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WILL THE REVOLUTION IN THE FUNDING OF CIVIL LITIGATION IN ENGLAND EVENTUALLY LEAD TO CONTINGENCY FEES?

Michael Zander*

INTRODUCTION

The English system for the funding of civil litigation is in the throes of a revolution. The system, which for centuries prohibited lawyers from taking any form of contingency fee in litigation, has recently accepted that they can contract for payment of fees dependent on the outcome of the case. Will it go further and adopt American-style contingency fees calculated as a percentage of the damages?

II. CHAMPERTY AND MAINTENANCE

From the earliest of times, the English system prohibited maintenance (the funding or other support of another's litigation) and champerty (the taking of a share of the spoils of litigation). Both maintenance and champerty gave rise to criminal and tortious liability. In 1993, Lord Mustill, giving judgment in the House of Lords in Giles v. Thompson stated,

My Lords, the crimes of maintenance and champerty are so old that their origins can no longer be traced, but their importance in medieval times is quite clear. The mechanisms of justice lacked the internal strength to resist the oppression of private individuals through suits fomented and sustained by unscrupulous men of power. Champerty was particularly vicious, since the purchase of a share in litiga-

* Emeritus Professor of Law. London School of Economics and Political Science. Email address: zander@legalmusic.u-net.com. The author is indebted to Professor Garry Watson for his valuable suggestions regarding earlier drafts of this paper.

1. If it is not litigation ("contentious work"), contingency fees are permitted. Contingency fees are, for instance, common in employment tribunal work, which is not regarded as litigation. Contingency fees are also permitted in pre-litigation—defined as being prior to the start of legal proceedings—and in foreign litigation.


tion presented an obvious temptation to the suborning of justices and witnesses and the exploitation of worthless claims, which the defendant lacked the resources and influence to withstand. 4

But gradually over the centuries “the courts became stronger, their mechanisms more consistent and their participants more self-reliant. Abuses could be more easily detected and forestalled, and litigation more easily determined in accordance with the demands of justice without recourse to separate proceedings against those who trafficked in litigation.” 5

In modern times, the prosecution of maintenance and champerty as crimes and torts fell into disuse. In 1966, the Law Commission said, “Maintenance and champerty as crimes are a dead letter in our law” 6 and “the great bulk of the litigation which engages our courts is maintained from the sources of others, including the state, who have no direct interest in its outcome, but who are regarded by society as being fully justified in maintaining it.” 7 It instanced as maintainers of litigation trade unions, trading associations, many friendly and benefit societies, third party liability insurance, and above all, the state funded legal aid scheme. It recommended that criminal and tortious liability for champerty and maintenance be abolished. The Criminal Law Act of 1967 duly achieved this the very next year.

However, in its report, the Law Commission specifically recommended that “champertous agreements (including in this context ‘contingency fee’ agreements) are unlawful as contrary to public policy” and that further study, in consultation with the Law Society, should be given to the question of “contingency fee” arrangements. 8 The Criminal Law Act included a provision drafted by the Law Commission that the abolition of criminal and tortious liability for champerty and maintenance “shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise ille-

5. Id. Jeremy Bentham wrote,
A mischief in those times . . . was that a man would buy a weak claim, in hopes that power might convert it into a strong one, and that the sword of a baron, stalking into court with a rabble of retainers at his heels, might strike terror into the eyes of a judge upon the bench. At present, what cares an English judge for the swords of a hundred barons? Neither fearing nor hoping, hating nor loving, the judge of our days is ready with equal phlegm to administer upon all occasions, that system, whatever it be, of justice or injustice, which the law has put into his hands.
7. Id. at 5, para. 15.
8. Id. at 5, para. 16.
The main consequences were that both branches of the legal profession continued to prohibit contingency fee arrangements and that the courts continued to regard such arrangements as unlawful.

The attitude of the courts at that time was reflected in Lord Denning's dictum in *Wallersteiner v. Moir (No. 2)*.10

English law has never sanctioned an agreement by which a lawyer is remunerated on the basis of a "contingency fee," that is that he gets paid the fee if he wins, but not if he loses. Such an agreement was illegal on the ground that it was the offence of champerty.11

In the earlier case of *Re Trepca Mines Ltd.*,12 Lord Denning explained the public policy behind the rule: "The reason why the common law condemns champerty is because of the abuses to which it may give rise. The common law fears that the champertous maintainer might be tempted, for his own personal gain to inflame the damages, to suppress evidence, or even to suborn witnesses."13

In *Trendtex Trading Corp. v. Crédit Suisse*,14 describing champerty as "a particularly obnoxious form of [maintenance]."15 Lord Denning especially condemned lawyers who charged a fee payable only if the case was won:

> [Champerty] exists when the maintainer seeks to make a profit out of another man's action, by taking the proceeds of it, or part of them, for himself. Modern public policy condemns champerty in a lawyer whenever he seeks to recover not only his proper costs but also a portion of the damages for himself, or when he conducts a case on the basis that he is to be paid if he wins but not if he loses.16

### III. The Move Toward Conditional Fees

For nearly a quarter of a century after the Criminal Law Act, nothing happened to change the direction of events. The only consideration of the matter by the Law Society, the solicitors' governing body, was a memorandum in 1970 in which it confirmed that it remained professional misconduct for a solicitor to enter into a contingency fee arrangement, and the Society agreed that such fees were contrary to public policy.17 The sole area in which it suggested that an exception

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10. 1 All E.R. 849 (1975).
11. Id. at 860.
12. 3 All E.R. 351 (1962).
13. Id. at 355.
14. 3 All E.R. 721 (1980).
15. Id. at 741.
16. Id.
might be made was that of debt collecting. The Solicitors’ Practice Rules at that time stated, “A solicitor who is retained or employed to prosecute any action, suit or other contentious proceeding shall not enter into any arrangement to receive a contingency fee in respect of that proceeding . . . .”

Moreover, the definition of “contingency fee” was not confined to arrangements under which a solicitor took “a share of the spoils.” A “contingency fee” was defined in the Practice Rules as “any sum (whether fixed, or calculated either as a percentage of the proceeds or otherwise howsoever) payable only in the event of success in the prosecution or defence of any action, suit or other contentious proceeding.” The rules, therefore, prohibited any fee arrangements dependent upon the outcome of the proceeding.

In 1979, the Royal Commission on Legal Services unanimously rejected contingency fees as a way of financing litigation on the ground that they would have a corrupting influence on lawyers:

The fact that the lawyer has a direct personal interest in the outcome of the case may lead to undesirable practices including the construction of evidence, the improper coaching of witnesses, the use of professionally partisan expert witnesses, especially medical witnesses, improper examination and cross-examination, groundless legal arguments, designed to lead the courts into error and competitive touting.

The prohibition on contingency arrangements was not always observed. Solicitors, especially in personal injury cases, were known to engage in “speccing”—taking cases on the basis that they would only seek to recover costs from the other side if the case was won and not charge the client if the case was lost. But since it was prohibited, such understandings could not be openly expressed.

In January 1989, the Thatcher Government’s controversial Green Papers reopened the issue. These were proposals for radical reform of the legal profession made by the then Lord Chancellor, Lord Mackay. Broadly stated, their thrust was to dismantle the whole raft of restrictive rules that inhibited free competition.

Current Government policy is, moreover, in favour of deregulation. This entails the removal of restrictions and the consequent widening.

19. Id. at SOLIC. PRACT. R. 18(2)(c).
20. ROYAL COMMISSION ON LEGAL SERVICES, FINAL REPORT, 1979, Cmdn. 7648, at 176.
22. A Green Paper is a government consultation paper.
of choice for those providing a service and for the consumer, unless there are clear public interest reasons to the contrary. The Government also believes that the onus should be on those who want to maintain a restriction to justify it.23

The Green Papers were fiercely resisted by lawyers and judges, and in the end, they were significantly modified in the subsequent White Paper,24 which was implemented by the Courts and Legal Services Act of 1990.25

One of the Green Papers was devoted wholly to the subject of contingency fee arrangements.26 Unlike the other two, this Green Paper did not in fact put forward firm proposals, but it did suggest that it was time “to consider at least some relaxation of existing restrictions.”27 Having canvassed arguments for and against the introduction of contingency fees, it considered a number of possible options. The first, and least problematic, was to adopt the Scottish system known as “speculative fees,” under which the solicitor agreed that he would only be paid if he won the case and then only such “taxed” costs as he could recover from the losing litigant. No substantial argument existed against this system other than that it appeared, unsurprisingly, that Scottish lawyers rarely made such agreements! A second option was to encourage lawyers to take such cases by giving them a sweetener in the form of something on top to reflect the speculative nature of the agreement and to reward the lawyer for the risk taken. It would not have to be a percentage of the damages; rather, it could be a percentage of the taxed costs.28 The third option was to allow contingency fees in the American sense, but to control the percentage of damages that could be taken by the lawyers (which it called “restricted contingency fees”). The fourth option was to allow contingency fees as a percentage of the damages without any restriction—though it advised “that this would not be in the public interest.”29 The Government indicated that its preferred option was the second:


26. See Contingency Fees, supra note 23.

27. Id. at para. 5.1.

28. Ironically, in view of subsequent developments, the Green Paper said, “This approach might... minimise the risk of the additional ‘speculative’ element being passed onto the unsuccessful defendant.” Id. at para. 4.5. See also infra notes 57-69 and accompanying text.

The Government believes that it is appropriate to consider the introduction in England and Wales of speculative actions on the Scottish model. It is for consideration also whether this should be coupled with the ability to agree an uplift in the costs, payable to the lawyer in the event of success . . . . This would be a small, prescribed percentage of the costs, which was unrelated to the amount of the damages or property recovered in the action.30

The Bar strongly condemned the whole idea, primarily on ethical grounds.31 The Law Society, while equally opposed to contingency fees on ethical grounds, supported the second option of the speculative fee, plus a percentage uplift of costs, by way of success fee.32 Six months later, in July 1989, the Government's White Paper stated that the consultation had resulted in a clear consensus in favor of that option.33

Section 58 of the Courts and Legal Services Act of 1990 gave effect to this by legitimizing “conditional fee agreements” (CFAs)—the new style preferred over the more rakish Scottish term “speculative fees.”34 The method adopted was somewhat oblique. Subsection (3) provided that a conditional fee agreement “shall not be unenforceable by reason only of its being a conditional agreement.”35 The effect of this provision was to preserve the solicitor’s rights against his client, even though the agreement was still both maintenance and champer-tous, and to preserve the client’s right to recover costs from the other side.36

The Act provided that the maximum permissible level of the uplift or success fee would be set by delegated legislation. The English feeshifting rule that the loser pays most of the costs of the winner (lawyer’s fees and disbursements) was not affected by the introduction of conditional fees.

In the event, it took no less than five years before the new system came into effect. The Lord Chancellor’s Department’s Consultation Paper suggested that, at least in the first instance, the success fee

30. Id. at para. 5.3.
33. Legal Services, supra note 24, at 41.
34. Courts and Legal Services Act, 1990, § 58 (Eng.).
35. Id. § 58(3).
36. The fact that a conditional fee agreement remains maintenance can have serious consequences for the lawyer whose client loses the case, is uninsured against the loss, and cannot pay the winner’s costs. The lawyers could then be liable to the successful litigant for his costs. See infra note 128 and accompanying text.
should be restricted to 10% of the initial fees. The Law Society responded by stating that it hoped the maximum success fee would be raised to 20%, though there could be an argument for it to be as high as 100%—on the basis that this would enable a lawyer to break even if only half the cases taken on a conditional fee basis were successful. Since conditional fees would be used principally in personal injury cases, the overwhelming majority of which result in settlement plus a payment of agreed costs, this was an implausible argument. But the Lord Chancellor's Department, which agreed that lawyers could charge "uplift" by way of success fees of up to 100% of the fees, accepted it. So what had initially been a proposal to allow a modest charge to the client of 10-20% was changed at the last moment to the very different proposition that in the event of winning the case the lawyer might receive double his fee.

The success fee is a percentage of the solicitor's base costs. Disbursements are separate. It should be noted that while the basic fees cover overhead as well as profit, the success fee is all profit. For example, if in the ordinary case profit represents say, roughly one-third of the gross, a success fee of 100% on fees of £1000 would add another £1000 to the profit of £300, making a total profit of £1300. A success fee of 25% would add £250 making £550. However, from the solicitors' point of view, those extra profits have to cover the cases that are lost where the lawyer is paid nothing. This is especially an issue for firms that specialize in smaller numbers of difficult, large cases that may not have the "critical mass" of large numbers of routine, straightforward cases.

The Regulations do not specifically require the lawyer to fix the percentage increase of the success fee solely by reference to the risk of losing the case. They only state that if a Conditional Fee Agreement provides for a success fee, it must briefly set out the reasons for setting the percentage increase at the stated level and must specify how much of the percentage increase is attributable to the cost of the lawyer ad-

38. Id.
39. Id.
40. Id.
41. For a spectacular example of a heavy loss in one major case, see Susie Steiner, Tobacco Firms Avoid Cancer Court Battle, Times (London), Feb. 27, 1999, at 5; Jon Robins, Solicitor Calls For Fresh Group On Assault On Tobacco Industry, Law Soc'y Gazette, Mar. 3, 1999, at 5 (reporting that the two firms acting on CFAs against tobacco companies had abandoned the case at a cost to one of the firms alone of some £2.5m).
vancing the money to the client.\textsuperscript{42} Plainly stated, the client is not an effective check on a solicitor's natural tendency to exaggerate the risks involved in the case and to inflate the percentage success fee.\textsuperscript{43} Insofar as the solicitor fixes the success fee by reference to the risks of that case, how could the client know whether the solicitor's assessment of the risk of not winning is reasonable? Insofar as the lawyer includes the risk of losing other cases, the client is in an even more hopeless position to evaluate it. Moreover, we know from research that clients generally do not "shop-around" when choosing a solicitor and that is also so when choosing between providers of CFAs.\textsuperscript{44} A client always has the right to challenge his own solicitor's bill at the end of the case—but it is hardly ever done.

Significant pressure from the client to keep success fees at a reasonable level was never likely to develop. Indeed as will be seen below, since the success fee is now recoverable from the losing litigant, the client no longer has any real interest in the matter. On the other hand, the losing litigant does have such an interest, and such challenges in litigated cases are common. Cases that settle do so usually on the basis of an agreement as to damages and costs, although there can now be a court challenge on costs only.\textsuperscript{45} In deciding whether the percentage increase is reasonable, one factor the court may take into account is the risk that the case would not be won, which is judged at the time of entering the CFA. The Law Society, in its guidance to solicitors on CFAs, makes it clear, however, that although on assessment of a solicitor's bill the risk to be taken into account includes the risk of losing that case, other factors are also legitimate: \textquote[46]{Solicitors may well not wish to apply the same uplift to all cases, or to all elements within an individual case . . . .} In considering what uplift to stipulate in any particular case, solicitors will wish to take into account the degree of risk of the case being lost and the cost of funding the litigation over a period of time.\textquote[47]{Id.}

\textsuperscript{42} Conditional Fee Agreements Regulations (2000) SI 2000/692. The cost of borrowing is not recoverable from the loser. \textit{See CIV. PROC. R. 44.3B(1)(a) (Eng.).}

\textsuperscript{43} This was confirmed by empirical research on success fees. \textit{See infra} notes 115-125 and accompanying text. \textit{See also} Michael Zander, \textit{Well, Anyway, Conditional Fees should be a Bonanza for Lawyers}, 145 NEW L.J. 920 (1995).


\textsuperscript{45} \textit{CIV. PROC. R. 44.12A (Eng.). For a case in point, see the discussion of Sarwar v. Alam, infra} notes 152-157 and accompanying text.

\textsuperscript{46} \textit{Guide to Professional Conduct, supra} note 18, at 306.

\textsuperscript{47} Id.
The new system came into operation in 1995 subject to rules laid down by delegated legislation and guidance from the Law Society that solicitors should not in any event take a success fee that amounted to more than 25% of the damages, though calculated as a percentage of fees. Insofar as this 25% cap applied, it could be seen as a kind of indirect American-style contingency fee. The Law Society also issued a model agreement.

Barristers are free to enter CFAs; though, for a variety of reasons, this method of funding is apt to be less attractive to them than to solicitors. Barristers cannot form partnerships and therefore cannot share the risks with colleagues. Also, it is the solicitor, not the barrister who has day-to-day contact with the case from start to finish.

IV. THE DEVELOPMENT OF A NEW INSURANCE PRODUCT—AFTER-THE-EVENT INSURANCE

Legal expenses insurance has been known in England since the 1970s mainly in the context of householder’s insurance and motoring. The industry has not been very successful in selling general “stand alone” legal expenses policies. In recent years, Before-the-Event (BTE) insurance policies, covering a range of legal problems, were increasingly offered for a very modest premium as an “add on” to householder’s insurance or motoring policies. Typically such policies cover lawyers’ fees, court costs, costs of witnesses and experts, plus costs of the opponent if the insured is ordered to pay them. Normally,


49. Subsequent research showed that this guidance was honored by solicitors in the observance. See STELLA YARROW, THE PRICE OF SUCCESS: LAWYERS. CLIENTS AND CONDITIONAL FEES 63 (1997).

50. Some firms charged an automatic 100% success fee and applied the 25% cap on damages. This policy is associated especially with the name of Kerry Underwood, a leading practitioner and author in the field. See KERRY UNDERWOOD, NO WIN, NO FEES, NO WORRIES (1999). It has not yet been determined whether such a blanket policy is lawful. It has also not yet been determined by the courts whether the success fee must be calculated as a percentage of the “party and party” costs, namely those that can be recovered from the opponent, or of the higher “solicitor and own client” costs. But since, as will be seen, success fees are now recoverable from the loser, the point is somewhat academic since the success fee is applied to the between-the-parties costs that are allowed. See COOK, supra note 21, at 471-72.


53. These premiums may cost as little as £12-£15.
there is a maximum (of the order of £25,000-£50,000) per claim. The policy may cover all members of the family.\textsuperscript{54} In addition, the insured can choose his own lawyer if legal proceedings are instituted.\textsuperscript{55}

But the introduction of CFAs transformed the insurance situation in that they led to the development of After-the-Event (ATE) policies. Typically, such policies are taken out by the claimant to cover the opponent’s legal fees and disbursements and the client’s own disbursements. The client’s lawyer’s fees are usually not covered since the lawyer will be acting on a no-win, no-fee CFA. In non-CFA cases, such policies can also support both sides’ cost insurance, which is attractive to risk adverse solicitors who thereby transfer the risk to their clients or the insurer.

There are a variety of ways in which the funding for payment of the premium is handled—the client initially pays it, the lawyers finance it, or some form of a loan arranged by the lawyers, funds the payment. There are even policies where the premium does not become payable until the end of the case, known in the trade as “the magic bullet.”

Premiums for ATE insurance have since risen sharply, but even from the outset they were sufficiently high for there to be great concern that they would inhibit the take-up of CFAs.\textsuperscript{56} The Lord Chancellor, Lord Irvine, produced an unexpected solution to this problem—one fraught with enormous consequences. Building on the traditional English fee-shifting rule that the loser pays most of the costs of the winner, a Consultation Paper invited views as to whether the winning claimant should be able to recover both the insurance premium and the success fee from the losing litigant.\textsuperscript{57} The reason, it said, was that both types of costs were incurred directly because the loser had put the successful party to the cost of taking proceedings, and they should therefore be recoverable in the same way as other costs.\textsuperscript{58} It said that the Government was, on the whole, ready-minded to make these changes but wanted to find out if they would be welcomed.\textsuperscript{59}


\textsuperscript{55} This is required under an EEC Directive. \textit{See infra} note 154.

\textsuperscript{56} In 1995, a client pursuing a high value claim for personal injuries caused by an industrial disease could have purchased an Accident Line Protect policy for £85. Four years later it cost over £3000. \textit{See} Conditional Fees-A Survival Guide, \textit{supra} note 48, at 136.

\textsuperscript{57} Lord Chancellor’s Department, Access to Justice with Conditional Fees: A Consultation Paper, paras. 2.13-2.22 (1998) [hereinafter Access to Justice with Conditional Fees].

\textsuperscript{58} \textit{Id.} at para. 2.14.

\textsuperscript{59} \textit{Id.} at para. 2.17.
Not surprisingly, the insurance industry was strongly opposed to the recoverability of insurance premiums and success fees. The Legal Aid Board said that making insurance premiums recoverable had the disadvantage that defendants with the strongest case would end up paying the highest amount, as the success fee would be highest in such cases. It warned that if success fees were recoverable, solicitors would have an incentive to charge an excessive uplift. There would be no reason to retain the 25% cap on the amount taken from the damages by way of the success fee, which would have the effect of generating "lawyer-driven litigation" as lawyers would have an incentive to pursue claims regardless of whether the damages claimed were small. The Bar and Law Society, predictably, agreed with the proposal that insurance premiums and success fees should be recoverable from the losing party. The Legal Action Group, a lobbying organization concerned with legal services for the poor, also agreed but, argued that the 25% cap on damages should be retained to prevent solicitors and their clients from agreeing on unreasonably high success fees.

V. THE FURTHER REFORMS OF 1998-2000

Conditional fee agreements were initially restricted to three categories of cases—personal injury, insolvency, and cases brought under the European Convention on Human Rights. In practice, almost all CFAs were in personal injury cases.

In October 1997, Lord Irvine, Lord Chancellor in the then-new Labour Government, caused consternation in the legal world by announcing that legal aid for the indigent would be abolished for all damages and money claims on the ground that they could be financed through CFAs. A few months later, in March 1998, he published a Consultation Paper, which stated that the Government intended to extend CFAs to all proceedings other than family and criminal cases.

In July 1998, the Government extended CFAs to all civil cases, save family work. The Access to Justice Act of 1999 further extended...
CFAs to cover family work relating solely to financial matters and property—though all cases involving issues about the welfare of children as well as criminal work remained outside the scope of CFAs. The 1999 Act also extended CFAs to proceedings other than court proceedings, such as arbitrations. More importantly, it also made both a premium paid for an insurance policy against the risk of having to pay costs and a success fee paid by the client recoverable from the losing defendant. The Explanatory Notes accompanying the 1999 Act stated that the intention was to ensure that the compensation awarded to a successful party is not eroded by any uplift or premium—the party in the wrong will bear the full burden of costs; make conditional fees more attractive, in particular to defendants and to plaintiffs seeking non-monetary redress; these litigants can rarely use conditional fees now, because they cannot rely on the prospect of recovering damages to meet the cost of the uplift and premium; discourage weak cases and encourage settlements; and provide a mechanism for regulating the uplifts that solicitors charge—in future unsuccessful litigants will be able to challenge unreasonably high uplifts when the court comes to assess costs.

The Government consulted regarding the details of implementing the changes envisaged by the 1999 Act. The new rules came into effect as of April 1, 2000. Equivalent rules for standard fee retainers known as “collective CFAs,” designed for mass providers and purchasers of legal services, such as trade unions, insurers, or commercial organizations, which were based on separate consultation, came into force in September 2000.

66. Id. Section 27 inserted a new section (58A) into the Courts and Legal Services Act of 1990. See id. § 58A(4) (applying CFAs to “any sort of proceedings for resolving disputes (and not just proceedings in a court) whether commenced or contemplated”).
67. Id. § 29.
68. Id. § 27.
69. Id. at para. 32.
70. See Lord Chancellor’s Department Consultation Paper, Conditional Fees: Sharing the Risks of Litigation (1999); Lord Chancellor’s Department, The Government’s Conclusions Following Consultation on Conditional Fees: Sharing the Costs of Litigation (2000).
72. See Collective Conditional Fee Agreements Regulations (2000) S.I. 2000/2988. For the background, see Lord Chancellor’s Department Consultation Paper, Collective Conditional Fees (2000); Lord Chancellor’s Department, Collective Conditional Fees-
The effect of the abolition of legal aid for most personal injury cases was to eliminate the cost to the taxpayer. But that saving to the public purse was not very great since most of the costs involved in such cases had always been recovered by the legal aid fund from insurers for losing litigants. The effect of introducing CFAs was to put the risk of losing on the claimant, which resulted in the development of ATE insurance policies. The effect of making success fees on CFAs and ATE insurance premiums recoverable from losing litigants was to make CFAs infinitely more attractive to claimants, to their lawyers, to trade unions, and to other group funders of litigation. As a result, CFAs have now become the standard way of funding litigation. By the same token, there has been a significant increase in the overall cost of handling these cases to insurers. This has led to the development of a new industry of "costs negotiators." They are hired by insurance companies and are paid on a contingency basis by a percentage of how much they reduce costs. The predictable result of the rising costs is that a relatively modest benefit to the public purse will in the end be paid for in increased insurance premiums.

VI. COULD THE COMMON LAW ACCOMMODATE CONDITIONAL FEES?

Over the past decade, the courts have been wrestling with the problem of whether event triggered fees could be integrated into the common law. First, indications were that this was not possible. Then, the judges seemed prepared to take it on. But lately, the judges have decided that fees triggered by the event can only be countenanced to the extent that they are directly authorized by statute.

The issue first came up in British Waterways Board v. Norman. Knowing that their client was impecunious, her solicitors advised Ms. Norman to bring a private prosecution against the Waterways Board on the understanding that, if the prosecution failed, they would not be paid the costs they incurred. The court held that the costs could be recovered under the statute which authorized the prosecution. The court then decided that events that can be anticipated at the outset of litigation cannot be the basis for calculating fees in the same way that events that can only be predicted in the course of litigation can.

73. See Stephen Ward, It's the Muppet Show, 17 Litig. Funding 10 (2002), which suggests that sometimes there is collusion between the negotiator and the claimant solicitor: "Okay, your file is worth three grand, put it in at five, we'll knock you down to three and a half, and we'll get 15% commission on the £1500 which the insurance company thinks it has saved." Id. See also Stephen Ward, The Tactical Game of Negotiation, 17 Litig. Funding 12 (2002).

74. An insurer stated: "It depends on who you speak to, but the belief is that the implementation of CFAs will cost something between £300 and £500 million per annum, to replace legal aid that cost £50 million per annum." T. Gorilely et al., More Civil Justice? The Impact of the Woolf Report on Pre-Action Behaviour 29 (2002).

look to her for payment of their fees.\textsuperscript{76} The prosecution succeeded, and the Board was ordered to pay the costs.\textsuperscript{77} It objected on the ground that since Ms. Norman did not have to pay costs if she lost, under the indemnity principle, the Board could not be liable for her costs.\textsuperscript{78}

The Divisional Court reluctantly accepted that argument. Lord Justice McCowan explained the rationale as follows: "To put it in a nutshell, once a lawyer has a personal interest in litigation, his or her objectivity may be affected."\textsuperscript{79} Mr. Justice Tuckey said that if the solicitors and client had an agreement that she would pay their fees, and if they had then not collected the fee, there would not have been a problem.\textsuperscript{80} The problem was that the agreement provided that she would not have to pay their fees.\textsuperscript{81} He accepted that the court's decision was most unsatisfactory, it elevated form over substance and invited solicitors to produce documents evidencing an agreement that both parties knew would not be enforced.\textsuperscript{82} The need for solicitors to engage in a subterfuge of such a kind in order to recover their costs, the judge said, showed that the underlying reasoning was unsound.\textsuperscript{83}

The unsatisfactory nature of the common law approach to these problems was further illustrated in \textit{Aratra Potato Co. Ltd. v. Taylor Joynson Garrett}.\textsuperscript{84} The claimants engaged the defendant solicitors on a general retainer, which provided that there should be a 20\% reduction from the solicitor/client costs for any lost cases. The High Court judge held that it was champertous and contrary to public policy for solicitors to agree to a differential fee dependent on the outcome of litigation, that the entire retainer was unlawful, and that, as a result, the solicitors could not recover their outstanding fees for work done—irrespective of the outcome of the cases and with or without the reduction. The fact that the solicitors were seeking to recover no more (and in respect of lost cases less) than their ordinary costs made no difference.\textsuperscript{85} Commenting in the later case of \textit{Thai Trading Co. v. Tay-
lor,86 Lord Justice Millett said, “If this is the law then something has gone badly wrong. It is time to step back and consider the matter afresh in the light of modern conditions.”87

In *Thai Trading*, the defendant had employed a solicitor (her husband) to act for her on the basis that she would not pay anything in respect of his fees if she lost. She won the case and, just as in *British Waterways*, the losing litigant objected to having to pay her fees since she had been under no liability to pay them if the case was lost. The Court of Appeal unanimously rejected this argument.

Giving the judgment of the Court, Lord Justice Millett advanced three preliminary propositions. First, if it was against public policy for a lawyer to have a financial interest in the outcome of litigation, it was because of the temptations to which that might expose him. At best he might lose his objectivity; at worst he might be tempted to pervert the course of justice in order to win the case. Second, it was not contrary to public policy for a lawyer to agree to act for an impecunious, but meritorious client who to his knowledge could not pay his costs if the case was lost. On the contrary, “it is in accordance with current notions of the public interest that he should do so.”88 Third, if there was temptation to win at all costs, it was present whether or not there was a formal waiver of fees. It arose from the knowledge that the lawyer would not get paid if the case was lost. The court reached the view that it was not contrary to public policy for a lawyer to agree that he was to be paid his normal costs if he wins but not if he loses. If the agreement was that he should recover more than his normal fee, that might make the whole contract unlawful and the whole fee therefore irrecoverable. But where the agreement was to pay the full fee, the unlawfulness, if there was any, was in the waiver or reduction of fees. On ordinary principles, the result of holding that to be unlawful was that the client was liable for the lawyer’s fees even if he lost the case. *Aratra Potato* had therefore been wrongly decided.89

It was fanciful, Lord Justice Millet said, to suppose that a solicitor would be tempted to compromise his professional integrity because he would be unable to recover his ordinary costs if the case was lost. “Solicitors are accustomed to withstand far greater incentives to impropriety than this.”90 The Courts and Legal Services Act of 1990 permitted lawyers to charge on a “no win, no fee basis.” This showed

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86. 3 All E.R. 65 (1998).
87. *Id.* at 72, para. 28.
88. *Id.* at 72.
89. See *supra* notes 84-85 and accompanying text.
90. *Thai Trading*, 3 All E.R. at 73, para. 31.
the fear that lawyers might be tempted to act improperly by reason of having a financial interest in the outcome of the case was exaggerated, and there was a countervailing public policy in making justice readily accessible to persons of modest means. Legislation was needed to authorize the increase in the lawyer's reward over and above his ordinary costs. But it was not needed to legitimize the long-standing practice of solicitors to act for meritorious clients without means.

This decision was given in February 1998 and leave to appeal to the House was refused. A few weeks later in April 1998, Vice Chancellor, Sir Richard Scott, decided Bevan Ashford v. Yeandle Ltd. The solicitors of the defendant company had an agreement with the liquidator that if the case was lost, they would be paid nothing other than their disbursements, whereas if the arbitration was won, they would get their normal fees. The barrister in the case had an agreement that if the arbitration was lost he would get nothing, but if it was won, he would get a success fee of 50%. The Vice Chancellor held that the law of champerty caught such contingency arrangements but that the bedrock of champerty was public policy and "notions of public policy change with the passage of time." The Court of Appeal's decision in Thai Trading had showed that a simple "no win, no fee" agreement with no provision for uplift was lawful and not champertous. But that did not dispose of the question raised by the barrister's 50% success fee if the arbitration was won. Sir Richard Scott held that the Court of Appeal's decision in Thai Trading and Section 58 of the Courts and Legal Services Act establishing the new system of conditional fees showed that public policy on contingent fees had changed. The two agreements in question in his case were therefore not unenforceable on the ground that they were champertous or otherwise illegal.

It seemed that the common law had changed. On July 4, 1998, the Bar Council altered its Code of Conduct to reflect the Thai Trading and Bevan Ashford decisions. The new rule stated that a barrister may charge "on any basis or by any method he thinks fit provided that such basis or method is: (a) permitted by law; and (b) does not involve the payment of a wage or salary." The Bar Council resolved, however, that "[i]t is inappropriate for a barrister acting in a criminal or

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91. The Vice Chancellor is the presiding judge in the Chancery Division of the High Court. The judge is now Lord Scott of Foscote, one of the law lords in the House of Lords.
93. Id. at 247.
public law child case to accept a fee which is dependent upon the outcome. The Guidance issued by the Bar Council to accompany the changed rule stated that it would permit at least the following arrangements: (a) "no win, no fee"—where the barrister agreed to forego the whole of his fee if the case is lost; (b) "no win, reduced fee"—counsel forfeits part of his fee if the case is lost; and (c) some conditional fee agreements outside the statutory scheme. But it did not permit contingency fee arrangements where the barrister took a percentage of the damages.

The Law Society also changed its rules. New Practice Rule 8(1), adopted in February 1999, stated that a solicitor may not enter into a contingency fee arrangement "save one permitted under statute or by the common law"—begging the question of what was permitted by the common law.

In the meanwhile, in November 1998, the Divisional Court had taken a step backwards in deciding Hughes v. Kingston Upon Hull City Council. The claimant took proceedings against his landlord, the local council, on account of damp premises. He signed a retainer with the solicitors acting for him that stated what would happen in respect of costs if he won but which said nothing as to what would happen if he lost. By the date of the hearing, the work had been done and the proceedings were withdrawn. The appellant's claim for costs was rejected on the ground that the arrangement was contrary to the Law Society's Practice Rules that forbade contingency fees. The court was referred to the then recent decision of the Court of Appeal in Thai Trading, which would normally have been binding. But the Divisional Court said that it was not bound by the decision, because in Thai Trading the judges had not been referred to the decision of the House of Lords in Swain v. Law Society, in which the House of Lords held that the Law Society's Practice Rules had the force of law. The Divisional Court did not address any of the public policy questions, but decided the case solely on the basis of the Practice Rules.

In November 1999, the issue was yet again before the Court of Appeal in Awwad v. Geraghty & Co. In 1993 (before CFAs were permitted), the solicitors agreed to act for the claimant in libel...
proceedings on the basis of normal full rate fees if he won but a lower rate if he lost.103 The case was withdrawn after the claimant accepted a settlement offer. The solicitor sent in a bill at the lower rate. The claimant refused to pay and initiated the taxation process whereby the court vets a lawyer's bill. At first instance, the judge held that the agreement was unlawful and unenforceable so that the firm was not entitled to recover any costs. The firm appealed, arguing that common law did not make the fees irrecoverable, or alternatively, that if the agreement was unenforceable, they were entitled to remuneration on a quantum meruit basis.

The Court of Appeal unanimously dismissed the firm's appeal.104 Rejecting the approach adopted by Sir Richard Scott in Bevan Ashford, the court concluded that it was against public policy for a solicitor to act for a client under a contingency arrangement, even one only specifying a normal fee, save in circumstances sanctioned by statute. The courts would not enforce such an agreement and where public policy refused enforcement, there could be no quantum meruit claim. Lord Justice Schieman, giving the leading judgment, admitted that there were many substantial arguments that favored the enforceability of conditional normal fee agreements. Such an agreement was of advantage to the client. It did not increase the liability costs of the losing party. It did not involve any division of the spoils as a contingency fee agreement did. There was therefore no extra incentive for the lawyer to stir up litigation. The temptation for the lawyer to act improperly was less than where there was a contingent fee arrangement or one where the lawyer got a success fee on winning. There was nothing improper in a lawyer agreeing to act for his normal fees but having in mind—for reasons of friendship or in order to foster future work—not to exact the fee if the client lost. Why should reducing that thought into a contractual statement render the agreement unenforceable? Conditional fee agreements promoted access to justice for members of the public.

What principally seemed to influence Lord Justice Schieman, however, was the fact that Parliament had recently addressed these issues first in the Courts and Legal Services Act of 1990 and more recently, as has been seen, in the Access to Justice Act of 1999. "It is clear from the careful formulation of the statutes and regulations that Parliament did not wish to abandon regulation altogether and wished to move

103. This is called a "conditional normal fee agreement," as distinct from one carrying a success fee.
104. The two judgments run to some twenty-five pages in the law report!
forward gradually. I see no reason to suppose that Parliament fore-saw significant parallel judicial developments of the law.”

Lord Justice May, concurring, said that the arrangement between the solicitor and the client for a lower fee rate if the case was lost was a contingency fee within the definition of rule 18(2) of the Solicitors’ Practice Rules. Contingency fees were unlawful unless permitted by legislation. He accepted the general thesis in Lord Justice Millett’s judgment in Thai Trading that modern perception of what kinds of lawyer’s fees arrangements were acceptable was changing. But the subject was one on which there were sharply divergent opinions. “I should hesitate to suppose that my opinion, or that of any individual judge, could readily or convincingly be regarded as representing a consensus sufficient to sustain a public policy.”

In the 1990 and 1999 Acts there had been statutory modification of the rules regarding contingency fees.

In my judgment, where Parliament has by . . . successive enactments, modified the law by which any arrangement to receive a contingency fee was impermissible, there is no present room for the court, by an application of what is perceived to be public policy, to go beyond that which Parliament has provided.

Permission to appeal to the House of Lords was given, but in the event no appeal was made.

The CFA provisions in the Access to Justice Act of 1999 were specifically designed to legitimate the kind of arrangements that were approved in Thai Trading and Bevan Ashford and that were held to be unlawful in Geraghty. Currently, the definition of “conditional fee agreement” is “an agreement with a person providing advocacy or litigation services which provides for his fees and expenses, or any part of them, to be payable only in specified circumstances.” Confusingly, the term “conditional fee agreements” therefore applies: (1) to CFAs providing for success fees; (2) to CFAs with only normal fees; and (3) to CFAs providing for no fees or reduced fees.

The present state-of-play is that although legislation has legitimated conditional fee agreements, the judges are unwilling to extend the

105. Awwad, 1 All E.R. at 628.
106. See supra notes 18-19 and accompanying text.
107. Awwad, 1 All E.R. at 634.
108. Id.
109. The Explanatory Notes state as to section 27, “This section replaces the existing section 58 of the Courts and Legal Services Act 1990 with two new sections: section 58 and 58A. New section 58 takes into statute law the decisions in the Thai Trading and Bevan Ashford cases.” Access to Justice Act, 1999, c. 27, para. 132 (Eng.) (explanatory notes).
110. Courts and Legal Services Act, 1990. § 27(1) (Eng.).
concept further or to validate any other form of event triggered funding for lawyers. The courts will continue to clarify the existing regulations but decisions such as Awwad appear to indicate that they will not approve forms of funding triggered by the outcome of the case other than those covered by statute. And most assuredly, it seems clear that the courts will not approve agreements between the lawyer and the client under which the lawyer would “share in the spoils” by taking a fee calculated as a percentage of the damages.

VII. WHAT RESEARCH ON CFAs SHOWS

The first published research on CFAs conducted before many of the cases had been completed showed that the average level of uplift agreed between lawyer and client was 43%. The voluntary cap on the success fee as a percentage (25%) of the damages had become standard, but the Law Society removed this cap after the success fee and insurance premium became recoverable from the loser. Finally, there was serious cause for concern as to the accuracy of risk assessment by solicitors’ firms. The uplift appeared to be “too low or

111. Cf. R. (Factortame Ltd.) v. Sec. of State for Transport, Local Government and the Regions (No. 8) [2002] EWCA Civ. 932, No. 2001/2536, July 3, 2002 (where the Court of Appeal upheld a contingency fee for a firm of accountants who assisted the lawyers, to be paid out of enormous damages recovered in the litigation). The Ontario courts have recently shown themselves to be considerably more courageous. In McIntyre Estate v. Ontario, [2002] O.J. No. 3417, docket No. 36074, Sept. 10, 2002, the Ontario Court of Appeal unanimously held that the 1897 Champerty Act providing that “[a]ll champertous agreements are forbidden” did not necessarily bar all contingency fee arrangements. Id. para. 16. Everything, it said, depended on whether the lawyers had an improper motive in entering the arrangement, and in considering this, one of the factors to be taken into account was the reasonableness and fairness of the fee structure in the contingency fee agreement. The court said that contingency fees were now regarded as one way of coping with the problem of access to justice: “the common law regarding contingency fee agreements has begun to evolve so as to conform to the widely accepted modern public policy norms.” Id. para. 65. Moreover, the court rejected the Attorney General’s argument that legalisation of contingency fees should be left to the legislature: “[w]hilst it is clearly open to the legislature to reform the law of champerty as it relates to contingency fee arrangements, I am satisfied that it is also appropriate for the courts to address this issue as part of their function in developing the common law.” Id. In the later decision of Raphael Partners v. Lam, [2002] O.J. No. 3605, Docket No. C36894, Sept. 24, 2002, the Ontario Court of Appeal upheld as reasonable and enforceable a contingency fee of 15% of the first $1 million recovered and 1% of each additional $1 million recovered – plus any costs paid by the defendant. The total recovery there was $2.75 million.

112. Yarrow, supra note 49. The study was based on a sample of two hundred CFA personal injury cases undertaken by 121 firms, all of which were personal injury specialists. For comment at the time, see Michael Zander, Two Cheers for Conditional Fees – Maybe, 147 New L.J. 1438 (1997).

113. Yarrow, supra note 49. This figure was later adjusted to 41% in relation to the cases in the sample for which outcomes information became available.

114. Id. at 31.
(more often) too high, in almost half the cases than would be justified to compensate the solicitor for losing the case.”

Subsequent research conducted after CFA cases had been completed showed that the vast majority of completed CFA cases (93%) were successful in the sense either of achieving a settlement or a judgment wholly or partly in favor of the client. This was in contrast to the pessimism about the likely success rate shown by solicitors in the earlier study. Thus, “a 41% average success fee would be appropriate to a case with a 70% chance of success, whereas in fact 93% of cases succeeded. The success fee appropriate to a case with a 93% chance of success would be only 8%.” The success fees written into the CFA “were higher than would have reflected the actual, very low, risk of losing.” The mean success fee actually taken by solicitors (29% of costs) was lower than the mean success fee agreed in the CFA (43% of costs). In some cases, the reason may have been that the amount taken was affected by the then existing voluntary 25% cap on the percentage of the damages that should be taken. In a few cases, the reason may have been that the solicitor shared the success fee with the barrister. In some cases, the reason was that the solicitors did not take the full success fee to which they were entitled. Nevertheless, “[d]espite this reduction, the mean success fee taken was still higher than the very high success rates would suggest were appropriate.”

The author concluded:

There is an intrinsic conflict of interest in the method of calculating the success fee. It is in the solicitor’s interest to over-estimate the risk of the case to justify a higher success fee. The study of clients in CFA cases showed that they did not understand CFAs sufficiently to identify this conflict. The regulation of the scheme did not adequately ensure that solicitors related the success fee to the risk in the case. Regulation hinged on the right of clients to request taxation (now called “assessment”) of the success fee by the courts but

115. Id. at xviii.

116. Stella Yarrow, Just Rewards? The Outcome of Conditional Fee Cases (2000) [hereinafter Just Rewards?]. The study was based on a sample of 197 cases supplied by a representative sample of fifty-eight solicitors’ firms specializing in personal injury work. The research consisted of interviews with lawyers in sixteen of the fifty-eight firms and details of just over half of the 197 cases (56%) that were completed. Fieldwork ended in March 2000. Id.

117. Id. at 31.

118. Id. at 7.

119. Id.

120. Id.

121. Yarrow, supra note 116, at 7-8.

122. Id. at 8.

123. Id.
in practice this did not happen. Competition was insufficiently strong to influence success fees.\textsuperscript{124}

VIII. Response of the Insurance Industry

As has been seen, the introduction of CFAs immediately stimulated the development of new insurance products to cover the costs, and when insurance premiums became recoverable this development became an explosion.\textsuperscript{125} There are now said to be some sixty providers of ATE insurance in the United Kingdom, all offering a great variety of packages.\textsuperscript{126} These policies are now of great importance. But the premiums for some kinds of cases, such as clinical negligence claims, are prohibitively high.\textsuperscript{127} If finance to pay the premium is not available, the solicitors may decide they cannot take the risk of acting.\textsuperscript{128}

The introduction of CFAs also resulted in the development of "claims management companies," new enterprises run by non-lawyers\textsuperscript{129} offering various forms of "no win, no fee" deals through mass marketing on television\textsuperscript{130} and the press. These companies solicit claims \textit{en masse} and then, typically, farm them out to solicitors on their panel for a referral fee.\textsuperscript{131} The solicitors take the cases not on the basis of conditional fees, but of usual costs often covered by "both sides insurance" under which the lawyers get paid win or lose.\textsuperscript{132} The premium for the insurance in the individual case is notionally paid by

\textsuperscript{124} Id. at 7.


\textsuperscript{126} For details of the policies of some eighteen different companies offered to solicitors, see \textit{Conditional Fees - A SURVIVAL GUIDE}, supra note 48 (explaining ATE insurance in Chapter 7). \textit{See also} Master O'Hare's lengthy and informative report to the Court of Appeal appended to its decision in \textit{Callery v. Gray (No.2)}, 4 All E.R. 1, 18-38 (2001). Comparative information is available on line at \textit{http://www.thejudge.co.uk} (last visited Nov. 15, 2002).

\textsuperscript{127} In complex cases the client may be charged hundreds of pounds for the initial inquiries before the firm decides whether the prospects of success justify taking the case on a CFA. \textit{See Gorijel et al., supra note 74, at 192.}

\textsuperscript{128} In 1999, Lord Spens's action against the Bank of England collapsed after the last-minute withdrawal of legal aid. He could not afford the premium of £100,000 for ATE insurance to cover anticipated costs of £750,000. His solicitors refused to continue for fear that if the case was lost and their client was unable to pay the costs, they might be held liable as maintainers of the litigation. \textit{Cook, supra note 21, at 472.}

\textsuperscript{129} In England there is no equivalent of the American lawyers' monopoly on the giving of legal advice.

\textsuperscript{130} The then market leader, Claims Direct, was at one stage spending £1.5m a month on TV marketing! \textit{Claims Direct Will "Return to Profitability,"} \textit{Vows CEO}, 145 Solic. J. 1071 (2001).

\textsuperscript{131} The referral fee in ordinary, small, routine cases can be as high as £500 per case. \textit{See Gorijel et al., supra note 74, at 22.}

\textsuperscript{132} This is provided by some insurers in cases where there is no CFA. \textit{See} John Peysner, \textit{What's Wrong with Contingency Fees?}, 10(1) NOTTINGHAM L.J. 22, 42-43 (2001); \textit{see also} Jeremy Fleming, \textit{The Personal Touch}. \textit{Law Soc'y Gazette}, July 5, 2001, at 18.
the client, but in practice the money is usually advanced, often by a finance house.\textsuperscript{133} The claims companies present severe competition to specialist personal injury firms of solicitors\textsuperscript{134} (other than those on their panels),\textsuperscript{135} although they themselves have had considerable (and much publicized) financial difficulties.\textsuperscript{136}

The purpose of the reforms introduced in the Access to Justice Act of 1999, making insurance premiums and success fees recoverable from losing defendants, was to protect the client so that he emerges from the case with either all, or at least most, of his damages intact. But the insurance industry has strongly resisted these developments.

Insurers said, for instance, that they would not reimburse successful claimants for the success fee and ATE premiums where the case settled pre-proceedings on the ground that until proceedings were issued there was no insurable risk. This argument was rejected by the Court of Appeal in the case of \textit{Callery v. Gray} and \textit{Russell v. Pal Pak Corrugated Ltd.}\textsuperscript{137} The defendants (which means the defendants’ liability insurers) argued that the success fee and the insurance premium should only be recoverable where sufficient information was available to form a reasonable prognosis of what risks were involved in the claim. It was unjust, they suggested, to saddle the insurers with the costs of the ATE insurance premium and the success fee without giving them a chance to identify the cases in which liability and quantum was undisputed so that the claimant’s success was certain. Although it conceded the force of this argument, the Court of Appeal rejected it

\textsuperscript{133} See Peysner, \textit{supra} note 132, at 29-31; Fleming, \textit{supra} note 132, at 18-21.

\textsuperscript{134} “I feel a bit like one of those Red Indians on the plain saying, ‘there don’t seem to be many buffalo this year’. Because we have a feeling that, you know, the herds are getting away from us. So we’ve got concerns about our market share,” stated a claimant’s solicitor on the subject of the claims management companies. GORIELY \textit{et al.}, \textit{supra} note 74, at 23.

\textsuperscript{135} For a recent, up-beat assessment of prospects by such a specialist, see Keith Miles, \textit{Return of the Lawyer, The Law.}, Feb. 25, 2002, at 33.

\textsuperscript{136} In March 2000, Claims Direct for instance, made a pre-tax profit of £10.1m on a turnover of £39.6m. \textit{Claims Direct Spells out Post-Flotation Plans}, 144 SOLIC. J. 550 (2000). In July 2000, it was listed on the London Stock Exchange with expectations of increased profits. But largely it seems as a result of serious media criticism based on the experience of disgruntled clients, the company’s fortunes went into reverse. In November 2001, it showed an operating loss of £8.5m over the previous six months. In July 2002 it applied to the High Court to go into administration with massive debts. James Moore, \textit{Fate of Claims Direct Hinges on Court Ruling, Times} (London), July 11, 2002, at 25. For a detailed account of the way in which the financing of Claims Direct cases worked, see the forty-three page judgment of the Chief Costs Judge in \textit{Re Claims Direct Test Cases} (July 19, 2002), available at \textit{http://www.courtservice.gov.uk} (last visited Oct. 11, 2002). Claims Direct did not use CFAs. Instead it charged claimants a standard fee of some £1300 and covered the risk of loss through insurance. But the Chief Costs Judge held that if the case was won only about half the fee was recoverable from the losing litigant as an insurance premium.

\textsuperscript{137} 3 All E.R. 833 (2001).
based on legislative policy and "a number of practical considera-
tions."138 Of the nine listed, probably the most important was the last:

There is overwhelming evidence from those engaged in the provi-
sion of ATE insurance that unless the policy is taken out before it is
known whether a defendant is going to contest liability, the pre-
mium is going to rise substantially. Indeed the evidence suggests
that cover may not be available in such circumstances.139

The court held that the successful claimant could recover a reasonable
success fee and a reasonable insurance premium for cover against the
risk of losing arranged when the solicitor was first instructed.

After receiving a detailed report from a costs judge (twenty-two
pages in the law report), the Court of Appeal went on to hold in Call-
bery v. Gray (No. 2)140 that the premium actually charged for such
cover in the case (£350) was reasonable and therefore recoverable in
full.141 It declined to rule on the legitimacy of considerably higher
uniform premiums for all cases offered by some companies,142 except
to say that on the face of it, the adoption of such an option would
seem hard to justify in ordinary fast-track road traffic cases.

The Court of Appeal also held that in modest and straightforward
claims for compensation arising from road traffic accidents, it was rea-
sonable for a success fee of a maximum of 20% of the costs to be
agreed at the outset. That was on the assumption that there were no
special features suggesting that the claim might not succeed. Where
there were such features, the appropriate uplift would be higher, but it
might not be right to attempt to assess that uplift until further infor-
mation about the defendant’s response was available.143 The Court
also raised the possibility that a success fee might reasonably provide
for two stages—for instance 100% if the case was won at trial, reduc-
ing to 5% if an early settlement was achieved.

The two decisions in Callery v. Gray were therefore a victory for
claimants and their lawyers. Insurers will have taken little comfort
from the Court of Appeal’s indication that in straightforward road

138. Id. at para. 181
139. Id. at para. 99.
140. 4 All E.R. 1 (2001).
141. Id. at para. 70.
142. One company charged a uniform £997.50.
143. In Callery’s case, the court reduced the success fee from 40% to 20%. In Russell’s case it
allowed a success fee of 20%. In the later case of Bensusan v. Freedman (Oct. 2001), available at
http://www.courts.service.gov.uk (last visited Oct. 11, 2002), the Senior Costs Judge held that,
similarly, in simple clinical negligence cases the recoverable success fee should be no higher than
20%. See Hurst Sets Negligence Limit, 15 Litig. Funding 4 (2001); How to Bring Costs-Only
Cases, 15 Litig. Funding 1, 4 (2001). However, in a defamation case the same judge agreed that
a 100% success fee was appropriate. First 100% Success Fee, 17 Litig. Funding 1 (2002).
traffic cases, the success rate could be as high as 20%, though they were encouraged that it might be as low as 5% on an early settlement in such cases.

Callery v. Gray was appealed to the House of Lords, which gave its decision in June 2002. It unanimously dismissed the appeal on the recoverability of the success fee, and by a four to one vote it also dismissed the appeal on the recoverability of the ATE insurance premium. The majority’s main reason was that the Court of Appeal should handle control of the conditional fees regime. This abdication of responsibility by the highest court was despite the fact that all five judges alluded to the possibility of abuse in conditional fees—by lawyers overcharging or setting excessive success fees knowing that their clients would not have to pay either the costs or the success fees and by insurers charging disproportionately high premiums.

But the victory for claimants in the Callery v. Gray litigation was short-lived. A year later, in Halloran v. Delaney, the Court of Appeal delivered a bombshell, holding that in straightforward motor accident cases that are settled without the need for legal proceedings to be started, the maximum uplift that should normally be allowed was 5%. In Callery v. Gray, both the Court of Appeal and the House of Lords made it clear that the 20% maximum uplift was based on the limited information then available to the courts about the economics of CFAs. The Court of Appeal said, “[O]ur conclusion is based on very limited data. In particular, it is too early to see what effect the new costs regime is having on the rate of settlements, and this judgment may itself affect that rate. It will be desirable to review our conclusions once sufficient data is available to enable a fully-informed assessment of the position.” But in suddenly changing the norm by

144. Sonic would question why the success fee should be as high as 20% in a case where the risk of not getting a settlement is close to nil. One insurer stated, “[I]n the Liability Insurers group we tried to find . . . passenger claim on a rear impact where we hadn’t made a payment. We didn’t get one. So to say there is a 20% risk in a situation like that . . . it’s just beyond belief.” Goriely et al., supra note 74, at 18.

145. 3 All E.R. 417 (2002).

146. See id. at para. 8 (per Lord Bingham); id. at para. 16 (per Lord Nicholls); id. at para. 55 (per Lord Hope).

147. For a critical review of the decisions in Callery v. Gray, see Michael Zander, Where are We Now on Conditional Fees?—Or Why this Emperor is Wearing Few, if any, Clothes, 65 MOD. L. REV. 919 (2002). The House of Lords decision was notable for searing analyses of the weaknesses of the system for controlling success fees and insurance premiums by Lords Hoffman and Scott.


149. In a further extremely unkind thrust the Court of Appeal backdated the 5% maximum a year to when both the judgments in Callery v. Gray had been published.

a swinging 75% reduction, the Court of Appeal produced no new
data or information. Nor did it produce any explanation or even dis-
cussion. It simply issued its *ex cathedra* pronouncement.

The decision in *Halloran v. Delaney* produced consternation for the
whole claimants industry\(^{151}\) coming on top of the problems created by
the earlier decision in *Sarwar v. Alam*.\(^{152}\) This, though won by the
litigant, was in reality a victory for the insurance industry. Sarwar (S)
was injured while a passenger in Alam’s (A) car. S sued A. His solici-
tor took the case on a CFA with a success fee and ATE insurance
policy. The case was settled without any proceedings being com-
menced, but costs were not agreed upon. At a hearing concerning
costs, A’s insurers produced a legal expenses insurance policy at-
tached to A’s car insurance policy that covered not only his legal
costs of bringing or defending claims, but also those of any passenger. The
trial judge held that S’s solicitors could not recover the ATE premium
under the Access to Justice Act of 1999, because he was already cov-
ered by his Before-the-Event (BTE) policy. Such policies cover both
damages and costs. The fact that he had not realized that he was cov-
ered could have been remedied by the solicitors making inquiries.

On appeal, the Court of Appeal noted that in 1999, some two-fifths
of all motor policies carried such cover that normally extended to pas-
sengers. In the previous two years, the market had grown signifi-
cantly.\(^{153}\) In small cases involving potential damages of under £5000,
it would be reasonable for the passenger’s solicitors to inquire
whether the driver had such a policy and to refer the client to that
policy, rather than purchase a new policy. The client should, for in-
stance, be asked to bring to the first interview any relevant motor and
household insurance policy. Such inquiries should, however, be pro-
portionate to the amount in dispute. The solicitor was not required to
embark on a treasure hunt, seeking to see the insurance policies of
every member of the client’s family in case by chance they contained
relevant BTE cover that the client could use. In this case, the court
held that the solicitors were entitled to recover the premium paid on
the new policy. The reason was that the court saw a conflict of inter-
est in the term in A’s policy giving A’s insurers “full conduct and con-
trol of any claim” brought by the passenger and another term which
would require the passenger to use a lawyer appointed by the in-

\(^{151}\) See, e.g., Michael Zander, *Is this the end for conditional fees?*, *Times* (London), Oct. 1,

\(^{152}\) [2001] EWCA Civ. 1401.

\(^{153}\) Over seventeen million people were paying premiums for BTE coverage.
The court indicated, however, that such conflict of interest could be avoided if legal expenses insurers set up organizations to handle claims that were clearly independent of liability insurers—a point that the insurance industry will no doubt have taken to heart.

A leading commentator has suggested that the implications of this decision are profound. 155 “Over the [past] two [or] three years, as a matter of deliberate policy, liability insurers and legal expenses insurers had created joint ventures to bolt on legal expenses cover, at [modest] or no extra charge, to house and motor insurance policies.” 156 The hope was that they could be used to defeat the recoverability of costly ATE insurance premiums and success fees in CFAs. Solicitors on the panels of legal expenses insurers charged modest rates without success fees. By replacing the client’s own lawyer with the insurer’s panel lawyer, cheap lawyers would replace expensive ones.

The implication is that the market for this type of work will alter its profile from provision by a range of independent solicitors buying after-the-event premiums on the open market . . . to a relatively small number of panel solicitors (possibly no more than 200 firms in the country) who will corner the market for modest claims. Their work will be controlled by legal expenses insurers who are closely linked to the insurers’ for the defendant . . . . A scheme where access to legal help is concentrated in a few hands, in the absence of an effective regulator, is a matter of serious concern. 157

Whether this doomsday scenario proves prophetic or exaggerated remains to be seen. Clearly, there will be more test cases before all the issues surrounding recoverability of success fees and insurance premiums are resolved. 158 At present, the insurance industry is contesting every possible point. 159

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154. A term requiring the insured person to use a lawyer appointed by the insurer is not lawful once proceedings have started. Insurance Companies Regulations (1990) S.I. 1990/1159.
155. John Peysner, Turning into Trouble, 10(2) NOTTINGHAM L.J. 64, 66-67 (2001). For a similarly concerned view of the implications of Sarwar, see David Lock, Funding Faces Tough Future, 16 LITIG. FUNDING 6 (2001). Lock emphasizes the danger implicit in the decision that routine small personal injury claims will come to be handled by lawyers acting for defendant insurers! For further comment, see Jon Robins, Before the Deluge, 15 LITIG. FUNDING 2 (2001).
156. Peyesner, supra note 155, at 66.
157. Id.
159. An oddity is that some of the underwriters behind the ATE providers are also defendant insurers—through a different division of the same organization. So, insurers are supporting and funding litigation against themselves, and are both seeking to recover the costs of the policies and disputing the cost of insurance premiums. CONDITIONAL FEES-A SURVIVAL GUIDE, supra note 48, at 140, para. 7.8. One advantage to the insurers of such satellite litigation is that in the meanwhile payment out is postponed. There are currently said to be as many as 25,000 pending
But the problems go deeper and the direction of likely further reforms is not yet clear. A variety of fundamental issues are currently under review.

IX. **Abolition of the Indemnity Rule of Costs?**

Until now, the English system has maintained the so-called indemnity principle of costs—that a losing party’s liability in respect of the winner’s costs is limited to costs that the winner would have had to pay.\(^1\) So, if the winner has an agreement with his own lawyers restricting or excluding such liability, the loser gets the benefit of such agreement. The rule therefore prevents a lawyer from acting pro bono or at a reduced rate for his client and then charging his normal fee to the loser. The rule applies even if there is a CFA that abides by all the relevant requirements. In other words, lawyers have to comply with both the Conditional Fee Regulations and with the indemnity principle. The rule means that if a lawyer wants to be sure that he will be paid, he must have an agreement with his client that his fees will be paid in full by the client—even if that is known to both to be a sham. The indemnity principle would equally be breached if the lawyer agrees to pay the premium for ATE insurance if the case is lost or where payment of the premium is deferred to the end of the case and no premium is payable by the client if the case is lost.

There are some recognized exceptions, for instance, costs funded by the state for the indigent—formerly through the Legal Aid Board and now through the Legal Services Commission. The losing litigant must pay the lawyer’s proper fees even though the successful client was not in a position to pay his lawyers. Another recognized exception is where the understanding is that the client’s costs will be paid by his employer, his trade union, or some organization to which he belongs. Providing that there is a theoretical possibility that the client will have to pay the costs, the courts have been prepared to treat that as sufficient to avoid the impact of the indemnity principle.\(^2\)

The basic rationale for the indemnity principle is that an award of costs is supposed to reimburse the costs actually incurred. Anything in excess of that could be said to be profit. It also has the useful by-


product of giving the court assessing a bill of costs a starting point for deciding what reasonable rates to allow. Also, if the winning litigant could submit a bill to the loser that was not based on agreement over the basis of charging with his own client, it might have the effect of significantly inflating the costs of litigation.

But in the new era of financing litigation through conditional fees, the indemnity principle has increasingly been seen as a stumbling block to desirable funding and marketing initiatives. It also prevents a lawyer saying clearly and unambiguously to his client that whatever happens, he will not be charged anything.

In a Consultation Paper in May 1999, the Lord Chancellor’s Department asked whether, in light of recent developments, the indemnity principle should be abolished. The principle having become “increasingly marginalised by the changes which have taken place in recent years,” the question arose whether there was any point in keeping the rule. The Consultation Paper said that the Lord Chancellor was considering abolishing the rule, but was “concerned that its removal should not lead to an increase in legal costs being awarded by the courts . . . .” The indemnity principle provided a cap on the costs that could be recovered from the loser. Without it, solicitors would technically be free to claim costs without bounds, subject only to assessment by the court.

The Government took preliminary action by including a provision in the Access to Justice Act to pave the way for abolition of the indemnity principle. Section 31 states that Rules of Court may make provisions for various matters including securing that the amount awarded to a party in respect of the costs to be paid by him to his representatives “is not limited to what would have been payable by him to them if he had not been awarded costs.” The Explanatory Notes to the Act state that Section 31 was “a general provision allowing rules of court to limit or abolish the common law principle known as the indemnity principle.” For many years, the Notes continued, the indemnity rule “was held to prevent recovery from the un-

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164. Id. at 16, para. 11.
165. Id. at 16, para. 12.
166. Access to Justice Act, 1999, § 31 (Eng.).
167. Id. (amending Section 51(2) of the Supreme Court Act of 1981).
successful party of any part of a solicitor’s fee which was contingent on the success of the case,” but recently a combination of case law and statutory provisions had greatly reduced the application of the principle in its pure form.  

The Government believed that “the partial survival of the principle [was] anomalous.”

Giving effect to that belief, in September 2000, the Lord Chancellor’s Department stated that Rules of Court should provide that the indemnity principle would not apply to the assessment of costs. The statement said that the Government recognized that the Rules Committee had a heavy burden of current work, but it recommended that the Committee should “consider the early introduction of any necessary rules.”

However, this failed to have the desired effect. It seems that the Rules Committee has taken the view that its powers are limited to matters of practice and procedure, and abolition of the indemnity principle transcends practice and procedure. Seemingly, one is therefore waiting for fresh primary legislation. At the 2001 Costs Forum and again at the 2002 Forum, organized by the Civil Justice Council, there was a broad measure of agreement that this should happen, the main question being when.

X. FIXED COSTS IN “FAST TRACK” CASES?

As one result of the major civil procedure reforms introduced in April 1999 following Lord Woolf’s report Access to Justice, civil cases in England are allocated to one of three categories: small claims,
fast track, and multi-track. A small claim is basically one involving an amount under £5000, the fast track is basically for cases involving amounts between £5000 and £15,000, and the multi-track is for cases outside the scope of the fast track.

Small claims cases are an exception to the normal fee-shifting rule. Although expenses can be recovered by the successful litigant to a limited extent, each side in small claims cases pays its own legal costs. Partly, this is to encourage use of the facility; partly, it is because costs of lawyers would tend to be disproportionate to the amount in dispute. If one wants to have legal representation, one must pay for it oneself.

Fast track cases are supposed to be completed within thirty weeks and the hearing, if there is one, should not last longer than one day. In his Interim Report, Lord Woolf recommended that lawyer's fees in fast track costs should be regulated by reference to the value of the claim, with percentages of that amount allocated to key stages of the proceedings. He envisaged that the fixed costs would apply not only to what could be recovered from the losing litigant, but also to the costs that could be charged to a lawyer's own client—"except in cases where there was an explicit agreement to pay more which had been fully explained to the litigant." In his Final Report, Lord Woolf said, "I consider that it should be possible to litigate even the upper band of fast track cases at a total legal cost of up to £2500, [excluding Value Added Tax and disbursements,]" although he conceded that more preparatory work was needed to get the right figures. But, although much further work was done by April 1999, when the fast track system was instituted, the Government found that no basis for taking a decision on fixed fees had emerged, with the exception of the costs of the day in court.

177. These cover the fixed costs payable on issue of proceedings, the travel expenses of a witness, up to £50 per day for loss of earnings for a party or witness, up to £200 for the costs of an expert and costs of enforcement. CIV. PROC. R. 27.14 (Eng.). Restricted costs can be exceeded if the losing party has behaved unreasonably.


179. LORD WOOLF, INTERIM REPORT, supra note 176, at 45, para. 17.


181. Where the award does not exceed £3000, the fixed fee for the hearing is £350; where it is between £3000 and £10,000 it is £500; where it is over £10,000 it is £750. Where a barrister attends as well, the fixed sum of £250 is added. These sums include the preparation of advocacy.
However, less than two years later, the climate of opinion has dramatically changed. The cause is what is perceived to be the failure of the Woolf reforms to cure the problem of costs in run-of-the-mill cases. Leading expert, Judge Michael Cook, said recently:

The idea of the Civil Procedure Rules, which took effect in April 1999, was to cut the costs of civil litigation. But the scheme has been spectacularly unsuccessful in achieving its aims of bringing control, certainty and transparency. There is growing concern among judges and lawyers that the new rules have backfired to such an extent that litigation costs have become a lottery. Parties have little idea of how much they will recover if they win or how much they will have to pay if they lose. As for control, even simple interim hearings are attracting costs awards of thousands of pounds where previously they ran only to hundreds. Of equal concern is the spate of satellite litigation over costs, often incurring expense out of all proportion to, or exceeding, the value of the subject of the litigation itself; even though an avowed aim of the new rules was that costs be proportionate to the matters in dispute.

The solution, he thought, included fixed costs for fast track cases.

At the Costs Forum at the end of November 2001, organized by the Civil Justice Council, the chairman, Lord Phillips, who succeeded Lord Woolf as Master of the Rolls, was reported to have said in his summary that the majority of the delegates supported the introduction of fixed costs for fast track cases. A sub-committee was set up to work on the problem and is supposed to report at a follow-up Forum to be held at the end of 2002.

They apply regardless of the length of the case. Civ. Proc. R. 46.2 (Eng.). Cases that are likely to last more than one day are not supposed to be on the fast track.

182. General editor of Butterworths Costs Service and author of Cook on Costs.


184. Judge Cook also proposed the abolition of recoverability of success fees and insurance premiums: “The financing of litigation should be a privileged matter between the client and the lawyer, and of no concern to the court or the paying party.” Id.

185. The Council was established as part of the Woolf reforms in Section 6 of the Civil Procedure Act of 1997. For the Council’s website, see http://www.civiljusticecouncil.gov.uk (last visited Oct. 13, 2002).

186. The presiding judge in the Court of Appeal, Civil Division.


Can this project that failed before now succeed? All sides seem to agree that costs in routine cases are far too high and that far too much time and money are spent in arguing over costs. Given the scale of widespread discontent on the subject, there is now a just possibility that this will come to pass in fast track personal injury cases.

But it is doubtful whether such a development would assist claimants or their lawyers. The concept of fixed fees is attractive mainly to judges who see it as a way of reducing their involvement in assessing costs (which they detest) and to the defendants’ insurance industry, which sees it as a way of reducing the costs they have to pay. The problem with fixed costs is that it is extraordinarily difficult to find a formula for setting the fees that strikes the right balance between adequately remunerating the claimants’ lawyers to make it sufficiently attractive for them to do the work while not overcompensating them. If the fixed fees are set too low, the lawyers either will not take on the cases, or they will downgrade their staff and skimp on the work done to make it pay. The problem is compounded by the fact that fast track cases are small cases where the real costs are quite often high by comparison with the amount in dispute. If the fixed costs are significantly below what is currently allowed as being proportionate and reasonable, it means almost by definition, the lawyers would have to reduce the work done on the case. It is doubtful whether that would represent an improvement in the system.

189. For a skeptical view, see Mark Harvey, *Fixed Fees – the Fool’s Gold*, 152 New L.J. 168 (2002). But for a very different view, see Neil Rose, *Lawyers Set to Agree Pre-issue Fixed Fees*, Law Soc’y Gazette, Oct. 31, 2002, at 1, reporting that a consensus for fixed fees on an opt-in basis was emerging at the meetings in regard to road traffic cases that settle before legal proceedings are started for under £10,000. Costs would be assessed according to the stage at which the case was settled and fixed in bands of £2500 according to the value of the settled claim. There would be guideline disbursements, success fees and insurance premiums. If the claimant accepted the guideline costs they would be paid without dispute and within fourteen days. If the claimant did not accept and went instead for a costs assessment, he would have to pay the costs of the assessment unless he succeeded in getting an order for costs that was greater than the guideline costs.


XI. Abolition of Fee Shifting?

There has been little debate in England as to whether the English fee-shifting rule\textsuperscript{192} should be abandoned in favor of the American rule that normally each side pays its own costs.\textsuperscript{193}

Lord Woolf in his Interim Report concluded that "on balance the arguments in favor of the cost shifting rule are valid and that the rule should be retained."\textsuperscript{194} The main arguments for the rule, he suggested,\textsuperscript{195} were first, that it was fairer that the successful party should recover the bulk of his costs from the loser (the greater the costs, the fairer); and second, the rule deterred unmeritorious litigation and encouraged earlier settlement.\textsuperscript{196} Woolf admitted that unmeritorious "nuisance" actions were not unknown in England and that the rule might also deter meritorious cases.\textsuperscript{197}

Lord Woolf proposed one important modification of the rule: namely, that at the end of the case, instead of automatically giving the winner his costs, the court should be willing to allocate costs by reference to the reasonableness or otherwise of the conduct of the parties both before action and after proceedings have been issued and to whether costs were unreasonably incurred.\textsuperscript{198} This principle was adopted in the new Civil Procedure Rules\textsuperscript{199} with the result that considerable amounts of time and money are now spent in arguments over the allocation of costs, sometimes immediately after the decision and sometimes at later, separate hearings. Whether this reform has, on balance, proved useful is highly doubtful.

On the other hand, Lord Woolf thought litigation should not be totally free from financial risk. "Because of the burdens which it imposes on society and on the court system, it should not be too easy an option."\textsuperscript{200} Indeed, since his reform proposals were aimed at reducing

\textsuperscript{192} Costs in litigation have theoretically always been in the discretion of the court. Until 1999, however, this discretion was almost invariably exercised without argument in favor of the winner. The new Civil Procedure Rules encourage the courts to use the discretion more often but they state, "The general rule is that the unsuccessful party will be ordered to pay the costs of the successful party." Civ. Proc. R. 44.3(2)(a) (Eng.).

\textsuperscript{193} For American literature on fee shifting, see the extensive references in Herbert Kritzer, Lawyer Fees and Lawyer Behaviour in Litigation: What does the Empirical Literature Really Say?, 80 Tex. L. Rev. 1943 (2002). A pre-publication version of this paper is available at www.polisci.wis.edu/~kritzer/research/lawmisc/FeeArrangement.pdf (last visited Oct. 12, 2002).

\textsuperscript{194} LORD WOOLF, INTERIM REPORT, supra note 176, at 204, para. 21.

\textsuperscript{195} Id. at 202, para. 15.

\textsuperscript{196} Id.

\textsuperscript{197} Id. at 203, para. 16.

\textsuperscript{198} Id. at 204, para. 23.

\textsuperscript{199} See Civ. Proc. R. 44(4), 44(5) (Eng.).

\textsuperscript{200} LORD WOOLF, INTERIM REPORT, supra note 176, at 203, para. 203.
the barriers to access to justice and, hence, might increase the number of contested cases, the need for financial restraint would be all the more important. The recent development of “no win, no fee” funding backed by insurance has significantly reduced this particular constraint. The main check on unmeritorious litigation may now be the lawyer’s reluctance to take on potential “losers” for fear of not getting paid or of being rejected by insurers for backing too many unsuccessful cases. Neither consideration has anything to do with the fee-shifting rule.

In America, it is said that juries, being aware that the lawyers will take their cut, allow for this by increasing damages awards. In England, because juries are virtually extinct in civil cases, damages are almost invariably assessed by judges who would not easily be persuaded to increase damages awards to compensate for lawyers’ fees. That is a further reason why the odds are against the fee-shifting rule being changed.

XII. Allowing American-Style Contingency Fees Calculated as a Percentage of the Damages?

Describing the introduction of conditional fees, the current edition of a leading work on costs says, “Contingency fees were still an abhor-

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201. In fact, at least to date, the reforms coincided with a considerable reduction in numbers of cases started. Initially it was thought this was largely due to lawyers holding back until the new system settled in, but it now appears to represent an important systemic change. The main reasons appear to be that the new rules provide a structure for pre-proceedings negotiations based on information exchanged between the parties under the so-called pre-action protocols. Also, the timetable for fast track cases is so tight that lawyers feel they need to be ready before they start proceedings, which again generates pre-issue settlements. A claimants solicitor stated, “You need to be ready to roll . . . because you’ve got a very, very strict timetable once you issue.” Goriley et al., supra note 74, at 160.


203. See e.g., Sue Allen, Insurance Scheme Drops 11 Firms, Law Soc’y Gazette, Feb. 17, 1999, at 4 (reporting that eleven firms of solicitors had been stopped from using Accident Line Protect insurance for their clients because of alleged poor claims experience and poor administration). Firms Suspended from ALP, Litig. Funding 1 (1999) (reporting that thirty firms had been suspended by insurers “because of concerns over their claims record”).

204. But see Heil v. Rankin, 3 All E.R. 138 (2000) (considering whether the courts could and should raise the level of non-pecuniary damages as proposed by the Law Commission). The Commission had recommended a rise of at least 50% but not more than 100% where the injury resulted in damages of over £3000 and tapered lower increases for smaller awards. Dealing with eight conjoined appeals, the Court of Appeal held that the courts had a responsibility to see that compensation remained fair, reasonable, and just, and it was therefore appropriate for the judges to undertake the task. It ruled that awards for the most serious injuries should be increased by something like a third, but that there was no need for increases in awards under £10,000. In between there should be adjustments that should taper downwards.
rence, but conditional fees were given cautious approval. It was a distinction without a difference." 205

Under both English-style conditional fees and American-style contingency fees, the lawyer's fee is determined by the result. If conditional fees are permitted, why not contingency fees? If contingency fees are banned because of fear that the lawyer might be tempted to stoop to unethical conduct to win in order to earn his fee, why does that same fear not apply to CFAs? 206

The case for the introduction of contingency fees in England has been developing slowly. 207 Under the pressure of the current growing concern over the problem of costs, the issue is for the first time being treated as a live topic.

205. COOK, supra note 21, at 465. Sir Peter Middleton in his report to the Lord Chancellor spoke to a similar effect:

There is no essential difference in principle between conditional and contingency fees. Indeed in some ways the latter may be preferable. Contingency fees create an incentive to achieve the best possible result for the client, not just a simple win. And they reward a cost-effective approach in a way that conditional fees, where the lawyers' remunera-

206. For discussion of ethical problems in England raised by conditional fees and/or contingency fees, see David Luban, Speculating on Justice: The Ethics and Jurisprudence of Contingency Fees, in LEGAL ETHICS AND LEGAL PRACTICE (Stephen Parker & Charles Stamford eds., 1995); Steven Simkins, An Ethical Choice? A Practical Reaction to the Death of Legal Aid in Personal Injury and Medical Negligence Claims, J. PERS. INJ. LITIG. 128 (1998); Colleen P. Graffy, Conditional Fees: Key to the Courthouse or the Casino, 1(1) LEGAL ETHICS 70 (1998); Stella Yarrow & Pamela Abrams, Conditional Fees: The Challenge to Ethics, 2(2) LEGAL ETHICS 192 (1999); Richard O'Dair, Legal Ethics and Legal Aid: The Great Divorce?, 52 CURRENT LEGAL PROBS. 419 (1999); SOCIETY FOR ADVANCED LEGAL STUDIES, ETHICS AND LAWYER FEE ARRANGEMENTS WORKING GROUP, THE ETHICS OF CONDITIONAL FEE ARRANGEMENTS (2001).


The writer first argued the case in MICHAEL ZANDER, LAWYERS AND THE PUBLIC INTEREST: A STUDY IN RESTRICTIVE PRACTICES ch. 6 (1968). The recent report of the Blackwell Committee to the Lord Chancellor said that if the new recoverability of success fees and insurance premiums under CFAs did not work satisfactorily, "contingency fees may have an important place in any future scheme." BLACKWELL COMMITTEE, THE INVESTIGATION OF NON-LEGALLY QUALIFIED CLAIMS ASSESSORS AND EMPLOYMENT ADVISERS WHO ACT FOR REWARD para. 106 (2000). For a strongly argued negative view by an American academic who is also a member of the English Bar, see Graffy, supra note 206. For recent American literature on contingency fees, see Symposium, Contingency Fee Financing of Litigation in America, 47 DEPAUL L. REV. 227-477 (1998), and a series of articles by Professor Herbert Kritzer, at http://www.polisci.wis.edu/users/kritzer (last visted Oct. 12, 2002).
One obvious advantage is that, unlike CFAs, they do not have the built-in incentive for lawyers to pad their costs in order to earn higher success fees. Another is that whereas CFAs are impenetrably complex, contingency fees would be much easier to explain to the client. The regulation requiring that the CFA be explained to the client is completely unrealistic.\(^{208}\) Now that the success fee and the insurance premium are recoverable from the loser, it is also completely pointless, since the client has no reason for taking an interest in the mysteries of the CFA.

More important would be the linkage in contingency fees between the fee and the amount of the damages. As has been seen, one of the chief aims of the Woolf reforms was that costs be proportionate to the amount in dispute. However, in the ordinary routine case involving modest amounts, this is difficult to achieve because a good deal of work needs to be done whatever the case.\(^{209}\) But even in relatively low-level cases, there are great variations in costs.\(^{210}\) A contingency fee as a percentage of the damages, by definition, gives a proportionate relationship—though whether the proportion is reasonable would obviously depend on its level, which may or may not be regulated.\(^{211}\) Sometimes, no doubt, contingency fees can produce a disproportionate reward for the lawyers, but it seems this is not as common as is sometimes suggested. America’s leading scholar on the subject, Professor Herbert Kritzer, in a recent paper explains:

> Analyses of the returns from contingency fee practice show that in a large proportion of cases lawyers actually make substantially less, on a per hour basis, than they would from work for which they could charge prevailing hourly rates; the median case for most lawyers produces a return at best slightly better than the prevailing

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\(^{208}\) "Clients had widespread and in some cases fundamental misunderstandings about CFAs." Yarrow & Abrams, supra note 206, at 192, 206.

\(^{209}\) A study done for Lord Woolf’s Interim Report showed that in a sample of High Court cases the mean costs allowed where the amount in issue was £12,500 or less were £12,044. Lord Woolf, Interim Report, supra note 176, at 254, annex 3, tbl.3.3. A later study of costs in 119 routine personal injury cases involving claims of between £1,000 and £15,000 with a mean value of claims of £6,493 had mean costs agreed between the parties of £4,116. Armstrong & Pevsner, supra note 180, at 293-94.

\(^{210}\) Armstrong and Pevsner concluded: “The research revealed enormous variations in levels of costs, and where and when they are incurred. This tends to militate against any attempt to achieve a meaningful standard fee for personal injury litigation as it is presently conducted . . . .” Armstrong & Pevsner, supra note 181, at 302.

\(^{211}\) In the United States, regulations, if any, vary from state to state. In Canada, contingency fees based on a percentage of the damages are now permitted in all the provinces including Ontario. British Columbia has a cap of 33.3% for motor vehicle cases and 40% for other cases. For details, see McIntyre Estate v. Ontario, [2001] 50 O.R.3d 137. See also supra note 111.
hourly rate. For most lawyers handling contingency fee work, the real profits from such work come from a very small segment of cases. While a few lawyers and law firms can “cherry pick” cases so that their case portfolio is largely composed of high profit cases, most lawyers need to take a range of cases to establish a network of referral sources . . . that will bring in the occasional high profit case.

Moreover, conditional fees can also produce returns for the lawyer that are disproportionate to the work done and the risks run—and often do.

Given the way matters have developed in England, there would probably be little support for allowing contingency fees unless they were recoverable from the loser in the same way as the conditional fee and the success fee, though there would no longer be a separate success fee. If the one is recoverable, there is no logical reason why in principle the other should not be.

Under the traditional English approach, the successful claimant got his full damages plus most of his costs—with the balance being deducted from the damages. The unsuccessful claimant might or might not have to pay the costs of the winning defendant. Now, with conditional fees the claimant gets his full damages, probably pays nothing toward his own costs, and because of insurance (the premium for which is recoverable) does not even face the possibility of having to pay the opponent’s costs if he loses. If contingency fees were permitted, it would presumably have to be on the same basis. It is probably impossible now to put the recoverability genie back into the bottle.

This is on the assumption that the lawyers would recover the contingency fee in place of what they now get in the form of costs plus success fee. In Ontario, the lawyers acting on contingency fees are permitted to recover their allowed costs from the loser and in addition

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213. Kritzer, supra note 193.
214. Yarrow, supra note 49, at xviii, tbl.7. In cases where the estimated chances of success were over 80%, the actual success rate was 100%, and the average success fee was 29% (compared with 0% suggested by the formula of dividing the risk of failure by the prospects of success); where the estimated chances of success were 60-80%, the actual success rate was 93%, and the average success fee was 43% (as against 8% suggested by the formula); where the estimated chances of success were 50-59%, the actual success rate was 72%, the average success fee was 60% (as against 39% suggested by the formula). Id.
215. Judge Hurst, Senior Costs Judge, holds the view (also held, as has been seen, by Judge Cook) that the recoverability of success fees and insurance premiums is the primary cause of the current costs chaos and should be ended. See Neil Rose, Vorsprung Durch Technik?, 17 Litig. Funding 2 (2002); Neil Rose, Top Judge Pushes for Recoverability Review, Law Soc’y Gazette, Jan. 31, 2002, at 1.
to take the full contingency fee from their own client out of the damages! But the contingency fee is not recoverable there from the loss. If the same role operated in England it would be attractive to the lawyers but less attractive than CFAs to their clients who would then have to pay the contingency fee out of their damages.

Will some form of American-style contingency fee calculated by reference to the damages emerge in England in the foreseeable future? Two years ago, it would have been unthinkable. Today it is a possibility.

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216. See Raphael Partners v. Lam. [2002] O.J. No. 3605. Docket No. C36894, Sept. 24, 2002. The Court of Appeal there upheld as reasonable and enforceable a contingency fee of 15% of the first $1 million recovered and 10% of each additional $1 million plus any costs recovered paid by the defendant. The total recovery was $2.5 million. The costs allowed in respect of fees (i.e. excluding disbursements) were $461,000.

217. Two significant events occurred after this article was set for printing: The December 2002 Costs Forum reached a consensus on a scheme for fixed costs in road accident cases settled under £10,000 without legal proceedings being issued. See supra pp. 290-91: John O'Hare, Costs Fixing, 152 Nw. L.J. 1931 (2002). Also in December 2002, the Ontario legislature passed the Justice Statute Law Amendment Act, S.O., ch. 24 (2002) (Can.), legitimating contingency fees subject to permitted maximum percentages of damages to be laid down by regulations.