendant personal injury solicitors, who are drawn from a relatively small number of firms, plaintiff personal injury solicitors are drawn from across the whole profession. In consequence they tend to have less experience and expertise.

1.1.11 The likelihood of a plaintiff's solicitor being a specialist varies between types of case. Road accident cases, for example, are most likely to be handled by non-specialists. As well as plaintiff solicitors and defendant solicitors, as groups, being significantly different, so are plaintiffs and defendants themselves. Plaintiffs tend to be individuals, whereas defendants tend to be insurance companies (2.5.2).

1.1.12 In the context of legal aid, the costs indemnity might be seen as redressing the balance between plaintiffs and defendants, and the current fee-for-service judicare system means that plaintiffs and their solicitors can afford to use counsel in over 50% of legally aided personal injury cases. There is evidence to suggest the figure is lower in relation to non legally aided work. On the other hand, there is evidence that insurance companies routinely feel the need to make 'nuisance' payments to avoid the costs of defending smaller claims brought by legally aided plaintiffs.

1.1.13 Solicitors tend to follow one or other of two basic strategies. The first approach emphasises reasonable negotiation. The alternative involves hard bargaining.

1.1.14 The available evidence suggests that hard bargaining constitutes the optimal strategy in terms of results for the client.

1.1.15 Few claimants consult lawyers and initiate claims immediately upon being injured. The majority seem to wait more than one month. There appears to be a relationship between the period of delay and the size of claim. It also seems to vary between case categories. For example, road accident victims tend to consult a solicitor sooner than others.

1.1.16 As regards the total duration of cases, it would seem to be fairly common for recipients of even the lowest levels of damages to wait more than 4 years for their cases to conclude. The average time is around 2 years. Proposals for fast track litigation have recently been
put forward by the Woolf Inquiry. They aim to substantially reduce this period by time-tabling and capping costs recovery.

1.1.17 Some delay is unavoidable. Cases need to be prepared. Even plaintiffs sometimes require some delay, generally so as to allow the prognosis to settle. However, delay is generally most favourable to defendants. It puts, for example, pressure on the plaintiff to settle and allows longer investment of any damages eventually paid out.

1.1.18 Past research clearly shows that the duration of a case varies greatly between stages of case conclusion. Cases which settle therefore conclude quicker than those which proceed to trial. Strikingly, cases which settle after the issue of proceedings seem to take well over 50% longer than those which settle pre-issue.

1.1.19 Although cases which conclude at a late stage of the claims process can take considerably longer than those concluding early on, only a small proportion actually reach the late stages. Indeed, only a few percent reach trial.

1.1.20 Duration is also affected by case category. For example, in relation to legally aided cases, despite the fact that a substantial number of medical negligence cases are abandoned after initial investigations are completed, they still average slightly longer from certificate issue to bill payment than do other types of personal injury cases.

1.1.21 There also appears to be a link between case duration and legal aid. Personal injury cases in which the plaintiff is legally aided last 20% longer than others.

1.1.22 It might be expected that the duration of a case would be affected by its complexity. However, the Woolf Inquiry found no significant link, once other factors were accounted for.

1.1.23 Personal injury cases can involve various amounts and proportions of time devoted to various types of activity. For example: clients must be conferred with; records, reports, witness statements and other evidence must be obtained and then examined; the law may have to be researched; counsel may have to be instructed; pleadings may have to be drafted and responded to; negotiations may be entered into; hearings, a trial and appeals may have to be conducted.

1.1.24 Previous research seems to suggest that around 15% of plaintiffs' costs in personal injury cases are accounted for by counsels' fees. Medical reports and medical witnesses also account for a significant proportion of costs. However, it has proved notoriously difficult to accurately analyse and quantify the work undertaken by solicitors themselves. For example,
Woolf found around a quarter of expenditure in taxed personal injury cases related to documents. However, this hides a multiplicity of activities.

1.1.25 Much of the work undertaken by solicitors could appropriately be described as routine. However, it is important to remember that a significant proportion is not, and skill, care and attention must be brought to bear on even the routine in order to ensure that it is indeed such.

1.1.26 Little research has been undertaken into the factors affecting costs in personal injury cases. There do, however, appear to be a number of specific and independent cost determinants.

1.1.27 Obviously, if, at the outset of a case, a defendant accepts liability on the terms set out by the plaintiff, then fewer costs will be run up than if the defendant fights and investigates all the way to court. The amount one party invests directly affects the amount the other must invest.

1.1.28 Directly linked to the above, costs seem to be linked to the stage of disposal. There would also appear to be links between costs and case complexity, firm size, venue and legal aid. The Woolf Inquiry found costs increased by 10% in general personal injury cases where the winning party was legally aided.

1.1.29 Counter-intuitively, costs have not always been found to be clearly linked to the duration of cases, although the Woolf Inquiry did recently find such a link.

1.1.30 There appear to be significant regional variations in the costs of personal injury cases. This does not necessarily mean that the same case would cost significantly more in one area than another, but such a proposition cannot as yet be ruled out.

1.1.31 The Legal Aid Board’s records for 1994-5 indicate a 78% success rate in personal injury cases. However, this figure includes medical negligence cases, which have less than a 50% success rate. Some categories of personal injury case have very high success rates. Road traffic cases, for example, succeed over 90% of the time.

1.1.32 The different success rates of different case categories may help to explain the difference in the average ratio of plaintiffs’ costs to damages obtained.

1.1.33 Where damages are recovered costs are invariably also recovered. In the context of legal aid this has a particular significance as, given the high success rates related above, the Board’s involvement in personal injury (excluding medical negligence) cases is generally in the capacity of banker, rather than insurer. As a consequence, it is possible that once account is taken of VAT and benefits recovery, the Treasury may actually
make a profit on legally aided personal injury (excluding medical negligence) cases.

1.1.34 Those who fail to obtain damages nearly always abandon their claim before trial. The most common reason for abandonment seems to be evidential problems coupled with a continuing denial of liability on the part of the defendant.

1.2 Matrimonial Research: An Outline

1.2.1 This chapter identifies common themes in recent divorce studies, and highlights findings which may inform the building up of case profiles. The most recent studies have taken relatively small samples of cases (usually divorce cases involving money and property disputes, although sometimes children and/or domestic violence too) and looked at them in detail. The complex nature of divorce cases lends itself to this sort of qualitative research.

1.2.2 There are a number of possible starting points for legal intervention in matrimonial cases; these include money and/or property disputes, issues arising over contact and residence of children, and also issues arising from cases of domestic violence. Though any of the above may be the starting point for legal intervention in a family case, any combination or progression of issues is possible.

1.2.3 Resolving disputes involving money and property involves a complicated process of deducing needs and expectations and attempting to maximise their fulfilment within the limits of existing income and capital. The major issues concerning children are contact, residence and maintenance. Residence seems to be agreed very early on in the majority of cases. Contact may take longer to negotiate though there is little conclusive evidence. The Child Support Agency now applies a formula to the non resident parent's income to determine the amount of child support to be paid. This negates the need for negotiations over the absent parent's liability and amount to be paid, but may have reduced the amount available for spousal support payments and removed one of the bargaining tools for negotiation.

1.2.4 Domestic Violence in this country has been researched much less than, for example, ancillary relief within divorce. Part of the reason for this is the difficulty in defining domestic violence itself. However, Legal Aid Board statistics suggest that at least 18% of divorce proceedings cases involve some domestic violence issues. A further 19,000 certificates were issued under the Domestic Violence and Matrimonial Proceedings Act 1976, (other proceedings include assault and trespass.) One study has looked at post separation violence and found that contact with children is a major flashpoint for violence.
1.2.5 The nature of divorce cases: their length, the confidential nature of the relationship between lawyer and client, and the emotional nature of the process makes empirical research into matrimonial cases very difficult to undertake. The majority of studies have concentrated on lawyer interviews, observing lawyer-client interaction and one has looked at divorce files. It appears from the research that different lawyers have different approaches to cases. Some lawyers appear to prefer to press ahead in the courts, whereas others prefer to negotiate settlements. What is not yet clear from the work that has already been undertaken is which strategy benefits the client / lawyer / case funder most. It seems that settling is the best strategy from the point of view of the client, particularly if the client has to pay his or her own legal bill. As the public purse is involved in legally aided cases, further investigation is needed to decide whether settling is the best strategy for legally aided divorces.

1.2.6 However, it has been argued that in contentious situations settlement and flexibility are not always desirable. Legally aided clients may have an advantage over their privately funded partners as they may be able to press ahead and go to court as costs do not have to be paid immediately. In one study most of the solicitors preferred to apply to the court as soon as possible and then “negotiate within the framework of that application”.

1.2.7 Despite the fact that there has been no systematic comparison of legally aided and privately funded matrimonial cases, the legal aid factor has occasionally been addressed as a part of less specific research projects. It seems legally aided ancillary relief cases are dealt with differently from those which are privately funded. The figures show that 60% of privately funded cases settle before the trial. In legally aided cases, only 22% settle prior to the day of the trial.

1.2.8 Why should this be the case? It has been suggested that issue of proceedings may be the only way to engage the other side in legally aided cases, or that legally aided cases are being handled by inexperienced and hard pressed lawyers who therefore respond rather than initiate, and so drift towards litigation. Of course, it may be that as legally aided clients do not have to pay lawyers’ fees (at least immediately) they are in a better position than the privately funded client to pursue their case in court.

1.2.9 Many more women than men receive legal aid in matrimonial cases. Their goals in such cases also seem to be different. For example, women may petition for divorce not because they want to end their marriage, but because they need immediate action to be taken on money or domestic violence.
1.2.10 Relatively few of the empirical studies have looked accurately at case duration or the work involved on the part of solicitors. One study estimated that for divorce cases (including children) 4 office contacts with the client were made on average and that, on average, 10 letters were written and 3-8 telephone calls made per client.

1.2.11 These suggest that where the main focus of conflict are issues involving children, the case may be resolved faster than if money or property issues are also being discussed.

1.2.12 One study found that 79% of couples obtain their decree within 12 months of filing the divorce petition. Another found that only 36% of applications were filed within 6 months of the petition, and 18% were filed more than 12 months later. This delay, it was suggested, was partly due to the delays encountered in securing legal aid by either or both parties, but also due to the general reluctance of the respondent.

1.2.13 Latent conflict over the divorce itself (if one party is fundamentally opposed) was common, in as many as 25% of cases.

1.2.14 It has been observed that those clients who came to their lawyers who appeared to have agreed all issues, often end up with incomplete or impractical settlements.

1.2.15 Lawyers may need to re-advise clients. e.g. lawyers said that they sometimes have to warn against an agreement providing for contact every weekend since their experience suggests that this will usually prove impossible for the mother to live with.

1.2.16 Many ancillary relief applications conclude within 12 months. However, they may equally stretch out for a number of years. The courts have been cited as a potential cause of delay, as has the reluctance of clients to disclose the extent of their income and capital and also the need to negotiate with third parties, e.g. mortgage companies. Many lawyers admit to using strategic delaying tactics. Imbalances in power and resources between the parties may also lead to delay.

1.2.17 In cases subject to a final order, there seems to be no relationship between settlement and the speed of resolution.

1.2.18 A solicitor's work is often focused around negotiations which take place before the courts are even involved.

1.2.19 There is conflicting evidence on the existence of a link between case complexity and duration. Although the use of factors such as the presence of children as a proxy for complexity have been found to indicate a link, not all studies have concluded likewise.
1.2.20 It seems fairly clear that ancillary relief cases do not neatly fit a cost-per-stage progression model. It has recently been found, for example, that cases which are adjudicated are not necessarily more expensive than cases which settle out of court. Conversely, domestic violence cases, if taken in isolation, do fit such a progression model.

1.2.21 In the light of all this, it is clear that there are serious gaps in our understanding of divorce cases. Three main areas may be identified:

(i) The combinations of issues which characterise certain case types or sub groups of cases;
(ii) The needs of cohabitees who are an increasing proportion of the population and are increasingly important in areas of family law such as the Child Support Act and the Children Act where the focus is on the parents of a child and not on whether or not the couple is married;
(iii) What solicitors actually do for their clients, how long it takes, how much it costs, and whether any of their functions are replaceable by either counsellors or mediators.

1.3 Block Contracting: Responses and Comments

1.3.1 The Legal Aid White Paper sets out, inter alia, proposals for a new system of block contracting of legal aid. The final form of contracts will be informed by research findings and piloting experience. However, it is envisaged that some form of contract specifying the volume of acts of advice, assistance, representation, or the number of couples to go through family mediation, at an agreed price will be central to the new system. Different types of case (e.g. medical negligence cases) would not necessarily be covered by the same contract even if they fell within a single case category (e.g. personal injury cases).

The Right to a Lawyer of Choice

1.3.2 The general principles of the solicitors' profession support freedom of choice in selecting solicitors. There may be concern that the implementation of block contracting will result in this right to a solicitor of choice being infringed, as in the long term legal aid work may be restricted to contracting firms. Thus, a person who has previously instructed a solicitor on a particular matter may find s/he can no longer do so on a new matter. Alternatively, it may be that someone calling at a firm of solicitors with a block contract will find that the firm is unable to accept their case as the firm has already fulfilled its contractual obligations for that period.

1.3.3 However, it appears this posited right to choose is something of a chimera. For example, there is no right to a lawyer of choice for those
receiving advice under the duty solicitor scheme. Moreover, the enactment which grants the statutory right of a person entitled to legal aid to select their own legal representative is made subject to a number of provisos. In theoretical terms, classic political theory would expect, as a corollary to such a right, an obligation upon solicitors to undertake work on behalf of any client requesting it.

1.3.4 The right to choose is valuable only if a real choice is made, on an informed basis. However, people who receive legal aid are generally in no position to be able to judge who is the most appropriate lawyer for them.

Access to Law

1.3.5 Concern has been raised from many quarters that the Government's proposals for block contracting will result in an unacceptable decrease in access to lawyers, and therefore justice, as a system of block contracts will inevitably result in a restricted number of lawyers being able to offer legally aided advice. However, such reductions per se are not necessarily objectionable. The fundamental purpose of allocating public money to legal aid is not to provide the growing number of qualified lawyers with an income. Any reduction in the number of legal aid service providers would become prima facie objectionable if legal services were to become financially inaccessible to members of the eligible population, through, for example, geographical remoteness.

1.3.6 In addition to the above, it may be naive to assume predictions about legal need will always be accurate. Consequently, mechanisms will need to be designed to cope with unforeseen need. Such mechanisms will be particularly important in rural areas, where contracting solicitors are likely to be spaced widely apart.

1.3.7 These problems have, to some extent, been recognised by the Lord Chancellor, who has proposed a central fund to be retained by the Legal Aid Board to cover unforeseeable and urgent need, for example, in very expensive cases. Furthermore, the Legal Aid Board has suggested that a fund might be used, under tightly controlled arrangements, to make money available to non-contracting solicitors to provide services in rural areas. Of course, mixing competitive contracts with a form of judicare poses pricing problems.

Independence of the Legal Profession

1.3.8 A traditional view of the legal profession is that they are and ought to be independent, autonomous and self-regulating. This is seen as a pre-condition to fulfilling obligations to the client. To deal effectively with a client's legal problems requires objective, expert and flexible diagnosis.
1.3.9 The Legal Aid White Paper's proposals to combat rising expenditure and to achieve quality through the mechanism of block contracts, within an overall pre-determined budget, may be seen as limiting the utility of this principle.

1.3.10 If practitioners were to be required to decide eligibility in terms of the means and merits tests, then it could be argued that they would become transformed into mere agents of the State. They would play a central role in rationing access to justice and deciding what is reasonable in the interests of the taxpayer. This could be to bring about something akin to a staff-lawyer model of legal services delivery by another name.

The Decision on Entitlement

1.3.11 There is some concern that in being responsible for making the formal decision on the grant of a continued entitlement to legal aid, solicitors will not apply the eligibility rules uniformly thus, introducing an element of arbitrariness to the system (if one doesn't exist already!). However, to an extent, this criticism does a disservice to the solicitors' profession, as most solicitors can be expected to apply rules of eligibility with integrity. Indeed, similar arguments might be directed at the fact that members of the solicitors' profession are expected to adhere to their professional rules of conduct. Furthermore, if the rules are ambiguous, guidance notes for their interpretation can be produced. Unfair decisions are, however, inevitable. An appeal system should, therefore, be introduced so as to ensure individual solicitors are not the final arbiters on eligibility.

Conflicts of Interest

1.3.12 At least two conflicts of interest may arise as a consequence of the realisation of the Government's block contracting proposals. The first conflict may arise with solicitors under pressure to minimise the work involved on cases, whilst maximising the work done might be in the best interests of the client. The second may arise if solicitors are to apply the merits test, for example, if cases are complex or uncertain or become so - and therefore likely to involve more time, effort and expense - solicitors may be inclined to turn them down. Monitoring will be a vital element of any attempts to reduce the impact of these conflicts.

Quality Controls, Competition and Infrastructure Costs

1.3.13 If there is to be an element of competition in the awarding of contracts, with quality being taken into account, then without expressly established criteria those who fail to gain contracts may perceive they have been treated unfairly or been the subject of politically motivated decisions. A series of benchmarks is necessary to avoid costly litigation and any associated notion that the justice system is being undermined by arbitrary decision making.
1.3.14 It is entirely legitimate for the Government to specify what standard of service lawyers should provide. The Government is responsible for ensuring that public money is well spent, and it is not reasonable to expect legally aided clients to judge the quality of advice and representation they receive.

1.3.15 Even if the advent of block contracts does reduce supplier-induced demand, it is important to emphasise that there is likely to be a relatively high burden of transaction costs associated with the infrastructure of contracting. These costs will be ex ante and ex post the entering into of contracts. They will be incurred, for example, in drafting the contract documents such as the contract specifications of tendering documents, and the contract conditions themselves, as well as in carrying out the tendering process. They will also be incurred through monitoring quality and other aspects of contractual performance and in settling disputes. These costs ought to be monitored themselves as it is conceivable that the benefits derived from contracting might be outweighed by them.

The Nature of Contracts

1.3.16 There is a fine balance that must be found between detail and flexibility within block contracts. It may be thought pragmatic to adopt, to some greater or lesser degree, a sequential and adaptive approach; to allow the future to unfold and to take action to deal with events as they occur, rather than cover all of them by a contract. In other words, to adopt an approach that allows for flexibility.

1.3.17 It is notable that many economists agree that in private sector transactions, involving long-term and continuing relations, contracts play a very marginal role. Instead, and particularly in relation to the supply of services, they are mainly affected by incentives, norms and the environment of trust and co-operation.

1.3.18 However, detail may be vital to prevent opportunistic behaviour on the part of solicitors, especially as an environment of trust takes time to build up and may, in any event, be impossible in the context of large numbers of disparate contracts. Detail may also be the only means to ensure the balance of financial risk in the contracting process is properly understood by all parties.

1.4 Proposals, Experiments and the Use of Contracting Outside the United Kingdom

1.4.1 Contracting with private attorneys for provision of criminal legal services is a regular occurrence in the United States (US). Contracts tend to be either
for all cases arising in a fixed-period for a fixed-price or for a fixed-number of cases at a fixed-fee per case.

1.4.2 In some form or other, contracting in the US dates back over twenty years. There is some evidence of contracting out of civil legal services, although the predominant picture is of such services being provided through non-profit organisations employing full-time lawyers.

1.4.3 Much of the experience with block contracting in the US has proved negative. The courts have even declared several contract programs to be unconstitutional.

1.4.4 A number of specific problems have been identified. For example, contracts are generally awarded as a result of competitive bidding, which creates an incentive to weigh cost over quality. This problem is exacerbated by the fact that many contract schemes make no provision to fund disbursements, and so there is also a disincentive for contractors to obtain these services.

1.4.5 Another problem identified has been the lack of resources made available for monitoring the work undertaken under contracts. Further problems include instability caused by the recurring contract bidding and renewal process, and poorly drafted contracts. As a result of this last matter, the American Bar Association has delineated a number of provisions regarded as essential to any contract for legal services.

1.4.6 It has been observed that the costs of contracts has tended to go up in the long run. Contract prices might inflate with time for a number of reasons. For example, if initial prices are uneconomic (to ensure bid success), they will eventually rise to an economic rate, or levels and/or methods of service will alter. Some firms might, of course, be motivated to carry legal aid work as part of a mixed practice, for altruistic or training purposes. It is unlikely, however, that this is the norm for practitioners. Also, if firms withdraw from the market as a result of their experience in working under contracts, prices might be expected to rise more rapidly. In any event, whatever initial prices are set, as time goes by and firms, which previously undertook legal aid work but failed to secure contracts, start to build up practice elsewhere or reduce capacity, it can be expected that fewer firms will be interested in bidding for contracts, thus reducing the level of competition.

1.4.7 Despite the above, there is certainly some agreement that contract schemes can have a place within a mixed delivery system, so long as the contracts are not awarded on price alone, do not oblige lawyers to provide an open-ended level of service, are monitored, and are controlled and managed locally.
1.4.8 There have been at least four US studies of the block contracting of civil legal aid cases. All four, however, have been subject to serious shortcomings.

1.4.9 The Delivery Systems Study was the most comprehensive study of models for the delivery of legal services ever conducted. It compared 38 'demonstration models' of delivery systems, in both rural and urban settings throughout the US. However, it failed to allow for direct comparison between model types within the same geographic area. So, apart from providing insight into the multiplicity of forms legal aid service delivery can take, it is of little help in determining the feasibility of block contract schemes.

1.4.10 The Private Law Firm Project had the specific purpose of looking at the delivery of legal services through high-volume low-cost contracts with private attorneys. The project covered five cities and local legal services programmes in those cities agreed to keep records and participate in an evaluation.

1.4.11 The contracts were "pay-as-you-go" and attorneys were paid on a fractionalised basis, meaning that if an attorney completed a case before judicial resolution he or she was entitled to a fractionalised payment of a case closed by judicial resolution.

1.4.12 Despite extensive data collection, there has been no substantive report or evaluation of the project. There is, though, evidence to suggest that the contracts may have allowed some savings to be made. For example, on 1984 figures, average cost per case closed was $120 under the Private Law Firm Project, whilst out in the field the average cost was $200.

1.4.13 Two of the cities which participated in the study conducted their own evaluations. In one, private attorneys discovered that they could not meet the programme's quality standards and make a profit. Furthermore, they found that the cases referred to them were more complex than had been anticipated, even though they were supposed to be no different from those handled by the legal services programme. In the other, none of the firms involved in the first phase of the project were willing to bid in the second phase.

1.4.14 The San Antonio Study compared the delivery of services by three law firms working on a contract basis with a staff programme and a judicare panel (or voucher system). The study has, however, been surrounded in controversy. Indeed, the American Bar Association report on it concluded that no inferences or conclusions could be drawn from the study on which to base policy recommendations.
1.4.15 On a brighter note, some success in the introduction of volume contracts has been had in Canada. For example, the Legal Aid Services Society of Manitoba (LAM) has been tendering out blocks of fifty young offenders' cases since March 1993.

1.4.16 According to the Executive Director of LAM, the quality of work done under contracts has been very good. However, the Executive Director has expressed concern that the scheme results in the loss of the right to a solicitor of choice in those cases where legal aid would have been normally available.

1.4.17 LAM has also experimented with block contracting in the rural area of Portage La Prairie. As with the larger scheme, there has been no proper evaluative study, however, the anecdotal evidence has been positive.

1.4.18 As a result of the Manitoba experience, the Policy and Planning Council of the Legal Services Society of British Columbia, despite earlier reservations, has recently decided to pilot a similar scheme in the near future.

1.4.19 Proposals for and experiments in the use of block contracts have not been confined to North America. In Australia, for example, the Legal Aid Commission of Victoria (LACV) has been investigating the use of contracting for legal aid services, and in December 1994 it commenced a 12 month pilot scheme involving the franchising of summary criminal prosecutions, traffic prosecutions, Children's Court cases (criminal) and bail applications relating to criminal prosecutions in the Magistrate's Court.

1.4.20 Queensland has also experimented with contracting. In March 1994, The Legal Aid Commission of Queensland (LACQ) commenced a pilot scheme for the tendering out of duty lawyer services at specified Magistrates' Courts.

1.4.21 In Scandanavia, also, contracting proposals have been put forward at a high level. In 1989 the Norwegian Labour Government issued a parliamentary policy report into civil legal aid and advice.

1.4.22 Among the report's proposals was that a system of contracting should be developed by experiment. Contracting was favoured because:

i) Norway's judicare system distributes cases to a large number of private lawyers according to claimants' choices and lawyers' capacities to do legal aid work. In most lawyers' offices legal aid work constitutes a minority of the total number of cases handled. Through contracting, increased quality and specialisation in legal aid and advice work would be promoted and a guaranteed income provided;
contracting would secure a more geographically and socially even distribution of legal services;

it would be a method by which to attract young lawyers into legal aid work before they became too tied up with paying clients; and,

it would provide a reliable, stable and predictable income for lawyers.

1.4.23 The proposals in the report were never implemented.

1.4.24 Contracting proposals have also been put forward elsewhere on the continent, for example, in the Netherlands. However, none of them have made the transition to reality.

1.5 **The Profiling Research**

1.5.1 The purpose of the case profiling research programme is to further the understanding of how legally aided personal injury and family cases proceed, develop explanations as to why they proceed as they do, provide a firm basis from which the block contracting debate can move forward and set out the foundations for their initial formulation.

1.5.2 The first phase of the research programme will explore the case profiles (or more particularly the pathways, costs, duration and distributions of legal aid certificated cases) and category profiles (or the distribution of case profiles within case categories) of personal injury and family cases.

1.5.3 The research will utilise a stratified and triangulated methodology: five complementary data sets, four predominantly quantitative and one qualitative.

1.5.4 The first data set will be drawn from the Legal Aid Board's electronic data systems and will be made up of all the Legal Aid certificated personal injury and family cases disposed of over a 12 month period and provide a broad macro picture, to be principally used for verifying the integrity of data collected from other sources.

1.5.5 The second data set will be comprised of a sample of such cases. The details will be drawn from the new style Legal Aid application, claim and report on case forms and court records. Legal Aid forms are readily accessible and contain a wealth of information, stored in a manner which lends itself to data collection.

1.5.6 A problem with Legal Aid claim forms is that they are not always submitted. However, the new report on case forms contain some details previously only found on claim forms, and so more information will be available than in the past.
1.5.7 The third and fourth data sets, which will be the principal focus of the research, will both comprise a sample of case details drawn from solicitors' files. Many of the basic details are common to both data sets. The fourth, however, contains extensive and additional costs details and qualitative elements.

1.5.8 The fifth data source will be semi-structured interviews with solicitors. These will be used to explore issues arising from a preliminary analysis of the (largely) quantitative data sets referred to above, and matters such as goals and strategies. We hope to be able to offer some form of explanation for our findings, rather than simply present a description of a large number of cases.

1.5.9 It is anticipated that preliminary data analysis will be complete in May 1997, allowing for interviews to follow in the Summer of 1997 and the final report to be completed by the end of the year.
2. PERSONAL INJURY LITIGATION: THE STORY SO FAR

2.1 Introduction

2.1.1 This chapter summarises the research which has been undertaken to date on personal injury litigation. The structure of the chapter follows the process of personal injury claims, starting from the accidents themselves and continuing through to the disposal of cases brought in the courts.

2.1.2 The nature of the parties, choice of lawyer, alternative legal strategies utilised and the costs involved in cases are all examined. Special note has been made of findings relating to legally aided claims, which are the subject of the research project set out in chapter 6.

2.1.3 Such legally aided claims make up a significant proportion of the totality of legally aided cases. In 1995-6, 23% of all certificates issued by the Legal Aid Board (and 45% of all non-matrimonial certificates) related to personal injury claims, a total of 87,800.

2.2 Accidents and Claims

2.2.1 Personal injury affects millions of individuals in England and Wales each year, yet only a fraction of that number bring claims and only a fraction of the claims are decided through active court involvement.

2.2.2 The Oxford National Compensation Study\(^2\) (The Oxford Study) found that 1,404, of a sample of 35,085 individuals, reported having been incapacitated for two weeks or more as the result of an accident, assault or industrial illness within the previous twelve months. That amounts to 4% of the sampled population. Despite changes in lifestyles, the figure is commensurate with both the Pearson Commission's\(^3\) earlier estimate of over 3 million accidents resulting in personal injury each year and the Law Society's\(^4\) more recent finding that 6.8 million people sustained accidental injuries lasting over two weeks over a three year period up to 1994, and 2.5 million attributed blame to someone else.

2.2.3 The Oxford study separately found that 30% of injuries (including illnesses and conditions) were suffered through leisure and sporting activity, 27% at (or through) work, 23% in domestic circumstances, 18.5% in road

---


\(^4\) 1994 Gallup poll conducted for the Law Society.
accidents and 1.5% through assault. Not surprisingly, work accidents disproportionately affected manual workers.

2.2.4 However, it found that only 26% of those affected considered making a claim, 14% consulted a solicitor and 12% obtained any damages (97% of whom did so through an out-of-court settlement). It is interesting that Hensler et al.'s recent US study estimated that only 19% of accident victims consider making a claim and 7% consult an attorney. The figures are not directly comparable (e.g. Hensler's relate to accidents causing economic loss), though they certainly cast some doubt on the notion of a dog sue dog culture we commonly associate with the Americans, at least at the individual level.

2.2.5 It should be noted that not all claims are conducted through lawyers. A small number of individuals deal directly with the opposing party. This is more common in the US context, but was also noted in the Oxford Study.

2.2.6 Occasionally, studies have sought to determine why such a large proportion of injured individuals do not bring a claim. Clearly, a significant proportion of accidental injuries are sustained through no fault of another party. However, equally clearly, not all of those who could bring a claim do so.

2.2.7 The Oxford Study asked accident victims who considered they should or might have been entitled to compensation, or who otherwise blamed someone else for their injuries, but who nevertheless did not bring a claim, why they did not do so? The six most common reasons given were that (i) a claim would have been too much trouble/bother, (ii) there were perceived difficulties in gathering evidence, (iii) no other party was wholly to blame, (iv) the expense of claiming would be too great, (v) the legal possibilities were unknown or unclear, and (vi) the injuries were not serious enough. As Table 2.1 below shows, these six reasons are the same as those uncovered by the Pearson Commission, although recalibrated. The figures provided have been re-classified to allow for better comparison.

---

8% of those obtaining damages did so independently of a solicitor.


7% was also the percentage reported by the Pearson Commission (Supra, n.3).

Supra, n.6

Table 2.1
Reasons for Not Bringing a Claim

<table>
<thead>
<tr>
<th>Reason</th>
<th>Oxford</th>
<th>Pearson</th>
</tr>
</thead>
<tbody>
<tr>
<td>Trouble/bother of making claim</td>
<td>19</td>
<td>9</td>
</tr>
<tr>
<td>Difficulties in gathering evidence</td>
<td>17</td>
<td>11</td>
</tr>
<tr>
<td>No other party wholly to blame</td>
<td>12</td>
<td>16</td>
</tr>
<tr>
<td>Fear of expense</td>
<td>11</td>
<td>3</td>
</tr>
<tr>
<td>Ignorance/confusion</td>
<td>10</td>
<td>15</td>
</tr>
<tr>
<td>Injuries not serious enough</td>
<td>8</td>
<td>18</td>
</tr>
<tr>
<td>Continuing relationship</td>
<td>5</td>
<td>8</td>
</tr>
<tr>
<td>No/little income loss</td>
<td>5</td>
<td>6</td>
</tr>
<tr>
<td>Other (or unable to categorise)</td>
<td>14</td>
<td>25</td>
</tr>
<tr>
<td>Total (%)</td>
<td>100</td>
<td>100</td>
</tr>
</tbody>
</table>

2.2.8 Reasons given were not uniform across types of accident. This was also so in respect of the likelihood of a claim being brought. A claim was brought by 34% of road accident victims, compared to 24% of work and just 4% of 'other' accident victims. Thus, even though only 18.5% of accidents were road accidents, they accounted for over 40% of claims. Work accidents accounted for a similar percentage, whilst 'other' accidents accounted for just 15% of claims. Hensler et al. found the difference between claim rates by road accident and other accident victims to be even more pronounced. They suggested the difference was down to a greater likelihood of blame being placed on another party and more severe injuries.

2.2.9 Fennell’s recent study of the funding of personal injury claims found that over half related to road accidents, just over a quarter to work accidents, and 6% to each of medical accidents, trips and occupier liability cases.

2.2.10 The Law Commission’s survey of compensated accident victims found that over 50% had been compensated in respect of work accidents, over 40% in respect of road accidents, and the remainder in respect of medical

---

and 'other' accidents. However, the survey did not utilise a representative sample. The number of higher damages cases was boosted to allow for better comparison. The clear differences between Fennell's and the Law Commission's findings might be explained if work accidents tended to receive higher damages or were more polarised as to quantum. However, this is far from being clear. Legal Aid Board records relating to cases closed in 1994-5, for example, suggest that work accidents lead to lower damages than road accidents. It may, though, be that the cases funded by legal aid are themselves unrepresentative.

2.2.11 The proportions of the different types of claim undertaken under legal aid certificates differ from those observed in each of the Oxford, Fennell and Law Commission studies. In 1995-6 the Legal Aid Board reported that only 15% of legal aid certificates issued to plaintiffs in personal injury cases related to road accidents. 20% related to work accidents, 15% to medical accidents and the remaining 50% to 'other' accidents.

2.2.12 Clearly, the proportions of the different types of cases undertaken under legal aid certificates has changed a good deal in the time since the Oxford study was undertaken. Legal aid records for 1977-8 paint a picture more consistent with the Oxford study findings (see table 2.2). However, this cannot explain differences with the Law Commission and Fennell studies, which were both conducted in the 1990s.

### Table 2.2

<table>
<thead>
<tr>
<th>Type of Accident</th>
<th>1975-6</th>
<th>1995-6</th>
</tr>
</thead>
<tbody>
<tr>
<td>Road accidents</td>
<td>42</td>
<td>15</td>
</tr>
<tr>
<td>Work accidents</td>
<td>29.5</td>
<td>20</td>
</tr>
<tr>
<td>Medical accidents</td>
<td>3</td>
<td>15</td>
</tr>
<tr>
<td>'Other' accidents</td>
<td>25.5</td>
<td>50</td>
</tr>
<tr>
<td><strong>Total (Percentage)</strong></td>
<td><strong>100</strong></td>
<td><strong>100</strong></td>
</tr>
</tbody>
</table>

2.2.13 A likely explanation for these differences is that particular funding sources are more prominently associated with particular types of cases. For example, and most obviously, trade union funding is usually associated with work accident cases. Fennell, for instance, found that a third of work accidents were funded by trade unions. Medical negligence cases, on the other hand, would seem to be most often funded by legal aid. Indeed, the Woolf Inquiry\(^2\) found 92% of taxed medical negligence cases to be legally aided, compared to 59% of other personal injury cases. In the light of this, it is to be expected that the proportions of different types of cases will vary with the source of funding.

2.2.14 Many reasons have been outlined above as to why individuals do not bring claims. What, though, of the reasons why claims are brought? These generally seem to be less complex. Rosenthal\textsuperscript{13}, for example, has suggested that:

\begin{quote}
"it is easy to agree on the objectives of a personal injury legal claim: to get as much money as possible, in the shortest possible time, with the least possible feelings of unpleasantness and inconvenience, for the lowest possible fee."
\end{quote}

The point is simple enough: claimants are primarily motivated by money. The other objectives mentioned, in so far as they are severable, are secondary and, as Rosenthal himself states, often incompatible. However, we must be careful not to over-simplify claimant motivation. Whilst there would certainly be general agreement that money is generally the goal, it is clearly not always so. Client motivation in medical negligence cases, in particular, should be approached with caution. Genn\textsuperscript{14}, in her recent study of medical negligence litigation, found that lawyers' perceptions of their clients reasons for bringing claims included the desire for an explanation, the need for an apology, and concern to prevent any repetition of the accident. The Association of Victims of Medical Accidents\textsuperscript{15} has also noted these alternative motivations, along with others, such as the desire to have the mistake or resulting distress acknowledged. As Genn noted, "The most important motivating factor for any particular patient varies from case to case, depending on needs and circumstances."\textsuperscript{16}

2.2.15 It would seem that there may be significant regional variations in the claim rate. The Legal Aid Board’s records, as Sherr et al\textsuperscript{17} have noted, show that some areas experience a far greater rate of legal aid claims per thousand population than others. For example, Merseysiders make more than twice as many certificated legal aid claims for personal injuries than those in the North East, and over five times as many as those in London. These figures undoubtedly mask differences in eligibility, legal culture, accident type and risk levels between areas, but certainly seem to be of an order to suggest that the proclivity to claim may vary regionally. Certainly the fact that more than 10 times as many certificated legal aid road accident claims are brought in the North West as in Merseyside seems beyond these easy explanations.

\begin{footnotes}
\item[15] The Association of Victims of Medical Accidents (1995) \textit{Client Care: Practice Standards}
\item[16] Supra, n.14, p.3
\item[17] Sherr \textit{et al.} (1996) \textit{Outcome Measures in Personal Injury Work}, unpublished report to the Legal Aid Board
\end{footnotes}
2.3 Choice of Solicitor

2.3.1 Although individuals sometimes bring their claim personally, usually a solicitor is used. As the Law Commission found in its survey of 761 compensated accident victims:

"Nearly all respondents reported that they had used a solicitor to assist with their claim for compensation."\(^{18}\)

In determining whether to use a solicitor and which to go to, claimants rely heavily upon the advice and recommendations of others.

2.3.2 The Oxford Study found that:

"More than two-thirds of all those who consulted a solicitor said that the first impetus to seek legal advice had come from another person."\(^{19}\)

32% of this advice came from friends and relatives, 29% from trade union officials, 10% insurance companies, 7% from medical personnel, 6% from employers, 6% from workmates or other patients and 5% from the police.

2.3.3 The source of advice varied considerably depending upon the type of case. For example 48% of advice in work accident cases came from trade union officials, compared to only 7% in road traffic and 2% in ‘other’ cases. In contrast, 57% of advice in ‘other’ cases and 46% in road traffic cases came from friends and relatives, compared to only 18% in work accident cases. Insurance companies (15%) and the police (12%) were also major sources of advice in road accident cases as, curiously, were potential defendants (17%) in ‘other’ cases.

2.3.4 Claimants who consulted ‘trade union lawyers’\(^{20}\) had invariably been referred to them by trade union officials. More than half those who consulted ‘ordinary private practitioners’ had had the particular firm recommended to them by someone else. Around three-quarters of the recommendations came from friends and relatives. The rest “came from miscellaneous sources,” such as medical personnel, employers and advice bureaux.

2.3.5 The Civil Litigation Research Project (CLRP) in the US, a large study of general civil litigation, found that 60% of individual litigants chose their attorney "on the basis of personal acquaintance, reputation, or recommendation of friends, family or associates," as opposed to only 20%

---

\(^{18}\) Supra, n.11, p.72

\(^{19}\) Supra, n.2, p.65

\(^{20}\) In the Oxford study ‘trade union lawyers’ were taken to include both lawyers employed by trade unions and lawyers regularly instructed by trade unions.
of institutional litigants, for whom choice generally “presents no question,” as there is already an established relationship with a particular firm.\(^{21}\)

2.3.6 As Genn\(^{22}\) has noted, claimants generally undertake little research into the relative merits of different firms. It has been observed, by Rosenthal\(^{23}\) for example, that claimants generally instruct the first lawyer they come across or are recommended.

2.4 **Plaintiffs’ and Defendants’ Solicitors: An Imbalance**

2.4.1 The fact that personal injury claimants arrive at a particular solicitor in a haphazard manner, coupled with Genn’s finding that “the solicitor to whom the plaintiff turns will be unlikely, whatever his experience, competence, or workload, to turn the client away if there are grounds for making a claim,”\(^{24}\) goes a long way to explain the differences that appear to exist between plaintiff and defendant solicitors in personal injury cases.

2.4.2 In contrast to defendant personal injury work which, as Fennel noted, “is a highly specialised field dominated by a relatively small number of firms,”\(^{25}\) plaintiff personal injury work, as Genn has observed:

> "... is undertaken by a wide variety of firms ranging from the few large specialist trade union firms handling thousands of personal injury claims a year, right down to single practitioner country practices who may not handle more than a handful of cases annually."\(^{26}\)

This contrast between the relative experience of defendant and plaintiff solicitors seems to hold elsewhere. The CLRP, for example, made similar findings.

2.4.3 The data held by the Legal Aid Board does not allow a determination of how much non legally aided personal injury work solicitors’ firms undertake. The data does demonstrate, however, that a substantial proportion of legally aided personal injury cases are undertaken by firms acting in only a few such cases per year.\(^{27}\)


\(^{23}\) Supra, n.13

\(^{24}\) Supra, n.22

\(^{25}\) Supra, n.10

\(^{26}\) Supra, n.22, p.35

\(^{27}\) LABRU, forthcoming
2.4.4 In the light of the above, it is no surprise that Chambers and Harwood\textsuperscript{28} found that 74\% of solicitors who said they regularly carried out personal injury work (34\% of the profession as a whole) devoted less than 25\% of their time to it. Only 4\% were exclusive personal injury specialists.

2.4.5 Although trade union firms undertake a sizeable proportion of plaintiff personal injury work in employer liability cases, they play a much lesser role in other types of case and, generally, in legal aid work. This is consistent with Fennell’s finding that road accident cases are more likely to be handled by non-specialists.

2.4.6 As well as seeming likely that the plaintiff’s solicitor in a personal injury case will generally be less experienced at such work than the defendant’s solicitor (and sometimes greatly so), there also appears to be other advantages enjoyed by defendants’ solicitors. As Galanter\textsuperscript{29} has indicated, as a consequence of their relative experience, defendants’ solicitors are able to build up a record of cases, structure their work to a greater extent, develop expertise, build a reputation and experiment and foster relationships with specialists. Being, generally, part of larger firms, they may also enjoy economies of scale.

2.4.7 Galanter\textsuperscript{30} has also described the US lawyers who serve “one-shooters”, the vast majority of personal injury victims, as “[tending] to make up the ‘lower echelons’ of the legal profession.” He went on:

“Compared to the lawyers who provide services to repeat players [such as insurance companies] ... [they] tend to be drawn from lower socio-economic origins, to have attended local, proprietary or part-time law schools, to practice alone rather than in large firms, and to possess low prestige within the profession.”

2.4.8 The only advantage that could be argued to follow from relative inexperience is a lesser likelihood of being affected by the potential conflict of interest that may arise when plaintiff and defendant lawyers have a continuing relationship. As Ross noted:

“[A conflict of interest] is more likely to occur for the negligence specialist, who negotiates on a repeated basis with the same insurance companies. His goal of maximising the return from any given case may conflict with the goal of


\textsuperscript{30} Galanter, M. (1974), Supra, n.29
maximising returns from the total series of cases he represents.\textsuperscript{31} However, this is little consolation and, in any event, is more relevant in the context of contingent fees.

2.4.9 It may, of course, be argued that the use of counsel by plaintiffs' solicitors should go some way to countering the experience (and any quality) imbalance. However, Genn observed that counsel is used "rather less frequently than one might suppose."\textsuperscript{32} She found that only 25\% of non-specialist solicitors routinely instructed counsel. Furthermore, counsel is often hampered by less than satisfactory instructions. Legal Aid Board records seem to indicate a greater incidence of use of counsel. They show that counsel was used in 57\% of legal aid certificated personal injury cases billed in 1995-6. There was no great variation between the case categories, although counsel was used only 51.8\% of the time in road traffic cases, compared to just over 60\% of the time in "other" cases. It is entirely possible, of course, that counsel is used less frequently in privately funded cases where the plaintiff has a more direct interest in the cost of the case.

2.4.10 In contrast to the above, Worthington and Baker's\textsuperscript{33} study of the costs of civil litigation in New South Wales and Victoria, which included a large majority of personal injury cases, found that counsel was used by the plaintiffs' solicitors in over 80\% of cases. However, it should be noted that the sample was skewed towards larger and more litigious firms.

2.5 Plaintiffs and Defendants: A Further Imbalance

2.5.1 The vast majority of plaintiffs in personal injury cases are individuals. According to the Judicial Statistics for 1995\textsuperscript{34}, over 90\% of the plaintiffs in the 3,230 personal injury cases set down for trial in the Queen's Bench Division of the High Court were individuals. In contrast, the great majority of defendants are insurance companies.

2.5.2 As well as defendants' solicitors generally having the advantage of and advantages which follow from greater experience, institutional defendants (the usual defendants) independently possess such advantages, and more besides. They, too, can build up a record of cases, structure their responses to claims, develop expertise, build a reputation and forge relationships with key players. On top of that, though, they have a greater

\textsuperscript{32} Supra, n.22, p.78
2.5.3 Through greater resources they are readily able to amass the information necessary to a case. As Genn found, in many cases, such as road and work accidents, they will get very early warning of a potential claim; they will commence investigations immediately and, often, they will complete these investigations “before the injured victim has recovered sufficiently to contemplate the question of suing anybody.”\(^{35}\) Of course, even if the injured victim were recovered s/he would not likely be able to investigate in a similar fashion. Genn also found that plaintiffs’ solicitors rarely arrange for site visits, which are often regarded as essential and fundamental to insurance companies.

2.5.4 Perhaps the greatest advantage institutional defendants possess is their ability to play the odds. Winning and losing in individual cases is not important, only winning overall. In contrast, for the plaintiff, the two concepts amount to the same thing. Ross, in his study of insurance claims adjustment, stated:

“By taking many ... gambles in litigating large numbers of cases, the insurance company is able to regard the choice between certainty and the gamble with indifference.”\(^{36}\)

2.5.5 Other advantages include, as Galanter put it, the “ability to play for rules in both political forums and in litigation itself by litigation strategy and settlement policy,”\(^{37}\) and, as Fiss has commented, immunity from the economic pressures to settle in particular cases. Many plaintiffs, as will be seen below, are “forced to settle” either because they “need the damages ... immediately,” or because “[they do] not have the resources to finance the litigation.”\(^{38}\) Also, as McEwin\(^{39}\) reported to the Australian Parliament, institutional defendants may benefit from being able to invest money for longer where there are delays. For this reason, as he reports Samuels\(^{40}\) to have observed, Australian insurance companies “usually ask for juries ... not because judges are perceived to be more generous but because of benefits to insurance companies in delaying trial.” It should be remembered, though, that defendant induced delays, especially in legally-aided cases, lead to greater costs exposure.

\(^{35}\) Supra, n.22, p.62  
\(^{36}\) Supra, n.31  
\(^{37}\) Supra, n.29  
2.5.6 Lack of resources to fight legislation can affect legally aided as well as personally-funded plaintiffs. Contributions can provide a great hurdle to surmount. The legally aided plaintiff, however, has a very special advantage, such as might even counterbalance the ability of institutional defendants to play the odds. The opponent of a legally aided plaintiff will only very rarely recoup costs if successful. This greatly alters the amount of any net gain that might result from holding out against or defeating a legally aided plaintiff. Indeed, there is much evidence that insurance companies routinely make ‘nuisance’ payments to avoid the costs of defending smaller claims.\(^{41}\) There is also anecdotal evidence that some solicitors \textit{illegitimately} obtain legal aid for unmeritorious small claims as a means of forcing a \textit{nuisance} settlement.

2.6 \textbf{Strategy}

2.6.1 In paragraph 2.4.2 it was recognised that plaintiffs instruct solicitors of all descriptions and levels of experience. As regards the basic strategic approach adopted by these solicitors, however, it seems that individually they tend to follow one or other of two basic approaches, to a large extent irrespective of the nature of the particular cases they deal with\(^{42}\).

2.6.2 The first strategy, as Genn observed, emphasises "the need for reasonable negotiation and the desire to avoid antagonising the defendant." Conversely, the second approach involves "a relentless and apparently uncompromising push towards trial"\(^{43}\), i.e. \textit{hard bargaining}.

2.6.3 This basic philosophical split between reasonable negotiators and hard bargainers has been observed most recently by Sherr \textit{et al}.\(^{44}\) through their personal injury \textit{outcome measures} consultation exercise.

2.6.4 The approach a given solicitor is likely to adopt seems to be linked to his/her degree of specialism. The first approach can loosely be associated with ‘non-specialist solicitors’ and the second with ‘specialists’. In keeping with this general proposition, Genn\(^{45}\) found that less than 1 in 10 specialists agreed that proceedings should be issued only after negotiations have finally failed, compared to almost a quarter of non-specialists. Nearly twice as many non-specialists as specialists thought that going to court should be regarded as a last resort.

2.6.5 A number of Genn’s respondents expressly commented that they had switched to the second strategy with experience.

\(^{41}\) For example, Genn, H. (1987), \textit{Supra}, n.22
\(^{42}\) \textit{Ibid.}
\(^{43}\) \textit{Ibid}, p.50
\(^{44}\) \textit{Supra}, n.17
\(^{45}\) \textit{Supra}, n.22
2.6.6 Genn's study suggests that hard bargaining constitutes the optimal strategy in terms of results for the client. Echoing Galanter's\(^{46}\) notion of "litigation" (see paragraph 3.3.12), she warned that "those solicitors who regard litigation as a last resort may deprive their clients of the opportunity to settle claims advantageously." After all, it is easy to hold out for an otherwise unattainable goal when there is no pressure to alter one's sights. It may even be tactically astute, if all the while the accident victim is becoming less resolved and more desperate. In the United States, Rosenthal's\(^{47}\) survey of personal injury victims suggested a link between specialism and results.

2.6.7 Non-specialists are particularly susceptible to tactical manoeuvrings on the part of the defence. As well as often being far less used to contentious work, they will also often see as straightforward what is in fact complex. Genn found strong evidence that many plaintiff solicitors underestimate the complexity of personal injury cases. Their perception of cases can therefore be manipulated that much more easily and convincingly by experienced defence lawyers. As one defence counsel put it:

"If you are dealing with some push-bicycle firm from Weybridge ... who have no idea about their client's case, [you] will try and psyche them out ... and undoubtedly succeed."\(^{48}\)

2.6.8 Furthermore, any poor performance by a non-specialist plaintiff solicitor will be hidden to all but the defence. As Genn put it; "the general uncertainty which pervades the whole area of personal injury litigation in relation to liability and quantum ... creates perfect conditions for the explicit or implicit justification of almost any strategy."\(^{49}\)

2.7 The Claims Process: Duration

2.7.1 Having seen that only a small proportion of accident victims bring a claim, that those who do ordinarily instruct a solicitor, that plaintiffs' solicitors are different as a group from those of defendants, that plaintiffs are disadvantaged as a consequence, and also that, as a group, they are independently disadvantaged relative to the usual defendants, we now turn to the nature of the claims process.

2.7.2 Accident victims do not always consult lawyers and initiate claims immediately upon being injured. As the Oxford study showed, "there is often a delay before an injured person consults a lawyer about making a


\(^{47}\) Supra, n.13

\(^{48}\) Supra, n.22, p.51

\(^{49}\) Ibid, p.103
claim\textsuperscript{50}. For example, in the Oxford study only 12\% of victims consulted a lawyer within one week of their accident. Over 50\% waited over one month, and a quarter of those waited six months or longer. 70\% of those who consulted a lawyer within one week were victims of road accidents. Over 80\% of those waiting six months or longer were victims of work accidents. These latter findings were put down to perceived accident reporting requirements and trade union handling of the early stages of some cases.

2.7.3 The Law Commission found that most claims were brought within three months of an accident, "although the period between the accident and first claiming tended to increase with the size of the claim\textsuperscript{51}.

2.7.4 These delays do not seem great when put into the context of the individual circumstances of accident victims, or that of delay within the claims process as a whole.

2.7.5 As has already been noted, victims are often incapacitated for a period of time after an accident and, in any event, many do not think to visit a lawyer until the idea is suggested by another person.

2.7.6 Worthington\textsuperscript{52}, in her study of the pace of personal injury litigation in New South Wales, found that the period prior to a claim being made accounted for 15\% of the time from accident to case disposal.

2.7.7 As has been seen, a claim in respect of personal injury can come about and, as shall be seen, progress in many different ways. Each stage of progression involves potential considerations, difficulties and costs. As claims move towards conclusion they each forge their own unique profiles. However, the research to date suggests that some patterns of cause, parties, court, conduct, duration, cost and outcome may be found, albeit not always clearly.

2.7.8 The length of time claims take to conclude continues to be the subject of much concern. The Law Commission found that "the majority of accident victims had to wait for very long periods before they received their damages\textsuperscript{53}. One-quarter of the recipients of even the lowest levels of damages had to wait more than 4 years for their cases to conclude. Those receiving the highest levels of damages had to wait over 6 years in one-third of cases. This, as the Law Commission commented, places the victim and victim's family in financial difficulty, prolongs the stress associated with litigation and may even impede recovery. Proposals for

\textsuperscript{50} Supra, n.2, p.107
\textsuperscript{51} Supra, n.11, p.69
\textsuperscript{53} Supra, n.11, p.xxi
fast track litigation have recently been put forward by the Lord Woolf.\(^{54}\) The Law Commission’s proposals place an emphasis on early disclosure, greater incentives to settle prior to the issue of proceedings, greater control over the number and use of expert witnesses, and the time-tabling of cases through the courts.\(^{55}\) No supporting empirical research, however, has been conducted relating to the use of experts and formal court procedures in the resolution of typical personal injury cases. The Law Commission’s supporting research has instead focused on taxed cases. Much of the simplification of the claims process is, nonetheless, clearly to be welcomed.

2.7.9 An analysis of an internal 1994 sample of 354 closed legally aided cases shows that the average duration from first instruction to disposition in successful cases was 20 months (median = 17). The cases included one lasting over 7 years and 5 others over 4. The Oxford study found that claimants reported the average duration from accident to receipt of damages to be 19 months (median = 16), although information from solicitors put the duration at 22.5 months (median = 19). It also found that 75% of settlements were reached within 2 years.

2.7.10 Concern at the time claimants often have to wait for the conclusion of their cases should not, however, overlook the fact that claimants themselves sometimes have good reason to delay progress and that delay is sometimes unavoidable. As the Law Commission stated:

"a certain degree of delay is inevitable while the parties wait for the medical condition of the plaintiff to stabilise."\(^{56}\)

In fact, the Oxford study found that just under 40% of respondent solicitors had advised clients to delay pursuing claims, invariably to allow for the prognosis to be settled. It also showed a clear link between the period of time the plaintiff took off work as a result of the accident and the delay to settlement. In the medical negligence context, Leigh has recently commented that much delay could be avoided if certain conditions were met, e.g.:

"if the patient is totally stable from the beginning, with all his or her future needs known and solutions accepted, or better still dead, and if the medical experts were readily available, produced their reports within a week or so, were available for conferences easily and replied promptly to letters!"\(^{57}\)

\(^{54}\) Supra, n.12
\(^{55}\) Ibid, p.4 et seq.
\(^{56}\) Supra n.11, p.71
2.7.11 Some of the solicitor respondents in the Oxford study, in keeping with Leigh's suggestion, stated that the obtaining of medical reports had caused undue delay. However, in New South Wales, Worthington found that medical reports were not generally a significant cause of delay (55 days to appointment, 7 to report), although their production to defendants may have been (median = 15 months). She also associated delay with slow responses to requests for information (in the context of 452 requests in 100 cases) and, in some cases, incompetence (e.g. lawyers attending conferences with the wrong papers).

2.7.12 Delays in responding to requests for information may sometimes be tied to the tactical delay of defendants. However, it should not be forgotten that it is the plaintiff who ultimately dictates the pace of litigation. As Genn has noted, "In principle, the impetus in any action must come from the plaintiff's side." Although, as she went on to note, "the complexity of rules of civil litigation ... do not facilitate the speedy conclusion of civil disputes."

2.7.13 It would seem, then, that the situation is close to that described by Dingwall and Durkin:

"The processing time of a case may ... reflect a compromise between efficiency, effectiveness, equity and humanity in ways which are not immediately obvious."

2.7.14 Past research clearly shows, in line with intuition, that the duration of a case varies greatly depending upon the stage at which it concludes. Cases which settle conclude quicker than those which proceed to trial. Kakalik et al found that air accident victims who settled out-of-court concluded their cases in half the time of those who went to trial. Fenn & Dingwall found an even greater disparity in relation to claims brought against an English District Health Authority, and Delaney's study of personal injury claims in the New South Wales District Court put the figure at under a third.

---

58 Supra, n.52
59 Delay is often in the interests of defendants. For example, it puts pressure on plaintiffs (who may be in grave financial difficulties as a result of their accident and who are often under additional stress as a consequence of having gone to law) to settle and allows longer investment of any damages eventually paid out.
60 Supra, n.22, p.102
2.7.15 Analysis of the 354 legally aided cases referred to in paragraph 2.7.9 further shows that cases settling prior to proceedings being issued took an average of 16 months from first instruction to disposal, compared to 27 months for cases which settled afterwards.

2.7.16 It is probable that plaintiffs often pay quite a price for early settlement. Fennell found that a third of settlements were for less than "the full value of the claim," and 28% of these reductions were directly attributed to a "general discount for early settlement." As Genn has observed:

"Most plaintiffs will substantially compromise their claim in order to avoid the experience of standing in the witness box in the High Court."66

2.7.17 It is not surprising, therefore, that Kakalik and King67 found that plaintiffs in US asbestos claims received 2.28 times the damages in cases where trial began than in those that settled beforehand. Whilst there are good reasons to suppose that plaintiffs in cases that settle before the commencement of trial would receive less in any event (defendants more likely to fight where more is at stake, etc.), it seems fairly clear that a reduction of damages to reflect, if nothing else, the 'hazards of litigation' would seem to be routine in settlements.

2.7.18 Although cases which conclude at a late stage of the claims process can take considerably longer than those concluding early on, only a small proportion actually reach the late stages.

2.7.19 The Oxford study found that only 2% of claims went to trial. It also found that 60% of settlements were arrived at prior to the issue of proceedings. The Law Commission68 also found that only a very small proportion of claims reached trial. Even studies of court records have produced low figures69, and they are inherently biased towards cases with court involvement. There is, then, a general acceptance that very few personal injury cases go to trial, though the precise figure remains unclear. The sample of 354 legally aided cases included only 2 that reached trial, although there is reason to believe that the longer lasting cases were under sampled. Settlements in the sample were also found to be three times more likely to have been arrived at prior to, rather than post, issue.

---

65 Supra, n.10, p.39. The other reasons included liability/quantum dispute (35%); contributory negligence (21%) and payment in (7%).
66 Supra, n.22, p.98
68 Supra, n.11
69 e.g. Delaney (1995), supra, n.64
2.7.20 It should by no means be taken for granted that the proportion of cases concluding at the various process stages is uniform between different areas or over time. Worthington\textsuperscript{70}, for example, found enormous regional variations.

2.7.21 It might be expected that the duration of a claim would be affected by its complexity. However, despite the fact that the period of time between first instruction and the issue of proceedings was found to increase with case weight\textsuperscript{71}, the Woolf Inquiry found "no evidence that heavier cases systematically took longer than lighter cases, holding other factors constant"\textsuperscript{72}.

2.7.22 Similarly, it might be expected that the duration of a claim would be affected by case category. Unlike above, however, the Woolf Inquiry found good evidence in support of this proposition\textsuperscript{73}. Legal Aid Board records also provide supporting evidence. Again, for example, despite the fact that a substantial number of medical negligence cases are abandoned after initial investigations are completed, they still average slightly longer from certificate issue to bill payment than do other types of personal injury claims. However, these two dates are not neatly indicative of claim start and end points. Further, it is not possible to determine whether individual process stages are of different duration as between categories.

2.7.23 Other factors which have been linked to the duration of claims include the size of eventual award\textsuperscript{74}, dispute as to liability or quantum\textsuperscript{75}, legal capacity of the plaintiff\textsuperscript{76} and extent of residual disability\textsuperscript{77}. Genn\textsuperscript{78} found that solicitors and insurance companies often blamed each other for delays! Solicitors also attributed delay to the legal aid process.

2.7.24 Finally, the Woolf Inquiry found a clear link between case duration and legal aid. The overall length of personal injury (excluding medical negligence) cases was 20\% greater where the winning party was legally aided, and the period from first instruction to the issue of proceedings was a mighty 50\% greater\textsuperscript{79}. Given the overall length of cases, it seems unlikely that these increases can be wholly accounted for by the delays.

---

\textsuperscript{70} Supra, n.52
\textsuperscript{71} This held in relation to personal injury cases in general, but not in relation to medical negligence cases.
\textsuperscript{72} Supra, n.12, p.360.
\textsuperscript{73} See paragraph 2.7.8 above
\textsuperscript{74} e.g. Law Commission (1994), supra, n.11
\textsuperscript{75} e.g. Harris \textit{et al.} (1984), supra, n.2
\textsuperscript{76} e.g. Worthington (1991), supra, n.52
\textsuperscript{77} Supra, n.2
\textsuperscript{78} Supra, n.22
\textsuperscript{79} The duration of medical negligence cases was 25\% greater where the winning party was legally aided. However, no link was found between legal aid and the period between first instruction and the issue of proceedings.
consequent upon the application procedure. Other explanations might include legal aid work being given low priority by solicitors, more work being undertaken where legal aid is available, and legally aided cases "being run harder and further than might otherwise be the case."  

2.7.25 According to the Judicial Statistics for 1995, the average hearing times for personal injury cases were as shown in Table 2.3.

<table>
<thead>
<tr>
<th>Category of Case</th>
<th>County Court</th>
<th>High Court</th>
</tr>
</thead>
<tbody>
<tr>
<td>Work</td>
<td></td>
<td>3h 32m</td>
</tr>
<tr>
<td>Road</td>
<td></td>
<td>2h 45m</td>
</tr>
<tr>
<td>Other</td>
<td></td>
<td>13h 12m</td>
</tr>
<tr>
<td>All</td>
<td>2h 23m</td>
<td>-</td>
</tr>
</tbody>
</table>

2.8 The Claims Process: Work Involved

2.8.1 Personal injury cases can involve various amounts and proportions of time devoted to various types of activity. For example: clients must be conferred with; records, reports, witness statements and other evidence must be obtained and then examined; the law may have to be researched; counsel may have to be instructed; pleadings may have to be drafted and responded to; negotiations may be entered into, and; hearings, a trial and appeals may have to be conducted.

2.8.2 The Lord Chancellor's Department, in a study of 50 taxed bills in personal injury cases, classified just under 50% of expenditure as having been incurred in "preparation for trial." Around 15% went to counsel and 10% on disbursements. Less than 5% was classified as having been incurred in respect of "attendances" or "preparation of documents" (see Table 2.5).

2.8.3 A study of taxed bills is clearly biased towards more costly cases and cannot, therefore, provide us with a picture of cases as a whole. More of a problem is the system of classification used. Ultimately, where there is a trial, isn't all expenditure (other than that incurred in its conduct) ultimately incurred preparing for it? There is certainly no neat division between that which is and that which isn't. The 50% of expenditure classified as having been incurred in "preparation for trial" must to some extent, therefore,

---

80. Supra, n.12, p.360
81. Supra, n.34
muddle the results. Further, we have no indication as to the way in which counsels' work was apportioned.

2.8.4 A more recent study of taxed bills was undertaken for the Woolf Inquiry. The Interim Report\textsuperscript{83}, as did the Lord Chancellor's Department, included a finding that 15\% of plaintiff personal injury case costs are accounted for by counsels' fees, 13\% by experts' fees and 3\% by discovery costs (18\%, 15\% and 2\% respectively in medical negligence cases). It further indicated that a quarter of costs relate to "documents" (see Table 2.6).

2.8.5 In the US, the Civil Litigation Research Project (CLRP)\textsuperscript{84} found, from a study of over 1,300 civil cases, that 16\% of time was spent conferring with the client, 16\% on pleadings and motions, 15\% on discovery, 14\% on settlement discussions, 12\% on factual investigation other than discovery, 11\% on legal research, and 10\% on hearings, trials and appeals (see Table 2.4). In State Court cases, the proportion of time spent conferring with clients was around 20\%, regardless of the stakes.

<table>
<thead>
<tr>
<th>Activity</th>
<th>Percentage of Time</th>
</tr>
</thead>
<tbody>
<tr>
<td>Conferring with Client</td>
<td>16</td>
</tr>
<tr>
<td>Discovery</td>
<td>15</td>
</tr>
<tr>
<td>Other Factual Investigation</td>
<td>12</td>
</tr>
<tr>
<td>Settlement Discussions</td>
<td>14</td>
</tr>
<tr>
<td>Pleadings and Motions</td>
<td>16</td>
</tr>
<tr>
<td>Legal Research</td>
<td>11</td>
</tr>
<tr>
<td>Hearings and Trial</td>
<td>9</td>
</tr>
<tr>
<td>Appeals</td>
<td>1</td>
</tr>
<tr>
<td>Other</td>
<td>6</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>100</strong></td>
</tr>
</tbody>
</table>

2.8.6 The CLRP also found that whilst 47\% of lawyers sampled said that they most disliked "planning and research", 91\% said that being thorough was very important. 33\% said they most disliked and 25\% most liked the negotiating process.

2.8.7 Interestingly, 64\% of CLRP lawyers said that they spent less than half their time on non-routine matters. For half of these the figure was less than a quarter. Genn\textsuperscript{85} found evidence of routinisation, but stated that an "extraordinary" amount of time seemed to be spent debating the merits of individual cases.

\textsuperscript{84} See, e.g., Kritzer (1990), supra, n.21
\textsuperscript{85} Supra, n.22
2.8.8 There are many difficulties in comparing practice in the US with that in the UK. Not least, the fact that the professional, legal and costs structures are very different. Also, the Civil Litigation Research Project looked at civil litigation as a whole. Specific and useful findings in relation to particular categories of case are limited.

2.9 The Claims Process: Offers and Payments Into Court

2.9.1 The Oxford study found that where defendants made offers to settle cases, plaintiffs reported that these were accepted in nearly two-thirds of cases. Second offers were accepted by a majority of the remainder, as were third, fourth and fifth offers. Second offers were between a third and a half greater than first offers. Third offers just under a third greater than second. In only one case did a plaintiff refuse an offer and subsequently abandon the claim.

2.9.2 The Law Commission found a greater proportion of rejections. However, like the Oxford study, they found that the likelihood of rejecting offers and the number of offers rejected increased with the size of settlement. Nearly four times as many plaintiffs receiving over £100,000 rejected 3 offers or more than did plaintiffs receiving less than £20,000.

2.9.3 As might be expected, Worthington found that the earlier the offers were made the earlier settlement was reached.

2.9.4 The Oxford study also found that solicitors in smaller firms were more inclined to accept first offers, suggesting again that more experienced solicitors are more likely to adopt an uncompromising approach to negotiations.

2.9.5 Offers may tempt plaintiffs to settle early. Payments into court, on the other hand, may force them to. Genn, for example, found that all her solicitor respondents agreed that payments into court increase the pressure to settle. Surprisingly, however, she also observed that they are not used “ruthlessly”.

2.10 The Claims Process: Cost

2.10.1 Zander recently stated:

"There have been remarkably few studies of the costs of civil litigation ... We have few hard data even about the

---

86 Solicitors reported a slightly lower figure, but still over 50%.
87 Supra, n.11
88 Supra, n.52
89 Supra, n.22
average cost of cases of different categories other than the superficial information published in the annual report of the Legal Aid Board. Consequently, the research findings below tend to do little more than scratch the surface.

2.10.2 If, at the outset of a case, a defendant accepts liability on the terms set out by the plaintiff, then less costs will be run up than if the defendant fights and investigates all the way to court. As Kritzer commented, "The amount invested by one side will have a major influence on the amount invested by the other." Consequently, the research findings below tend to do little more than scratch the surface.

2.10.3 Directly relating to this, costs seem to be linked to the stage of disposal. A study of the costs of legal aid certificated cases undertaken for the Lord Chancellor's Department by Ernst & Young²² clearly indicates this to be the case, as does an analysis of Legal Aid records.

2.10.4 The CLRP did, however, find a link between costs and case category. Legal Aid Board records for cases closed in 1994-5 similarly indicate such a link. Medical negligence cases, for example, cost almost twice the amount (£3,526) of 'other' personal injury cases (£1,800), despite greater early abandonment. The Interim Report of the Woolf Inquiry²³ also reports such a link, with taxed medical negligence cases costing an average £38,252 compared to £20,413 for personal injury cases as a whole. Further, the Final Report²⁴ reports that, whereas 40% of taxed medical negligence cases cost more than £20,000, only 25% of taxed other personal injury cases do so. Medical negligence cases were also found to have the highest minimum costs (£3,759).

2.10.5 Sherr et al.²⁵ have drawn attention to a seeming link between average case durations and average costs between different legal aid areas. However, the link was only associated with work accidents, there was no analysis at the individual case level, and the measurement of duration was, as has been explained, unreliable and could have been distorted by, for example, differences in regional billing practices.

2.10.6 The CLRP also found links between costs and complexity, firm size and venue²⁶. The findings of the Woolf Inquiry also indicate "substantial

---

²⁰ Supra, n.1
²¹ Supra, n.21
²³ Supra, n.83
²⁴ Supra, n.12
²⁵ Supra, n.17
differences in average costs between the heaviest and lightest cases.\textsuperscript{97} Median costs of the weightiest personal injury cases were £91,720 compared to £7,264 in the lightest. However, costs were proportionately higher in the lightest cases. As the Interim Report stated, “the more straightforward the case, the higher the costs relative to the value of the claim.”\textsuperscript{98}

2.10.7 The Woolf Inquiry also found that costs were affected by claim value in general personal injury cases. However, “the percentage of the claim value that costs represent” increases dramatically as the claim value decreases. For example, costs were on average found to represent 11% of claims in excess of £250,000 compared to 135% of claims below £12,500.

2.10.8 Counter-intuitively, costs have not always been found to be clearly linked to the duration of cases. The CLRP found only a weak link, and Worthington and Baker found no statistically significant link at all. Further, Pleasence and Maclean’s\textsuperscript{99} study of assessed bills in closed legal aid certificated cases found “no clear relationship between case duration in days and billed minutes of work.”\textsuperscript{100}

2.10.9 As with duration, case costs were found to increase when the winning party was legally aided. The increase amounted to 10% in general personal injury cases, although no such increase was observed in relation to medical negligence cases.

2.10.10 As was mentioned above (see paragraphs 2.8.2.-2.8.4), the Lord Chancellor’s Department\textsuperscript{101} and the Woolf Inquiry\textsuperscript{102} have undertaken detailed analyses of expenditure in taxed personal injury cases. Their findings are set out in Tables 2.3 and 2.6. There is no indication as to how the proportions vary within individual cases.

2.10.11 The findings set out in the two tables below demonstrate Williams and Williams\textsuperscript{103} finding that “in particular in personal injury cases, medical reports and medical witnesses at trial [account] for a significant proportion of the total costs of litigation.”

---

\textsuperscript{97} of firms was linked to costs. In particular, “experienced firms have significantly lower disbursements in plaintiff cases,” both in relation to counsel and expert witnesses.

\textsuperscript{98} Supra, note 52, at p.353. In this context, case weight was determined according to “complexity of issues, importance of case to the parties and to other litigants and potential litigants, unusual expedition, number and importance of documents, and quantum.”

\textsuperscript{99} Supra, n.83, p.253


\textsuperscript{101} In contrast, see, for example, Williams, P.L. and Williams, R.A. (1994), supra, n.96

\textsuperscript{102} Supra, n.82

\textsuperscript{103} Woolf (1995 and 1996) Supra, n.12, n.83


\textsuperscript{101} Supra, n.82

\textsuperscript{102} Woolf (1995 and 1996) Supra, n.12, n.83

\textsuperscript{103} Ibid., p.85.
Table 2.5
Elements of Expenditure in Taxed Personal Injury Cases (LCD
(1986))

<table>
<thead>
<tr>
<th>Expenditure Element</th>
<th>County Court</th>
<th>District Registry</th>
<th>RCJ</th>
<th>ALL</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>n = 10</td>
<td>n = 19</td>
<td>n = 20</td>
<td>n = 49</td>
</tr>
<tr>
<td>Document Preparation</td>
<td>%</td>
<td>%</td>
<td>1.5</td>
<td>2.5</td>
</tr>
<tr>
<td>Trial Preparation</td>
<td>4.3</td>
<td>2.4</td>
<td>49.9</td>
<td>48.5</td>
</tr>
<tr>
<td>Disbursements</td>
<td>10.3</td>
<td>12.9</td>
<td>10.7</td>
<td>11.5</td>
</tr>
<tr>
<td>Attendances</td>
<td>3.9</td>
<td>3.7</td>
<td>2.9</td>
<td>3.5</td>
</tr>
<tr>
<td>Counsel's Fees</td>
<td>14.1</td>
<td>14.3</td>
<td>18.5</td>
<td>16.0</td>
</tr>
<tr>
<td>Taxation</td>
<td>3.1</td>
<td>2.2</td>
<td>1.3</td>
<td>2.0</td>
</tr>
<tr>
<td>Miscellaneous</td>
<td>0.4</td>
<td>0.8</td>
<td>1.6</td>
<td>1.0</td>
</tr>
<tr>
<td>Court &amp; Taxation Fees</td>
<td>7.2</td>
<td>5.8</td>
<td>4.0</td>
<td>5.5</td>
</tr>
<tr>
<td>V.A.T.</td>
<td>10.6</td>
<td>9.5</td>
<td>9.5</td>
<td>9.5</td>
</tr>
<tr>
<td>TOTAL</td>
<td>100</td>
<td>100</td>
<td>100</td>
<td>100</td>
</tr>
</tbody>
</table>

Table 2.6
Elements of Expenditure in Taxed Personal Injury Cases (Woolf
1996 (1995 in brackets))

<table>
<thead>
<tr>
<th>Medical Negligence</th>
<th>All Personal Injury</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>n = 206 (43)</td>
</tr>
<tr>
<td>Counsels' Fees, incl.:</td>
<td>%</td>
</tr>
<tr>
<td>Settling Pleadings</td>
<td>18 (2)</td>
</tr>
<tr>
<td>Conferences</td>
<td>(4)</td>
</tr>
<tr>
<td>Brief/Refresher Fees</td>
<td>(10.5)</td>
</tr>
<tr>
<td>Advice (Written)</td>
<td>(1.5)</td>
</tr>
<tr>
<td>Experts' Fees</td>
<td>14 (15)</td>
</tr>
<tr>
<td>Discovery</td>
<td>(2)</td>
</tr>
<tr>
<td>Documents</td>
<td>(27)</td>
</tr>
<tr>
<td>Disc/Docs Combined</td>
<td>28</td>
</tr>
<tr>
<td>TOTAL</td>
<td>60</td>
</tr>
</tbody>
</table>

2.10.12 The average plaintiffs' costs in personal injury cases were found by Fennell\textsuperscript{104} to amount to £3,917, although successful cases cost nearly twice as much as unsuccessful ones. Legal Aid Board records for cases closed in 1994-5 put the figure at £2,653. This figure, though, masks significant differences between the costs in different case categories. Medical negligence cases cost an average of £3,526, road accident cases

\textsuperscript{104} Supra, n.10
£3,257, work accidents £2,800, and 'other' cases £1,800. The relatively high cost of road accident cases can be explained by their high success rate. The lower than expected figure for medical negligence cases can likewise be explained by its relatively low success rate.

2.10.13 It is clear from Legal Aid Board records that there are significant regional variations in the costs of personal injury cases. For example, cases in London cost twice the amount of cases in the North East, even after the proportions of case categories are equalised. This does not, of course, necessarily mean that the same case would tend to cost twice as much in London as in the North East, although such a proposition cannot yet be ruled out. It is highly possible that the situation is brought about, at least in part, by there being significant differences in the types of claims made, which are not reflected in the Board’s classification systems. Sherr et al.¹⁰⁵ have noted that damages are proportionately higher in the more expensive regions. However, it is not yet clear how this holds at an individual case level or whether or not this is a reflection of significant differences between the types of cases in the regions.

2.11 Disposal

2.11.1 Of the 14% of accident victims who were found by the Oxford study to have instructed a solicitor, around three-quarters successfully obtained damages. This is lower than the 93.6% success rate in Fennell’s¹⁰⁶ study. However, different methods of calculation were used and Fennell’s study favoured more specialist firms and failed to define cases in a satisfactory manner. The Oxford study findings are more similar to those obtained from Legal Aid Board’s records for 1994-5, which indicate a 78% success rate. However, the Board’s figures include a significant number of medical negligence cases, which have less than a 50% success rate¹⁰⁷ and the numbers of which have grown dramatically over the last few years.

2.11.2 As has been indicated, different case categories are associated with different success rates. At one end of the scale, as Legal Aid Board records clearly show, are road accidents (90.6% success rate of certificated cases closed in 1994-5) and at the other, medical accidents (49.1%). Between these extremes lie ‘other’ accidents (81.39%) and work accidents (77.2%).

2.11.3 Fennell¹⁰⁸ also found the success rate for medical accident cases to be far lower than for other categories of case, and that of road accidents to be higher.

¹⁰⁵ Supra, n.17
¹⁰⁶ Supra, n.10
¹⁰⁷ This is an exaggerated figure which includes cases where costs only are met by the defendant.
¹⁰⁸ Supra, n.10
2.11.4 The different success rates of different categories of case may help to explain the difference in the average ratio of plaintiffs' costs to damages obtained. This is most clearly illustrated by the poor return of medical negligence cases. However, more subtle differences have been reported. Genn found that the average ratio was also related to the size of settlement. Sherr et al. have observed a stability of the ratio at the macro level, as between different legal aid areas.

2.11.5 As might be expected, given the nature of trade union solicitors and the different make up of trade union funded cases, Fennell found trade union funded cases to have the highest success rate (95.1%) and legal aid cases the lowest (90.9%).

2.11.6 In the US, Rosenthal's study of the involvement of personal injury plaintiffs in the litigation process suggested that increased personal involvement in the running of a case enhances the likelihood of success. As Kritzer has pointed out, it is the institutional defendants who are most likely to get involved in the running of their cases.

2.11.7 Where damages are recovered Fennell found that costs are invariably also recovered. In the context of legal aid this has a particular significance as, given the high success rates related above, the Board's involvement in personal injury (excluding medical negligence) cases is generally in the capacity of banker, rather than insurer. As a consequence, it has been suggested that once account is taken of VAT and benefits recovery, the Treasury may actually make a profit on legally aided personal injury (excluding medical negligence) cases.

2.11.8 Those who fail to obtain damages nearly always abandon their claim before trial. In the Oxford study, 45% of claimants who abandoned their claims said that evidential problems provided one of the reasons for doing so. 18% said that they did so because the accident was their own fault, 16% because of the costs involved and 15% because liability was disputed. Other reasons included the trade union or solicitor's handling of the case, delay, the trouble/bother of proceeding and the affect that such would have on a continuing relationship.

---

106 e.g. Kakalik and King (1992), Supra, n.62
110 Supra, n.22
111 Supra, n.17
112 Supra, n.10
114 Supra, n.21
115 Supra, n.10
116 The Association of Personal Injury lawyers, in their response to the Green Paper, Legal Aid - targeting Need, estimated this profit at over £1.5 million for 1994/5.
2.11.9 Genn\textsuperscript{117}, in her study of a scheme set up to inform accident victims of the possibilities offered by the law, found the most common reason given by claimants for abandoning their claim was the defendant's denial of liability. This was followed, in decreasing order of prevalence, by the refusal of legal aid, the fear of costs, solicitor incompetence, evidential difficulties and limitation difficulties. Solicitors gave different reasons. Their most common reason was the lack of any real cause of action. This was followed by lack of instructions, unfavourable witnesses and, finally, denial of liability.

2.11.10 In a later study of medical negligence cases, Genn\textsuperscript{118} found that 43% of plaintiffs' solicitors said that their clients' "inability to finance the claim" was the most common reason for abandonment. 36% referred to adverse medical reports.

\textsuperscript{117} Genn, H. (1982) \textit{Meeting Needs}, Oxford: CSLS

\textsuperscript{118} Supra, n.14
3. MATRIMONIAL RESEARCH: AN OUTLINE

3.1 Introduction

3.1.1 This chapter identifies common themes in recent divorce studies, and highlights findings which may inform the building up of case profiles. The structure of this chapter will, therefore, follow the chronological path of a case, starting at the beginning of legal intervention following through the components to the legal end point of the case, seeking to identify factors which affect the length, cost and concluding stage of the case.

3.1.2 In 1994 158,000 divorces were granted in England and Wales, of which over half were to couples with children aged under 16. It is difficult to determine what proportion of all divorce cases are legally aided as: cases can be split over a number of separate certificates; case codes are not clear cut; and individuals move in and out of eligibility for legal aid during the course of their case. However, it is clear that a substantial proportion of the Legal Aid budget is spent on matrimonial proceedings. In the financial year 1994-5 matrimonial proceedings cost the taxpayer £332 million. Assistance can be provided in two ways: first, Green Form work which consists of a few hours advice and assistance and second, full legal aid for matters ancillary to the divorce petition including arrangements for children and financial matters.

3.1.3 This chapter reviews empirical studies of divorce, focusing on ancillary relief. The most recent studies which are of direct relevance to case profiling have taken relatively small samples of cases, usually divorce cases involving money and property disputes (sometimes children and/or domestic violence too) and looked at the cases in some detail either, examining the solicitors files (see Ingleby), sitting in on lawyer-client conferences or, interviewing clients, lawyers and judges (see Sarat and Felstiner, Davis Cretney and Collins). The complex nature of divorce cases lends itself to this sort of qualitative research. The different work patterns of lawyers and judges and the personalities and circumstances of the parties all have a strong influence on the nature and pathway of the case and make each case individual. Complexities also stem from the fact that divorce is an emotional business, as Sarat and Felstiner have noted in the following passage:


Civil legal aid is not available for undefended divorce only (Legal Aid Act 1988 Part 1 Para.5a Sched.2).


"Divorce is different from most other areas of legal practice. Divorce, more than most litigation, originates in personal failure and rejection. The number of clients in divorce who are experiencing some form of personal crisis is high, probably higher than in parallel fields such as criminal law, personal injury, worker compensation, landlord and tenant, consumer, and bankruptcy."  

3.1.4 This chapter is structured as follows:

(i) It begins with an analysis of the possible starting points for legal intervention in matrimonial cases; these include money and/or property disputes, issues arising over contact and residence of children, and also issues arising from cases of domestic violence. The starting point for the case, therefore, often has a part to play in the definition or categorisation of that case. The different combinations of issues at the start of the case may also have an important role in its definition. For example, a case may include issues relating to both the financial aspect of divorce and arrangements for children.

(ii) This is followed by an examination of how a case proceeds: the strategy and pathway chosen by the lawyer and the client. This will include some mention of how the lawyer explains the legal framework within which the case is set to the client, how the lawyer frames the client’s requests in legal terms, and whether mediation has been used.

(iii) Findings from different studies are then drawn together to identify how legally aided cases might differ from privately-funded cases in their process and the strategies adopted.

(iv) The manner in which cases end is looked at in conjunction with the factors which affect the length of the case and the stage at which it concludes.

(v) The final section examines the relationships between the following: length/duration of case; complexity of case; stage case concluded; case costs and the impact of legal aid to one or both parties.

3.2 Starting Points for Matrimonial Cases and their Definition

3.2.1 Many recent studies of matrimonial cases have confined themselves to certain aspects of divorce cases, or restricted themselves to certain types of matrimonial cases. Some studies have been limited to specific areas such as property disputes, child custody, or domestic violence. These studies have contributed valuable insights into the nature and complexity of divorce cases. However, a comprehensive understanding of the legal process in divorce requires a broad perspective that encompasses all aspects of the case, from the initial contact with the lawyer to the final conclusion of the case.

---

of matrimonial case. If all case types were examined, very large samples would be required to identify any significant trends in particular case types. Instead, many researchers have opted for smaller samples of cases of a certain type. This allows in-depth qualitative analysis which is extremely informative though broad generalisations about the full range of case types cannot be made.

3.2.2 As the summary table of research at the end of this chapter shows, the Davis et al study reported in "Simple Quarrels" looked at 80 divorce cases from 3 different courts in England. The sample was restricted to ancillary relief cases - i.e. those involving disputes over money and/or property. They did not examine children issues such as contact and residence. (Similarly see Sarat and Felstiner, Jackson et al, and Mather et al.) Ingleby, however, looked at 60 files from 5 solicitors and monitored them at quarterly intervals and looked at divorce cases involving children as well as money and/or property disputes (for other studies which included children see Walker J et al, Griffiths, Erlanger et al, and Eekelaar and Maclean). Ingleby is also one of the few studies to examine the effects of domestic violence.

3.2.3 Thus, matrimonial cases can be broadly defined in one of four ways:

(i) those cases which involve money and/or property disputes or settlements, which most of the studies cited were based upon;

(ii) those cases which involve disputes or issues arising from the presence of children, for example, residence or contact issues;

(iii) those matrimonial cases where domestic violence was an issue. It should be borne in mind that studies of domestic violence often include cases where couples were not married;

(iv) those cases which involve any combination of the issues mentioned above. It is, therefore, possible to model matrimonial cases:

\[
\text{MONEY AND/OR PROPERTY} \pm \text{CHILDREN} \pm \text{DOMESTIC VIOLENCE}
\]

Where \( \pm \) means "plus or minus" and where any combination of the three is possible.

It is important to note that variations of these categories are common, and, in particular, combinations of the above categories are frequently found. For example, financial issues are often resolved at the same time as arrangements for children. If the case unfolds and includes further issues as it progresses, this will also affect the definition and the profile of the case. Figures from an interim report\(^\text{124}\) from a sample of 155 married parents show that at the time of separation or divorce, the matters on which advice was sought from lawyers were as follows: 34 sought advice on money property and residence, 10 sought advice on money and residence and 10 sought help on property and residence. Only 2 sought advice on money only, and 7 on residence

only. These figures give us some idea of the prevalence of such combinations. In order to allow analysis of each issue, the three types are considered separately below.

Money and / or property

3.2.4 The financial problems for divorcing couples are numerous. In most cases they must attempt to sustain two households on the resources which previously supported only one. A balance needs to be found between competing claims and the available resources. This involves a complicated process of deducing needs and expectations, arranging them in a hierarchy, and then attempting to maximise their fulfilment within the limits provided by the brute facts of existing income and capital.\textsuperscript{125} It is possible to argue that such considerations will be of less relevance to families or parties who are legally aided as their financial resources may be more limited than those in higher income groups as only families with relatively low disposable incomes are eligible for legal aid. They may, however, be home owners (and thus be subject to the statutory charge on their property, even if it is postponed until later in life), as there is now a property owning low income population. Negative equity and interruption of earnings through unemployment, resulting in debt and repossession, also need to be examined. It is vital to consider the effects of attempting to resolve such financial difficulties and debts when couples divorce, as these negotiations may be as complicated as untangling other property arrangements and pension entitlement.

Children

3.2.5 In 1994, 56% of all divorces were granted to couples with children under the age of 16.\textsuperscript{126} The major issues concerning children are contact, residence and maintenance. Residence, it appears from studies such as Griffiths\textsuperscript{127} and others, seems to be agreed very early on in the majority of cases (sometimes even before the couple have visited their lawyers.) Contact may take longer to negotiate though there is little conclusive evidence. The court no longer has jurisdiction to decide on levels of child support (maintenance) following the implementation of the Child Support Act 1991 unless there was a pre-existing order dating pre-1993. In the past, "packages" of financial support were negotiated balancing child support and spousal support with lump sums. Negotiating figures for child and spousal support was necessary as joint orders were made. The Child Support Agency now


\textsuperscript{126} Supra, n.119, p301

\textsuperscript{127} Griffiths J., (1986) "What do Lawyers actually Do in Divorce Cases?", 20 Law and Society Review, 135-175
applies a formula to the non resident parent’s income to determine the amount of child support to be paid. This negates the need for negotiations over the absent parent’s liability and amount to be paid, but may have reduced the amount available for spousal support payments and removed one of the bargaining tools for negotiation.

**Domestic Violence.**

3.2.6 The Legal Aid Board’s Annual Report for 1995-6\(^{128}\) shows that over 25,000 legal aid certificates were granted for domestic violence matters; this represents 25% of all certificates issued for all matrimonial proceedings. Of these, well over half were first issued as emergency certificates. This shows the magnitude of domestic violence proceedings under legal aid.

3.2.7 Domestic Violence in this country has been researched much less than, for example, ancillary relief within divorce. Part of the reason for this is the difficulty in defining domestic violence itself. There is no precise, accepted, definition of what constitutes violence and so comparisons of the extent of violence are very difficult. There is also the problem that victims of domestic violence may not want to talk about it, or even admit its existence which may mean that reported figures underestimate the problem. However, in 1992 the British Crime Survey indicated that 11% of women who lived with a partner had experienced some degree of physical violence. As many as 1 in 3 divorces\(^{129}\) may involve domestic violence and this can be the starting point for divorce proceedings. Last year certificates issued for domestic violence injunctions within divorce proceedings numbered over 6,000 and there were over 8,000 cases in the combined category of injunction, ancillary relief and residence and contact.\(^{130}\) Together, these suggest that at least 18% of divorce proceedings cases involve some domestic violence issues. A further 19,000 certificates were issued under the Domestic Violence and Matrimonial Proceedings Act 1976.\(^{131}\) In a study of 60 divorce files by Ingleby, almost half (28) involved some level of domestic violence.\(^{132}\)

3.2.8 One study has looked at post separation violence and found that contact with children is a major flashpoint for violence.\(^{133}\) This study raises awareness of forms of domestic violence which are often overlooked. It reports that children were physically abused in 40-60%

---

\(^{128}\) Legal Aid Board Annual Reports (1995-6), HMSO July 1996.


\(^{130}\) Supra, n.128

\(^{131}\) Ibid.

\(^{132}\) Supra, n.121, p.21

of domestic violence cases, and that children could also witness violence against their mother which might in turn constitute emotional abuse. Evidence of sexual abuse was found in up to 30% of cases.  

3.2.9 As the studies cited above show, the complex matrices of issues which make up individual divorce cases are extremely difficult to study. Thus, effective comparisons between studies and, therefore, between jurisdictions are difficult. However, some common trends can be seen and provide useful information in particular about the way in which cases are run - the strategies and pathways employed by clients and lawyers when a matrimonial case proceeds. These common trends are discussed in section 3 below.

3.3 How a Case is Run: Strategies and Pathways

3.3.1 In their seminal article "Bargaining in the Shadow of the Law" Mnookin and Kornhauser state that:  

"In view of the critical role of lawyers and the disparate functions they may perform, it is startling how little we know about how lawyers actually behave."

Though there have been several important studies since this was written, the statement still has validity, particularly for legally aided cases. The nature of divorce cases: their length, the confidential nature of the relationship between lawyer and client, and the emotional nature of the process, makes empirical research into matrimonial cases very difficult to undertake. Most of the research that has been undertaken has looked at certain issues within divorce, such as ancillary relief in studies with sample sizes ranging from 40 to 200. The majority of studies have concentrated on lawyer interviews, observing lawyer-client interaction and one has looked at divorce files. Though some mention of pro bono work in other jurisdictions is made, little substantial research has been carried out on the process, strategies and outcomes of legally aided family law cases.

3.2.9 This section divides the way in which matrimonial cases are handled into three parts. The first examines the strategies and pathways used by lawyers and their clients; the second examines research which has included work on the role of the lawyer as translator of legal concepts; and the third short section looks at mediation and the research which has included mediation as part of the profile of the case.

---

136 See summary at end of chapter for comparisons.
3.3.3 Family lawyers, in the majority of cases, are not in the business of creating or encouraging conflict between divorcing parties. Their task is to aid in the untangling of a relationship and in the setting up of two new households. In this light, both the legal aid lawyer and the private lawyer (who may be the same person at different times) seem to have common goals. It is also possible for the client to move in and out of legal aid eligibility as their income fluctuates and circumstances change. However, it appears from the research that different lawyers have different approaches to cases. Some lawyers appear to prefer to press ahead in the courts, whereas others prefer to negotiate settlements. What is not yet clear from the work that has already been undertaken is which strategy benefits the client / lawyer / case funder most. In some cases it might seem clear, for example, Ingleby found that "the preference of solicitors for settling disputes without resorting to the court was particularly strong in the negotiation of child-care disputes." However, for other types of case, what is "best" for the players must first be agreed and only then can the optimum strategy be decided upon. It also appears from the research cited in this chapter that finding what is in the clients' best interests is often so complex and individual to each case that making generalisations is very difficult.

3.3.4 "Negotiation" lawyers and "litigation" lawyers may therefore be distinguished. Negotiation lawyers do not initiate proceedings but negotiate with the other party's lawyer until a settlement is reached. This may then be "rubber-stamped" by the court in the form of a consent order. In contrast, litigation lawyers will issue proceedings to get the case moving in a more active, aggressive manner. Thus, a distinction can also be made between "active" or "responsive" modes of working. This overlaps with the litigation-negotiation model but makes more of a distinction between those lawyers who start the negotiations or proceedings and those who answer or merely respond to the first lawyer's moves. (See paragraph 3.3.12). Of course it is possible for lawyers to act in both ways in different cases and even within the same case. Dividing lawyers into those who litigate and those who negotiate may therefore be too simplistic a model when they are often responding to constantly changing circumstances.

3.3.5 Negotiating a settlement is desirable as it respects the autonomy of the parties and allows them to participate in the decision process which may mean that the agreement is more likely to be complied with. However, it has also been argued that settlement does not always equal agreement and that coercion can be a dominant feature. In

---

137 Supra n.121, p.59
these cases the capacity of the parties to make decisions must be considered, as must their relative bargaining power, and any other unrepresented parties such as the parties' children.

Arguments for settling / negotiating.

3.3.6 The arguments for settling/negotiating include:
(i) the parties have some input into any decisions made;

"Settlement can be particularised to the needs of the parties, it can avoid win/lose, binary results, provide richer remedies than the commodification or monetarisation of all claims, and achieve legitimacy through consent...and affords greater flexibility of procedure and remedy."

(ii) the parties are more likely to comply with any settlement reached if they had some part in its construction. It will be longer lasting;
(iii) court services have a vested interest in settlement, as court costs and backlogs may be reduced;
(iv) the costs, delays and trauma of appearing in court may be avoided. (Delays should also be considered with reference to third parties such as any relevant children);
(v) the uncertainty associated with judicial decisions, i.e. the possibility of getting less than the settlement (e.g. Calderbank) offer. If the parties settle, at least they can be sure of the result.

Arguments for litigating:

3.3.7 The arguments for litigating include:
(i) the client may get a better result;
(ii) citizens must have access to courts if they are to have access to justice;
(iii) the court hearing may be delayed: therefore allowing a "cooling off" period;
(iv) tactical use of court procedure and delay can force the other side into conceding.

3.3.8 Though it has been argued that generalisations are not easily made, it seems that settling is the best strategy from the point of view of the

---


141 A "without prejudice letter" see Calderbank [1976] Fam 93 at 106.
client, particularly if the client has to pay his or her own legal bill. As the public purse is involved in legally aided cases, further investigation is needed to decide whether settling is the best strategy for legally-aided divorces.

3.3.9 Settlement seems to be preferred by matrimonial lawyers in Britain (see Ingleby, Sarat and Felstiner, Jackson et al, Griffiths etc.) however, some studies suggest that it may not always be in the best interests of the client. For example, Erlanger et al\textsuperscript{142} looked at 25 informally settled divorce cases in Wisconsin, US. Though they state that the majority of family cases are settled informally, they believe that settlement does not always equal agreement. This is an important point which is sometimes ignored. Although settlement in some cases reflects flexibility, party participation and true agreement, Erlanger argues that in most cases it reflects unequal financial resources; procedural support or emotional stamina. In this study, only 6 couples of the 25 co-operated during the settlement process. In over half of the cases the couples were contentious: “terms were secured through threats and intimidation or pressure from attorneys or court personnel; and in each case at least one of the parties criticised the outcome.”\textsuperscript{143} This illustrates how settlement does not always equal happy resolution.

3.3.10 Settlement is usually seen as a desirable thing, indeed there are pressures on the clients to settle: social pressures not to go to trial; lawyers encouraging settlement; new relationships demanding time and attention; and the emotional and financial pressures to get the whole thing over with as quickly as possible. However, Erlanger argues that in contentious situations settlement and flexibility can be a bad thing: “parties who were impatient to settle sacrificed property and support rights to satisfy a more immediate desire to end the process.” A reluctance to settle, however, seemed to work to the party’s benefit in terms of outcome. Legally aided clients may have an advantage over their privately funded partners as they may be able to press ahead and go to court because costs do not have to be paid immediately (though contributions and the statutory charge may apply.) This is an example of how imbalances can arise where one party is legally aided and the other is not.

3.3.11 Several researchers, including Davis, Cretney and Collins and Galanter, have attempted to identify different stages at which settlement takes place. The following list of stages was produced by Davis et al in consultation with solicitors\textsuperscript{144}:

\textsuperscript{143} Ibid p.591
\textsuperscript{144} Supra n.138, p 93.
(i) settlement before the parties even consult solicitors; they arrive with an agreed package;
(ii) settlement very early on in negotiations between solicitors with no reference to court;
(iii) settlement following an ancillary relief application and exchange of affidavits;
(iv) settlement following interlocutory applications and, perhaps, one or more preliminary appointments;
(v) settlements at the door of the court.

This scale produces a useful framework to define at what stage a case may conclude.

"Litigotiation"

3.3.12 Galanter has argued that the strategies of litigating or negotiating are not separate. Instead, he states that "invoking a court is not an abandonment of negotiation but a shift in bargaining formats."145 "Litigotiation" is what Galanter calls the strategic pursuit of a settlement through mobilising the court process. This may in fact be what is happening in the legally aided ancillary relief cases as described by Davis et al in "Simple Quarrels". Section 4 deals with the differences in approach between legally aided and non legally aided matrimonial cases and suggests some reasons for the difference. Others have argued that even if the court process is not involved and the parties do not set foot in the court, "divorcing parents do not bargain over the division of family wealth and custody prerogatives in a vacuum; they bargain in the shadow of the law."146 This argument suggests that the court system can have an effect on the profile of a case even if the case never reaches court.

Solicitors' Case Management and Outcome.

3.3.13 Ingleby, Griffiths, and Davis et al provide some of the few studies of run-of-the-mill matrimonial cases. The Davis study is important as it looks at 80 money and/or property disputes from the point of initial application to the court to the final resolution or settlement in England and Wales.147 It is a study of solicitor's case management of ordinary cases. At the end of the project, 25 were still ongoing, and of the remainder, 15 were adjudicated and 30 settled. (The remaining 10 were abandoned or no proceedings were issued.) The sample was predominantly working class. Their general conclusion is that it is solicitors' case handling rather than judicially enunciated principle

---

147 Supra n.138
which largely determines the outcome of the case. Though 30 cases from this sample settled, half of these settled within the court framework (see section 5). Indeed, Davis et al state: "we were left in no doubt that there are many cases - perhaps the majority - in which the bulk of the negotiations follows an application to the court for ancillary relief; and certainly all Legal Aid cases go down this route."148

3.3.14 This suggests that though solicitors prefer to negotiate and encourage settlement, as they indicated when asked by researchers, this does not mean that they will not use the court if they have to, and use the court as part of the negotiating process as Galanter implies. Most of the solicitors preferred to apply to the court as soon as possible and then "negotiate within the framework of that application."149 One solicitor in the study believed in an active approach at all times. Davis et al’s findings appear to contradict the majority of research findings in which solicitors appear to prefer to settle without the use of court procedure. This may be due to the way questions are phrased and the different definitions of negotiation (which can be inside or outside of the court framework) and the differences between active and responsive modes of working. However, the sample of solicitors in the Davis study does appear to have preferred a more active approach. This may be due to the high proportion of legally aided cases in the sample and reasons for these differences are suggested in section 4.

Solicitors as Translators.

3.3.15 In an early study Cain150 describes how lawyers use a language different to that of their clients: "lawyers peddle the language of the law ... Lawyers coerce the experiences and life situations of their clients to fit these definitions." How much time does a lawyer have to devote to explaining the legal framework to the client or persuading him or her what a reasonable approach might be? Some research (see Cain’s work cited above) suggests that it is the client who guides the lawyer to the settlement or at least decides what it is that he/she wants. One lawyer from Main in the US describes himself as an "expensive cab driver. The passenger decides on the destination and I decide on the route."151 This is what Cain calls the process of "translating" where the client controls the case and the lawyer translates or describes how the case might proceed within a legal framework. Others have described the process as one which is

148 Ibid., p.298
149 Ibid., p.99
primarily in the hands of the lawyer, for example see Mather et al and Griffiths.152

3.3.16 Strategy is all important and conflict between lawyer and client most often arises over decisions about case settlement.153 Clients can be divided into those who have high and those who have low expectations from the settlement. In the Mather study, more lawyers said that their clients had high expectations (46% of lawyers said that they had to make their clients see reason most frequently whereas 17 % said that increasing their clients' expectations was more frequent). The remaining 37% said that other factors influenced this with the clients' gender being the most commonly mentioned factor. Goal setting and client education seem to be the most commonly used methods of making the client have reasonable expectations of outcome. One example of new legislation reducing the need for lawyer "translation" is the new child support guidelines because they generally preclude negotiation with clients over this contentious issue.154 This may also be the case in this country since the introduction of the Child Support Act 1991 though there is, as yet, no supporting empirical evidence.

3.3.17 A difficult choice for a lawyer is deciding whether or not to take a case to court when s/he disagrees with the client's goals (whether they be over or under demanding). In general the lawyers in the Mather study said that they attempt to strike a balance between the client's wishes and a fair and reasonable outcome. In this country, the issue is complicated further in legally aided cases as the lawyer also has a duty to the Legal Aid Board not to continue with unreasonable cases - those which s/he would not advise a client to pursue if they were funding the case themselves. Lawyers are thus caught up in two problems. First, how much time lawyers should spend providing personal and emotional counselling for their clients (especially if the client is not paying)? and secondly, how much responsibility we expect lawyers to take for decision-making on behalf of their clients? It has been argued that one of solicitors' important roles in trying to get clients to agree to settle is to "reassure them as to the acceptability of what has been offered."155

Mediation

3.3.18 Finding a definition of mediation is difficult as different approaches exist. For example, alternative dispute resolution may describe one type of mediation whereas assisted decision making may describe

152 A study of structured, open-ended interviews with 163 divorce lawyers in Main and New Hampshire, and lawyers' reports of their own behaviour.
153 Supra, n.150, p.297
154 Ibid., p.301
another. Such differences will need addressing when the Family Law Act and its plans for mediation are implemented. In the US, mediation has been seen as part of the solution to reducing the amount of time spent by the lawyer in attempting to negotiate a reasonable settlement between the parties. Mediation has been explored in this country as a form of alternative dispute resolution in divorce cases. In her book "Conciliation in separation and divorce: finding common ground" (1986) Lisa Parkinson draws a useful distinction between (i) settling disputes or ending conflict; and, (ii) a resolution which is a lasting agreement which both parties are happy with. This could be an important distinction to make, as type of dispute or settlement may, indeed, have an effect on the case profile. However, it is not always possible to distinguish between the two types of mediation in past research as the research was not couched in these terms.

3.3.19 The Newcastle mediation study\(^{156}\) showed that of a sample of 510 mediation records: 62% of couples who attended comprehensive mediation were seeking assistance in sorting out maintenance arrangements; 90% in financial assets; 76% concerning property; 62% residence and 76% contact relating to children. This study is useful as it gives an idea of the ranges of issues which are involved in divorce cases. The figures illustrate how much overlap there is between issues in individual cases. Unfortunately, the figures do not give any idea of patterns within the distribution, for example, whether property and financial assets tend to be grouped together as intuitively we might expect. We do know, however, that 42% of couples were apparently seeking help on all of the issues and 20% with four of them. The figures give an idea of how many issues solicitors and clients are juggling, whether they are in or out of court.\(^{157/158}\)

3.4 Are Legally Aided Cases Different?

3.4.1 The difficulty in investigating whether or not legally aided matrimonial cases are treated differently from privately funded cases by lawyers or courts is that, so far, there has been no systematic comparison of the two. Most of the recent research does not specifically identify patterns of work within legally aided cases. In fact, much of the research seems intent on finding patterns in groups of divorce cases of mixed funding as a whole. This may also be due to the difficulty in obtaining sample sizes large enough to make comparisons between differently

---


\(^{157}\) Ibid.

funded cases. Difficulties are also compounded where both sides of a case are examined and where one party is legally aided and the other is not. This situation is common and complicates any comparative study.

3.4.2 The nature of legally aided matrimonial cases makes them interesting to study, as Ingleby points out in his book "Solicitors and Divorce". The way in which legal aid payments are made (e.g. partly per letter/phone call as well as hourly rates) means that letters, telephone messages and conference notes are present. This makes them a very rich source of data as a full record of all activity is required.\textsuperscript{159}

3.4.3 Most recent research has emphasised the role of the lawyer in promoting settlement and avoiding litigation because litigation is expensive, inflexible and the results are uncertain. Arguably, the most interesting finding from empirical research, from the point of view of legal aid research is that by Davis et al in "Simple Quarrels".\textsuperscript{160} The results from this research suggest that legally aided ancillary relief cases are dealt with differently from those which are privately funded. The figures show that 60% of privately funded cases settle before the trial. In legally aided cases, only 22% settle prior to the day of the trial.\textsuperscript{161}

3.4.4 Though the sample is small which makes firm conclusions difficult to draw, this is a striking difference in outcome of differently funded cases. Some practitioners may be seen to concentrate their work in privately-funded family cases, others in legally aided cases, however, many practitioners do both types of work. If the same people are conducting both privately and publicly funded cases, what factors could be causing such a difference in the mode of case conclusion? The difference may be a result of the profile of the sample which contained a disproportionate number of legally aided cases. This is a persuasive argument as 64 of the 79 women (80%) in the sample were legally aided. However, the fact that so many of the legally aided cases went to trial is interesting in itself. Why should this be the case? Davis suggests that issue of proceedings may be the only way to engage the other side in legally aided cases; or that legally aided cases are being handled by more inexperienced and hard pressed lawyers who, therefore, respond rather than initiate and who drift towards litigation. Davis et al explain that the rate of remuneration available under Legal Aid is not generous compared with that which can be achieved in the private sector. "The result is a plethora of young, overburdened practitioners working with limited efficiency upon an excessive volume of cases."\textsuperscript{162} Another possible suggestion is that

\textsuperscript{159} Supra n.121, p13.  
\textsuperscript{160} Supra n.138  
\textsuperscript{161} Ibid., p.137  
\textsuperscript{162} Ibid., p.119
as legally aided clients do not have to pay lawyers' fees immediately (they may have to pay contributions and/or the statutory charge on their house which is often postponed) they are in a better position than the privately funded client to pursue their case in court.

3.4.5 As the above makes clear, it is difficult to draw conclusions from this study as the sample was small and contained a large number of legally aided cases. Other factors, such as local legal culture, could also have had a part in the way the cases were handled. The findings can only emphasise the need for further empirical work in this area.

Is it a question of legal aid or gender?

3.4.6 Another reason for the differences between the legally aided and the non-legally aided may be ascribable to gender differences. Legal negotiations over money and property are characterised as discretionary and flexible, and judges tend to say that individual circumstances vary too much for any formula to be applied. The disadvantages of the legal system, as recently analysed in “Simple Quarrels”\(^{163}\), are the uncertainty, expense and intrusiveness of the investigation. The system is characterised, say the authors, by settlement and delays where “women, in particular need a speedy order; men may well prefer delays since they are likely to be the losers.”\(^{164}\) This could also be due to the different funding patterns where men are privately funded and so wish to avert extra costs, whereas, women who are often legally aided have little or no immediate concern regarding legal costs.

3.4.7 There may also be gender differences in the patterns of petitioners and applicants (people bringing the cases.) It is known that there are differences in the patterns of men and women bringing actions to stop domestic violence as it is usually women who are the victims and therefore usually the applicants. For example, the Legal Aid Board Annual Report for 1991-2 states that 78.5% of applicants assisted with injunctions within divorce proceedings were female. It is also possible that the differences between men and women are different again in legally aided cases. For example, in 1994-5, 72.5% of legal aid advice and assistance (Green Form advice) bills were paid by the Legal Aid Board in relation to divorce and judicial separation brought by women applicants. In 1991-2, 73.0% of people assisted in divorce ancillary relief cases were women. These figures concur with the findings of Davis et al in “Simple Quarrels” where over 80% of the women interviewed were legally aided (64 of the 79 women in the sample were legally aided) whereas many of the men were not (only 29 of the men

\(^{163}\) Ibid.
in the Davis study were legally aided.). These high levels of women applicants in divorce and related cases have been present for the last decade.\textsuperscript{165} Women may petition, not because they want to end the marriage but because they need action taken on money or domestic violence. The increase in women petitioners may also reflect the nature of many legally aided ancillary relief cases where the wife is legally aided and the husband is not. There is a need to distinguish between cases where both parties are legally aided, and those where one of the parties is privately-financed. There may be differences in the strategies of a divorcing couple where one party must pay legal bills promptly, and the other has no legal aid contributions except perhaps a postponed statutory charge on the house.

3.4.8 Since financial assistance to litigants of limited means who wished to divorce was introduced in 1950 and has been uprated a number of times since, it has been suggested that the forty year trend towards an increased proportion of female petitioners is due to “the way the legal aid fund operates, with both parties being separately assessed so that it pays [the parties](quite literally) to ensure that the poorer of the two (in terms of current assets and income) does the petitioning.”\textsuperscript{166}

3.4.9 Despite the way in which the Legal Aid fund operates, Davis and Murch found that the high proportion of female petitioners does indeed reflect the woman’s role as the key decision-maker, determining if and when the marriage should end. In the “Conciliation in Divorce” survey, figures were produced to indicate who took the decision to divorce:

<table>
<thead>
<tr>
<th>Who takes the decision to divorce?</th>
<th>view of wives</th>
<th>view of husbands</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No.</td>
<td>%</td>
</tr>
<tr>
<td>Wife’s decision</td>
<td>104</td>
<td>72</td>
</tr>
<tr>
<td>Husband’s decision</td>
<td>25</td>
<td>17</td>
</tr>
<tr>
<td>Joint</td>
<td>14</td>
<td>10</td>
</tr>
<tr>
<td>Not recorded</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Total</td>
<td>144</td>
<td>1</td>
</tr>
</tbody>
</table>

\textit{(table 1, from Grounds for Divorce 1988 Davis G., and Murch M., OUP p33)}

\textsuperscript{165} See Legal Aid Board annual reports
These figures suggest that the men and the women in this study both thought that it was the wife's decision to divorce (in the majority of cases). This finding concurs with the Legal Aid Board's Annual Report figures concerning the number of petitions brought by women.

Who gets legal aid?

3.4.10 The Davis and Murch study found that in 23% of cases both parties were granted legal aid and in 53%, only one party was granted legal aid (i.e. over 76% of cases one or other or both parties were legally-aided.) Another interesting result is, that in over half of all the cases in the sample, only one party was legally aided. This emphasises the need for research into cases where one party is legally aided and the other is not. "The fact of only one party being legally aided (whether this be petitioner or respondent) clearly makes for an imbalance in power in these initially contested cases. In particular, the respondent's failure to obtain legal aid usually marks the effective end of the proceedings." 168

3.5 Case Length and Case Conclusion

Case length and hours worked

3.5.1 The duration of a case, the time spent on the case and the stage of its conclusion are all important elements of a case profile. The following section examines previous research to draw out any findings which may inform these aspects of case profiles.

3.5.2 Relatively few of the empirical studies have looked accurately at case length or duration. Work undertaken is sometimes easier to determine for example, the approach taken in Griffiths' study estimated that for divorce cases (including children) 4 office contacts with the client were made on average. The first was usually long, lasting over an hour on average (but ranging from 25 minutes to 3 hours.) Other measurements of work performed by the solicitor include letters and telephone calls. In the Griffiths study, on average, 10 letters were written per client and 3-8 telephone calls were made. These can be used as proxy measures for how complex the case was, though care must be taken when extrapolating from these figures as they represent solicitor estimates rather than numbers recorded by the observer.

167 Ibid., Table 25, p.127.
168 Ibid., p.127.
3.5.3 Interesting figures are provided by the Newcastle Mediation study.\textsuperscript{170} Though this is not a study of lawyer handling of divorce cases, the findings are of direct relevance to case profiling. Of a relatively small sample of 102 comprehensive mediation cases, the average number of appointments was just over 5. These were spread, on average, over 4 months and took more than 12 hours of the mediator’s time.\textsuperscript{171} These figures cannot be compared with other studies as there is no study which looks at divorce cases in the hands of lawyers in exactly the same way. However, an interesting comparison can be made between the above figures from comprehensive mediation and the following which are for child-focused mediation. The sample for child-focused mediation contained 298 cases, and these took on average 1-2 appointments spread over less than a month, taking only 3 hours of the mediator’s time. These suggest that where the main focus of conflict are issues involving children, the case may be resolved faster than if money or property issues are also being discussed. Haskey, however, has shown that, because divorces to couples with children aged under 16 in their family currently take a little longer than for the average couple, 76% of couples with children have to wait longer for divorce.\textsuperscript{172} Again conflicting findings mean that care must be taken extrapolating from the results of small surveys.

\textit{Case Length and Delay}

3.5.4 Haskey found that 79% of couples obtain their decree within 12 months of filing the divorce petition.\textsuperscript{173} Davis \textit{et al} in “Simple Quarrels” found that only 36% of applications were filed within 6 months of the petition, and 18% were filed more than 12 months later.\textsuperscript{174} This delay, they suggest, was partly due to the delays encountered in securing legal aid by either or both parties, but also due to the general reluctance of the respondent. Of the 29 cases in which the husband was (eventually) awarded legal aid, there were 8 (27%) in which his affidavit in reply was filed more than three months after the legal aid was granted. This suggests that delay caused by waiting for legal aid is a minor part of the overall delay. Griffiths observed that some partners seemed genuinely reluctant to divorce. Latent conflict over the divorce itself (if one party is fundamentally opposed) was common, in as many as 25% of cases. This latent conflict was considered by the observer to be also responsible for all sorts of difficulties, such as delaying tactics and resistance on other issues. Reconciliation after a brief period was also common, in as many as 20% of cases, though the observer noted the number in which earlier attempts to reconcile had failed and it seemed that only half would survive. Delay can also

\textsuperscript{170} Supra, n.156
\textsuperscript{171} Ibid., p.48
\textsuperscript{172} Supra, n.119, p.304
\textsuperscript{173} Ibid., p.304
\textsuperscript{174} Supra, n.138, p.140

61
occur where parties think that they have settled all the relevant issues themselves. Griffiths found that those clients who came to their lawyers who appeared to have agreed all issues; often end up with incomplete or impractical settlements. For example, lawyers had to re- advise clients with unreasonable demands or concessions i.e. lawyers said that they sometimes have to warn against an agreement providing for contact every weekend since their experience suggests that this will usually prove impossible for the mother to live with.175

3.5.5 The distribution of case lengths in the Davis et al study was as follows: 39% of the ancillary relief applications in this study concluded within 12 months (application to final order); of this 39%, 3% concluded within 3 months, and 4% within 6 months. 21% of cases took between 1 and 2 years, 1% over 2 years, and the remaining 39% had no final order as yet.176 Davis et al also point to individual courts as causes of delay. For example, of the three courts in their study, Bristol brought cases to a conclusion quicker than those at Wandsworth, and cases at Wandsworth were dealt with more quickly than those at Newport.177 It may be that the courts were dealing with cases of different natures which added to the differences, however, the researchers assert that the court has a role to play in delay.

3.5.6 Delays in settlement or proceedings can be due to the reluctance of clients to disclose the extent of their income and capital. Information can be requested in an ancillary relief case about the other side's resources (rule 2.63) which is considered necessary to the case. One solicitor in Ingleby's sample178 admitted using this provision when the other side made what she regarded as an unacceptable offer. This can increase delays and costs as the request must be replied to formally, and may require further client conferences. In the Mather study, 20% of the lawyers interviewed admitted to using strategic delaying tactics. Ancillary relief proceedings are a battle - a battle to secure a court order. To be able to withhold information and to be able to survive in relative comfort without a resolution of the dispute gives one party, invariably the man, the power to push for settlement on more favourable terms for himself. There is, therefore, often an imbalance in power and assets which can increase delay.179

3.5.7 Solicitors may also have to negotiate with people other than their clients. For example, correspondence with building societies arranging mortgages or avoiding repossession can increase delays.

175 Ibid, p.150. (In more than 50% of all the cases observed, they agreed that the children should stay with the mother)
176 Supra, n.138, p.144
177 Ibid., p.140
178 Supra, n.121, p.87
179 Supra, n.138, p.226

62
3.5.8 Davis *et al* also examined the relationship between delay and settlement or adjudication. On the evidence of their study, settlement was not found to be quicker than adjudication. It is often assumed that settlement brings a case to an earlier conclusion because going to court is avoided. However, in this study there was no significant difference in the time taken to settle or the time taken to conclude a case in court (29 cases were ongoing and so conclusions from this data should be tentatively made). However, of those cases which were the subject of a final order, “there appeared to be no clear relationship between settlement and speed of resolution.”

*The point or stage of case conclusion.*

3.5.9 In most studies, the findings indicated that the issues involving the residence of children could often be resolved quickly. Griffiths found that conflict over the children, especially over residence did not appear to be common and 5-10 minutes of the first meeting was usually sufficient to decide the matter. In 95% of cases this was what happened. However, if there was conflict over the children it tended to be far more serious, and, most of the first meeting was devoted to it.

3.5.10 In the Davis *et al* study, a table illustrates the distribution of end points of the 80 cases in the sample:

<table>
<thead>
<tr>
<th>Type</th>
<th>Number</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>No ancillary relief application</td>
<td>5</td>
<td>6</td>
</tr>
<tr>
<td>Consent order</td>
<td>15</td>
<td>19</td>
</tr>
<tr>
<td>Consent order (following mediation appointment)</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>Consent order (case having been listed for trial but settled before hearing date)</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>Consent order (agreement reached on day of trial, before representations made)</td>
<td>8</td>
<td>10</td>
</tr>
<tr>
<td>Consent order (following representations)</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>Case adjudicated</td>
<td>15</td>
<td>19</td>
</tr>
<tr>
<td>Case still unresolved</td>
<td>25</td>
<td>31</td>
</tr>
<tr>
<td>Proceedings abandoned</td>
<td>5</td>
<td>6</td>
</tr>
<tr>
<td>Total</td>
<td>80</td>
<td>100</td>
</tr>
</tbody>
</table>

(from Davis G. *et al* (1994) “Simple Quarrels”, *Table 1*, p.39)

---

182 *Supra*, n.127, p.149
Proceedings were abandoned in 5 of the 80 cases, and in another 5 no ancillary relief application was actually made. Davis et al explain that most of the abandoned cases occurred in circumstances where any maintenance paid by the husband would not have been sufficient to remove the woman and children from Income Support. 25 cases were continuing at the end of the research period and the remaining 45 were either settled or adjudicated: 15 were adjudicated and 30 settled. The table shows that of those which settled, half got consent orders and had little court involvement. The other half included 3 which settled after court based mediation, 2 after a trial date was set, 8 at the "door of the court" and 2 settled on the day of the trial after representation. The size of this sample makes it difficult to make any firm conclusions from these findings, however, it is interesting to note the spread of settlement at different stages. Though 15 cases were formally adjudicated, it is fair to say that a further 15 involved the court in their settlement. This suggests that the court has a larger role to play in settlement than, prima facie, it might seem.

3.5.11 Ingleby also found that a substantial percentage of cases settle before the client even reaches the solicitor:

<table>
<thead>
<tr>
<th>Type of Case</th>
<th>Self help</th>
<th>Agreement without invocation of the court</th>
<th>Threat and/or invocation of the court</th>
<th>Settlement at the door of the court/at the hearing</th>
</tr>
</thead>
<tbody>
<tr>
<td>Domestic violence</td>
<td>12</td>
<td>3</td>
<td>8</td>
<td>5</td>
</tr>
<tr>
<td>Interim financial support</td>
<td>16</td>
<td>6</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Final financial support</td>
<td>2</td>
<td>8</td>
<td>8</td>
<td>2</td>
</tr>
<tr>
<td>Child care</td>
<td>27</td>
<td>10</td>
<td>5</td>
<td>6</td>
</tr>
</tbody>
</table>

(N=60)
(Ingleby R. (1992) "Solicitors and Divorce", Table10.1, p155)

183 Supra, n.138, p.39
These figures are interesting and demonstrate how much work is done before the client sees the solicitor, and then how few cases make it to court (the exception perhaps being domestic violence). Again, the sample in Ingleby's study is small and so conclusions are difficult but what is clear, as Davis et al seem to have found, is that there is a great range of stages of case conclusion and that the distribution of cases over them is also wide. Ingleby concludes by saying that solicitor activity appears to be concentrated at the bottom of the litigation scale. By this he means that much of a solicitor's work is focused around negotiations before the court is involved.

3.5.12 Similar results were found in the Conciliation in Divorce study carried out by Davis and Murch where in a sample of 114 divorce cases, only 4 were eventually the subject of a trial on the decree issue. It appeared that in this study most cases initially set down for trial are not, in the event, tried and adjudicated. Similarly, Erlanger found that 90% of cases are informally settled. Settlement can occur on the morning of the trial "at the door of the court". This may be partly due to pressure from the barrister and the judge as "two days spent arguing a case whose outcome he can more or less predict is both a waste of time and, since he will already have secured his brief fee, sadly unremunerative."185


3.5.13 This was a large survey of 26,000 civil bills (11,000 bills from the Legal Aid Board and 17,000 returned by the courts.) The results provide a broad picture of the proportions of cases finishing at different stages. For example, 18% of domestic violence cases finished before issue of proceedings compared to 82% after the issue of proceeding. Other family cases were found to conclude as follows: 19% ending before issue of proceedings, 16% after issue but before set down, 9% after set down for trial/hearing, and 56% after trial/hearing commenced. Over half concluded after the trial had proceeded which is more than was found by Davis et al. However, care must be taken when extrapolating from these figures as the category "all other family" includes all family cases except domestic violence, i.e. cases such as care proceedings, ancillary relief and adoption are included within this category.

3.5.14 Further research is needed to determine the patterns of case length and amount of time worked per case. In particular, individual categories of work such as ancillary relief, and separate categories of combinations of domestic violence and/or children issues, should be examined on their own as well as in broader groups.

184 Davis G., and Murch M, Grounds for Divorce, p.132
185 Supra, n.142, p.133
186 Supra, n.92, p.34
3.6 Finding Links between Length of Case, Complexity of Case, Stage of Case Conclusion and Case Cost.

3.6.1 To attempt to "transplant" features or experiences of divorce law across jurisdictions is impossible. National family law must be seen in its social, economic and political context. However, it is clear that many of the problems associated with marriage breakdown are universal and some attention to alternative strategies could be an important aid to the law reformer.\(^{187}\)

3.6.2 It is clear in some jurisdictions that case cost has little to do with how long it took to resolve, the complexity of the case, or the stage of case conclusion. For example, in Germany a formula is used to calculate case cost based on the parties' income and the "value" of the matters before the court. In a divorce case, this is calculated as follows:

- Monthly net income of husband x 3
- Monthly net income of wife x 3
- 150 DM per child
- 100 DM waiving of pension splitting
- Monthly child support x 12
- Monthly spousal support x 12
- Monthly pension asset compensation transfer payment x 12
- Monthly rent of apartment x 12
- Compensation payment (property division) x 1\(^{188}\)

3.6.3 The value of the divorce case then determines the fees according to a scale. This formula is applied in all cases. In Germany, legal aid covers the costs of court proceedings and of settlements in court, however, it does not cover notarised agreements or private settlements outside court. Out-of-court settlements in lower-income groups are, therefore, rare. In this country, however, as solicitors are paid hourly rates, length of case and cost of case (as well as complexity of case) might be expected to be highly correlated.\(^{189}\)

3.6.4 In "Simple Quarrels" however, Davis et al found no relationship between complexity of case and the duration of the case. One reason for this, suggested by Davis, is that the simpler cases can take just as long as the more complex cases if they are in the hands of less experienced lawyers. The complexity of case was assessed in terms of the parties' wealth, and this was measured against time taken to reach case conclusion.

---


\(^{189}\) See also Pleasence P. and Maclean S. (1995) *Leeds Survey* (unpublished) results which showed that there are long periods of inactivity in divorce cases so a better correlation might be between cost and number of hours worked.
Figures 3.6.5 suggest that the "simple case takes, on average, as long as the more complicated disputes involving both maintenance and a privately owned matrimonial home." In fact, though their figures do not actually show this, Davis et al state that they suspect simple cases may take longer.

3.6.5 Complexity of case may have an effect on other aspects of a case. For example, if the presence of children are taken as a proxy measure for case complexity, some studies have found that cases involving children as well as money take longer to conclude. However, if the only areas of dispute involve children, these cases may take less time to conclude. For example, the mediation study (Walker et al) showed that child-focused mediation only needed on average 1-2 appointments over 1 month compared to 5 over 4 months for comprehensive mediation sessions which involved all aspects of divorce.

3.6.6 It is difficult to analyse the aspects of cases which may push costs up as most of the research has focused on the social and legal aspects of divorce not average case costs. Some statistics were presented in the introduction above about how much legally aided matrimonial cases cost. However, what is more difficult to determine is what factors affect cost, and what are the major cost drivers? The Lord Chancellor's survey on civil standard fees for family cases showed that ancillary relief cases do not fit a cost-per-stage progression model. The cost-per-stage progression means that the higher the stage reached (from settling before reaching the lawyer to a court hearing) the more expensive it will be. The surprising finding of the LCD survey was that this was not the case in ancillary relief cases i.e. cases which are adjudicated are not necessarily more expensive than cases which settle out of court. Ancillary relief cases which never invoke the court but which are long drawn-out battles over the information given and negotiating support payments or lump sums can, of course, take longer than a simple adjudication in court. This puts the case too simply but this important finding should not be ignored as it is clearly counter intuitive. Davis et al found that ancillary relief cases which settled did not always take less time to conclude. Together, these results suggest that ancillary relief cases are not easy to model.

3.6.7 Domestic violence cases (injunctions/ousters in isolation) seem to be the only clear example of cases where there is a strong relation between length of case and case cost. Domestic violence cases also fit the cost-per-stage progression model. However, this may be due to the urgency of domestic violence cases which are often granted emergency legal aid certificates and which solicitors are more likely to give priority to. The court procedure for these cases is also more routine and fixed which

---

190 Supra, n.138, Table 16, p.147
191 Ibid., p.146
192 Supra, n.92
could be constraining costs and stages compared to the looser framework for other case types. Where combinations of case type (e.g. domestic violence, children and money) are involved, it is much more difficult to make any firm conclusions about length, cost or stage of conclusion. Much more empirical research is needed before such comparisons could be made.

3.7 Conclusion

3.7.1 The review of recent literature above demonstrates how little is known about legally aided matrimonial cases. Though some idea of the nature of divorce cases in general has been built up from a number of essentially qualitative studies, there are few studies which have large samples and involve quantitative methods. So far, theories of why solicitors and clients prefer to fight or settle have been explored. Before the debate can be fully informed, further empirical work is needed to examine the nature of legally aided cases, the situation of legally aided clients and the strategies employed. The review identifies areas where there are gaps in our understanding of divorce cases. Three main areas may be highlighted:

(i) the combinations of issues which characterise certain case types or sub-groups of cases;

(ii) the needs of cohabitees who are an increasing proportion of the population\(^\text{193}\) and are increasingly important in areas of family law, such as the Child Support Act and the Children Act where the focus is on the parents of a child and not on whether or not the couple is married;

(iii) what solicitors actually do for their clients, how long it takes, how much it costs and whether any of their functions are replaceable by either counsellors or mediators.

\(^{193}\) Clarke L., (1995) "Demographic aspects of Cohabitation" using census data shows that the proportion of all households which are cohabiting couples living as married has increased to 5.08%
# SUMMARY OF RECENT DIVORCE STUDIES

## WITH RELEVANCE TO CASE PROFILING

<table>
<thead>
<tr>
<th>Authors</th>
<th>Published</th>
<th>sample size</th>
<th>type of research</th>
<th>findings</th>
<th>relevance to case profiling</th>
</tr>
</thead>
<tbody>
<tr>
<td>Davis G., Cretney S., Collins J.</td>
<td>&quot;Simple Quarrels&quot; (1994) Clarendon Press, Oxford.</td>
<td>80 cases from Bristol(21), Newport (33) and Wands-worth (26); lower end of socio-economic scale</td>
<td>continuous monitoring 2 years. Interviews with parties, solicitors, judges. (Concentrates on ancillary relief - money and/or property disputes, no cases involving children) wife only - 48 husband only-14 both -18</td>
<td>most women were legally aided in this study. Legal aid lawyers forced to issue proceedings to engage other side. Looks at delay. 64 of 79 women (80%) in the sample were legally aided 25 cases ongoing at the end of the study 45 adjudicated 30 settled</td>
<td>1. settle before trial in 22% of legal aid cases, 60% rest. 2. 39% of ancillary relief applications conclude within 12 months 3. settlement not faster than adjudication 4. no relationship between complexity of case and time taken 5. cases taken by young overburdened practitioners.</td>
</tr>
<tr>
<td>Ingleby R.</td>
<td>&quot;Solicitors and Divorce&quot; (1992) Clarendon Press, Oxford</td>
<td>60 files from 5 solicitors in Britain (range of practices)</td>
<td>continuous (quarterly) monitoring of solicitors' files (18 months) all aspects</td>
<td>28/60 files involved domestic violence court used: 1.dispute resolution 2. rubber stamp agreements.</td>
<td>solicitors prefer to settle. Court = risky and expensive especially where children are involved. Most activity at bottom of scale (agreements without court.)</td>
</tr>
<tr>
<td>Sarat A., and Felstiner W.L.</td>
<td>&quot;Divorce Lawyers and their Clients&quot; (1995) OUP</td>
<td>40 cases US</td>
<td>continuous monitoring - observing, tape recording, attending court and mediation sessions.</td>
<td>most lawyers encourage settlement not conflict</td>
<td>time spent educating clients as to what is reasonable.</td>
</tr>
<tr>
<td>Mather L., Mainman R.J., McEwen C.A.</td>
<td>&quot;The Passenger decides on the destination and I decide on the route: are divorce lawyers expensive cab drivers?&quot; (1995) Internat. J. Law and Family 9 286-310</td>
<td>163 divorce lawyers in Maine and New Hampshire US</td>
<td>structured open-ended interviews with divorce lawyers.</td>
<td>46% had to make clients see reason, 17% had to harden their clients to demand more. 20% admitted strategic use of delay.</td>
<td>is strategic delay used? do clients have to be educated? How much time do / should lawyers spend &quot;counselling&quot; their clients.</td>
</tr>
<tr>
<td>Griffiths J.</td>
<td>&quot;What do Dutch Lawyers Actually Do in Divorce Cases?&quot; (1986) Law and Society Review 20 135 - 175</td>
<td>200+ interviews with divorcing couples, including children observation, lawyers and judges.</td>
<td>pattern of client lawyer contact and strategy</td>
<td>long first interview, 4 office contacts, 10 letters 3-8 phone calls, an exploratory approach</td>
<td>settlement favoured by lawyers. predictability of judges opinion in Netherlands facilitates settlement</td>
</tr>
</tbody>
</table>

---

69
<table>
<thead>
<tr>
<th>Source</th>
<th>Description</th>
<th>Sample Data</th>
<th>Findings</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Walker J., McCarthy P., Timms N.</strong></td>
<td>“Mediation: the making and remaking of co-operative relationships. An evaluation of the effectiveness of comprehensive mediation.” (1994) Relate Centre for Family Studies, Newcastle</td>
<td>5 projects in Brighton, Bristol, Cambridge Coventry and Newcastle. 102 comprehensive mediation sessions, 298 child focused mediation</td>
<td>for 62% of couples attending comprehensive mediation, maintenance was at issue, for 90% -financial assets, for 76% -property, for 62% -residence and for 76% - contact</td>
</tr>
<tr>
<td><strong>Lord Chancellor’s Dept.</strong></td>
<td>Survey of Civil Legal Bills, (1996)</td>
<td>11,000 bills from LAB area offices, 17,000 from courts. Extracted data elements from bill forms to attempt to build standard fee regimes for civil cases. 2 standard fee regimes, one for domestic violence and one for “all other family” ancillary relief did not fit the cost-per-stage progression model.</td>
<td>distribution of case conclusion: family cases (not anc. relief, emergency prot orders, or private law children): before issue of proceeding: 19% after issue, before set down: 16%, after set down :9%, after hearing commenced: 56% domestic violence: before issue of procs - 18%, after issue of proceeding: 82%</td>
</tr>
<tr>
<td><strong>Erlanger HS., Chambliss E., Melli MS.</strong></td>
<td>“Participation and flexibility in informal Processes” (1987) Law and Society Review 21 595-604</td>
<td>25 informally settled divorce cases with children in Wisconsin, US</td>
<td>43 interviews with parties, 33 with lawyers</td>
</tr>
</tbody>
</table>

NB Care must be taken when extrapolating from the findings of these surveys and studies as they have been presented to illustrate the research context for case profiles in family law i.e. these may not be the primary findings of the studies but those relevant to this study.

Possible split between those who prefer to settle and those who prefer to litigate. 15% of clients withdrew. Over 30% of family cases closed after “counsel and advice”. 18.36% got a court decision.

All solicitors questioned preferred to negotiate rather than litigate. Childbased mediation is quicker than comprehensive mediation: 1-2 appointments compared to 5, over 1 month compared to 4 and 3 hours of mediation compared to 12.

60% of women had sole custody of children. 8% of men had sole custody of children, 28% of cases joint, and 4% split.

Distribution of case conclusion: family cases (not anc. relief, emergency prot orders, or private law children): before issue of proceeding: 19% after issue, before set down: 16%, after set down :9%, after hearing commenced: 56% domestic violence: before issue of procs - 18%, after issue of proceeding: 82%.

Settlement does not equal agreement. Majority of cases (90%) are informally settled.

<table>
<thead>
<tr>
<th>Source</th>
<th>Description</th>
<th>Sample Data</th>
<th>Findings</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Walker J., McCarthy P., Timms N.</strong></td>
<td>“Mediation: the making and remaking of co-operative relationships. An evaluation of the effectiveness of comprehensive mediation.” (1994) Relate Centre for Family Studies, Newcastle</td>
<td>5 projects in Brighton, Bristol, Cambridge Coventry and Newcastle. 102 comprehensive mediation sessions, 298 child focused mediation</td>
<td>for 62% of couples attending comprehensive mediation, maintenance was at issue, for 90% -financial assets, for 76% -property, for 62% -residence and for 76% - contact</td>
</tr>
<tr>
<td><strong>Lord Chancellor’s Dept.</strong></td>
<td>Survey of Civil Legal Bills, (1996)</td>
<td>11,000 bills from LAB area offices, 17,000 from courts. Extracted data elements from bill forms to attempt to build standard fee regimes for civil cases. 2 standard fee regimes, one for domestic violence and one for “all other family” ancillary relief did not fit the cost-per-stage progression model.</td>
<td>distribution of case conclusion: family cases (not anc. relief, emergency prot orders, or private law children): before issue of proceeding: 19% after issue, before set down: 16%, after set down :9%, after hearing commenced: 56% domestic violence: before issue of procs - 18%, after issue of proceeding: 82%</td>
</tr>
<tr>
<td><strong>Erlanger HS., Chambliss E., Melli MS.</strong></td>
<td>“Participation and flexibility in informal Processes” (1987) Law and Society Review 21 595-604</td>
<td>25 informally settled divorce cases with children in Wisconsin, US</td>
<td>43 interviews with parties, 33 with lawyers</td>
</tr>
</tbody>
</table>

NB Care must be taken when extrapolating from the findings of these surveys and studies as they have been presented to illustrate the research context for case profiles in family law i.e. these may not be the primary findings of the studies but those relevant to this study.

Possible split between those who prefer to settle and those who prefer to litigate. 15% of clients withdrew. Over 30% of family cases closed after “counsel and advice”. 18.36% got a court decision.

All solicitors questioned preferred to negotiate rather than litigate. Childbased mediation is quicker than comprehensive mediation: 1-2 appointments compared to 5, over 1 month compared to 4 and 3 hours of mediation compared to 12.

60% of women had sole custody of children. 8% of men had sole custody of children, 28% of cases joint, and 4% split.

Distribution of case conclusion: family cases (not anc. relief, emergency prot orders, or private law children): before issue of proceeding: 19% after issue, before set down: 16%, after set down :9%, after hearing commenced: 56% domestic violence: before issue of procs - 18%, after issue of proceeding: 82%.

Settlement does not equal agreement. Majority of cases (90%) are informally settled.
4. BLOCK CONTRACTING: RESPONSES AND COMMENTS

4.1 Introduction - The Government's proposals for Block Contracting of Legal Aid.

4.1.1 The Lord Chancellor's White Paper "Striking the Balance - The Future of Legal Aid in England and Wales" (Cm3305) sets out, inter alia, proposals for a new system of block contracting of legal aid. The final form of contracts will be informed by research findings and piloting experience. However, it is envisaged that some form of contract specifying the volume of acts of advice, assistance, representation, or the number of couples to go through family mediation, at an agreed price will be central to the new system. Different types of case (e.g. medical negligence cases) would not necessarily be covered by the same contract even if they fell within a single category (e.g. personal injury cases) if such were necessary to ensure maximum uniformity of work type under contracts.

4.1.2 This chapter sets out some of the key elements of the discussion surrounding the Lord Chancellor's proposals. It represents an analytical summary rather than a development of policy.

4.1.3 Chapter Outline

The Government aims to ensure reasonable access to suppliers. Sections 2 and 3 examine the question of access to solicitors and the right to a lawyer of choice.

Sections 4 and 5 examine the independence of solicitors and the possible impact of contracting upon that independence. They also include some discussion of the nature of solicitors' devolved powers under a block contracting system.

Section 6 identifies the potential conflicts of interest for solicitors which may arise within such a system, and problems such as the possible "cherry picking" of simple cases by solicitors within a contract.

Section 7 looks at the mechanisms for ensuring quality of service. In particular, it examines the concept of franchising and the role of competition in the block contracting process.

The final sections explores the rationale and theories behind block contracting.

4.2 The Right to a Lawyer of Choice.

4.2.1 The general principles of the solicitors' profession support "the freedom of choice of clients in selecting or engaging solicitors on terms and on the basis of their own choosing." As the Law Society has stated elsewhere, this choice extends to legal aid clients:

"The Society believes the presumption should be that legal aid clients should have the same wide choice as those paying privately."¹⁹⁶

It may be argued that the implementation of block contracting will result in this right to a solicitor of choice being eroded. The Government's proposals set out in the White Paper envisage that, in the long term only those solicitors who have been awarded block contracts will be entitled to carry out the majority of legal aid work:

"Only providers who fully meet the required standards will qualify for long-term contracts..."¹⁹⁷

This was put more explicitly in the earlier Green Paper "Legal Aid - Targeting Need" (Cm 2854), which stated:

"Under the new proposals the quality standards will be an inherent part of the contract arrangements and, therefore, only quality assured suppliers would be able to undertake legal aid work."¹⁹⁸

4.2.2 A person who has previously instructed a solicitor on a particular matter may find s/he can no longer do so on a new matter as the solicitor, being without a contract, may no longer be entitled to accept instructions on a legally aided basis. Alternatively, it may be that someone calling at a firm of solicitors with a block contract will find that the firm is unable to accept their case as the firm has already fulfilled its contractual obligations for that period. Again, a firm may have a contract restricted to a particular area of work, such as personal injury work, whereas the putative client has a problem relating to consumer credit.

¹⁹⁷ Supra, n.194, para.3.16
4.2.3 The right to a lawyer of choice is said to be of practical importance as it is crucial to forming a good client-lawyer relationship.\(^\text{199}\) A person is more likely to trust a lawyer who they have chosen themselves. Also, if they have a lawyer thrust upon them, they may tend to feel they are receiving a second class service which is different from the person who can pay for a lawyer of choice. The Law Society has written:

"For other public services, the Government has rightly given considerable emphasis to giving the public a wide choice of services. It has sought to ensure that those using public services are not forced to use a standard monolithic supplier. This principle is as important in legal aid - where the client's trust in their solicitor is crucial - as it is for other public services... For legal aid, there is a particular need to ensure that clients have confidence in their lawyer - particularly when the case involves, as it often does, some organ of central or local government on the other side."\(^\text{200}\)

4.2.4 However, it appears this posited right is something of a chimera. The enactment which grants the statutory right of a person entitled to legal aid to select their own legal representative is made subject to a number of provisos.\(^\text{201}\) So the right in legal terms is not universally applicable. Furthermore, in theoretical terms, classic political theory would expect, as a corollary to such a right, an obligation upon solicitors to undertake work on behalf of any client requesting it. Solicitors' rules of professional conduct impose no requirement upon solicitors, who carry out legally aided work to accept any and every client. There is no cab rank rule for solicitors. As the 'Guide to the Professional Conduct of Solicitors' states; "A solicitor is generally free to decide whether to accept instructions from any particular client... this principle applies to legal aid work".\(^\text{202}\) In fact, generally, nothing prevents a solicitor from assigning work on a case to a partner within their firm or to a competent and responsible representative who is employed in their office or is otherwise under their immediate supervision.\(^\text{203}\)

4.2.5 The right to choose is valuable only if a real choice is made, i.e. a selection is made from a number of options and it is made on an informed basis. The purpose behind exercising the right is to obtain suitable and

---


\(^{200}\) Supra, n.196, p.10

\(^{201}\) See Section 32 of the Legal Aid Act 1988. The section restricts the right, for example, in relation to contempt proceedings, in respect of solicitors who have been excluded from legal aid work, and allows statutory instrument to exclude the right operating in relation to work of a "prescribed description" or specify that it may only be undertaken by members of a panel.


\(^{203}\) There are restrictions on the delegation of work in some cases. For example, that undertaken by duty solicitors and members of the child care panel.
quality legal advice. However, many people who receive legal aid are unlikely to know more than one lawyer, if they know any at all. Moreover, people who receive legal aid may be less likely to be able to judge who is the most appropriate lawyer for them. It is patronising to suggest otherwise, as most people are not equipped to make an informed choice. As some commentators have said:

"It is surely unrealistic to expect most clients to be able to assess the depth and currency of their lawyer's legal knowledge or their skills as negotiators, mediators or advocates let alone their management skills and motivational skills. Indeed, it appears that some people prefer not to have to choose their own lawyer, and in fact may be deterred in seeking legal help if they have to make the choice."

4.3 **Sufficient Consumer Choice**

4.3.1 Arguments about reductions in the right to a solicitor of choice indirectly raise important questions about whether the proposals for block contracting will result in an unacceptable decrease in access to lawyers and, therefore, justice.

4.3.2 As stated above a system of block contracts will result in a restricted number of lawyers being able to offer legally aided advice. This will lead to a reduction in the number of solicitor's offices acting as legal aid outlets. One commentator has estimated a reduction of from approximately 11,000 firms to between 4,000 to 5,000.\textsuperscript{206} The Law Society has been even more pessimistic:

"The Government's proposals would be likely to reduce the number of legal aid offices by at least three-quarters, from over 11,000 to no more that 2,500, assuming franchising becomes more successful than it has been so far."\textsuperscript{207}

4.3.3 Such reductions per se are not necessarily objectionable. The fundamental purpose of allocating public money to legal aid is not to provide the growing number of qualified lawyers with an income. As the Government notes, block contracts could embrace schemes which would enhance access to legal services. As the Legal Aid White Paper states: "The Government hopes that providers will propose alternative approaches to the traditional High Street Office for example, telephone

\textsuperscript{205} See studies referred to National Council for Welfare, Supra, n.199, p.58
\textsuperscript{207} Supra, n.196, p.11
4.3.4 However, any reduction in the number of legal aid service providers would become prima facie objectionable if legal services were to become financially inaccessible to members of the eligible population. As the Law Society has suggested:

"Ease of physical access to assistance is particularly important for legal aid clients... Legal aid clients are unlikely to be able to afford travel costs even over relatively short distances, therefore if no readily accessible and local legal advice is available, they are likely to allow their rights to go by default." 

4.3.4 Those administering contracts will have the formidable task of ensuring that sufficient contracts are let in such a way as to provide accessible legal services. This not only involves the complex task of predicting the demand for legal services within the areas of the proposed Regional Legal Services Committees and contracting so as to meet that demand. It also requires policy decisions as to what distance of travel should be taken to be affordable and contracts allocated accordingly. A task which becomes especially difficult in regions where the eligible population is distributed in both rural, semi-rural and urban areas. It is important that travel costs should not deter eligible persons from bringing bona fides claims.

4.3.5 The Green Paper (though not the White Paper) accepted that some legal services will not be so readily available to some clients. For example:

"some specialised services, for example immigration advice and representation, or preparation of the defence in major fraud cases, would need to be concentrated at certain centres on the grounds of greater expertise and efficiency." 

It is important that adequate referral arrangements be put in place in relation to such services.

4.3.6 In addition to the above, it may be naive to assume predictions about legal need will always be accurate, and that contracting will therefore make sufficient solicitors accessible. It is possible that there could occasionally be under-prediction. This could, for example, mean that:

---

208 Supra, n.194, para.3.19
209 It may also be argued that a certain level of reduction would be undesirable as lawyers may find that their practices are too geographically dispersed for them to acquire an effective knowledge of local legal cultures. Of course, differences in local legal cultures may well be a product of the practices of individual law firms. So a reduction in the number of law firms may result in more uniformity.
210 Supra, n.196, p.11
211 Supra, n.198, p.43
"for some type of cases, legal aid might be available in Nuneaton, but not in Newcastle. In some parts of the country it would be available in June but not in December. Variations of this sort will turn civil legal aid into a lottery."  

4.3.7 With fewer solicitors in a locality able to provide legally aided services, it will become more likely that clients will go to solicitors who may find themselves with a conflict of interest between the parties and so are unable to accept instructions. Examples of this conflict of interest might arise in Children Act, matrimonial, employment or landlord and tenant cases. Moreover, if a contracting solicitor, serving a particular locality, went out of business or withdrew from a contract, there could be no alternative contracting solicitor in the locality able to provide a sufficient service. The discussion in Chapter 5 addresses this problem in an international context.

4.3.8 Mechanisms will need to be designed to cope with unforeseen need and such circumstances. For example, there will need to be some system for referring clients from one solicitor to another, or for making sure that a client goes directly to a solicitor who is contractually, or otherwise entitled to take their case on. Such mechanisms will be particularly important in rural areas, where contracting solicitors are likely to be spaced widely apart, particularly if, as it has been suggested, the quality criteria for contracts favour economies of scale and, therefore, the larger firms which tend, at present, to be located in urban areas.

4.3.9 The problems alluded to in the preceding paragraphs have been recognised by the Lord Chancellor, who has proposed a central fund to be retained by the Legal Aid Board to cover unforeseeable and urgent need, for example, in very expensive cases. Furthermore, the Legal Aid Board has suggested, and the Lord Chancellor has agreed, that a fund might be used, under tightly controlled arrangements, to make money available to non-contracting solicitors to provide services in rural areas and that Regional Legal Services Committees might have a remit to disseminate information about the availability of local legal services. Of course, mixing competitive contracts with a form of judicature poses pricing problems.

---

213 It is notable that, during the first two years of Delivery Systems Study, Western Nebraska Legal Services found that with their contracting system the primary problem was such conflicts of interest, such that it was often difficult to find available attorneys. See, 'Contracts with the Private Attorney: Pros and Cons', Joe Louie Romero, (undated), 10.
4.3.10 It is important that any remedial mechanisms be able to operate without undue delay. Help may be required urgently, for example, in child abduction cases, cases involving domestic violence and cases where tenants have been unlawfully evicted. It may be acceptable for some clients to wait for legal advice, as patients do within the NHS, but it must always be remembered that there are limitation periods operating within the law and that the passage of time can often have a grave effect upon the prospects for bringing a successful case.\footnote{ibid.}

4.3.11 Finally, as the Lord Chancellor has recognised, it is important that the use of specialist contracts does not mean that contracting lawyers will be unable to advise on all aspects of a client's problems, even if they have spare capacity under their own contract. A client who has one case with a variety of legal problems should not be obliged to visit more than one office, thus being potentially disadvantaged both in respect of the coherence of advice and representation and the costs and inconvenience of multiple attendance.

4.3.12 Restricting the work which a lawyer may undertake for his or her client is inefficient in at least two ways. First, a client may, on different occasions, have two or more problems or have one problem with a variety of legal aspects. Being obliged to see different lawyers will mean that time and effort will be duplicated by lawyers in building up a relationship and in gathering information which is common to all or some cases. Second, co-ordinated management between lawyers from different practices will prove necessary, as without it, inconsistent advice may be given as to the development of an overall strategy for a client's case. This need for lawyer co-operation will inevitably entail additional cost.\footnote{ibid., p.51}

4.3.13 Perhaps, therefore, what the Legal Aid Board has described as a "holistic approach" to dealing with clients' problems ought to be adopted;\footnote{ibid., p.80}

\"..we would not want contracts to impose artificial constraints within which clients' needs could not be met effectively. Clients' problems do not come in packages which slot neatly into categories. There must be sufficient flexibility for clients' problems to be dealt with by a single supplier where some aspects of the problems are outside the contracted categories. However, quality suppliers need to recognise the limits of their expertise and refer clients elsewhere if the aspects of problems which lie outside their immediate sphere of expertise would be more effectively dealt with by someone else, or perhaps a specialist.\"
4.4 The Independence of the Legal Profession

4.4.1 A traditional view of the legal profession is that they are and ought to be independent, autonomous and self-regulating. Such independence is meant to "guarantee the rights of citizens" and "underpins the rule of law" because it means freedom from government. Less grandiously, it is seen as a precondition to fulfilling obligations to the client. To deal effectively with a client's legal problems requires objective, expert and flexible diagnosis.

4.4.2 The White Paper's proposals to combat rising expenditure and to achieve quality through the mechanism of block contracts, within an overall predetermined budget, may be seen as limiting the utility of this principle.

4.4.3 Solicitors, it may be argued, will be reduced to being tradesmen and tradeswomen through a process of bureaucratisation. This is because their management systems and the work undertaken for clients will be controlled and made subject to pre-determined quality criteria and budgets. Standardisation will result, with an associated loss of professional discretion as to how best to deal with individual clients. Indeed, the comments of one practitioner, made about franchising, could well be applied to block contracting:

"If your firm is franchised and you're reliant on legal aid cheques then they have power over you and you're an agency, a branch of the state not an independent firm."

4.4.4 Moreover, if practitioners were to be required to decide eligibility in terms of the means and discretionary merits tests within a rationed system, it could be argued that they would become transformed into mere agents of the state. They would play a central role in rationing access to justice and deciding what is reasonable in the interests of the taxpayer. It could be argued that this would come close to bringing about a staff-lawyer type model of legal services delivery by another name.

4.4.5 Of course, some have other opinions on the role of the legal profession. Lawyers have, for example, been described as "self-seeking, parasitic,

---

220 Supra, n.214, p.159 et seq.
221 Reported by Sommerlad, supra, n.214, p.171
222 Supra, n.194, p.51. Solicitors will continue to assess means in relation to initial advice and assistance.
223 Ibid., para 2.18. The Legal Aid Board will be given the power to delegate the operation of the merits test. However, the Lord Chancellor has made it clear that delegated powers will not extend to ultimate refusals on the grounds of insufficient resources.
often incompetent and ready to subordinate the needs of clients to their own interests."  

4.4.6 It has often been argued that lawyers cannot act as guardians of liberty as generally, as individuals, they are keen to maintain their exclusive social privilege and dominance. To this, though, it has commonly been replied that if solicitors are guardians of liberty, it has nothing to do with their right as a group to be self-regulating it has, instead, to do with the (very same!) characters and traits of individuals. It may be possible to find convincing examples of lawyers in independent practice acting in the interests of the state or other institutions as against personal freedom.

4.4.7 Ultimately, arguments about self-regulation guaranteeing independence, expertise and flexibility in dealing with clients' problems only succeed if it can be shown that self-regulation leads to professional rules being developed that respect these values. This, in turn, implies that it is plausible for another body, such as the Legal Aid Board, to develop rules as to how solicitors run their practices that could enshrine and guarantee the same values.

4.4.8 However, one final concern, which would arise if the Legal Aid Board were to exercise both the function of funding and the function of monitoring the quality of work of practitioners, is that the Legal Aid Board may come under increasing pressure to "limit the professional judgement a practitioner can deploy on behalf of the client", as insistence on standard procedures would make expenditure easier to control and predict. An alternative to the Legal Aid Board performing both functions would be to have a separate inspectorate to guarantee and adjudicate quality standards. Such an organisation would be more amenable to arguments that departing from a set procedure in a given case or number of cases might be appropriate.

4.5 The Decision on Entitlement.

4.5.1 Under the plans for block contracting, solicitors may assume much of the responsibility for making the formal decision on the grant of and continued entitlement to legal aid. In this context Goriely argues; "a mass of independent solicitors with different ideological stances, operating in different areas under different budgetary pressures, are bound to produce inconsistent decisions." In other words, even if there are rules for determining eligibility, they will not be uniformly applied or interpreted.

225 Supra, n.214
226 Legal Action Group (1992) p.147
227 Ibid.
228 See para.4.4.4 above
meaning that some entitled to legal aid will be denied it or perhaps, those not entitled to legal aid will receive it.

4.5.2 To an extent this criticism does a disservice to the solicitors' profession, as most solicitors can be expected to apply rules of eligibility with integrity. Indeed, similar arguments might be directed at the fact that members of the solicitors' profession are expected to adhere to their professional rules of conduct. Furthermore, if the rules are ambiguous, guidance notes for their interpretation can be produced. As the Legal Aid White Paper suggests solicitors will apply the eligibility test having regard to directives and guidance from the Lord Chancellor and the Board and any requirements of the contract which the solicitor has with the Board. Indeed, the Law Society during the public consultation on the reform of the green form scheme and franchising in the late 1980's, argued for devolving responsibility for civil legal aid administration onto solicitors on the basis that it could result in the standardisation of policy for the grant of legal aid, provided that clear monitoring criteria and detailed guidelines were supplied to solicitors. It also favoured devolving responsibility, as delays in the granting of legal aid certificates mean "long periods when no progress is made on a case". These can be detrimental to clients, and in "some cases further complicate the case, or cause loss or hardship."230

4.5.3 However, it is certainly reasonable to suppose that some arbitrary or unfair decisions on eligibility will be made. Unfair decisions are inevitable, particularly if the merits test contains subjective and discretionary elements within a rationed system such as the importance of cases to particular clients.231 An appeal system should therefore be introduced so as to ensure individual solicitors are not the final arbiters on eligibility. However, it is notable that the Legal Aid Board "does not believe that a formal appeal process is necessary or desirable" against decisions not to take a case on, but instead favours a system whereby "a client whose case is initially rejected on the merits by one supplier is free to approach another".232 This is curious, given that (a) there is already an appeals procedure to the relevant Area Committee, followed by the possibility of judicial review, (b) the Board advocates an appeal system when a supplier, during the currency of a case, decides it no longer passes the merits test233 and (c) the Board's line seems to encourage multiple applications. Is an undeserving claimant simply to keep trying until he or she finds a firm with an unmet contractual obligation?

4.5.4 Under the present system unassisted parties are entitled to make representations to, and have them considered by, the Legal Aid Board on the issue of whether legal aid was properly granted. The Lord Chancellor

---

231 Supra, n.194, para.2.16
232 Supra, n.215, p.30
233 Ibid., p.80
accepts that some such right should be retained even though the application of the merits test will be transferred from the Board to individual solicitors. Those litigating against legally aided parties are heavily disadvantaged by the fact that even though they may successfully pursue their case they are unlikely to recover any of their costs. Therefore, with equity in mind, just as the issue of some right of appeal against a refusal to grant legal aid ought to be addressed, so should the concerns of unassisted parties faced with what appears to be an undeserving cause.

4.5.5 As at present, solicitors will be responsible for assessing means in relation to initial advice and assistance. Clearly some sort of mechanism will be required to be in place to prevent fraud on the part of applicants, which is of ever increasing public concern. It is difficult in practical terms to see how solicitors will be able to access the required information to verify their clients' verbal instructions, except perhaps in those situations where the applicant is able to provide direct evidence that they are in receipt of, for example, income support or unemployment benefit. It would be undesirable to put solicitors in a position where they are required to directly question the bona fides of their client. At the very least, therefore, solicitors should be supplied with a route to somebody that is in a position to test the accuracy of information provided by a client should doubt arise.

4.6 Conflicts of Interest

4.6.1 It appears that at least two conflicts of interest may arise as a consequence of block contracting. First, it may be argued that inclusive costing will "create a serious conflict of interest between solicitors' need to ensure that they do not make a loss from the contract and each client's wish that their case be prepared thoroughly and presented expertly." The fact that contracts will set a price in advance, which is to account for counsel's fees, disbursements and the solicitor's profit or income, will generate an incentive for solicitors to keep their work to a minimum, to advise clients to settle when they would not so advise a private client and not to make use of more expensive and perhaps more competent counsel and experts. However, this conflict of interest is only likely to arise in an acute form if contracts do not remunerate solicitors at a fair and reasonable level. Therefore, in awarding contracts, consideration should be given to what is an appropriate level of remuneration. The lowest price should not necessarily be accepted. Experience in the US has shown bids...
can often be unrealistic. For example, those applying to supply indigent
defence services often lack fiscal foresight when being offered a
guaranteed source of income.  

4.6.2 A second conflict of interest is said to arise as a consequence of solicitors
potentially applying the merits test, i.e. of deciding whose cases ought to
be taken on. This conflict of interest arises with potential clients. If a
case is complex or uncertain (or becomes so) and is, therefore, likely to
involve more time, effort and expense, then because funding is fixed,
solicitors may turn it down. This problem could be exacerbated if, as the
Government suggests, renewal of contracts may depend to some extent
on a solicitor's success rate. Solicitors may "cherry pick" straight forward
cases (i.e. those that provide the highest profit margins) and use the
merits test as a guise under which to reject cases.  

4.6.3 It has been claimed that the application of management standards and
transaction criteria will reinforce any tendency towards "cherry-picking". If
these encourage routinisation then solicitors may be slow to take on
cases that do not fit into their organisational patterns or fit the ideal of
transaction criteria.  

4.6.4 The Legal Aid Board has suggested that monitoring the work of individual
suppliers, over a reasonable period of time, will ensure that "cherry-picking" does not occur. It is hoped that such monitoring will provide a
general deterrent effect and thus minimise the number of persons
disadvantaged by cherry-picking. However, the potential for cherry-picking
cannot be removed entirely as solicitors are not obligated to take every
case that comes forward.  

4.7 Quality Controls and Competition  

4.7.1 It is important that some form of objective quality criteria be used and
enforced in relation to block contracts. There are two principal reasons for
this.  

4.7.2 First, if there is to be an element of competition in the awarding of
contracts, with quality being taken into account, then without expressly

---

237 Ibid., p.22
238 Ibid., p.25-26
239 It does not appear that there is a necessary connection between solicitors applying the merits
test and "cherry picking", unless solicitors will be obliged to take on all potential clients. Rather
failure to meet the merits test is used as an excuse by solicitors to take on cheaper cases.
'Debating the quality of legal services: differing models of the good lawyer', IJLP, Vol 1, No.2,
p.163, where the authors found that firms undertaking a high volume of legal aid work on a
"strictly routinised basis" were reluctant to take on relatively rare kinds of work which did not
"fit into their organisational patterns".
241 Supra, n.215, p.51
established criteria those who lose out in the competitive grant process may perceive that they have been treated unfairly or subjected to politically motivated decisions. A series of benchmarks is necessary to avoid costly litigation and any associated feeling that the system of justice is being undermined by arbitrary decisions.

4.7.3 Second, the experience of a competitive system for the award of contracts in the US has been that "in most cases, over time, the cost has gone up and the quality has gone down". The Law Society have argued along these lines:

"Competitive tendering for legal aid would lead to a spiral of decline in terms of quality of service provided to the public. When contracts were first awarded in an area, awarding them to the lowest bidder would itself drive down quality. Thereafter, firms which tendered unsuccessfully would have no alternative but to organise their affairs so that they were not dependent on legal aid work, if they could. Increasingly, therefore, legal aid work would be abandoned by the great majority of firms. The risk is that it would be left to a small group of second rate cut price practitioners."

4.7.4 For a successful tenderer, the longer the term of a contract the less incentive there is to continue to provide a high quality of service, since a regular supply of work is guaranteed for some time. Suppliers might therefore tender at a lower price, thereby maximising their chances of obtaining a contract, with the aim of delivering a minimal quality of service by using one lawyer to handle an inappropriately large number of cases or having low paid inexperience lawyers perform the work. It is imperative that a system is not favoured that, as the current system outside of the franchising context does, "presumes every practitioner to be a neurosurgeon".

4.7.5 In any event, it is legitimate that the Government specify what standard of service lawyers should provide. The Government is responsible for ensuring the public money is well spent, and it is not reasonable to expect legally aided clients to judge the quality of the advice they receive.

4.7.6 Nevertheless, it must be accepted that it will be a near-impossibility to formulate universally acceptable quality criteria. As one commentator has said of attempts to define legal competence:

242 Spangenberg Group (1989) Findings Concerning Contracting for the Delivery of Indigent Defense Services, a memorandum prepared for the Center of Law and Social Policy by the Spangenberg Group, Newton MA.
243 Supra, n.236, p.24
"Almost all such attempts are doomed to syllogism and ellipsis: a competent person is a person who is competent."\(^{246}\)

Moreover, as another stated:

"Performance by a lawyer can range on a continuum from non-performance and Inadequate Professional Services (sic), through minimum competence to average competence and above finally to excellence."\(^{246}\)

4.7.7 The White Paper proposes to control the quality of legal aid work through the use of outcome measures and the transaction criteria developed for franchising.\(^{247}\) These are discussed elsewhere.

4.8 The Theory Behind Block Contracting

4.8.1 A theoretical basis for the Government's proposals for block contracting can be found in the Social Market Foundation's Memorandum "Organising Cost Effective Access to Justice".\(^{248}\) There the provision of legal aid is analysed using the framework provided by principal-agent theory. Two types of problems common to principal/agent relationships are identified as being present in the legal aid system, moral hazard and information asymmetry. It is argued that they have caused supplier-induced demand, escalating costs and a deterioration in service. One of the solutions to supplier-induced demand, it is suggested, is to contract with lawyers to provide a given volume of service, paying them on a fee for case basis.

4.8.2 The relationship of principal/agent occurs when an individual relies on a third party to provide a service. In the legal aid system:

"The basic principal-agent relationship remains that between the assisted person and the solicitor. This relationship is mediated by the Legal Aid Board, acting on behalf of the assisted person, and which also has a principal-agent relationship with the solicitor."\(^{249}\)

\(^{245}\) Cooper J (1991) 54 MLR, p.112, at p.113.
\(^{247}\) Supra, n.194, p.22, para 3.17. In para 3.15 the Lord Chancellor also refers to the management standards developed for franchising. However, these standards relate not so much to quality of work provided, but how efficiently it is delivered and how waste is reduced, allowing work to be undertaken to a more consistent standard.
\(^{248}\) Social Market Foundation (1994) Organising Cost Effective Access to Justice, Social Market Foundation Memorandum, no.7
4.8.3 Moral hazard exists in two ways. First, it exists between the assisted person and the Legal Aid Board. As those receiving legal aid usually pay only a proportion of the full cost of a case, they have less incentive to be concerned about the level of expenditure incurred by their solicitors. In fact, "zero costs may provide the assisted person with incentives to consume legal services to the point where marginal benefits are very low, resulting in allocative inefficiency". Second, there is the moral hazard which exists between the solicitor and the Legal Aid Board. Because the solicitor, and not the Legal Aid Board (or clients), is uniquely able to obtain, possess and decide what is relevant information, s/he is delegated with the responsibility of deciding what level of services are to be provided to clients. However, as the solicitor is paid on a fee-per-item basis s/he has an incentive to maximise the numbers of items of service s/he provides. The solicitor can do so as the Legal Aid Board is not in a position to assess "the choices available, their likely consequences, and their costs and benefits": there is asymmetry of information between the Legal Aid Board and those solicitors carrying out legal aid work.

4.8.4 The above analysis, outlining why there is potential in the present legal aid system for supplier-induced demand, is then compared with the increased expenditure on legal aid between 1987-1988 to 1993-94 which could be consistent with the supplier-induced-demand hypothesis. For example, it is pointed out that:

"...legal aid for criminal cases in the higher courts is the only category where the number of acts of assistance is not subject to supplier-induced demand. Between 1987-1988 to 1993-94, the number of acts of assistance decreased by about 26%. The main scope for supplier-induced demand in this category is in the hours worked per case which will be reflected in the cost per case. Over the same period, the real cost per case (i.e. additional to the Treasury GDP deflator) increased by about 130%.

4.8.5 Furthermore, it is stated that, with the exception of the Duty Solicitor Scheme, in all the other categories of legal aid work (ABWOR, Green Form, Criminal Magistrates' Court Work and Civil) the cost per act of assistance increased over the seven years. The number of acts of assistance under the Green Form Scheme increased over the seven years by 50%, and this was so despite eligibility being reduced.

4.8.6 However, other factors could account for the above increase. For example:

\[\text{\cite{ibid, p.54}}\]
\[\text{\cite{Supra, n.248, p.6}}\]
there was a tendency throughout the 1980's for the average cost of cases to rise faster than the increases in prices generally. This was partly a result of increases in the amount of work involved in the "average" case including such matters as the need to consider advance disclosure of prosecution statements in criminal cases, and the increased burden of discovery of documents and the tendency to make greater use of expert witnesses in civil cases. There were also significant increases in the hourly rates paid in civil cases as individual county courts increasingly allowed more realistic fee rates (following a High Court decision on the matter), rather than imposing arbitrarily low figures.\textsuperscript{252}

An alternative explanation might be that the rise in cost per case stems from inefficiencies in the court system, giving rise to greater waiting times, cancellations and adjournments. Alternatively, the intrinsic complexity of or the mix of cases may be changing. For example, there has been a notable increase in complex fraud cases and medical negligence cases and because of the Children Act 1990 there has been increased emphasis on the need for proper representation for parties in cases involving children. There are many potential explanations.

\section*{4.9 The Rationale for Block Contracting}

Contracts are seen as a method by which the Legal Aid Board ceases to be a passive third party payer of lawyers, but instead becomes an active buyer of access to justice.\textsuperscript{253} Through the medium of contracts the Legal Aid Board will be able to control and reduce the cost of lawyers' work for four reasons.

First, it is envisaged that as contracts will guarantee a significant volume of work, the Legal Aid Board will be able to negotiate down from the higher price which could be charged on a case by case basis. Whilst this will not control supplier-induced demand per se, it will reduce potential starting costs.

Second, significant administrative savings should be possible through a shift from primarily case by case administration to primarily block by block administration.

Third, as contracts will be renewable according to the solicitor's performance, they will have an incentive to control costs. Thus, from the


\textsuperscript{253} \textit{Supra,} n.248, p.13
Government's perspective the potential for moral hazard on the part of solicitors will be reduced.

4.9.4 Fourth, through the experience of contracting with solicitors the Legal Aid Board will require knowledge of how to make comparisons between solicitors and therefore, become better placed to negotiate up on quality and down on price.

4.10 Transaction Costs

4.10.1 Even if the advent of block contracts does reduce supplier-induced demand, it is important to emphasise that there are likely to be relatively significant transaction costs associated with the infrastructure of contracting. These costs will be ex ante and ex post the entering into of contracts. They will be incurred, for example, in drafting the contract documents such as the contract specifications of tendering documents, and the contracts conditions themselves, as well as in carrying out the tendering process. They will also be incurred through monitoring quality and other aspects of contractual performance and in settling disputes. These costs ought to be monitored themselves as it is at least conceivable that the benefits derived from contracting might be outweighed by them. 254

4.10.2 Policy decisions will need to be made on what level of detail is to be put into the contract documents. The Audit Commission has produced a blueprint outlining what should be included in contracts for the provision of local authority services, and this blueprint might be applied to the block contracting of legal aid services. 255 It specifies that, first, contract specifications should set out required inputs, processes, and outputs. Second, it stipulates that the contract conditions should satisfy the following eight key questions:

(i) Who are the parties to the contract?
(ii) What are the powers and responsibilities of these parties?
(iii) When and how does the contract come into effect?
(iv) How are the changes to be made to the specification?
(vi) What happens when things go wrong?
(vii) What provisions are there for events outside the control of the contracting parties?
(viii) What happens at the end of the contract?

254 At a recent meeting of local authority lawyers, it stated that the cost of Compulsory Competitive Tendering of local authority legal services far outweighed the benefits. See 'in-house lawyers beat private practices in tendering battle'. The Lawyer, 9 April 1996, p.2
4.10.3 These instructions are deceptively simple. The drafting of contracts will not be a straightforward task, least of all because of 'bounded rationality', i.e. the limited ability of individuals to process all the available information presented in a complex situation, and so reflect in contracts all future contingencies and adaptations to unforeseen circumstances. It may be too costly, or indeed impossible, to write complete contracts. Indeed, this has been explicitly recognised in relation to NHS contracts.

4.10.4 Furthermore, as has been argued in relation to the Compulsory Competitive Tendering of local authority services, the formalisation of detailed obligations and rights in a contract provides a fertile ground for conflict:

"The concrete presentation of contract specification and conditions in formal documentation increased the likelihood of even minor transaction difficulties being defined as problems requiring remedial action. Whereas within hierarchies deficiencies in performance might not have been perceived due to vague or inadequate specification, there now exists a complex but definable basis for evaluating service delivery; and whereas previously the problem might have been ignored or passed onto another level within the organisation, much more is at stake for the parties in quasi-market exchanges, again increasing the potential for conflict. Even within authorities historically committed to maintaining and co-operating with internal work-forces, relationships have soured and disputes have arisen, and there is evidence of a hardening of attitudes on the client side."

4.10.5 Therefore, the view might be taken that it will not be appropriate to attempt to formulate contracts to deal with all eventualities. Instead, it may be thought pragmatic to adopt, to some lesser or greater degree, a sequential and adaptive approach; to allow the future to unfold and to take action to deal with events as they occur, rather than cover all of them by a contract. In other words, to adopt an approach that allows for flexibility. Indeed, it is notable that many economists agree that in private sector transactions, involving long-term and continuing relations, contracts play a very marginal role. Instead, and particularly in relation to the supply of services, "they are affected overwhelmingly through economic incentives,"

257 British Medical Association (1989) Supplementary Report to a Special Conference of Representatives of Local Medical Committees on 27 April 1989, General Medical Services Committee of the British Medical Association, p.30
customary and conventional norms and values of trust and cooperation".\(^{259}\)

4.10.6 Such an approach may prove to be problematic in the case of block contracts for a variety of reasons. The drafting of incomplete contract documents may encourage opportunistic behaviour on the part of the solicitors. That is to say, lack of clarity or precision in contracts may be manipulated by solicitors to their own advantage, by being selective in the disclosure of information or distorting it, or by making overly ambitious promises in order to win a contract.\(^{260}\) 'Cherry-picking' is an instance of such opportunism. To avoid this, costs that have been saved on drafting contract documents will, in whole or part, have to be spent on monitoring and enforcement.

4.10.7 Furthermore, as block contracts are incomplete, in that they do not specify a price for every eventuality, a high degree of risk is placed on solicitors. The fee is fixed but the delivery costs will be variable. Without any mechanism to share unforeseen excess costs with the Legal Aid Board, understandably there will be insistence on the part of the solicitors to have the notional contract fee increased to include an element to cover their risk premium, consequently increasing overall costs.\(^{261}\)

4.10.8 Also, it may prove to be impossible, at least at the outset, to leave relations with solicitors to non-contractual mechanisms. Those mechanisms that have been described above as governing private sector transacting, take time to build up and develop. Notably, the Legal Aid Board has suggested:

"...that the best approach would be to concentrate on the stage our suppliers are at now and begin a gradual step by step transition towards the defined objectives but without at this initial stage, having a preconceived idea about the detail of how final contracts will be constructed. We believe that this approach would be more effective in achieving the final objectives because it immediately establishes the partnership approach we want to adopt with our own suppliers and would allow us to work together in determining the best way to reach the ultimate objectives."\(^{262}\)

\(^{259}\) Ibid., p.230
\(^{260}\) Such opportunism may not be a problem if there is a large number of solicitors keen to undertake legal aid work, as those who are prone to behave opportunistically would be aware that they could be replaced by others. However, it is always conceivable that the present number of solicitors available to undertake legal aid work will be drastically reduced following the first round of contracts.
\(^{261}\) Though of course it might be argued that risk premia are constituted by payments on account and increased speed of payment.
\(^{262}\) Supra, n.215, p.49
Such an approach to the transition from the present system to complete block contracting could have the benefit of building up a spirit of trust and co-operation between solicitors and the proposed regional boards.

4.10.9 Finally, it should be noted that the greater the detail present within contracts, especially in relation to case descriptions, the greater the burden of *needs* prediction. There will be a point beyond which sensible predictions will not be possible. A balance may be hard to find.
5. PROPOSALS, EXPERIMENTS AND THE USE OF CONTRACTING OUTSIDE THE UK.

5.1 Introduction

5.1.1 This chapter sets out some of the experiences of other jurisdictions in contracting for legal aid services. It is arranged into five parts, one dealing with each of the United States, Canada, Australia, Norway and the Netherlands.

5.1.2 Much of the experience relates to criminal, rather than civil, legal aid services. However, the structural similarities are readily apparent.

5.1.3 Some of the schemes included share similarities to the franchising scheme currently operating in England and Wales.

5.2 United States

5.2.1 Many public defender schemes in the US are salaried services, however, contracting with private attorneys for provision of criminal legal services is also a regular occurrence in the US. For example, by 1992 the majority of criminal defence schemes for the poor in Arizona, Idaho, Kentucky, New Mexico, North Dakota, Oregon and Washington were contract schemes.

5.2.2 Such contracting schemes have mainly been operated in small communities (with populations of less than 50,000) although they have also occasionally been operated in heavily populated municipalities, either as the only means of providing representation or to supplement public defender or assigned counsel programs. In some form or other, contracting in the US dates back over twenty years.

5.2.3 There is some evidence of contracting out of civil legal services, although the predominant picture is of such services being provided through non-

---


265 Supra, n.263, p42

profit organisations employing full-time lawyers. There is, of course, no large scale organised civil legal aid provision in the US.

5.2.4 In relation to criminal defence services for the poor, two basic types of contract seem to be used in the US: fixed-price, fixed-period contracts and fixed-number, fixed-fee-per-case contracts.

5.2.5 The defining characteristic of the first type is that the contractor agrees to accept an undetermined number of cases within an agreed contract period, frequently a year, for a flat fee. Under these contracts attorneys are normally responsible for the cost of support services, such as the use of experts and investigators. Moreover, even if the number of cases exceeds that which was projected, the contracting attorney is responsible for providing services for the unforeseen cases with no extra remuneration.

5.2.6 In contrast, fixed-number, fixed-fee-per-case contracts require an attorney to deal with a predetermined number of cases for a fixed fee per case. As with the first type of contract, support services are normally included in the contract price. Typically, the contracting attorney will submit a monthly bill indicating the number of cases handled during the period. Once the predetermined number of cases has been reached, the option exists to renegotiate or extend the contract.

5.2.7 Much of the experience with contracting in the US have proved negative. The courts have even declared several contract programmes to be unconstitutional. For example, the practice in Mohave County of awarding contracts for criminal defence work on the basis of price alone was found to be contrary to due process and to infringe the right to counsel. The practice had led to a collapse in the quality of legal representation. Financial considerations resulted in only the most junior lawyers undertaking cases.

5.2.8 The Spangenberg Group has identified a number of problems which seem to regularly occur in the contracting and competitive tendering of criminal indigent defence services. Of most concern, perhaps, is the low level of attention to quality assurance, probably consequent upon the dominant theme of the schemes examined, namely the desire to cut costs and control levels of expenditure.

---

271 See, for example, the following Spangenberg Group Reports: 'Oklahoma Indigent Defense Systems Study' (1988), p.53; 'Assessment of Indigent Defense System in Ohio'
5.2.9 Problems identified by the Spangenberg Group included the following.

(i) Competitive bidding creates an incentive to weigh cost over quality. As a result, even qualified contractors have not received sufficient funds to provide competent representation.

(ii) Many contract programmes make no provision for funds for expert witnesses, investigation and other necessary costs of litigation. Thus, there is a disincentive for contractors to provide these services as they must pay for them out of their own pockets.

(iii) Competition in the market place, one of the stated purposes of competitive bidding, has not lead to efficient, quality legal services. In most cases, over time, the cost has gone up and the quality has gone down.

(iv) While the initial cost of contract schemes may be less than that of public defender programmes or assigned counsel schemes, in most cases, costs rise over time to a level that exceeds those of them both.

(v) Fixed price contracts result in a substantial case overload and less than adequate representation to individual defendants.

(vi) In the majority of contract schemes, the most qualified and experienced practitioners eventually drop out and are usually replaced by recently qualified law graduates and marginally competent criminal attorneys. The price at which the contract can be awarded is too low to interest experienced practitioners and, as a consequence, it has become increasingly difficult to find qualified attorneys willing to bid.

(vii) Competitive bidding usually creates instability in the indigent defence system as contractors are replaced from year to year.

(viii) The majority of systems using fixed price contracts develop the goal of 'capping' the total over the contract period.

(ix) Year to year competitive bidding has resulted in substantial administrative costs, necessary to process bids and to negotiate the contracts. As a result, in some cases contractors have provided services for some months without an executed contract, or instead competitive cost bidding has been replaced by an announced annual fixed fee or an announced fixed cost per case scheme.

Lack of resources has made monitoring and enforcement of compliance with contract terms sporadic, if it occurs at all. The provision of services has fallen below national standards set by, for example, the American Bar Foundation and the National Legal Aid Defender Association.

In some jurisdictions competitive bidding has resulted in collusion between practitioners to fix the contract price.

Moreover, a number of empirical studies looking at the effects of replacing a public defender or private assigned counsel scheme with a low-bid contract scheme have been critical.

A study of the contract scheme which partially replaced a public defender programme in Clarke County, Washington, found that there was a significant decline in the quality of representation in misdemeanor cases. An element of this was the finding that the level of representation provided under the contract scheme appeared lower than that provided under the public defender scheme. For example, fewer jury trials and de novo appeals were requested and fewer motions to suppress filed. In addition, there was an increase in the number of guilty pleas made at first appearance under the contract scheme. Also, whilst public defenders made requests on several occasions for funds for expert witnesses, contract attorneys didn't make any.

Another study, which compared a contract scheme which replaced an ordered assigned counsel scheme, found that the contract scheme cost less per non-trial case in the short term, as attorneys spent fewer hours on each case and made fewer appearances. However, it questioned whether the contract scheme was more cost-effective, as it "may [have been] providing services at a lower cost, but ... lowering the quality of services".

The principal problem identified with contract schemes in the US has been the fixed price and low bid system of contracting, where contracts

---

272 A low-bid contract system is where the contract is simply awarded to the firm or firms that submit the lowest bid. Resources, competence and experience, for example, are not taken into account.


274 Ibid., pp.52-53


276 Ibid., p.200
are awarded on the basis of price alone. As Singsen and Bergmark\(^\text{277}\) have put it, the implementation of competitive models can lead to the "devaluation of quality in favour of low cost and high volume."

5.2.14 Despite the above, there is certainly some agreement that contract schemes can have a place within a mixed delivery system, so long as the contracts are not awarded on price alone, do not oblige lawyers to provide an open-ended level of service, are monitored, and are controlled and managed locally.\(^\text{278}\) As Spengenburg and Tarsy have said\(^\text{279}\), if quality is monitored "contracting for defence services can be an efficient and effective alternative to the public defender and assigned counsel models. Unfortunately, too many jurisdictions have used the contract option solely as a means to cut costs, often at the expense of the quality of representation." Singsen and Bergmark have also placed a special emphasis on monitoring. However, they also noted the "difficulties in defining or measuring the goals and accomplishments of local legal services programs." As they note, client characteristics and needs vary, as do case complexities, lawyer skills, levels of social impact, levels of client satisfaction, etc. In the English context, the work on Transaction Criteria and Outcome Measures is attempting to meet similar difficulties.

5.2.15 Perhaps not surprisingly, as Gorie\(^\text{280}\) has recently commented, there has been great variety in the form of contracts used in the United States: "In some cases there was no formal contract at all, with attorneys providing services under verbal agreements. At the other extreme, some contracts covered 18 separate subjects including attorney qualifications, training, monitoring, complaints, caseload limits, conflicts of interest, disbursements and support services." She has also noted that the US schemes have tended to suffer from inadequacy or lack of monitoring.

5.2.16 The American Bar Association has delineated 15 provisions which it considers are essential to any contract with a private attorney for the provision of criminal legal services.\(^\text{281}\) A contract should, at the very least, contain terms relating to the following:

(i) the categories of cases in which the contractor is to provide services;

(ii) the term of the contract and the responsibility for completion of cases undertaken within the contract term;

---


\(^{278}\) See, for example, Spengenburg and Beeman, supra, n.268, ABA Standard 5-3.1 in 'Standards for Criminal Justice etc', supra, n.264, and Huxtable, P. (1993) An Examination of Some Foreign Legal Aid Schemes, Bunbury: Legal Aid Commission of Western Australia.

\(^{279}\) Reported in Goriely (1996), supra, n.263, p.42

\(^{280}\) Ibid, p.43.

\(^{281}\) See ABA Standards 5-3.2 & 3 in 'Standards for Criminal Justice etc', supra, n.264
(iii) the basis and method of determining eligibility of persons served by the contract;
(iv) identification of attorneys who will perform legal representation under the contract and prohibition of substitution of counsel without prior approval;
(v) allowable workloads for individual attorneys, and measures to address excessive workloads;
(vi) minimum levels of experience and specific qualification standards for contracting attorneys, including special provision for complex matters such as capital cases;
(vii) a policy for conflict of interest cases and the provision of funds outside of the contract to compensate conflict counsel for fees and expenses;
(viii) limitations on the practice of law outside the contract by the contractor;
(ix) reasonable compensation levels and a designated method of payment;
(x) sufficient support services and reasonable expenses for investigation service, expert witnesses and other litigation expenses;
(xi) supervision, evaluation, training and professional development;
(xii) provision of, or access to, an appropriate library;
(xiii) protection of client confidences, attorney-client information and work product related to contract cases;
(xiv) a system of case management and reporting; and,
(xv) grounds for termination of the contract by the parties.

5.2.17 The unifying idea is to ensure that lawyers carrying out work under contracts have appropriate experience, training and monitoring, and that they have access to the support and resources necessary for litigation. In other words, contracts should ensure the provision of quality legal representation and they should not be awarded primarily on the basis of cost.282

5.2.18 There have been at least four US experiments in the use of block contracting for civil legal aid. However, the lessons to be learnt from them are limited, as they have principally been concerned with comparing block contracting schemes with staff attorney programmes. The first three were funded by the Legal Services Corporation ("LSC").

---

282 See Spangenburg Group report for other terms and conditions suggested by various lawyer groups.
The Delivery Systems Study. 283

5.2.19 The Delivery Systems Study was the most comprehensive study of models for the delivery of legal services ever conducted. It compared 38 'demonstration models' of delivery systems, in both rural and urban settings throughout the US.

5.2.20 The 38 demonstration models fell into eight basic categories:

(i) **Staff Attorney** - The essential characteristic of this model is that salaried attorneys and paralegals provide most client services.

(ii) **Judicare** - Attorneys in private practice are paid on a fee-for-service basis to provide legal services to eligible persons within a specified geographic area. All attorneys in private practice whose practice is covered by the geographic area are invited to participate.

(iii) **Prepaid Legal Services** - A type of legal insurance project in which eligible individuals or families are enrolled in a prepaid plan with a schedule of benefits. The plan may be administered by, for example, a consumer group, bar association or insurance company.

(iv) **General Services Contract** - A staff attorney programme contracts with a law firm or individual attorney to provide a wide range of services within a given geographic area, on a flat-fee or fee-for-service basis. In a sense, the work of the legal services programme is outsourced to an attorney or firm.

(v) **Specialised Services Contract** - A staff attorney programme contracts with an attorney or firm to provide a particular service, for example, in relation to divorces, on a fee-for-service basis.

(vi) **Legal Clinic** - A private law firm, compensated on a fee-for-service basis, that uses its own salaried attorneys, paralegals and support personnel to provide services on a high-volume, low-cost basis to clients eligible for legal aid.

(vii) **Organised Pro-Bono** - Volunteer private attorneys provide services without charging a fee to eligible clients.

(viii) **Voucher** - Vouchers are provided to individual eligible clients or organised groups who then select a private attorney to provide advice and assistance.

5.2.21 The study found that, in terms of cost per case, quality of casework, client satisfaction and social impact, the staff attorney models performed best. The study also found that of all the other models tested only organised pro-bono programmes, contracts with law firms as a supplement to staff attorney programmes, and independent judicare with a staff component were 'viable' and could be used to deliver effective economical legal

---

services (if appropriate local conditions and sound programme management existed).\textsuperscript{284} It also concluded that the use of private lawyers was only practical if they were paid a substantially reduced fee - i.e. not 'their usual and customary fee'.

5.2.22 Unfortunately, the study failed to allow for direct comparison between model types within the same geographic area. As there was great variation between the legal problems and case types dealt with by each delivery system, the comparisons attempted were methodologically unsound.

The Private Law Firm Project.\textsuperscript{285}

5.2.23 The Private Law Firm Project began in 1983 with the purpose of looking at the delivery of legal services through high-volume, low-cost contracts with private attorneys. In particular, it was intended to test the hypothesis that private contractors could provide legal services at lower cost than local staffed programmes, but with equivalent or greater quality of service.

5.2.24 The project covered five cities (Des Moines, Jacksonville, Laredo, Orange County and Portland) and local legal services programmes in those cities agreed to keep records and participate in an evaluation.

5.2.25 The tendering procedure commenced with a solicitation informing private attorneys of the selection criteria. These were price; the ability to provide quality service; the experience of the firm in providing low-cost, high-volume services; and any automation techniques the firm used (since automation is an important component in providing high volume service). A bidding conference was then held allowing interested attorneys to speak with LSC representatives about exactly what the bidding process would entail. Proposals were then received by the LSC and reviewed by a committee of 3 staff members who read, rated, and tabulated each proposal. On that basis and additional peer review by the local bar

\textsuperscript{284} 'Viable', for the purposes of the study, meant a number of things. Firstly, a model was 'viable' if it was 'feasible'. This required that there were groups of individuals willing to develop and implement the model; that the model could operate consistently with the Legal Services Act and subordinate regulations; that the legal community supported it; and that model could address the legal services needs of the client population. Secondly, it was 'viable', if it scored as well as, or better than, the staff attorney programme it was being compared with, on the basis of four criteria applied by an Advisory Panel - The four criteria, as already noted, being average cost per case; quality of individual case work; client satisfaction; and the impact which the model had or was expected to have in 'terms of long lasting improvement or avoidance of deterioration in living conditions of significant segments of the eligible population'.

association and the local programme, a preliminary recommendation was made about the finalists. Negotiations were conducted with attorneys who it was felt warranted further investigation and, finally, recommendations were made to the Board of Directors and President of the LSC and contracts were entered into.

5.2.26 Contracts involved one or more local private attorneys or law firms receiving grants to provide specified services to a defined number of eligible persons during the contract period, or agreeing to handle certain types of cases for negotiated fees.

5.2.27 The contracts were "pay-as-you-go" and attorneys were paid on a fractionalised basis, meaning that if an attorney completed a case before judicial resolution s/he was entitled to a fractionalised payment of a case closed by judicial resolution.

5.2.28 Despite extensive data collection, the LSC has failed to produce a substantive report or evaluation of the project. Nevertheless, according to Leslie Q. Russell, Co-ordinator of the Project, certain economies have been gained from using the contracts. Moreover, they have proved themselves to be efficient and quality has been maintained. On 1984 figures, average cost per case closed was $120 under the Private Law Firm Project, compared to $200 elsewhere. Administrative costs have been relatively small.

5.2.29 It appears that some form of report has been produced by the LSC, as the result of a request from a Congressman. However, as Singsen has noted, it does not amount to a serious evaluation, containing just five pages of unsupported narrative with conclusions that strain credibility.

5.2.30 The Orange County and Jacksonville legal services programmes however, conducted their own evaluations.

5.2.31 In Orange County, private attorneys discovered that they could not meet the programme's quality standards and make a profit. Furthermore, they found that the cases referred to them were more complex than had been anticipated, even though they were supposed to be no different from those handled by the legal services programme. Attorneys expressed dissatisfaction with the low fee schedules and paperwork associated with obtaining payment under a contract from the LSC. In fact, all of the contracting attorneys reported that they would never again undertake work of this kind for the price available from the LSC. It also appeared that contract attorneys provided significantly less service than staff attorneys.

---

5.2.32 In Jacksonville, none of the firms involved in the first phase of the project were willing to bid in the second phase. The price of contract services went up significantly in the second phase, and the private firms cost per case was significantly higher than the staff programme's cost per case. Moreover, a limited and preliminary form of quality assessment revealed that in social security cases and S.S.I disability cases, two private firms reported success (a finding of disability) in 45% and 59% of cases, compared to the 82% reported by the local programme. Also, the local programme had put in 3 to 5 times as much time per case, but had a lower total cost per case than either private firm.

5.2.33 Contract prices might inflate with time for a number of reasons. Clearly, if initial prices are uneconomic (to ensure bid success), they should eventually rise to an economic rate, or levels and/or methods of service will alter. Some firms might, of course, be motivated to carry legal aid work as part of a mixed practice, for altruistic or training purposes. It is unlikely, however, that this will be the norm. If, as in Jacksonville, firms withdraw from the market as a result of their experience in working under contracts, prices might be expected to rise more rapidly. In any event, whatever initial prices are set, as time goes by and firms which previously undertook legal aid work but failed to secure contracts start to build up practice elsewhere or reduce capacity, it can be expected that fewer firms will be interested in bidding for contracts, thus reducing the level of competition.

The San Antonio Study.

5.2.34 The San Antonio Study involved the provision of divorce law services in San Antonio, Texas. In particular, it related to uncontested divorces, contested divorces in which there was no domestic violence, and contested divorces in which there were allegations of domestic violence. No issues relating to child custody were included in the cases.

5.2.35 It compared the delivery of services by three law firms working on a contract basis with a staff programme and a judicare panel (or voucher system). Clients were referred on a random basis.

5.2.36 The LSC chose the contracting law firms via a bidding process, which involved assessment by a bid review committee and representatives of the local programme. In the event, the rates which were eventually paid under the contracts were negotiated down from the bid prices.

5.2.37 The study has been surrounded in controversy. The American Bar Association report on it concluded that no inferences or conclusions could be drawn from the study on which to base policy.
recommendations. Professor Steven R Cox, who managed the project, recommended that on the basis of study results multiple delivery models should be used so as to stimulate intermodel competition.

The Monterey County Project.

5.2.38 The Monterey County project in California involved a comparison of a staff and contract-based scheme providing legal services to poor farmers. The contract was won by a consortium of farm owners who employed a law firm to provide the services. Over time, it became clear that not only was the private firm not as effective at achieving results as the staff programme, but also it could not achieve the same caseload volume. The private firm eventually faded out of the project. It should be noted that the services provided by the law firm were mainly performed by paralegals.

5.3 Canada

5.3.1 As with the US, Canada's experience of contracting for legal aid services is mainly in the criminal field.

5.3.2 The Legal Aid Services Society of Manitoba (LAM), operating in a large province with a thinly spread population, has, for example, been tendering out blocks of fifty young offenders' cases since March 1993. The motivation for putting such cases out to tender is to save costs.

5.3.3 By the end of 1993, eleven contracts had been granted to seven firms. The lowest price per case has been Can. $90. On average, the cost per case on a non-contracted basis is Can. $350. However, the contracts cover additional minor cases which would not normally be covered by legal aid.

5.3.4 Apart from any cost per case savings that may have been achieved, it appears that the scheme has resulted in a case volume saving. The number of persons seeking assistance has declined, seemingly because non-contracting firms, anxious not to lose clients to contracting firms, have represented clients at no charge in the knowledge that if they approach LAM they will be advised that the work must go to a contracted firm.

5.3.5 The initial request for tenders met with a good response. A likely explanation for this is that contracts not only guarantee money in a

---


288 Supra, n.278, p.49
recessionary economy but also provide up to fifty new clients who may well provide a future source of income.

5.3.6 According to the Executive Director of LAM, the quality of work done under contracts has been very good. However, the Executive Director has expressed concern that the scheme results in the loss of the right to a solicitor of choice in those cases where legal aid would have been normally available (i.e. not under the expanded eligibility of the tender scheme).

5.3.7 Since November 1992, LAM has also awarded a contract to a private firm to deliver criminal and family law legal aid services in the town of Portage la Prairie, which had a history of poor legal aid services. Given the remoteness of the town, LAM felt there was insufficient demand to justify setting up an office with staff lawyers.

5.3.8 A contract was put out to tender and awarded to a reputable local firm. Under the contract the firm now provides duty lawyer services, preliminary legal advice (one afternoon per week), attends the women's refuge on call, and takes on five cases per month.

5.3.9 Despite the fact that little study has been undertaken into the scheme, and the fact that there isn't extensive provision for monitoring, other than a complete reporting requirement (which sounds more impressive than the reports appear!), “LAM is satisfied that the contracting of legal services in the Portage la Prairie area has been a great success.” According to the Executive Director, the firm continued to provide the same quality of service as it did prior to entering into the contract. LAM, therefore, intends to continue the scheme even without Federal funds. It should be noted, however, that the initial contracting firm has decided not to compete for the contract again, “due to the loss of one of its criminal lawyers.” This fact demonstrates the potential instability of contracting schemes.

5.3.10 The British Columbia Legal Services Society has considered the possibility of contracting blocks of its work to private lawyers. It has looked at this option in relation to Youth Court work where it is legally obliged to provide representation to every defendant, irrespective of parental income. In the past, it has declined to pilot such schemes, being fearful that minimum work standards might be sacrificed for cost saving. However, as a result of the positive experience in Manitoba, the Policy and Planning Council of the Legal Services Society of British Columbia has, this year, decided to pilot a similar scheme in the near future.

269 Legal Aid manitoba (1993) Portage Legal Services Initiative Evaluation
290 Supra, n.278, p.8
5.3.1 The Ontario Legal Aid Plan enters into many contracts for the provision of legal services. These are not, however, part of an overall strategy to control expenditure or improve the quality of service.

5.3.12 In Saskatchewan, private lawyers enter into contracts to provide duty lawyer services at particular courts.

5.4 Australia

5.4.1 The Legal Aid Commission of Victoria (LACV), as Giddings (1994a, 1994b, 1995) has reported, has been investigating the use of contracting for legal aid services. This is against a background of capped legal aid expenditure and the high cost of administering a judicare system. An audit investigation into the assignments division of the LACV found that administration costs were as high as 20% of total costs.

5.4.2 In December 1994, the LACV commenced a 12 month pilot scheme involving the franchising of summary criminal prosecutions, traffic prosecutions, Children's Court cases (criminal) and bail applications relating to criminal prosecutions in the Magistrate's Court. Franchised firms became entitled to grant legal assistance to their clients without referring applications for legal assistance to the LACV.

5.4.3 The scheme involved selecting six firms for a franchise - the intention being that the six firms be representative of three categories of firms: those which had handled 51 to 99 summary legally aided criminal cases in 1993/1994, those which had handled 100 to 199 and those which had handled over 200.

5.4.4 Some sixty firms or sole practitioners were asked to express their interest in accepting franchises. Around half responded positively and were consequently sent a package consisting of a draft franchise agreement, a franchising manual and other related documents.

5.4.5 The documents explained that it was a requirement of the scheme that franchisees keep detailed records and to adopt internal regulatory procedures. For example, they were required to record "centrally" every

---

291 Australia is a federal nation. Different legal aid service schemes operate within each of the states and territories.


294 There was, however, no prescribed maximum or minimum number of cases for which solicitors could tender.

103
"significant complaint" made by a client, respond promptly and appropriately to any such complaint and record the response. Furthermore, detailed records were to be kept of each case, setting out instructions, advice given, action to be taken, advice given to clients about payment of contributions, the identity of the solicitor to handle the matter and key dates.

5.4.6 Franchisees were also required to appoint a "contact officer", who would be responsible for communicating with the LACV in relation to matters arising out of the franchise agreement, attend a half-day training session about the procedure for granting legal assistance, and to submit to on-site audit inspections, at least quarterly, of files and records.

5.4.7 Other requirements related to file management, service of barristers and consultants, staff management and legal reference materials.

5.4.8 Six firms were eventually granted franchises after having submitted tenders which included a statement of "proposed fees" for the various steps that have to be taken in the course of the tasks for which the franchise would be granted. They comprised fees for an appearance taking one day or less, appearance for second and subsequent days of hearing, contest mention fee where mention is followed by contest, contest mention fee where plea is heard at the mention, tape transcription fee and bail application fee.

5.4.9 If the number of cases a franchised firm wished to handle exceeded the number contracted for, the LACV was entitled to terminate or restrict the excess "self-determined" grants of aid.

5.4.10 Separate to the above, in the Autumn of 1994 the LACV approved a policy for the tendering out of significant cases. This policy applied to some civil (medical negligence, product liability and immigration cases) and all criminal cases.

5.4.11 The criteria for a 'significant case' were to be:

(i) anticipated solicitor's costs should exceed Aus $30,000; or
(ii) anticipated quantum of damages in a civil case should exceed Aus $500,000; or
(iii) the case by its nature should be unique or extra-ordinary, for example, the Children of God case; or
(iv) the case should be of particular public interest, for example, a claim for personal injury arising out of breast implants or defective contraceptive devices.

The expectation was that there would be fewer than five such cases per year.

---

295 Giddings, J. (1995), supra, n.292, p.6
5.4.12 When a significant case is submitted to the LACV with a request for a grant of legal aid, an LACV committee (including nominees from the Law Institute of Victoria (LIV) (akin to the Law Society)) makes a decision whether tenders are to be sought and, if so, evaluates responses.

5.4.13 Under the scheme, solicitors entitled to carry out legal aid work are invited to join one of a number of “significant case specialist panels” (such as an immigration, personal injury or criminal law panel). Membership of an appropriate panel is a condition precedent to submitting a tender, except in the case of a solicitor who submits an original application for legal aid.

5.4.14 Membership of a specialist panel requires accreditation by the LIV "and/or other quality accreditation". For example, draft proposals issued by the LACV in relation to the selection of accredited specialists in criminal law extend to a required presentation in a mock court environment, as a test of proficiency in advocacy, as well as a formidable reading list of relevant primary and secondary sources. The idea is that those who pass the test should deserve the label of an expert in criminal law.

5.4.15 Membership also requires meeting specifications relating to practice management standards.

5.4.16 In relation to counsel, the committee either agrees a global fee package entitling the solicitor to choose counsel, allows for separate counsels’ fees to be paid or, approaches barristers on an agreed list requesting for a quotation for fees.

5.4.17 Queensland has also experimented with contracting. In March 1994, The Legal Aid Commission of Queensland (LACQ) commenced pilot scheme for the tendering out of duty lawyer services at specified Magistrates’ Courts.

5.4.18 Tenders can not be accepted on the basis of price alone and, similarly to Victoria, practitioners who tender must be accredited practitioners in accordance with the Queensland Law Society duty lawyer accreditation procedures. They are, therefore, required to have general experience in criminal law work, an understanding of the duty lawyer scheme and a working knowledge of the LACQ (e.g. legal aid guidelines and eligibility criteria).

---

296 Giddings suggests that the merits of tendering out such cases are far stronger in relation to such cases, which involve very novel legal issues or very substantial legal aid expenditure, or both.

297 Supra, n.293, p.384. Also Fordham, H. 'Legal Aid: Rostering to Tendering', Proctor 6 March 1994.
Firms, sole practitioners and barristers may submit tenders on their own behalf or in co-operation with others as a consortium.

The contract price is a lump sum, no expenses are payable under the contract, and its duration is six months.

Successful tenderers are solely responsible for all duty lawyer arrangements at the specified Magistrates' Court during the contract period. Spot visits, without prior notice, are made to Magistrates' Courts by Legal Aid Commission staff and monthly written reports must be provided on the operation of the service by the successful tenderer.

Early indications about the evaluation of the scheme, from John Hodgins, the Director of the LACQ, were to the effect that there was an increase in quality of service to clients and an estimated financial saving of Aus $200,000. Indeed, there was considerable competition amongst firms for the duty lawyer work. Duty lawyer work is an important adjunct to criminal law practice; access is given to an on-going client base and thereby the opportunity is given to bring in more work. This would no doubt be less so in relation to civil cases. Civil litigants follow different patterns of recidivism!

The scheme has been criticised for a number of reasons. For example, by limiting the first steps of criminal defence into the hands of a few, the opportunities for young solicitors to develop their advocacy skill and gain court experience will be reduced. Furthermore, it has been suggested that the system will result in the aggregate of experience evident under the old system being locked out, never to be replaced.

In addition to the above, it appears that the LACQ plans to contract out 50% of summary criminal cases by 1998. Under the proposed system firms will bid for blocks of fifty cases to be dealt with over a 12 month period. Tender prices would include the expected outlays on barristers' fees.

These plans may be extended to family law matters.

The Legal Aid Commission of New South Wales has recently proposed a pilot project involving the tendering by barristers for criminal work on the county court circuit, and by solicitors acting in indictable matters in Sydney and Sydney West District.

---


106
5.5 Norway

5.5.1 In 1989, the Norwegian Labor Government issued a parliamentary policy report, drafted by Jon Johnsen, into civil legal aid and advice. The report's proposals were never implemented. Nevertheless, amongst them was the proposal that a system of contracting should be developed by experiment.

5.5.2 Contracting was favoured because:-
(i) Norway's judicare system distributes cases to a large number of private lawyers according to claimants' choices and lawyers' capacities to do legal aid work. In most lawyers' offices, legal aid work constitutes a minority of the total number of cases handled. Through contracting, increased quality and specialisation in legal aid and advice work would be promoted and a guaranteed income provided;
(ii) contracting would secure a more geographically and socially even distribution of legal services;
(iii) it would be a method by which to attract young lawyers into legal aid work before they became too tied up with paying clients; and,
(iv) it would provide a reliable, stable and predictable income for lawyers.

5.5.3 A variety of types of contracts were envisaged to achieve these ends. For example, contracts paying amounts comparable to the average fees charged to paying clients would be offered to lawyers willing to emphasize legal aid work in their practice. Under such contracts, lawyers could oblige themselves either to do a minimum amount of hours per year, see a minimum number of clients or, undertake a minimum number of cases per year. Being guaranteed a stable and reliable income would allow lawyers to specialise in legal aid work and, thereby, the competence and effectiveness of legal aid services would be improved.

5.5.4 To secure a more even distribution of legal services, lawyers or a firm might contract to cover a certain area for example, a remote municipality or outlying district. Instead, they might contract to provide services for a certain client group, such as disability pensioners, immigrants or inmates in psychiatric hospitals. Alternatively, a firm might connect to an institution whose clients were in need of legal aid, like a crisis centre for raped and battered women.

5.5.5 To attract young lawyers, contracts were to be of 1-5 years duration - so as to secure a reasonable economy for starting a practice. Moreover, the

---

report suggested cheap credits to lower start up costs and, therefore, improve liquidity.

5.5.6 Various forms of payment were suggested. Payment could be per hour, per case or, a set sum for a certain amount of work. It was proposed that standard fees for statistically significant cases like family, landlord and tenant, and public insurance should be tested out. Higher fees for lawyers that could document a special competence in a field of legal aid work was also considered.

5.5.7 It was suggested that contracts might include an obligation to participate in courses on legal aid work.

5.5.8 Finally, it was proposed that lawyers might take part in the planning of legal services for the county in which they practised, so as to encourage commitment to the general functioning of a contract scheme.

5.6 The Netherlands

5.6.1 In 1985, under the direction of Wouter Meers, Head of the Legal Aid Division of the Ministry of Justice of the Netherlands, civil servants were directed to design a legal aid scheme that would combine maximum service with efficiency, without expanding the legal aid budget.

5.6.2 The principal proposals arrived at were as follows:

(i) Of the 200 million guilders then being paid to private legal aid practitioners 50% would be paid in the traditional way and limited to matrimonial and criminal work;

(ii) The other 50% would be offered to such practitioners on the basis of yearly contracts which initially would be renegotiated annually.

---


302 As with the UK, the Dutch legal aid budget is uncapped and expenditure is demand led. Legal aid covers all areas of law (except wills and conveyancing) and all jurisdictions, including administrative tribunals. There is not, however, an oversupply of lawyers (there are only 37 lawyers per 100,000 population) and more than half of lawyers operate as sole practitioners.

303 Advocates in private practice provide the great majority of legally aided work. In 1985 they received 80% of legal aid funds and in the early 1990's almost 85% (see Cooper (1985), supra, n.301, p.607 and Goriely (1992), supra, n.297, p.806). They are paid through a system of fixed fees (i.e. not on an hourly rate) paid in advance. The cost of work is assigned from schedules depending on the type of work involved and a lawyer wishing to do legal aid work for a client applies to the Ministry of Justice for a block advance to cover the cost of work in progress. When the work is done the lawyer sends an account to the Ministry together with the legal aid certificate. (Notably, the Dutch Order of Advocates has lobbied the Justice Ministry to introduce a system of payment by hours worked, arguing that this would be fairer and would improve quality).
5.6.3 The contracts would be administered by special boards, possibly the existing management boards of the Buros van Rechtshulp. They would be offered on the basis of competitive tenders to a board, submitted by any local lawyer interested in participating in the scheme. Contracts were to be granted not to firms of lawyers but to individual lawyers. Once the skill and bona fides of contracting lawyers was established, annual renegotiations of the contracts would be unnecessary.

5.6.4 It was envisaged that a series of objective criteria would be set as a precondition to an application for a contract. For example, a practitioner should already have completed a specified number of cases in their specialist area, or should have attended an approved course or, instead, be a member of a recognised group specializing in the area of law for which they would be contracting. If demand exceeded supply, additional subjective criteria, based on local knowledge and experience, might be applied by the managing board.

5.6.5 A wide variety of ways in which lawyers might fulfil obligations under the contracts was envisaged. In fact, any contract would be acceptable provided the lawyer and board granting it agreed to its terms. A great deal of freedom would be allowed to lawyers to devise a method appropriate to their skill, their clientele etc. For example, a lawyer might agree to handle all cases, within his/her office locality, relating to a specialist area of expertise, free of charge. Instead, a contract might be entered into to provide evening surgeries, during which any type of case would be initially handled free of charge. Alternatively, back-up services might be provided to a local Buro voor Rechtshulp or, an agreement entered into to deal with a fixed number of cases per year on referral from a Buro. In summary, advocates would be encouraged to develop innovative schemes to use monies to the best effect.

5.6.6 A condition of renewal of a contract would be the submission of a satisfactory account of the previous year's activities.

---

304 The Buros Voor Rechtschulp total 20 and operate out of 57 offices. If England and Wales were to have the same ratio of offices to population, 190 would be required - Goriely (1992), supra, n.301, p.807. They are independent foundations and have a number of functions. Firstly, they refer clients to private practitioners, especially in the field of criminal and family law. Most clients, however, go directly to advocates. Secondly, they act as legal aid offices, granting the equivalent of legal aid certificates. Administrative staff are employed to carry out means and merit tests for those applying for legal aid through private practitioners. Thirdly, they give advice and assistance in social security, housing, employment immigration and consumer cases, relating to administrative appeals. Finally, they run purely administrative aspects of the duty solicitor scheme for those held in police custody. The Buros are governed by a board which includes local lawyers, judges and academics. There is little community involvement in their management. Moreover, decisions are increasingly being made by paid managers.

305 Contracting lawyers would be free to carry out additional matrimonial and criminal legal aid work paid for in the traditional way.
5.6.7 Later, proposals were made for a standard legal aid contract in which each firm would agree to deal with a fixed quota of cases per year, with a margin of 10%.

5.6.8 The Dutch Order of Advocates strongly opposed contracting. The problem was that it would require firms to do 10% of cases without payment. Another was that once a firm had fulfilled its quota, it would be required to send clients to other firms which were not yet up to quota. Similarly, the system provided no solution to the situation where the flow of cases in a particular area exceeded the contractually stipulated number. Furthermore, private practitioners (interviewed by Goriely) opposed the principle of having contractual terms dictated by the Ministry. This, they thought, would remove their independence.

5.6.9 It appears that proposals for a comprehensive or wide ranging system of contracting have been dropped by the Dutch Government.

5.6.10 Officials at the Ministry of Justice have indicated that they would not like to see competition, based upon tendering for contracts, purely on cost. They consider that quality would be too greatly impaired. Furthermore, Dutch legal aid remuneration cannot realistically be reduced. It is about a quarter to a third of average private client rates.

5.6.11 Instead, the Dutch Legal Aid Act 1994 provides for a 'closed shop' as a method to control quality and expenditure. Under it, new regional councils are empowered to draw up conditions of eligibility for practitioners to receive legal aid grants. These conditions will relate to the minimum and maximum number of cases which advocates can undertake, their expertise and the internal organisation of their firms. A register will be drawn up of lawyers entitled to do legal aid work.

5.6.12 Nevertheless, the Act does allow for contracts to be entered into. These will not be for case work but for preliminary advice and assistance and to cover areas where there is not a Buro office or where Buros cannot meet surplus demand.

---

308 Supra, n.278, p.84
309 Ibid., p82
6. THE PROFILING RESEARCH

6.1 Introduction

6.1.1 The preceding five chapters set out the context within which our profiling research is to be undertaken. This chapter provides a description of the research purpose and methodology.

6.1.2 In general terms, the research purpose is relatively straightforward. It is to further our understanding of how legally aided personal injury and family cases proceed, develop explanations as to why they proceed as they do, provide a firm basis from which the block contracting debate can move forward and set out the foundations for their initial formulation.

6.1.3 Likewise, the basic methodology is relatively straightforward. Data relating to the pathways, costs, duration and work undertaken in legal aid certificated personal injury and family cases will be collected from a substantial sample of such cases and analysed, using standard statistical techniques, to:

(i) provide a comprehensive description of the cases, individually and as a group;
(ii) determine the extent to which commonalities and contrarities exist as between them; and,
(iii) determine whether the pathways, costs, duration and work undertaken in them can be predicted with any significant degree of certainty.

6.1.4 The detailed research questions and specifics of the methodology, however, require further elaboration. This is set out below.

6.2 The Purpose of the Research

6.2.1 In order to effectively proceed with any scheme of block contracting, a thorough understanding must be obtained as to:

(i) how different cases are structured, in terms of work elements, cost elements and timescale; and,
(ii) how the different structures are distributed, both in terms of their frequency within defined case categories (a subject of this study) and the frequency of occurrence of cases of the categories themselves within individual solicitors' firms (the subject of a separate study of specialism being concurrently undertaken by the Legal Aid Board Research Unit).

310 See paragraph 6.2.5 below.
6.2.2 Without such an understanding, it will not be possible to finally determine:
(i) the descriptions of cases that should be contracted for;
(ii) the minimum number of cases contracts should relate to in order to fairly distribute the financial risks associated with uncertainty of process, as between the Legal Aid Board and individual solicitors’ firms;
(iii) the case details that should be collected in order to monitor contracts and determine whether obligations are being met; and,
(iv) whether contracts could form the sole basis for the provision of legal aid services.

6.2.3 As Chapters 2 and 3 above have demonstrated, the utility of previous research is limited to providing a platform from which to progress our understanding in these areas. A far higher level of detail, particularly in relation to the costs elements of cases, needs to be obtained. The Legal Aid Board recognised this in its response to the Lord Chancellor’s proposals, set out in Chapter 4 above, and stated that a “considerable amount” of further work needs to be done.

6.2.4 The Legal Aid Board Research Unit is, therefore, proposing to undertake a programme of research to explore case profiles - or more particularly the pathways, costs, durations and distributions of legal aid certificated cases - and category profiles - or the distribution of case profiles within case categories.

6.2.5 By pathways we mean the routes by which individual cases proceed to their conclusion. As figure 6.1 below demonstrates, in relation to personal injury litigation undertaken through a solicitor, every case must take a route through one or more basic stages and, within each of these, particular sub-stages. The later the stage, the fewer the number of cases that remain.

6.2.6 The ultimate goal of the research is to determine identifiable types of case and category profile, to map their characteristics and distribution, and establish their determinants.

6.2.7 The principal research questions are therefore as follows:

(i) Are there any identifiable standard or common case profiles?
(ii) If so, what are their characteristics and how do they relate to case categories and other external case characteristics (i.e. (broadly) cause, party and solicitor details)?
(iii) What are the cost drivers within cases and how are they distributed between and within cases?
(iv) With what reliability can aggregate costs be predicted from external case characteristics, individually and in blocks?
Figure 6.1 Principle Pathways of Personal Injury Cases
(v) With what reliability can aggregate costs be predicted from external case characteristics combined with pathway characteristics, individually and in blocks?
(vi) To what extent can differences between case categories be explained by the adoption of different philosophies as to strategy?

6.2.8 As personal injury and family cases represent around three-quarters of all legal aid certificates issued and provide a real contrast in terms of their aims, objectives and processes, we intend to commence our research programme by asking the research questions of these.

6.3 Methodology

6.3.1 It is intended that the research utilise a stratified and triangulated methodology. Five complementary data sets, four predominantly quantitative and one qualitative, will be utilised (see figure 6.2.)

6.3.2 The largest data set will be comprised of a sample of cases, the details of which will be drawn from the Legal Aid Board's electronic data systems. In simple terms, the Board currently operates two systems, one concerned with the processing of certificates, the other with processing solicitor's bills. The data contained on the two systems is fairly limited, having been collected for operational (rather than research) purposes. However, it does allow for low level analysis of (a) cause of action, (b) aggregate profit costs, disbursements and counsels' fees and, (c) monetary awards. Although a problem, identified by Sherr et al (1996), with the last of these, is that it appears solicitors sometimes provide details of gross awards and sometimes of awards net of state benefit clawbacks.

Figure 6.2
The Six Data Sets

<table>
<thead>
<tr>
<th>Data Source</th>
<th>Sample Size(^{311})</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Legal Aid Board Electronic Data Systems</td>
<td>&gt; 50,000</td>
</tr>
<tr>
<td>2. (a) Legal Aid Forms</td>
<td>approximately 2,000</td>
</tr>
<tr>
<td>(b) Court Records</td>
<td></td>
</tr>
<tr>
<td>3. Solicitors' Files (through franchise audits)</td>
<td>approximately 750</td>
</tr>
<tr>
<td>4. Solicitors' Files</td>
<td>approximately 150</td>
</tr>
<tr>
<td>5. Interviews with Solicitors</td>
<td>20</td>
</tr>
</tbody>
</table>

\(^{311}\) The figure represents the sample size for each of the two subjects of study
The First Data Set

6.3.3 The first data set will be drawn from the Legal Aid Board's electronic data systems and will be made up of all the Legal Aid-certificated personal injury and family cases disposed of over a 12 month period, and provide a broad (but blunt) macro picture to be principally used for verifying the integrity of data collected from other sources.

The Second Data Set

6.3.4 The second data set will be comprise a sample of such cases. The details will be drawn from the new style Legal Aid forms and court records. Legal Aid forms are readily accessible and contain a wealth of information, stored in a manner which lends itself to data collection. Legal Aid application forms, for example, contain details of when a solicitor was instructed, the circumstances surrounding a case, and the parties. Legal Aid claim forms provide dates and details of work undertaken, disbursements and stages passed through. An indication is also given of correspondence levels.

6.3.5 A problem with Legal Aid claim forms is that they are not always submitted. This is particularly so in personal injury cases, most of which are won. As Fennell (1994) has observed, such success invariably results in costs being met in full and there being no claim on the Legal Aid Fund. Even in successful cases, however, some documentation is submitted. Thus, aggregate profit costs, disbursements, counsels' fees and the dates and details of the stages passed through can be determined.

6.3.6 In relation to the Legal Aid Board's role as insurer, which comprises its heaviest burden and which will constitute the focus of attention in formulating block contracts, an understanding of lost personal injury cases (which generally involve net loss to the fund) is vitally important. An emphasis on these cases is not, therefore, without some benefit. However, the reduced detail of the won cases in the sample does constitute a weakness to the overall research design that must be appreciated. It should also be noted, though, that the increased level of detail on the new Legal Aid forms greatly mitigates this weakness. As also does the collection of data from taxation schedules.

6.3.7 In the more expensive cases, claims for costs are not submitted to the Legal Aid Board but are rather submitted to the court for taxation. Around one-third of cases are taxed. To gain details of these cases we will examine court records. Taxation schedules contain full details of the work undertaken, disbursements and the use of counsel.

6.3.8 The second level data set sample will be made up of two-thirds assessed and one-third taxed cases, with a total sample size of around 2,000.
The Third and Fourth Data Sets

6.3.9 The principal focus of the research will be on the third and fourth data sets, which will both comprise a sample of cases drawn from solicitors’ files. Solicitors’ files constitute a rich source of information for, as Goriely and Williams (1993) have noted, "keeping a proper file is a central part of a solicitor’s work."

6.3.10 The third and fourth data sets will be similar, with basic elements being included in both. Most noticeably, the third will include a far reduced level of costs detail. However, in a number of these cases some additional detail can be appended from Legal Aid forms, using certificate numbers to link cases.

6.3.11 The fourth data set will include the highest level of detail relating to costs. All details available will be recorded. It will also contain a degree of qualitative data. This will be recorded on an ad hoc basis, as and when matters of interest arise.

6.3.12 There remains the possibility that an additional data set, at a level midway between the third and fourth, will be obtained through the use of a postal survey. This would allow the combined sample size to be increased from 1,000.

The Fifth Data Set

6.3.13 The fifth data source will be semi-structured interviews with solicitors. These will be used to explore issues arising from a preliminary analysis of the (largely) quantitative data sets referred to above, and matters such as goals and strategies. We hope to be able to offer some form of explanation for our findings rather than simply present a description of a large number of cases.

6.4 The Data Elements

6.4.1 The third data set questionnaires are set out at the end of this chapter. As was noted above, these form a part of the fourth data set also. However, far greater costs and incidental detail will be available from the fourth.

6.4.2 In paragraphs 6.4.3 et seq., some of the key elements of the questionnaire designs are described and explained.
The Personal Injury Questionnaire

6.4.3 The case categories used in the first section of the personal injury questionnaire are fairly standard, and constitute an expanded form of the Legal Aid Board's own categorisation system. It was felt that any more elaborate form, such as was used in the Civil Litigation Research Project, would lead to coding and comparison problems and unacceptable delays for those compiling the data. Ten categories have been used, though, rather than the Board's four. Road traffic accidents have, for example, been split into those where the plaintiff is driver, passenger and pedestrian. As might be imagined, the liability questions generally raised are rather different in respect to each.

6.4.4 In relation to party details, it is clearly important to establish those factors that may affect the involvement of the court (as where a minor is involved), the bargaining power and strategies of the parties (which, as was seen above, may vary greatly between corporate and individual parties), the complexity and product of future earnings calculations (although this is of very limited relevance to run-of-the-mill cases), attitudes to or of lawyers and the courts (such as age and gender), or general propensity to litigate (such as employment status). The questions in the second section of the questionnaire attempt to address this need.

6.4.5 As was noted in Chapter 2 above, the nature and seriousness of the injuries and conditions sustained by accident victims may well affect the nature of case profiles. For example, if the medical prognosis is not clear from the outset of a case, or multiple expert opinions are needed, then delays will most likely result and disbursement costs will increase. Alternatively, if a pre-existing condition is exacerbated by an accident, then causation problems will arise and damages calculations will become more complex.

6.4.6 Stating that seriousness of injury may be an important data element and determining how it is to be measured are, however, two very separate matters. Pearson found duration of incapacity to be the least unsatisfactory measure of severity of injury. The Law Commission found period of hospitalisation the least unsatisfactory. Others have sought to categorise types of injuries in such a way as to reflect severity. However, unless a comprehensive (and inordinately complex for large scale data collection) categorisation system is used, such as that of the Judicial Studies Board, a reliable link between injury type and severity is perhaps beyond reasonable expectation. Back, neck and head injuries

312 See Delaney (1995), supra, n.65, Fennell (1994), Supra, n.10, Harris et al. (1984), Supra, n.2, Pearson (1978), supra, n.3
313 As perceived loss is relative.
315 Supra, n.11
316 See, for example, Worthington (1991)
can range from minor concussion and whiplash right through to spinal severance and consequent paraplegia.

6.4.7 However, despite the obvious difficulties, we have persevered with an injury categorisation system. It may be that in conjunction with other data elements it may enable a better description of severity of injury (and/or complexity of case). Therefore, as can be seen from the personal injury questionnaire, a number of measurements have been adopted. It is intended that these be tested with and against each other to establish the optimum method.

6.4.8 As was hinted at in the preceding paragraph, seriousness and nature of injury are possible elements of a working measure of case complexity, which must affect case profiles. However, it can probably be seen to follow from this that even greater definition problems might surround case complexity than seriousness of injury. Firstly, it is important to avoid defining complexity in an ultimately circular manner. Thus, the amount of work involved in a given case could not (on its own) provide a satisfactory measure. We cannot allow a case to be described as complex on account of the amount of work involved at the same time as accepting it as having involved such an amount on account of its being complex! Something beyond simply the way in which a case has been managed must be included in any definition. Unfortunately, in identifying objective matters, such as the number of legal disputes, we may also be measuring (at least in part) the legal and management skills of the lawyers involved. Also, as we demand more of a description of the case itself, we increase the intellectual and time demands placed upon those collecting the data.

6.4.9 The American Bar Association\textsuperscript{317}, suggested that estimated length of trial, number of factual and legal disputes, anticipated motions and discovery activity, number of witnesses and number of exhibits be used as a measure of complexity. Section 5 of the questionnaire incorporates a number of these factors. It was felt that the estimated length of trial would be not so useful in the context of personal injury litigation, given the small proportion of cases progressing to trial.

6.4.10 In measuring the result of personal injury cases, the starting point, as was discussed in Chapter 2, must be a determination of the extent of any damages obtained by the claimant. Where no damages are obtained, the reasons should be determined, especially if the claim was withdrawn rather than lost. Section 6 of the questionnaire deals with these matters.

6.4.11 The costs of claims are dealt with in section 7 of the questionnaire. Resource considerations meant that only aggregate costs could be

included. However, as was detailed in paragraphs 6.3.4 et seq. and 6.3.11 above, detailed costs data is to obtained through the second and fourth level data sets.

6.4.12 Section 7 also includes a question relating to the liability of clients to pay contributions towards the cost of their case. It is thought that this might affect the influence exerted by clients upon their solicitors. It also, of course, affects the net cost of cases to the Board.

6.4.13 *Key dates* are included within section 8 of the questionnaire. We have attempted to ensure that the dates included reflect both the procedural and work stages of personal injury cases. Clearly, many of the dates will not apply to *run-of-the-mill* cases.

6.4.14 Details of offers and payments into court are included in section 8 to provide some insight into the nature of negotiations and strategic behaviour.

**The Family Questionnaire**

6.4.15 Chapter two described why the complex nature of many family cases makes them intrinsically difficult to classify as they can involve a number of different elements and follow various different paths. The three basic elements described in chapter two are: children; money/property; and domestic violence. These elements may be present in family cases in isolation, in combination or progression. Taking this into consideration, the case categories used in the first section of the family questionnaire allow family cases to be defined more accurately than current Legal Aid Board case codes. This is because the precise profile of the case is recorded. Previous empirical work in this area has tended to concentrate on a relatively small number of cases of a similar type, for example, Sarat and Felstiner*318* looked at divorce cases involving disputes over money and property but where there were no issues relating to children. Some researchers have looked at a wider range of issues but this has tended to restrict the sample size.*319*

6.4.16 Family cases in this study will be accurately recorded in the questionnaire using a system of multiple categorisation. This allows all the relevant issues which arose in the case to be recorded rather than just those which arose at the start of the case (the major flaw in the Board's present categorisation system). The double column allows for differentiation between issues which arose at the beginning of the case and those which arose later.

---


319 See for example the 60 cases studied by Ingleby (1992) *Solicitors and Divorce*, Oxford: Oxford University Press.
6.4.17 Party details are recorded in the second section of the questionnaire. The age, gender, duration of the relationship and client’s particular needs may all influence the profile of the case. In particular, the number and ages and residence of any children relevant to a case may be important determining factors. If the client has any health needs or special communication requirements such as a translator this will also be recorded as it may effect case length and cost. We have included many possible influencing factors though some will inevitably be stronger indicators than others once the results have been analysed. It is hoped that the first two sections will provide an accurate description of the case thus, allowing more accurate comparisons and analysis of cases building up information about cases - i.e. ensuring comparisons between groups of well matched cases.

6.4.18 Section 3 details the progression through the case and the duration of different stages within each case. This section will collect information for the first time on the length of time between the client first visiting the solicitor, any Green Form work performed, the emergency certificate (if sought) and the full certificate. The point at which counsel is instructed will be determinable, as will the progression through court procedure. This information will promote a better understanding of key work stages within cases. A separate question is included on the questionnaire to determine the level of mediation currently used in legally aided family cases. This may be a useful statistic when considering the implications of mediation as a part of the new Family Law Bill. Information will also be collected in this section relating to settlement and consent orders. In an attempt to discover more about the tactics used by lawyers and clients within cases, the proportions and results of Calderbank offers, and the possible delaying tactics used e.g. non-disclosure (section 3.25) have also been included in the questionnaire.

6.4.19 Case costs are also recorded in summary form in the questionnaire. This will enable the costs of Green Form and ABWOR work to be related to the total case costs for the first time on a large scale. This important information will enable the analysis of the proportion of work under Green form and under the legal aid certificate within individual cases. At present, recording systems for Green Form work and work done under a certificate are completely separate and it is not possible to relate the costs for any given case. As undefended divorces are not eligible for full legal aid\(^\text{320}\), many cases start out under Green Form for the first few hours of work and then a certificate may be applied for to complete any ancillary matters. At present it is difficult to get a clear idea of how much work is done under Green Form compared to under a certificate. Putting these costs together will produce figures which represent costs for whole cases rather than the work carried out under two separate systems.

\(^{320}\) Legal Aid Act 1988 Part 1 para 5a Schedule 2
6.4.20 The costs section of the questionnaire also records whether or not the client paid any contributions, or was liable for the statutory charge. We think that this information may also have a part to play in determining case profiles.

6.4.21 Case result is recorded in an innovative way incorporating the results of all the possible elements of a family case. This section allows all possible combinations of results to be recorded from a simple injunction in a domestic violence case to the complex matters ancillary to divorce: e.g. where the children reside at the end of the case; what type of contact is agreed or ordered; and how the family home and other assets are divided. It also allows for more unusual or less expected combinations such as contact arrangements within a domestic violence case. The table in this section\(^{321}\) may be difficult to complete, but even partially completed gives some idea of the distribution of resources of the couple as individuals at the beginning and again at the end of the case. This information will be particularly important in ancillary relief cases. It may also be that the financial position of the parties at the start of the case is a good indicator of the type of case profile and could be used as a measure of complexity.

6.4.22 The result section also distinguishes between those issues which were resolved in court and those which were resolved outside court or simply “fizzled out”. It is important to identify the end point of the case and the mode of conclusion (informal settlement versus court order) as this may also aid the profiling of cases. It is also important to acknowledge the number of cases which do not have a neat conclusion but which end when the solicitor receives no further instructions. The emotional nature of family cases may make them more prone to such end points however, at present, proportions are not really known. It is hoped that the formulation of the family questionnaire in this way will aid the building of accurate family case profiles.

6.5 The Research Timetable

6.5.1 The research timetable is set out in figure 6.3. As can be seen, it is anticipated that the preliminary data analysis will be complete in May 1997, with the final report following level 2 and 5 data collection in December 1997.

6.5.2 The delays experienced in introducing CIS have to some extent forced the delay of the level 2 data collection exercise. It will now commence on 5 May 1997 and continue for 2 to 3 months. On the positive side, the delay will allow time to (a) re-appraise the role of level 2 data in the light of the

\(^{321}\) Adapted from Sherr A., Moorhead R., and Paterson A "Lawyers - The Quality Agenda" Vol 2 p210-211
provisional analysis of level 1, 3 and 4 data, and (b) progress the parallel specialism research project.

Figure 6.3
The Research Timetable

6.5.3 The specialism research project, which is concerned with the distribution of case categories between and within firms, and the relationship between private and legally aided casework within firms, has a provisional timetable terminating in August 1997. It is proposed that external data collection will commence in early 1997.
CASE PROFILING / OUTCOME MEASURES SURVEY

PERSONAL INJURY

1.1 Solicitor account number: __________

1.2 Today's date: ___ / ___ / ___

1.3 Was today's audit: Pre-contract / Post-contract / Not applicable

1.4 Legal aid certificate number ____________________________

1.5 Was there a change of solicitor firm in this case (delete): Yes / No
If yes, how many times? ___

1.6 What was the cause of the plaintiff's injuries? (tick one box only)

1.6.1 Road traffic accident [ ]
   If RTA, was the plaintiff DRIVER [ ]
   PEASSENGER [ ]
   PEDESTRIAN [ ]

1.6.2 Accident at work [ ]

1.6.3 Work related condition acquired over time [ ]
   (e.g. deafness, asbestosis, white-finger, etc.)

1.6.4 Trip, fall or slip (Highway/Local Authority cases only) [ ]

1.6.5 Product liability [ ]

1.6.6 Occupier's liability [ ]

1.6.7 Medical negligence [ ]

1.6.8 Other (please specify) ____________________________ [ ]

1.7 Was the case: (tick one box only)

1.7.1 a County Court case [ ]

1.7.2 a High Court case [ ]

1.7.3 transferred to the County Court [ ]

1.7.4 transferred to the High Court [ ]

1.7.5 none of the above (i.e. pre-issue) [ ]

Please enter here the time it takes you to complete this form: ___ minutes
PARTY DETAILS

2.1 Client date of birth: ___ / ___ / ___
2.2 Client gender: Male / Female
2.3 Was the client represented by a next friend? Yes / No
2.4 At the time of the injury, was the plaintiff: (tick one box only)
   2.4.1 employed [ ] 2.4.2 self-employed [ ] 2.4.3 unemployed [ ]
   2.4.4 student [ ] 2.4.5 retired [ ] 2.4.6 a minor [ ] 2.4.7 homemaker [ ]
2.5 Was the other party legally aided? Yes / No
2.6 Was the other party insured? Yes / No
2.7 Was the other party an individual (i.e. not a company &c.)? Yes / No

SERIOUSNESS OF INJURY

3.1 Can it be determined whether or not the plaintiff was hospitalised? Yes / No
3.2 If yes, was the plaintiff hospitalised? Yes / No
3.3 Also if yes, for how long was the plaintiff hospitalised? ___ wks ___ dys
3.4 For how long was the plaintiff unable to work*? ___ wks ___ dys
3.5 For how long was the plaintiff's working capacity reduced*? ___ wks ___ dys
   * If permanently, tick here 3.4 [ ] 3.5 [ ]
3.6 Was the injury/condition fatal in this case? Yes / No
3.7 From the information in the file, what is your subjective assessment of the seriousness of injury/condition sustained? (tick one box only)
   3.7.1 Minor injury with full recovery within 1 year [ ]
   3.7.2 Minor injury with full recovery within 1 to 2 years [ ]
   3.7.3 Moderate injury with full recovery within 3 years [ ]
   3.7.4 Moderate injury with persistent problems [ ]
   3.7.5 Severe injury with moderate permanent disability [ ]
   3.7.6 Severe injury with severe permanent disability [ ]
3.8 Will the plaintiff require future care? Yes / No

NATURE OF INJURY

4.1 Which of the following injuries/conditions did the plaintiff sustain? (tick all boxes which apply. If none apply, leave blank) 4.1.1 No details of injury [ ]
   4.1.2 Head injury [ ] 4.1.3 Back or neck injury [ ]
   4.1.4 Disfigurement [ ] 4.1.5 Loss of limb [ ]
   4.1.6 Loss of sight or hearing [ ] 4.1.7 Congenital condition [ ]
   4.1.8 Terminal condition [ ] 4.1.9 Psychiatric problems [ ]
   4.1.10 Paralysis [ ] 4.1.11 P.V.S. [ ]
4.2 Did the plaintiff have a pre-existing condition exacerbated by the accident? Yes / No

COMPLEXITY OF CASE

5.1 Was liability: (tick one box only) admitted [ ] not admitted [ ] disputed [ ]
5.2 If disputed, was there: (tick if appropriate)
   5.2.1 a total denial of liability [ ] 5.2.2 alleged contributory negligence [ ]
5.3 Was causation disputed? Yes / No
5.4 Was quantum disputed? Yes / No
5.5 Was a police accident report obtained in this case? Yes / No
5.6 Number of experts used: _______
5.7 Number of expert reports commissioned: _______
5.8 Number of non-expert witnesses used by client: _______
5.9 Potential number of defendants, if greater than 1 _______
6 RESULT
6.1 Was the client awarded (or settle for) any damages? Yes / No
6.2 What was the gross award (before clawbacks, etc.)? £
6.3 What was the amount within this representing general damages? £
6.4 If no damages were obtained, did the plaintiff withdraw the case? Yes / No
6.5 If yes, was this because (tick one box only)
   6.5.1 client wished to discontinue / ceased instructing [ ]
   6.5.2 claim not sustainable [ ]
   6.5.3 client died [ ]
   6.5.4 legal aid revoked [ ]
   6.5.5 other [ ]
7 COSTS
7.1 Was the client assessed as liable for contributions? Yes / No
7.2 What was the cost of any green form work undertaken in the case? £
7.3 What was the total profit costs (excl. green form work)? £
7.4 What was the total disbursements (excl. green form work)? £
7.5 What was the total counsel fees (excl. green form work)? £
7.6 How many counsel were instructed by the client's solicitor? 
7.7 Was the client awarded (or did the settlement include) costs? Yes / No
7.8 If yes, were all costs recovered? Yes / No
8 STAGES
8.1 What were the dates on which the following steps occurred or commenced? (enter all applicable dates - they need not be consecutive)
   8.1.0 Date of accident
   8.1.1 First instruction of solicitor by client
   8.1.2 First instruction to proceed (if different to above)
   8.1.3 First medical report received
   8.1.4 Counsel's first opinion received
   8.1.5 Counsel's last (if different) opinion received
   8.1.6 Prognosis settled
   8.1.6.B Notification of case to defence
   8.1.7 Negotiations commenced
   8.1.8 First offer from other party
   8.1.9 Proceedings issued
   8.1.10 Service
   8.1.11 Close of pleadings
(6.6) If the case was settled, what was the date of settlement?
   8.1.12 Set down for trial
   8.1.13 First interlocutory hearing
   8.1.14 Trial
   8.1.15 Verdict
   8.1.16 Appeal hearing
   8.1.17 Last work on the case (excl. bill preparation)
   8.1.18 Bulk of money paid to plaintiff
8.2 How many offers were made by the other side?
8.3 What was the amount of the first offer? £
8.3 Did the client refuse any offer against the solicitor's advice? Yes / No
8.4 What was the date of the last payments into court
8.5 What was the amount of the last payment into court £
CASE PROFILING / OUTCOME MEASURES

MATRIMONIAL / FAMILY

Is this a pre-contract or post-contract audit:  pre / post
Solicitor account number: __________
Today's date: ___ / ___ / ___
Legal Aid certificate number: ____________________________________________
Was there a change of solicitor in this case: Yes / No
If yes, how many? _______

1 CASE CATEGORY

1.1 Which proceedings were involved in this case: (tick one box only)

1.1.1 Divorce [ ]
1.1.2 Judicial separation [ ]
1.1.3 Nullity [ ]
1.1.4 Breakdown of cohabitee relationship [ ]

Which of the following issues arose: which issues were contested:

(tick all relevant boxes)

1.2.1 Children - residence [ ] [ ]
1.2.2 Children - contact [ ] [ ]
1.2.3 Children Act s8 Prohibited steps order [ ] [ ]
1.2.4 Children Act s8 Specific issue order [ ] [ ]
1.2.5 Parental Responsibility order [ ] [ ]
1.2.6 Children other [ ] [ ]
1.2.7 Ancillary relief - CSA/lump sum to child(ren) [ ] [ ]
1.2.8 Ancillary relief - periodical payments/lump sum to spouse [ ] [ ]
1.2.9 Property transfer/mortgage [ ] [ ]
1.2.10 Other finance (eg pensions/debts) [ ] [ ]
1.2.11 Domestic violence (injunction/ouster) [ ] [ ]

1.3 If the case went to court, in what court was the final hearing?
(tick one box only)

Family Proceedings / magistrates court [ ]
County court [ ]
High court [ ]
Court of Appeal [ ]
PARTY DETAILS

2.1 Client date of birth: _____ / _____ / _____

2.2 Client gender: male / female

2.3 Was the client petitioner / respondent

2.4 Duration of marriage (years/months) _____ / _____

2.5 Duration of (most recent) separation (if separated) (years/months) _____ / _____

2.6.1 Does the client have any physical or mental disabilities? Yes / No

2.6.2 Does the client have any special language requirements? Yes / No

2.7 Children: number: _____ ages: _____, _____, _____, _____, _____, _____

(State relationship if parents are not birth parents of children)

2.8 With whom do children reside (start of case)?
mother [ ] father [ ] other [ ] specify

2.9 Was the other party legally aided? Yes / No

STAGES

3.1 Date of first instruction _____ / _____ / _____

3.2 Date of first green form work done (if any) _____ / _____ / _____

3.3 Date of certificate _____ / _____ / _____

3.4 Date of first domestic violence incident (relevant to this case) _____ / _____ / _____

3.5 Emergency application sought? Yes / No

3.6 Date of first contact with other side/other side's solicitor _____ / _____ / _____

3.7 Was counsel instructed? Yes / No

If yes, date of first instructions to counsel: _____ / _____ / _____

3.8 Date of first expert report, if any _____ / _____ / _____

Type of report welfare [ ] accountant [ ] other [ ]

3.9 Date of filing of petition _____ / _____ / _____

3.10 Date of acknowledgement of service _____ / _____ / _____

3.11 Date of submission of affidavit _____ / _____ / _____

3.12 Did the lawyer advise the client to settle Yes / No

3.13 Date of pre-trial settlement _____ / _____ / _____

(Complete this where all issues are agreed even if parties go to court for a consent order)

3.14 Date of consent order _____ / _____ / _____
If some, but not all, contested issues were settled before going to court, date of agreement of:

<table>
<thead>
<tr>
<th>Issue</th>
<th>Date of Agreement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Children - residence</td>
<td></td>
</tr>
<tr>
<td>Children - contact</td>
<td></td>
</tr>
<tr>
<td>Children Act s8 Prohibited steps order</td>
<td></td>
</tr>
<tr>
<td>Children Act s8 Specific issue order</td>
<td></td>
</tr>
<tr>
<td>Parental Responsibility order</td>
<td></td>
</tr>
<tr>
<td>Children other</td>
<td></td>
</tr>
<tr>
<td>Ancillary relief - CSA/lump sum to child(ren)</td>
<td></td>
</tr>
<tr>
<td>Ancillary relief - periodical payments/lump sum to spouse</td>
<td></td>
</tr>
<tr>
<td>Property transfer/mortgage</td>
<td></td>
</tr>
<tr>
<td>Other finance (eg pensions/debts)</td>
<td></td>
</tr>
</tbody>
</table>

3.25 Was the lawyer satisfied that the other party has fully disclosed all relevant financial information? Yes / No

3.26 Was a Calderbank offer made? Yes / No

3.27 If yes, by Petitioner / Respondent

3.28 If yes, was it accepted? Yes / No

3.29 Date of first interim hearing                         ____ / ____ / ____

3.30 Date of final hearing                                  ____ / ____ / ____

3.31 Date of last work (prior to bill preparation)          ____ / ____ / ____

3.32 Was Legal Aid withdrawn prior to discharge?            Yes / No

If yes, reason: (tick one box only)

<table>
<thead>
<tr>
<th>Reason</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>3.33.1 Legal aid revoked</td>
<td>[ ]</td>
</tr>
<tr>
<td>3.33.2 No further instructions</td>
<td>[ ]</td>
</tr>
<tr>
<td>3.33.3 Parties reconciled</td>
<td>[ ]</td>
</tr>
<tr>
<td>3.33.4 Other</td>
<td>[ ]</td>
</tr>
</tbody>
</table>

4 COSTS

4.1 Was any green form work undertaken in this case? Yes / No

4.2 If yes, what was its cost? £_______

4.3 Was the Green form extended? Yes / No

4.4 If yes, how many times? ____

4.5 Was any ABWOR work carried out? Yes / No

4.6 If yes, what was its cost? £_______

4.7 Was the client assessed as liable for contributions? Yes / No

4.8 Was the client liable for the statutory charge? Yes / No

4.9 Was the client awarded costs? Yes / No

4.10 Was the client ordered to pay costs? Yes / No

4.11 What was the total profit costs? £_______

4.12 What was the total disbursements? £_______

4.13 What was the total counsel fees? £_______
RESULT

If possible complete the financial details of both parties at the start and at the end of the case. The most important is the client’s income at the start and the end of the case.

<table>
<thead>
<tr>
<th></th>
<th>client start of case</th>
<th>client end of case</th>
<th>other party start of case</th>
<th>other party end of case</th>
</tr>
</thead>
<tbody>
<tr>
<td>5.1 Net Income</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(£ per week)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>incl. benefits</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>5.2 Outgoings</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(£ per week)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>5.3 Capital, Equity</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>in home, pension/savings</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>5.4 Debts:</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>overdraft</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>mortgage</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>loans (£)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

At the end of the case

5.6.1 With whom did the child(ren) reside? mother [ ] father [ ] other [ ]

5.6.2 If contact was specified, was it: supervised [ ] visiting [ ]

5.6.3 Who remained in the family home: mother [ ] father [ ] children [ ]

5.6.4 How was the property disposed (if relevant):

- to be sold and split in the future[ ] sold and split[ ] straight transfer[ ]

5.6.5 child(ren): amount £____ per week

5.6.6 spouse: amount £____ per week

5.6.7 child(ren) total amount £____

5.6.8 spouse total amount £____

5.6.9 If domestic violence was at issue, were undertakings accepted/injunction/ouster granted? Yes / No

5.7.1 Did the parties go back to court for variation/enforcement of any order? Yes / No

5.7.2 If yes, how many times____

5.8 Which of the following issues were agreed/ordered in court

5.8.1 Children - residence [ ]

5.8.2 Children - contact [ ]

5.8.3 Children Act s8 prohibited steps order [ ]

5.8.4 Children Act s8 specific issue order [ ]

5.8.5 Parental responsibility order [ ]

5.8.6 Children other [ ]

5.8.7 Ancillary relief - periodical payments/lump sum to child(ren) [ ]

5.8.8 Ancillary relief - periodical payments/lump sum to spouse [ ]

5.8.9 Property disposal/split [ ]

5.8.10 Other finance (eg pensions/debts) [ ]

5.8.11 Domestic violence (injunction/ouster/undertakings) [ ]