

WHAT'S WRONG WITH CONTINGENCY FEES?

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An Englishman while passing along the main street in Maine stepped in a hole in the sidewalk and, falling, broke his leg. He brought suit against the city for one thousand dollars and engaged Hannibal Hamlin for counsel. Hamlin won the case but the city appealed to the Supreme Court. Here also the decision was for Hamlin's client. After settling up the claim, Hamlin sent for his client and handed him one dollar.

"What's this?" asked the Englishman.

"That's your damages, after taking out my fee, the cost of the appeal, and several other expenses" said Hamlin.

The Englishman looked at the dollar and then at Hamlin. "What's the matter with this?" he asked; "is it bad?"

A prominent lawyer died in an accident. When he got to the pearly gates, he complained to St. Peter that he didn't deserve to die so soon. That it was so unfair. That he was only 48 years old. That there most certainly must be some mistake. "There's no mistake" said St. Peter. "We checked, and according to your very own records of hourly billings, you're a hundred and ten".¹

INTRODUCTION

How should individuals and corporations fund the use of lawyers to resolve disputes? The central theme of this article is to examine the progress made in reforming the antiquated system of financing and costs in Britain; to investigate the way in which lawyers are increasingly sharing risk and reward with their clients and to make proposals about what further reforms are required.

The above jokes spring from a millennium of suspicion about lawyers and their works and they do not assist us in determining, in situations where clients need legal services — to bring or defend a claim — which is the most efficient and effective way of paying for those services. This subject is an issue that is generating substantial public debate. There are three reasons for this: first, the Reforms of Civil Procedure; second the limitations on Civil Legal Aid and the growth in alternative means of financing litigation; and thirdly the recent arrival of claims management companies — and their "in your face" TV advertising.

What Do Clients Want From Lawyers

At the very least they want their lawyers:

- (1) To be on the same side as the client.
- (2) To be knowledgeable about the law.
- (3) To be efficient.

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¹ From M. Galanter, "Anyone can fall down a manhole: the contingency fee and its discontents" (1998) 47 *DePaul Law Review* 457. In this article Galanter uses a number of methods, including jokes, to examine attitudes to contingency fees in the US context and, in the wider context, uses this as a mirror to societal response to lawyers. The contingency fee has been the normal method of funding litigation, particularly personal injury litigation, in the USA since the late 19th century. Does the first joke from the early twentieth century (still circulating in a more modern version on the internet) offer a peculiar attack on the contingency fee arrangements? Not really, as the second joke suggests it is simply part of a wider attitude to the hegemony of lawyers in the USA. (There are probably more jokes circulating about contingency fee lawyers rather than those billing on the hourly rate but this may simply be because the former, concentrating on personal injury practice, are closer to the streets and the latter to the boardrooms).

- (4) To understand the psychology of the client and opponent.
- (5) To offer predictable and cost effective fee structures.

How do these aspirations correspond to reality? Can progress be made towards the ideal by structural changes?

It has been apparent that the environment of civil litigation as identified by Lord Woolf², and numerous commentators prior to him, is far from satisfactory. However, we tend to assume that most lawyers have professional integrity. Indeed, it comes as an enormous surprise to read in novels like *Kowloon Tong*³ by Paul Theroux of a tale involving a corrupt solicitor who sells out his own client. That is still, very fortunately, a rare event in this country. However, there are elements within the system and the structure of lawyers' fees that tend to place the lawyers' interests against the interests of the client. As such, this can lead to conflicts of interest and issues of inefficiency and poor client care. The recent debacle concerning the Office for the Supervision of Solicitors and the issue of consumerism within the legal area⁴ shows that the general public are not seriously concerned about the integrity of their lawyers but they are desperately worried about their efficiency. For example, the charging systems of solicitors are the subject of many complaints. These systems are normally based on charging an hourly rate (divided into a minimum six minute unit for a phone call or letter) that can lead to a perception that lawyers "churn, grind and pad" their files claiming more time than is appropriate.

The key area for discussion in this article concerns the way in which money flows through the dispute resolution system to resolve disputes. That money can flow from a number of different directions. It can come from the client instructing the lawyer or it can come from transferred payments in the course of settlement or adjudication by a court, from the payer to the individual bringing or defending the claim. Here, we come across a major difference between the approach adopted in the USA and that adopted in Britain and the rest of the common law world. Broadly speaking (and there are some substantial exceptions to this) the position in the USA is that clients instruct their own lawyers and, win or lose the case they remain responsible for their lawyers' fees and expenses. The loser contributes little or nothing to those fees. In the common law, and to a lesser extent in civil law jurisdictions, the winner of the case receives some or all of the costs involved in bringing the case.⁵

² *Access to Justice: Final Report* (HMSO, 1996).

³ Penguin, London, 1997.

⁴ M. Seneviratne, "Consumer complaints and the legal profession: making self-regulation work?" (2000) 7(1) *International Journal of the Legal Profession* 39.

⁵ Definitions:

Costs – Lawyers' fees. These may be owed to the client's own lawyer or transferred costs paid to the winner by the loser ("both sides' costs"). The CPR introduces the concept of proportionality plus issue based costs.

The English Rule – The loser pays the winner's costs (*c.f.* the American rule: both sides bear their own costs).

The Indemnity Rule – English rule costs are paid by the loser to the winner *up to but no more than* the winner would have to pay his own lawyer in any event. If the winner has agreed not to pay his own lawyer *win or lose* then there is a possible breach of the indemnity principle.

Disbursements – Outpayments made by a lawyer on behalf of a client for medical reports, court fees, *etc.*

Contingency Fee – The winning lawyer takes a piece of the action (damages). The losing client does not pay his own lawyer or the winner. This is a standard approach in personal injury work in the USA. It is available in certain types of work in England and Wales (non *litigation* cases).

Conditional Fee Agreement (CFA) – Available in the UK for all cases except crime and family. The losing client does not pay his own lawyer but pays the winner's costs. The lawyer's reward is *not* a share in the damages but an increase (mark up) on normal fees: the success fee.

Legal Expense Insurance (LEI) – Available as a stand alone product or a bolt on to other insurance products such as a motor policy. A yearly premium covers the insured against legal costs (own lawyer and the other side).

After the Event Insurance (AEI) – This is available to cover legal costs *after* the event (an accident, a breach of contract, *etc.*). It is bought after the event. It covers both CFA cases and "ordinary litigation" where "both sides' costs" must be covered. (Lawyer charges the client *even* if the client loses).

Current cost arrangements are extraordinarily arcane and difficult.⁶ Essentially, the cost rule was created in the early Middle Ages, which had its own litigation crisis. This crisis was initiated by an increase in the number of writs issued in the Queen's Bench Division. A large number of those writs involved disputes over land and were an indication of the struggle that was emerging in the feudal system between smaller landowners and tenants and their landowners. In a remarkable analogy with the current complaints of a "litigation crisis" the allegation was made that there was too much litigation around and that it should be restrained. The method chosen was to create a disincentive to litigation by forcing the loser to pay a contribution towards the other side's costs. It was intended in this way to prevent unmeritorious cases being brought and this has been a constant theme since. The Statute of Gloucester 1275,⁷ which started the process of introducing transferred costs, also allowed the winner to ask the Court Officer to inflict corporal punishment on the loser in the event that the bill could not be paid. It is interesting to note that this particular rule fell into disuse and was finally laid to rest in the eighteenth century by a somewhat typical pragmatic English approach. Holt C.J., when asked to order punishment of a defendant who had failed to pay costs, said he had never heard of such a thing and his officer did not have a warrant to do it and, therefore, it would not happen.

It is fundamental to the English rule that the loser pays the costs and expenses (disbursements) to which the winner has been put, and if the winner has not been put to any costs then there is nothing to be paid. This is called the indemnity principle⁸ and it has haunted the attempts to reform this area of the law. This principle has had a limpet-like attachment to our jurisprudence based on something much more powerful than theory – prejudice. From the early middle ages, it was clear that the courts disliked the idea of lawyers acting speculatively on behalf of clients. Clearly, the same motivations and the same class basis of prejudice is at work in the idea of creating transferred costs – vested interests do not want individuals to have access to the courts. The two principles that were developed by the common law to deal with this so-called "problem" were champerty (sharing in the spoils of the case) and maintenance (supporting litigation brought by another). These principles conflict with the basic economic function of lawyers, as service professionals, which is that it is in lawyers' economic interests to pursue cases which are likely to succeed. While lawyers might aspire to sitting in their offices waiting for work, in reality this has never been the pattern.⁹ The development of the solicitors' profession arose out of the concept of lawyers soliciting for business at the Royal Courts, that is, assisting individuals who had cases and needed more help in than that provided by the advocates of the Bar.

A direct comparison with the United States of America can be drawn. The developing legal profession took from England large elements of the common law system but, in key ways, rejected elements in favour of a constitutionally based

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Recoverability – Arrangements under the Access to Justice Act allow for the winner's success fee in a CFA and the AEI premium (supporting a CFA or "ordinary litigation") to be recovered from the loser.

Litigation – Court based proceedings as opposed to cases that have not yet been issued in a court or are heard in tribunals.

⁶ Those readers who are not of a nervous disposition might read A. Walters & J. Peysner "Event Triggering Financing of Civil Claims: Lawyers, Insurers and the Common Law" (1999) 8(1) Nott. L.J. 1.

⁷ 6 Edw. 1, c.1

⁸ J. Peysner "A revolution by degrees: from costs to financing and the end of the indemnity principle"(2001) 1 Web JCLI. Currently the Rules Committee is considering its limitation or abolition.

⁹ Peysner (2000), *op. cit.*

representative democracy. America is pre-eminently a law-based culture and while we in the UK may have our legal soap operas, these are very recent phenomena compared with the central importance of the law and lawyers in US popular culture, for example *Perry Mason*, *LA Law* and *Ally McBeal*. This represents a very different model to the English system, a model based on the right of the citizen to approach the court and have access to it. The US system looks at the problem of financing litigation and answers the question in an entirely different way. *In general, as indicated above, the loser does not have to pay a substantial amount towards the winner's costs and individuals, in appropriate cases, can access lawyers who are able to do the work on a contingency fee basis – in other words a cut of the damages recovered, directly in contravention of the champerty principle.* While this contingency fee system is not universally used in the US, particularly in commercial work, it is fundamental in key areas such as personal injury. It reflects, in part, a common US approach encouraging individuals and corporations to bring actions on their own behalf which are also on behalf of the wider community¹⁰. This is seen, for example, in the use of private attorney generals in anti-trust jurisprudence. There are companies who bring cases against competitors alleging anti-competitive practices and recover not only damages and declaratory remedies, but also additional or punitive damages (double or treble damages) as an additional punishment to the wrongdoer and an incentive to bring the case. This relates to the central idea of American democracy, which, although often honoured more in the breach, is to disaggregate and reduce the amount of Government control, and retain to individuals as much initiative as possible.¹¹

It might seem that the system in Britain is a workable and certainly long lasting, if rather eccentric, system. What has caused it to come under such comprehensive attack? The reason is the growth to maturity, and decline, of Legal Aid. The problem about the litigation cost system outlined above is the price of the entry ticket. Only the wealthy and corporate can afford to use lawyers. As such since 1945 there has been cross party support for a system to support individuals to obtain access to the civil courts: the Legal Aid system.¹²

The British Approach Comes Under Attack

The Legal Aid system became a victim of its own success. The Treasury saw the need to limit, cap, or at least curb the increasing supply of legally aided services interacting with a rising demand for Legal Aid.¹³ Even at the height of Thatcherism it was never suggested that the Civil Legal Aid system should be abolished in its entirety leaving the provision of such work entirely to market forces. Whether this was out of tender regard for Mrs. Thatcher's former colleagues at the Bar or some deeper recognition of the need for citizens to have the ability to access the courts was never completely explained. During this period a number of ideas were floated, including that of a "no fault"

¹⁰ It also reflects an approach in the USA that does not disdain the cash nexus in the relationship between lawyer and client. While this may have its downside it does avoid such cant as the idea that a barrister, as "gentleman", does not contract for services with a solicitor but has an arrangement based on honour.

¹¹ Compare, for example, bail bondsmen and bounty hunters. Whilst in our country the court and police operate a bail system and enforce that bail system, in the USA bail is often put up by a third party, the bail bondsman, who will lose that money if the alleged malefactor fails to attend court and thus has an incentive to employ a bounty hunter to track down and recover the malefactor and deliver him to court. The recent arrangements between Michael Douglas and Catherine Zeta Jones the Hollywood actors are also instructive. As part of their pre-nuptial arrangements they entered into a contingency fee arrangement. For every year the couple stay together Ms. Jones accrues an additional \$1 million. Clearly, there is a strong incentive here for Ms. Jones to remain with Mr. Douglas for as long as possible. There is also a "filing" clause whereby the damages "roll up" if Mr. Douglas strays and Ms. Jones decides to depart.

¹² See M. Spencer "The Common Law Legacy and Access to Justice: Contingency Fees and the Birth of Civil Legal Aid" (2000) 9(2) Nott.L.J. 32.

¹³ G. Bevan, "Has there been a Supplier-Induced Demand for Legal Aid" (1996) 15 C.J.Q. 98.

scheme, in various areas of provision (see below) and the contingency Legal Aid Fund promoted by the Bar.¹⁴

While the Government grappled with how to deal with the problem of the public finance in Legal Aid, other waves of change were sweeping across the legal scene including globalisation and its concomitant reduction in state subsidies, the rise of branding, and the developing commodification of legal work.¹⁵ While this article will not undertake an in-depth examination of the question of market economics in the legal field, it is clear that the legal market was slowly becoming more responsive to pricing mechanisms and the potential of new ways of financing. The question then became how could the State withdraw from supporting litigation and yet still allow access to the courts?

THE DEVELOPMENT OF CONDITIONAL FEES

The conditional fee emerged from this background. The conditional fee is a meeting of two ideas: The concept that a lawyer shares risk with a client and that insurance (*i.e.* pooling of risk) can be used to cope with the transferred cost problem. While there had been substantial experience in Scotland of a speculative scheme and, indeed, contingency fees were used in other jurisdictions and in non-litigation areas of English practice, they had always foundered on the problem of how to deal with the costs of an unsuccessful case. It is no comfort to a citizen that their own lawyer will not bankrupt them when the other side's lawyer will. The method adopted was to introduce a reward for lawyers taking risks – namely a success fee over and above lawyers' normal costs if the case was won. This represented a reward to the lawyer for taking the risk of losing cases. The problem of transferred costs was addressed by looking back to an old way of dealing with legal costs and bringing it up-to-date. For many years Europe has had legal expense insurance and this had had some impact in Britain.¹⁶ The difficulty was that English consumers were extremely reluctant to buy insurance to cover future contingent risks. The reasons for this are complex and may be because many people thought, often wrongly, that in the event of difficulty they would be covered by the Legal Aid scheme. In any event, most legal expenses insurance was bought almost "accidentally" as an add-on to a motor insurance policy or a household policy. The premiums for these policies were very low, reflecting limited marketing, lack of take-up and lack of claims. If legal expense insurance ("LEI") was not to be the solution to the potential withdrawal of Legal Aid then what was the answer? The resolution to the problem was the creation of an apparently bizarre product: after-the-event insurance ("AEI"). When this proposed product was shopped around Lloyds, it was greeted with a considerable amount of scepticism. How could you insure against an event that had already happened? Of course, the insurable event is losing the case, and that has not yet happened. Once underwriters grasped this there was no difficulty in seeing the theoretical possibility of AEI, but there was, and there remains, a difficulty in two areas. First, who should carry out the risk assessment of

¹⁴ This suggested a fund which would be set up by the Government with a grant and which would then top-slice the damages of cases that the fund supported. All winning cases would, therefore, support the future losing cases. The Bar claimed that they had actuaries who had analysed the figures of such a scheme and ascertained that not only would the initial grant allow the scheme to function, but that it would become self-financing after five years and the Government would get its money back. It is of note that the figures were never exposed to public scrutiny and while the idea had considerable attraction to the Lord Chancellor he was not convinced of the scheme's practicality.

¹⁵ See "Introduction" in J. Peysner (ed.) *Civil Litigation Handbook* (Law Society, London, 2001, forthcoming).

¹⁶ A. Gray and N. Rickman, "The Role of Legal Expenses Insurance in Securing Access to the Market for Legal Services" in A. A. S. Zuckerman and R. Cranston, *Reform of Civil Procedure* (Clarendon Press, Oxford, 1995).

the case (insurer or lawyer) and indeed is risk assessment possible?¹⁷ Second, what is the correct level of premium, bearing in mind the lack of history of setting premiums in this area and the lack of clarity about how much legal costs and disbursements would be generated by a given number of losing cases? When one compares the fact that marine insurance has been around from well before 1800BC¹⁸ this new product might well be written on the basis of premiums that were too low (to attract business) which in due course would cause difficulty; or too high, which would limit the emerging market.¹⁹

When conditional fees were first introduced under the Courts and Legal Services Act 1990 they generated little activity because, despite the fact that AEI was slowly emerging and the risks of losing the case were limited and more predictable, there was still an alternative available: Legal Aid. As such the Government took the view that the only way of kick-starting the conditional fee market, and achieving its aim of limiting the growth of Legal Aid expenditure, was to begin the process of curtailing Legal Aid and abolishing it in stages. The first abridgment of Legal Aid was in the area of personal injury and this caused some bemusement. It was quite clear that most personal injury cases were successful and as such cost the Legal Aid Fund very little. At the conclusion of the case the solicitor accounted to the Legal Aid Board (now the Legal Services Commission) for all the costs that had been recovered from the loser (often an insurance company). When the solicitor's fees are taken out of those costs, there is usually either a small surplus or a small payment. In any event, the money tends to go round in a circle and, in effect, the Legal Aid Board acts as a bank for personal injury work. Indeed, some years ago Cyril Glasser, the solicitor and former special consultant to the Legal Aid Advisory Committee, suggested to the government that the whole complicated administrative scheme of Legal Aid for personal injury could be replaced by a straight loan from the Government in return for an administrative charge paid by the solicitor.²⁰ In reality, of course, the reason why the "cheapest" part of Legal Aid was the first to go was that the benefits it had to the Government were also the benefits it would have to an emerging market for AEI: the fact that most cases succeed and the loser pays costs and damages.

The final step in the reform programme was to resolve the problem of the success fee and insurance premium. For many people conditional fees represented a very substantial way of accessing justice. However, there was a downside. First, the insurance premium and the solicitors' mark-up or success fee would have to be paid by the successful client.²¹ The impact on some cases, *e.g.* speculative cases involving contract disputes by companies, was minimal. However, in the personal injury field, bearing in mind the current damages doctrine, by paying out a success fee and the insurance premium, the claimant would be *bound* to end up with less money than the court thought was reasonable to represent the tort principle of *restitutio in integrum* (in other words putting the successful party back in the position they should have been in prior to the damage).

¹⁷ W. Goldstein and R. Hogarth, *Research on judgement and decision making* (Cambridge University Press, 1997).

¹⁸ The Code of Hammurabi promulgated then devoted 282 clauses to the topic under the title of "bottomry". (P. Bernstein, *Against the Gods. The Remarkable Story of Risk* (John Wiley, Chichester, 1996), at page 92.

¹⁹ There are rumours that these premiums are too low but as the figures are commercially confidential it is difficult to know. This demonstrates one issue when legal provision is "marketised": data on volumes of cases and, to some extent cost, which was collected and published by the Legal Services Commission tends to disappear.

²⁰ His committee, the Financial Provisions Working Party, found that an approximate charge of £10 would cover the cost of handling the net cost of legal aid in personal injury cases without the need to charge contributions. (see 27th Legal Aid Annual Reports 1996/7). Power was made available in the subsequent Legal Aid Act but the scheme did not proceed.

²¹ This can be compared to the legal aid position after costs are paid by the loser. Any shortfall, covered by the statutory charge, was often absorbed by the assisted person's solicitor.

It was clear to lobbying bodies such as the Action for Victims of Medical Accidents (AVMA) and the Association of Personal Injury Lawyers (APIL) that a solution was available in an extension of the cost principle to include the success fee and insurance as, in effect, recoverable expenses. This issue was raised in consultation and although the then Minister was careful not to deal with this issue during the debate on the Access to Justice Bill the resulting scheme was absolutely clear in principle: both the success fee and the insurance premium were recoverable.

It is correct to say that although the principle of these arrangements was simply stated, the actual administrative and regulatory arrangements are highly complex. The author was involved in two large consultation exercises on the recovery of these items and the process of creating collective conditional fee agreements whereby individuals would be introduced to solicitors by membership organisations such as trade unions or motoring clubs. The resulting scheme is agonisingly difficult and contains a central kernel of what can only be viewed as nonsense: the fact the conditional fee agreement has to be fully and comprehensibly explained to a client²² who (insured under a conditional fee agreement) has no real interest in it except in a theoretical way.²³ This difficulty of the conditional fee arrangements will be returned to later. Thus, the arrangements that have rolled out in 2000 represent a withdrawal of the Legal Aid scheme for most cases²⁴ and a replacement by a conditional fee scheme.²⁵

CFAs and Commercial Litigation

The area in which there has been little progress has been that of commercial litigation. The Access to Justice Act 1999 allows for a range of risk based cost arrangements. The term conditional fee now covers types of arrangement that are very different from the original idea of a conditional fee. For example, there is no requirement that they need to include a success fee element. This allows a return to the types of arrangements that were possible at common law for a short period following the *Thai Trading* case.²⁶ Thus solicitors can charge their normal rate or less than their normal hourly rate (a discount) if they are unsuccessful. The question of course is, what is success? This can be defined in sophisticated ways. For example, a defendant company may instruct its lawyers that they will be prepared to defend a case unless it is possible to obtain a settlement whereby they pay the claimant £1 m or less. If the solicitors are able to negotiate a settlement at £750,000 or less then they will be entitled to a supplement of 25% on their hourly rates. If the only settlement available is at more than £1 m then their hourly rates would be discounted by 25%. It is possible to have a matrix of arrangements whereby quantum aims and objectives are linked to time aims and objectives; in other words settlement in a specific period of time. Why, apparently, have there been so few of these agreements? It is clear from the Eversheds Survey²⁷ that there is considerable interest in reward related agreements in commercial work and clients are talking to their lawyers about them. However, they are not instructing solicitors on this basis. The reasons for this may be quite complicated:

²² The arrangements are less complex for referrals from membership organisations.

²³ See discussion concerning the problem of the successful client in Peysner (2000), *op. cit.*

²⁴ Except cases concerning children or patients and cases dealing with family or crime.

²⁵ The model of risk assessment and the interest of lawyers in risk assessment has also revitalised risk managed work in areas such as employment cases in tribunals which were not historically covered by the limitations on litigation and in which costs are not normally transferred.

²⁶ A. Walters and J. Peysner, *op. cit.*

²⁷ Eversheds Solicitors *Access to Justice Survey* (2000) based on a sample of directors and managers of legal departments of UK private companies and public sector bodies. 24% of respondents had discussed conditional fees with their lawyers (29% in the private sector, 12% in the public sector). 48% of respondents indicated that they would be prepared to pay a reward if a case was won and expect to pay less if the case was lost.

(1) There are a range of firms (the blue chip law firms) that are likely to be reluctant to accept instructions on this basis. After all, if one can be paid £350 an hour why would one wish to compromise! It may be that the same applies from the point of view of the corporate client, particularly for the bigger PLCs. They may take the view that they can adequately incentivise their solicitors by paying them high rates and that that is sufficient.

(2) Some firms may overemphasise this type of approach to attract this work, or any work.

(3) Some firms may be risk averse and disguise the amount of work they do on this basis so as not to warn other clients.

We are at the very early days in these arrangements and it is difficult to know how things will turn out. The best comparison is with the United States. Whilst there is a very vigorous risk based litigation system in personal injuries and in some other areas, it has not yet managed to break through into mainstream commercial litigation.²⁸

THE CLAIMS MANAGEMENT COMPANIES

If the Access to Justice Act 1999 was meant to create a simplified and common system based on conditional fees with clients' first port of call being their solicitor, this hope has been thrown into confusion by the rise of the claims management companies. The unexpected arrival of these companies is a reflection of the fact that once the market is opened up by the removal of restrictions, innovation and search for profit will produce unexpected results.

Claims management companies offer a number of models but essentially they operate in a similar way. They are non-lawyers, normally incorporated, who solicit for claims, usually through mass marketing and the use of franchisees, and farm out those claims to solicitors on a panel who then take the work forward. For this reason they are called in the USA "claims farms" and in those jurisdictions they are normally unlawful because of the proprietary right of the local Bar Associations to act as lawyers and to exclude competitors.²⁹ The claims farms in the US have had limited impact, partly because of pressure from the local Bars, and also because of the existence of contingency fees which allow relatively easy access to lawyers. However, this may not be the case for long, partly because, at the state level, judges are beginning to be more amenable to an argument that lawyers preventing competition is in itself anti-competitive and unlawful and, secondly, that the relatively small units within which contingency fee lawyers operate in the personal injury world in America may benefit from a central agency providing them with referrals.³⁰

The claims management companies have made a dramatic impact on the world of personal injury and they are likely to move further into employment work. No doubt their brands (the major player claims that 90% of the population has seen one of their advertisements) are capable of being levered into new marketing opportunities whether

²⁸ Stuart Benson, law firm management consultant, has advised the author that Motorola has encouraged law firms by instructing them to pursue settlement at a certain level and, if the case does not settle, the litigation will be given to another firm.

²⁹ As noted in the *Lord Chancellor's Report into Non Qualified Claims Assessors and Employment Advisers* ("The Blackwell Committee").

³⁰ In the USA the referral system is more sophisticated because lawyers are allowed to share the contingency split and, therefore, are motivated to pass on cases which they cannot do to those that can in return for a kick-back; and to obtain from lawyers work which they can do in return for a share in the proceeds. A basic arrangement for inter-firm referral is lawful in the UK under current practice rules – which in turn are likely to be relaxed – but because there is no contingency split allowed then the reward available to oil the wheels is limited.

it is in conveyancing or other provisions of legal or related services. The capital accumulation available through this model presents an enormous challenge to the role of an independent legal profession where capital units are much smaller. Only by effective co-operation or a series of take-overs will claimant personal injury solicitors be able to compete. The danger of this development is that the claims management companies whose financial arrangements are extremely opaque³¹ – partly because of the need to get round maintenance and champerty rules – exercise an extraordinary degree of centralised control over their panel of solicitors. For example, it is the subject of speculation as to how claims management companies earn the money, but it appears that this is done from a mixture of underwriting commissions and commissions on training and marketing.

What has this got to do with risk-managed litigation exemplified by conditional fees? On the face of it the claims management companies appear merely to introduce cases to lawyers who then make their own arrangements with clients. However, under the centralised control of the company those arrangements are often on a “usual costs” basis, in other words not on a conditional fee basis. The costs of both sides, the claimant’s solicitor and the defendant’s are guaranteed by “both sides insurance”. The insurance is paid for by the client, although the money is advanced to the client via a financing house or, conceivably, by way of a magic bullet.³² Thus, it appears that all risk has disappeared but, of course, risk cannot be removed. There are a number of ways in which risk is retained. Firstly, the insurance premium offers a high premium, currently of £1,500 approximately. While this premium is not fantastically excessive compared with other “both sides’ costs” insurance it has met with resistance (bearing in mind that no success fee is recoverable). Who picks up any unpaid and unrecoverable premium? While Claims Direct offer their clients a guaranteed “no win, no fee” arrangement, what happens to the insurance premium if the case is lost? What happens to the lawyers’ costs? Part of the answer lies in efficient risk assessment and, as illustrated above, the benign background of personal injury law to the claimants’ prospects. With good assessment and management very few cases taken on should not be successful. If the case is lost, then insurance is available to cover any shortfall. However, it is believed that out of the £1,500 the true risk cover is very low indeed (the balance being absorbed in commissions, marketing expenses and profit) and as such it seems that the product could not support a heavy number of claims (in this it is similar, of course, to all other forms of insurance). There must be an incentive within this system for panel solicitors to be reticent about claiming on the insurance for fear that they will be thrown off the panel and lose what maybe a very important part of their caseloads. While no doubt solicitors are making some claims on the policies there is a danger that risk is retained by the solicitor, or passed on to the client, by under-settlement of claims. It should be specifically noted that the Claims Direct arrangements lapse if proceedings are issued (presumably because of maintenance and champerty restrictions) and so there is a built in propensity not to issue proceedings.³³ The horrendously complicated and opaque nature of claims management company arrangements suggest that they might be more than happy to go back to the way in which many of them operated, *i.e.* by taking a contingency fee cut out of clients’ damages.

³¹ The original market leader Claims Direct suffered from a media attack on its arrangements and, at the time of writing, has suffered a catastrophic decline in the price of its shares.

³² In this arrangement no premium is paid at the start of the case. If the case is successful it is recovered or if unsuccessful paid out of the proceeds of the policy.

³³ This in itself is not wholly wrong. The whole trend of the Woolf Reforms and the creation of protocols is to discourage litigation except as a last resort.

While the market leader has had a tremendous effect and has attracted a deal of controversy, the situation is now moving rapidly. The creation of the Blackwell Committee³⁴ was motivated by industry concern, echoed in the Government, that claims assessors, *i.e.* totally non-qualified people (soliciting for and negotiating claims but not allowed to litigate them) were taking large contingency fee cuts from clients and selling them out by under-settlement. In fact, the Committee, of which the author was a member, indicated in the report that there was little or no evidence of a great deal of activity by such unqualified people. What was discovered was the unexpected rise of the claims management companies. While there have been criticisms of their methods and approach there has equally been praise. Clients in particular like the idea that they are visited by franchisees in their own homes and do not have too much to do with a solicitor. Despite the evidence of successive Law Society surveys, the logic of market success suggests that there is still diffidence from amongst the population about approaching a solicitors' firm and fear of the cost, whether, post Access to Justice Act, this fear is justified or not.³⁵

The major difficulty about claims management companies is the fact that they are completely unregulated except when incorporated by company law. If they continue to gain greater and greater power over solicitors, in themselves a heavily regulated profession, the Government must readdress the issue that was put before them by the Blackwell Committee and consider regulation. The author understands that this will be difficult as the market is new, developing and dominated by one or two players. This makes both Government regulation and self-regulation very difficult to move forward. However, it is unlikely that this position will be left for long, partly because of lawyer pressure, partly because of consumer problems from time to time, but mostly because of the public face of the claims management companies. They are, quite literally, "in your face" and anyone who spends any time at all watching day time television will see very large numbers of these advertisements. Claims Direct, Tiger Claims, One Claim: the advertisements range from the subtle to the totally crass. In one extraordinary offering (now apparently scrapped) a glamorous young woman looks longingly at a sports car and says: "I've always wanted one of those and now I have had an accident I can have one". A soothing voice then introduces the slogan: "Every cloud has a silver lining". Such an advertisement is horrendous and plays entirely into the hands of those commentators who allege that civilisation as we know it will collapse because of the "litigation crisis". They appeal directly to a Gordon Gekko type attitude that "greed is good" which is entirely inappropriate to personal injury work. The reality is that damages in these areas are compensatory damages and simply aimed at putting clients back in the position they would have been in if they had not suffered the wrong. Some advertisements suggest that litigation is a game and one simply bends down in the street and picks up a £10 note. They are fundamentally misconceived and do nobody any credit. However, as indicated above, other than the Advertising Standards Association, who do not police bad taste, the industry is unregulated and, therefore there is a substantial risk that new entrants will damage the standing of existing players and, by implication, affect the reputation of solicitors.

All of these problems have to be set against the very obvious advantage to the consumer of ready access, via the media and call centres, to lawyers who will take on their cases, and this is an important prize that should not be neglected – particularly as Government withdraws funding from this area.

³⁴ See n. 29 above.

³⁵ H. Genn, *Paths to Justice: what people do and think about going to law* (Hart, Oxford, 1999) at p. 236.

THE ADVANTAGES AND DISADVANTAGES OF RISK-BASED LITIGATION

The Advantages

The advantages of risk-based litigation now need to be considered against the “normal” way of funding litigation by hourly paid costs recoverable in any event from the client. These advantages can be summarised in the following way. First, the lawyer is on the same side as the client – if the client wins, the lawyer wins. Also, the lawyer is motivated. Without treading into areas of morals, it is abundantly clear that whilst a profession may have aspects which are different from a business – such as independent self-regulation and ethical standards shared by its members incorporating a code of discipline – the underlying core of a profession organised in business units must be to be businesslike.³⁶ It is trite to comment that if a profession’s income falls then it will become unviable and in the process of becoming unviable strange things will happen. For example, during the very rapid decline of domestic conveyancing in the United Kingdom in the late 1980s, caused by the introduction of competition from banks and estate agents and the collapse of the housing market, income from domestic conveyancing fell dramatically. Some firms quietly went out of business; in other firms partners became involved in fraudulent schemes of re-mortgaging or kept their income up by dipping into the client account. The current demise of the Solicitors’ Indemnity Fund can be directly traced to difficulties that began to emerge in this market.

By transferring risk from the client to the lawyer the system offers comfort to the funder, whether the client or the taxpayer. While the extent of subsidy to clients and, therefore, to lawyers from the state is a political issue and outside the scope of this article, it is important to note that in an era of globalisation one key feature of all elected or electable parties is a wish to limit and prescribe the extent of State support. Privatisation in a more or less robust form seems to be the way for the future and, therefore, it seems not unreasonable to produce a system that works with the grain of politics, rather than against it. The alterations to encourage lawyers to be paid by results are undoubtedly economically efficient. There is a long tradition of lawyers overcharging. Indeed, the concept of a professional rent, *i.e.* the ability to earn above the market rate for services, has always been associated with the problem of monopoly by service professionals requiring, as a condition of their professional status, methods of disciplining the potential exploitation of clients.³⁷ Attempts to limit overcharging have an equally long history. In his spare time from uniting Christendom and running the then known world, the Holy Roman Emperor, Charles V, took an interest in law reform.³⁸ One of his attempts to limit overcharging was to tinker with the rule whereby barristers were paid to prepare court pleadings by the page. His reform commission introduced a rule that required them to produce not less than four words per line and not less than 14 lines per page. As the figure below shows, counsel in these pleadings

³⁶ How far professionalism is antipathetical to profit and business is discussed in R. Abel, “The Politics of Professionalism: The Transformation of English Lawyers at the End of the Twentieth Century” 2(2) *Legal Ethics*, and in R. Posner, *Overcoming Law* (Harvard University Press, Cambridge Mass., 1998).

³⁷ In England and Wales this is accomplished in two ways. Firstly, by court control through assessment of recoverable costs and, secondly, by the right of a client to obtain a certificate from the Law Society as to, whether or not a solicitor’s costs have been reasonable. Whilst both of these controls are relatively rarely applied they do introduce a backstop to the question of costs.

³⁸ The author is grateful to Professor Dr. C.H. van Rhee of the Department of Metajuridica at the University of Maastricht in the Netherlands for sight of his PhD thesis “Litigation and Legislation: Civil Procedure at First Instance in the Great Council for the Netherlands in Malines” (1522–1559) [archives générales du royaume et archives de l’État dans les Provinces Studia 66] Brussels 1997 which deals with Charles V’s attempts to procedural reform. For followers of Woolf it is instructive to note that the Emperor’s commission took the view that a particular problem was the ability of the litigants to delay and obfuscate proceedings and this should be curbed.

has exactly met the requirements of the rule, no less and certainly no more. Whilst this has the virtue of clarity by not cluttering up the page, the primary reason must have been the attorney's wish to increase the amount of pay per case.³⁹

④ *freeholder holds / interest*
regarding the property / the
benefit of the property / the
benefit of the property / the
benefit of the property / the
benefit of the property / the
benefit of the property / the
benefit of the property / the

John Doe, executor of the will /
of the estate of the late John Doe
of the county of Middlesex
do hereby certify that the
within and contained in the
copy of the will of the late
John Doe, as aforesaid, is a true
and correct copy of the original

John Doe, executor of the will

Advertising offers a useful analogy. Advertising agencies used to get a commission on the advertiser's total spend. Thus, advertising agencies' best economic strategy was to produce a successful advertisement and keep it running: minimum investment by the agency for maximum return. The result was ubiquitous slogan-based advertising campaigns which ran and ran and were so familiar in the 1950s and 1960s:⁴⁰ "Beanz

³⁹ There is a direct analogy here between the way in which English conveyancers used to produce greater and more flowery descriptions when in the nineteenth century they were paid by the word.
⁴⁰ Winston Fletcher, "Slogans are good for You", *The Times*, 20 October 2000.

meanz Heinz”; “Guinness is good for you”; “Go to work on an egg”, and so on. More recently, in an attempt by clients to cut costs, more agencies are paid by the hour so their incentives are reversed and they want to do as much work as possible.⁴¹

Economic efficiency is broader than simply the payment by client to lawyer. The downward pressure on a lawyer’s costs and the need for them to be more effective in spotting winning cases and culling cases that are potentially unsuccessful encourages them to make their businesses more effective. It is clear that viable personal injury practices, for example, will need to invest in much higher levels of information technology and better settlement systems in order to be able to sustain their operations in an era of this litigation. This is because the transfer of risk also transfers the capital requirements from the client (or the Legal Aid fund) to the law firm. For many areas of work that were formerly the province of Legal Aid, or private client funding, this imposes a new requirement for working capital on the business. Formerly, this would be dealt with either by payments on account or interim payments. Again, this is a pressure to make businesses more professional. It is quite clear from work by Zuckerman that systems of payments whereby the price per unit is reduced, for example in the German fixed cost litigation system,⁴² do not inevitably lead to a failure of the market. For example, German litigators are able to function profitably within a market that encourages a high turnover and low overheads, rather than low turnover and high cost per visit.

Getting the Balance Right

What can be set in the balance against the advantages of risk based litigation? A number of issues have been raised as potential disadvantages of which three will be examined: the question of settlement; the question of ethics and under-settlement and the so-called “litigation crisis”.

The Encouragement of Settlement

Should dispute resolution be best organised through a State sponsored litigation system using the courts and leading to a trial? Some commentators⁴³ have suggested that encouragement to settlement, including the increase in ADR, is dangerous as it undermines the common law system of precedent. To understand this, it is necessary to take a view as to whether disputes were historically resolved in Britain by litigation or by settlement. Less than 2% of cases actually went to trial prior to the introduction of the Civil Procedure Rules in 1999. Of the great majority of disputes very few cases actually were issued in the court. It is quite apparent from the Access to Justice Inquiry⁴⁴ that a good deal of these cases that were filed in the court were issued only in order to encourage or force a settlement. When examining the implications of a potential rise in demand for subsidised court systems, against a need to keep them under control, Woolf took the view that the way to square the circle was to introduce a system of pre-action protocols, with accompanying cost implications, which obliged people to exchange information prior to issuing proceedings. The theme of these arrangements was that the problem of late settlement (*i.e.* close to or at trial) was

⁴¹ *C.f.* “Dentists ruin teeth for profit”, *The Observer*, 16 April 2000: “. . . studies show that dentists replace fillings far more than necessary, and that if they suffer a drop in income they will replace their patients’ fillings more frequently”. Globalisation is also relevant. By creating international commodities the task is to differentiate one from another so agencies produce bizarre and surrealistic advertisements to differentiate their client’s product from the indistinguishable mass of competitors.

⁴² A. Zuckerman “Lord Woolf’s Access to Justice: Plus ça change . . .” (1996) 59 M.L.R. 773

⁴³ Fiss, “Against Settlement” 93(6) *Yale Law Review* 1073.

⁴⁴ *Op. cit.*

caused by a failure of the parties to understand fully the case that they faced, and indeed their own case, until late on in proceedings. The issue of precedents suggests that the common law requires the sacrifice of individuals to allow their case to go up through the system in order to create precedents that would benefit the whole system (by allowing the common law to address novel issues and revitalise itself) even if the benefit to the parties is often incidental. An example is *White v. White*,⁴⁵ a family law case that has established a precedent on the equal division of assets following divorce. However, this was at the expense of some £500,000 of legal costs, a factor that attracted adverse judicial comment in the House of Lords. The implication of this case is that the precedent system may do good to the generality but can be quite disastrous for individuals.⁴⁶ It is also clear that in many cases precedents were established not because the parties had any particular interest in the outcome of the case, but because the costs were so huge that the case went to the Appeal Court solely, or mainly, in an attempt to avoid paying costs. Clearly, if the common law were to be weakened by any reduction in precedents then measures should be taken. Perhaps, in suitable cases, even outside the current provisions of legal aid, the State should indemnify both sides against their costs in order to allow the burden of precedent setting to be shared by the community as a whole.

Ethics and Under-Settlement

The next question is the issue of ethics and under-settlement. This argument proceeds on the assumption that if a lawyer will only be paid if the lawyer wins then there is a strong incentive to settle a case for less than it is worth rather than risk proceeding and not getting paid at all. This is a highly complex issue and there is no empirical evidence as to the way in which solicitors are operating under the conditional fee regime as compared with their previous behaviour. The argument has to be conducted through proxies, including the way in which US lawyers operate. The literature there is extensive but by no means clear. A number of issues need to be addressed.

First, whether, and to what extent, under-settlement actually is a problem. If you were to ask an individual client whether he would be willing to accept a settlement of £1,000 now or wait for five years (not an unusual period for personal injury claims prior to the introduction of the Fast Track procedure) and get £1,500, then the client, not unnaturally, would be happy to accept the smaller sum. The process of litigation is extraordinarily stressful and clients may well be happy to trade a reduction in that stress for a reduction in quantum. A client who comes into the office asking for compensation for whiplash, or for unfair dismissal, may sometimes be surprised that compensation for smaller cases is more generous than the client would have expected. A reduction in the received damages (whether by way of sharing it with a lawyer or by way of a discount for early settlement) may well be acceptable. Where this analogy breaks down is in the larger cases, particularly cases involving personal injury with continued loss of earnings or nursing care. The way in which damages in the personal injury area are calculated is by a relatively low amount of general damages (in other words the damages for the injury) but to achieve *restitutio in integrum* by catering for each and every need of a client over a long period of time. Take a doubly incontinent claimant with a long expectation of life. Simply by factoring in the additional toilet rolls over, say, a 15-year life then there is already a substantial claim before one considers such issues as nursing care at very high hourly rates.

⁴⁵ [2000] 3 W.L.R. 1571

⁴⁶ At least in this "big money" case, the parties still had lots of money left.

The next issue is the question as to whether or not it is possible to say that a case has been under-settled. While, as has been indicated above, there will be a range of items of discrete damages which can be quantified, general damages are a moveable feast. In the personal injury area it is instructive to listen to solicitors arguing about the quantum of an injury, despite all the assistance of guides to damages and the multiplier in calculating long-term loss. These are questions of negotiation rather than platonic reality. In other cases, such as discrimination, awards are at large. To demonstrate under-settlement it would be necessary to demonstrate consistently a "correct" level of settlement and this is far from the case.

The final issue is the question as to whether or not a lawyer will be motivated to accept an under-settlement.⁴⁷ The risk-bearing lawyer faces a problem, which is common to all lawyers, namely, that the outcome of the case influences their pay. It is not unique to the contingency fee or conditional fee arena. For example, under the Legal Aid arrangements if a case is won then both sides' costs are likely to be much higher than costs obtained directly from the Legal Services Commission. This gives an incentive to move to trial or settle close to trial when there is maximum leverage. It also gives an incentive to under-settle if the defendant is prepared to pay both sides costs rather than let the case go to trial where it may be lost. There is no empirical evidence that this had led to under-settlement. Recent work suggests that lawyers adopt a long view of their relationship with their opponents in the personal injury arena (with whom they will spar frequently) and selling out a client in one case might well produce lower settlement offers (and lower ancillary cost payments) in future cases.⁴⁸

THE LITIGATION CRISIS

The rise of the claims management companies has fuelled an increasing view that we are moving towards an American style "litigation crisis".⁴⁹ The leading polemicists in this area, Simon Jenkins of *The Times* and Frank Furedi, Reader in Sociology at the University of Kent, adopt a similar approach from different political perspectives. They are concerned that the idea of the assertive citizen acting as a knowledgeable consumer enforcing rights, a favourite motif of both the Major and Blair Governments, is one of the engines turning our system into what Jenkins refers to as the "victim-based society". In other words, whinging and complaining have been transformed from a national characteristic into a source of income for "complaint professionals" such as litigation lawyers.

At a cultural level there are clearly issues here and it is quite apparent that society is now far more involved with the tropes of a litigation-based system. This leeches out into all sorts of areas that seem highly inappropriate. Take the author's local taxi company. Living five minutes away from the railway station and frequently using the trains, I constantly have to go through a dialogue which involves me asking the controller to send a taxi driver to come about twenty minutes before the train leaves, which I have decided is a reasonable period of time. Whereupon the controller always says: "Do you know our company's policy?" Confessing ignorance, I am informed:

⁴⁷ Discussed in J. Shapland *et al*, *Affording Civil Justice* Law Society, London, 1998; P. Pleasance, *Report of the Case Profiling Study. Personal Injury Litigation in Practice* (London, Legal Aid Research Board Unit, 1998)

⁴⁸ R. Dinwall *et al*, "Firm Handling: the litigation strategies of defence lawyers in personal injury cases" (2000) 20(1) *Legal Studies*.

⁴⁹ The author is contributing an essay in a book on the so-called "Compensation Crisis" to be published by Hodder and Stoughton in 2001.

“well, unless you leave three quarters of an hour we won't take any responsibility if you miss your train”. I have attempted to debate with the taxi controllers on issues of remoteness, foreseeability and the extent of duty in this area but they are immovable.

Is Litigation Increasing?

The reality is that there is very little evidence about the true amount of litigation and whether it is going up or down. The judicial statistics are unhelpful. They show a recent reduction in the issuing of proceedings but, of course, under the influence of the protocols this would be inevitable. It is likely that there will be supply led increase in disputes because of the influence of claims management companies in the area of personal injury and spreading into that of employment. These will be matched by greater activity by the Community Legal Service, Equal Opportunities Commission, *etc.* The question then is, what is so wrong with this? If you have a rights based society then remedies should follow. There seems little point in shifting from collectivised rights to individual rights (as both Labour and Conservative parties proclaim) and then not allowing people to exercise those rights. There is still a considerable inertia amongst the population that is reflected in “lumping” problems rather than disputing them.⁵⁰ For example, there is evidence that the cost of litigation is not the major spur in preventing people from going to court. People have better things to do with their time. It is necessary to examine in some detail, and far beyond the confines of this paper, the way in which the tort system, or any other method of individual based litigation, can influence society for good.⁵¹ Certainly in the light of Sir William Macpherson's report into the murder of Stephen Lawrence it would be hard to argue that civil actions brought against the police for misbehaviour should be made more difficult because the police will sort their own house out.

Ambulance Chasing

One central issue in this debate is the question of ambulance chasing. Some of the claims management companies and claims assessors are advertising in such a way that they are susceptible to this charge. However, historically ambulance chasing was an allegation made against those solicitors involved in disaster cases. This was a breed of solicitors which arose during the latter part of the last century dealing with mass actions arising out of the same incident, *e.g.* Kegworth, the Paris air crash, Lockerbie and a number of others. They are also involved in “creeping disasters” such as the HIV litigation and mass pharmaceutical cases. Whilst the efficacy of their approach (particularly in pharmaceuticals) has been criticised elsewhere, it will be very hard to deny that more restrictions on the right of tort victims to bring claims in disaster scenarios will increase safety.

What is the Effect of Limiting Litigation?

A case study on the way in which the alleged abuses of litigation influences behaviour is the case of *Roe v. The Ministry of Health*.⁵² This is a case that took place at the beginning of the development of the National Health Service. The plaintiffs had spinal anaesthesia injections prior to surgery. The procedure went badly wrong, leaving them

⁵⁰ Genn, *op. cit.*, looks at this issue and shows that people are prepared to accept minor injuries and minor problems without doing anything about them. Of course, one person's silly and insignificant claim is another's important issue. While parents who are high earners may be able to pay for private education and, therefore, choose schools for their children that suit their purposes, individuals using the state system may instruct lawyers if they have been allocated to a school without the decision being taken fairly.

⁵¹ See P. Cane, *Atiyah's Accidents Compensation and the Law* (Butterworths, London 1999).

⁵² [1954] 2 Q.B. 66

paralysed. The cause of the paralysis was unclear and, therefore, the plaintiffs issued proceedings on the grounds of *res ipsa loquitur*, in other words the thing explains itself: one does not go into hospital expecting to come out crippled. Lord Denning, in the majority in the Court of Appeal, found that there was no liability because the plaintiffs failed the foreseeability test. While the danger was well recognised at the time of the trial in 1953 it was not known at the date of the accident in 1947. The immediate result was a cessation of the development of spinal anaesthesia injections for many years as, after the case, the problem was foreseeable. Only more recently has their value been recognised. In the instant case, the patients were left without a remedy. It is clear that this was a policy decision relating to Lord Denning's response to criticism of his earlier decision in *Cassidy v. Ministry of Health*.⁵³ Here he found for the plaintiff by developing a doctrine of the independent and direct liability of hospitals, and therefore the nationalised NHS. This caused a backlash from the medical establishment who raised concerns about the possibility of US-style litigation causing defensive medicine linked to the prospect of financial pressure on the nascent NHS. Accordingly, he took the opportunity in *Roe* to backtrack and ensure that the plaintiff lost. He was characteristically robust about this *volte face*: "The courts are, I find, always sensitive to criticism. So in the next case *Roe*, we sought to relieve the anxiety of medical men".⁵⁴

What has been the effect of Lord Denning's judgment? Perversely, it both set back clinical development and set a trend that offered doctors a less taxing legal environment.⁵⁵ A refusal to find liability on the hospital system meant that there was no pressure to take steps to produce a safer system. While professionalism and a desire to treat patients properly should have produced safe medicine, it is abundantly clear that this was not the case and medical accidents have risen annually. New developments, such as evidence-based medicine, are only now coming in some 50 years after Denning's judgment, partly as a response to an increase in clinical negligence cases. It is very hard indeed not to argue that *Roe* set back the interests of patients by a misconceived notion of protecting doctors.

*The No Fault Alternative*⁵⁶

If litigation needs to be constrained and if, in an advanced society, we do not wish to leave people injured with no redress, then what other alternatives are available? A "no fault" approach was adopted in New Zealand and led to the introduction of a "no fault" scheme to cover all personal injury cases. The New Zealand scheme suffered from a particular defect which was that the claimant still had to prove causation, *i.e.* that a medical accident had caused the injury complained of, rather than the natural history of the disease. However, there was no requirement to prove negligence either in the area of medical injury, pharmaceutical injury or road injury. The difficulty that has emerged is that such a scheme is extremely vulnerable to the pressure on central government budgets. In the New Zealand case an incoming administration slashed the scheme's expenditure. As the right of individuals to take action in the courts had been abridged they were left in a much worse situation.

⁵³ [1951] 1 All E.R. 574

⁵⁴ *The Discipline of the Law* (Butterworths London, 1979), at p. 241.

⁵⁵ The author is grateful for sight of a draft copy of an article by Paul Balen and Christopher Hutton "A Legal Theory with a Memory" to be published this year in *Clinical Risk* which analyses the case of *Roe* and the aftermath.

⁵⁶ P. Cane "Does No fault have a future?" [1994] J.P.I.L. p 302

Despite this history there is some evidence that “no fault” schemes might have a place. In the author’s view⁵⁷ a “no fault” scheme is particularly suitable in discrete areas such as brain injury cases where the claimants are clearly injured and not responsible but the cause of their injury (whether they were born injured or injured by the process of birth) is a matter of debate. In the US they have schemes that cover workmen’s compensation and schemes whereby motorists can choose different regimes of car insurance offering cheaper cover at the expense of limiting access to the courts.⁵⁸

Absent “no fault” schemes, the question to be addressed is whether a system based on people not claiming is a good system. The activities of claims management companies will increase the propensity to claim but by how much is uncertain and, of course, they operate on insurance based risk management systems and one of the complaints might well turn out to be that they do not back sufficient cases.

THE ADVANTAGES AND DISADVANTAGES OF CONDITIONAL FEES AGAINST CONTINGENCY FEES

This paper now approaches the thrust of the argument, first by comparing and contrasting conditional fees as against contingency fees. It then moves forward to present a menu of possible additional reforms to the system to inject more liquidity and to make lawyers less risk averse.

There are a number of reasons why conditional fees have substantial disadvantages as compared with the contingency fee purpose. First, conditional fees are simply not as economically efficient as contingency fees. In a conditional fee the arrangement involves a multiplier of basic fees with a maximum of 100%.⁵⁹ This compares with the contingency fee arrangement that incorporates a fee based on a percentage of damages recovered. The difficulty of conditional fee arrangements is likely to arise when a lawyer is offered a simple and effective way of cutting to the chase, rather than going through a great deal of litigation. Take a case where either the defendant or the court has stayed for Alternative Dispute Resolution (ADR) such as mediation. If it is possible to resolve the case at an early stage then this would be in the interests of the clients, the court and the system as a whole but may not be perceived to be in the interests of the lawyer whose base fee is reduced and, therefore, his success fee. This is a highly complex problem. While understanding the motives that may push lawyers into doing more work than is required, and in particular the pressures on assistants caused by billing targets, the author has campaigned with some success for lawyers to understand the advantages, in terms of cash flow and general efficiency, of rapidly turning over their caseloads.

The original arrangements for conditional fees, prior to the Access to Justice Act, had a number of substantial limitations that affected their take-up. The first problem was the danger of adverse costs, which was addressed by after-the-event insurance. The second was the competition from Legal Aid, which would be addressed by removing the competition. However, there remained a particular difficulty that was the almost incomprehensible nature of the agreement signed by the client on entering a conditional

⁵⁷ J. Peysner, “Health Care Litigation: Examination, Diagnosis and Prognosis” (1998) J.P.I.L. 91.

⁵⁸ Rand Institute for Civil Justice Research Brief “How would a “Choice” Auto Insurance Plan Affect Insurance Costs and Compensation of Accident Victims?” www.rand.org/publications/RB/RB9031/

⁵⁹ Prior to the introduction of the recoverability regime there was a voluntary cap of 25% on damages, potentially enforceable by professional discipline. Thus, if basic costs plus the success fee exceeded the cap the balance was irrecoverable. In the light of discussions about ethics it is instructive to note that there is no evidence that the cap was ever broken.

fee agreement. The need to meet the requirements of the regulations and avoid the dangers of maintenance and champerty whilst attempting to produce a clear simple product which offered clients a “no win, no fee” arrangement were extreme. The third problem was the inter-relationship between the regulations and the indemnity principle.⁶⁰ The result was a highly complex agreement that the average client found incomprehensible. However, practice rules and the regulations required the arrangements to be explained so here was a Catch 22 situation that was explored in detail by Yarrow and Abrams in their research.⁶¹ The fourth, final and most important problem was, as discussed above, that the winning client lost a substantial cut of his or her damages.

And with one bound the problem is solved . . .

This left the Government in a quandary. They wanted to remove legal aid, starting with personal injury cases, but did not wish to move towards pure contingency fees for political reasons⁶² and thus they deprived themselves of the opportunity of the enormous simplicity of the American model. In consultation they began to search for an answer to this conundrum and came under considerable pressure from the plaintiff lawyers and victims lobbies to amend the existing conditional fee arrangement model on the grounds that it was unfair to individual claimants. It is popularly believed that the solution to this problem emerged at an Oxford Union debate in 1999, involving Marlene Winfield of the National Consumer Council, Chris Ward of Accident Line Protect (The Law Society conditional fee insurance intermediary) and Geoff Hoon, then Parliamentary Secretary in the Lord Chancellor’s Department. In a graphic illustration of the problem Ms. Winfield stood up and showed the audience a cheque for £1,250 that her “client” had recovered in respect of an accident claim. She then tore off one part of the cheque saying: “that’s what my client has to give up for the insurance premium” and then a second part saying: “that’s what my client has to give up for the success fee” leaving a small part of the cheque available for the client. At this point the Minister then persuaded Chris Ward that he should pick up the two cut off parts of the cheque and return it to Ms. Winfield. Thus, legend says, the concept of recoverability of these items as part of the costs, or disbursements, of the successful claimant was born. While this is a wonderful story, it appears that policy was not created in quite such an “on the hoof” way, but that the Minister used this opportunity to demonstrate a view that had emerged as the potential solution. The idea of recoverability of these additional liabilities seemed a magical solution to the difficulty – the claimant would retain all the damages with the additional costs of insurance and success fee coming from the loser. This would act as an economic incentive on losers not to litigate unnecessarily.⁶³

Recoverability and transparency

The introduction of the recoverability regime does not remove all the complications from the point of view of the client. Not only do the regulations bizarrely require that all the issues involved in the conditional fee arrangement are explained to the client

⁶⁰ See Peysner (2000), *op. cit.*

⁶¹ S. Yarrow and R. Abrams, “Conditional Fees: The Challenge to Ethics” 2(2) *Legal Ethics* 192.

⁶² Lord Irvine, the Lord Chancellor, was particularly opposed to them.

⁶³ Historically insurance companies have tended to play a long game, preferring to reserve their settlement monies earning interest in their own accounts, rather than pay out too early. This works well in an era of inflation and rising interest rates. As inflation and interest rates have been low and steady for some time other pressures apply and insurers are now looking more keenly at their legal costs. Early settlement may increase their cash flow difficulties but can reduce their legal bills. Further, the new Civil Procedural Rules introduce sanctions against delay that, together with the pre-action protocols, suggest an increase in forward loading and early settlement.

even if the client is adequately insured. The insurance products themselves are supremely complicated and present real difficulties in comprehension to clients and lawyers. There is no clear annual percentage rate ("APR") as in the credit industry, or anything like it. The requirement to continue to give an explanation to clients of the agreement is mostly driven by the continued existence of transferred costs under the English Rule and the indemnity principle. With regard to the latter, the Government having taken powers to abolish the rule in the Access to Justice Act should act quickly.

A Cloud on the Horizon

The recoverability solution has rapidly run into difficulties. Despite an extensive consultation programme⁶⁴ a major difficulty has arisen starting with the recoverability of after-the-event insurance premiums entered into before proceedings were issued.⁶⁵ The situation, at the time of writing, is that defendants' insurers are refusing to pay pre-issue premiums as well as success fees.⁶⁶ This offers two major threats to the viability of the system.

First, insurance operates on a pooling of risk. The earlier after-the-event insurance is entered into, particularly if it is to cover the whole of the caseload without adverse selection (as in most of the panel schemes such as Accident Line Protect), potentially the greater the spreading of risk and potentially the lower the premium level. The defendants' insurance organisation, FOIL (the Forum of Insurance Lawyers) believes that some premiums are far too high.⁶⁷ One key difficulty is that the way premiums are made up – and this is common throughout the insurance industry – is opaque. It is recognised that *all* premiums contain elements that go towards marketing, administration and profit as well as pure risk money but the AEI market contains examples of premiums (particularly brokered by claims management companies) which seem unusually high and somewhat more than might be required by the risk. Without clarity about the way premiums are made up, it is very hard to offer a clear view of those that are excessive. In any event, there will be little room to reduce premiums if the pre-issue premiums cannot be recovered.⁶⁸

The attitude to paying liabilities incurred pre-issue encourages litigation and flies right in the face of the Woolf Reforms with their emphasis on litigation being the last resort. This problem, as of Summer 2001, is casting a pall over many personal injury firms, and after the event insurance providers, whose cash flow is being adversely affected. There are two parallel streams of activity which may resolve the problem. First, the case of *Callery v. Grey*⁶⁹, an unreported cost appeal from the County Court, will be heard by the Court of Appeal in July. Second, there are joint industry wide discussions taking place, sponsored by the Law Society and the Association of British Insurers (ABI) with a view to a negotiated compact.⁷⁰ If neither the courts nor

⁶⁴ Nottingham Law School organised a consultation exercise under "Chatham House Rules", chaired by the author, on the recoverability arrangements and the author also chaired a second departmental consultation meeting on collective fee arrangements.

⁶⁵ Legal expense insurance is not recoverable. The reason for this is that the general level of legal expense insurance is quite low, thus making it less vital for it to be recovered and, secondly, it is a generic product covering all a client's claims in a particular year and, therefore, it would be quite difficult to allocate part of the insurance to a particular claim.

⁶⁶ (This approach has started to spread into cases that have been issued and payments of premiums that the insurers claim to be too high are also not being paid.)

⁶⁷ *Litigation Funding* 11 Jan 2001.

⁶⁸ In the recoverability regulatory scheme there is little scope to argue about the level of insurance premium. This would seem to be an economically inefficient way of keeping insurance premiums low. However, it would meet a policy requirement to support the development of an immature market.

⁶⁹ Unreported. Chester County Court, 29 Jan 2001.

⁷⁰ The author is assisting these discussions.

negotiation resolve this issue then the government will have to act quickly to break the impasse by introducing amending legislation.

Reliance on Insurance

If the Government has put all its eggs in one basket – the insurance basket – it is important to examine whether that was a sensible decision. If there are doubts about the long term viability of the insurance market, then that suggests that spreading the pool of risk by including more reward and more risk for lawyers (through a contingency fee system) would be a sensible hedge. The difficulty in assessing the insurance market is that it is wrong to look at it simply from a structural point of view, *i.e.* are there sufficiently big players with robust capital capable of withstanding claims. The big may not be beautiful and there are certainly examples of companies who have made wrong decisions on such a scale that their viability is at risk, whether in the retail trade or in insurance. Probably, a more sensible approach is to look at the track record of insurers and underwriters and here, of course, there are difficulties because the AEI – intriguingly called the market for “morning after pills” by an American commentator⁷¹ – is new and relatively unproven. Certainly, the labile nature of premiums, normally in an upward direction, suggests that more experience will be necessary before there is any consistency of approach.⁷² This issue has now emerged in the press.⁷³ There appears to be a difficulty emerging with more and more AEI products and claims managers chasing sceptical and limited underwriting capacity. Either capacity will increase, possibly through mergers of AEI providers, or products will fall away: the outcome is uncertain.⁷⁴

Both Sides Costs Insurance

One issue is the question of AEI for “ordinary litigation”, *i.e.* non-conditional fee arrangement cases. This is provided by some insurers and has advantages for risk averse lawyers because they receive their normal costs. It is the current insurance vehicle for leading claims management companies and is used by their panel solicitors. In principle this type of cover should be more expensive than AEI for conditional fee arrangements as more is at risk (both sides’ costs rather than the loser’s costs only). In practice the position is more complicated. Very often the reduced AEI plus the success fee would be equivalent to an “ordinary” litigation AEI and as both are recoverable it does not make much difference.

While the theory suggests that “both sides” AEI will be more expensive there are complicating factors. There are no intensive market pressures or professional requirements on solicitors as agents for clients to shop around for insurance. It is impractical to do so. It is inefficient, the best risk management being by delegated panels. As mentioned above, there is no easy APR-like comparison. Everything depends on access to credit and the extent of cover, including self insured elements.⁷⁵ Again, as stated above, the recoverability regime for insurance premiums offers little or no court control to ratchet down premiums. The premium price is, therefore, unlikely to be market

⁷¹ J. Evans “England’s New Conditional Fee Agreements: How Will They Change Litigation” 63 Def.Couns.J.376

⁷² A related problem is that some finance houses intimately associated with AEI providers or claims management companies are charging high rates of interest (20% or more) on advanced disbursements. This is unrecoverable under the Access to Justice Act 1999 and does not represent good value for money for the consumer, bearing in mind that this is secured by the insurance policy.

⁷³ Fiona Bawdon, “Tough Time for After the Event Insurers” *Solicitors Journal* 17 November 2000, at p. 1038.

⁷⁴ A prudent risk managed approach would suggest that to remove the potential to fund litigation by any other method than insurance – for example, by limiting the current use of contingency fees as the Bar are proposing is premature (see contribution by Matt Kelly QC to the *Blackwell Committee* report).

⁷⁵ “thejudge” web site (www.thejudge.co.uk) is an attempt to produce comparisons.

sensitive. This suggests that the price will be higher than it might be as the buyer is not the ultimate payer.⁷⁶ All depends on the propensity to claim against the insurance. If solicitors do not claim because they might be expelled from the AEI's panel, the risk is simply transferred to the lawyer without any concomitant reward as there is no success fee. Thus, winning cases cannot subsidise losing ones.

Fixed Costs

A particular issue arising out of the conflict of contingency fee and conditional fee approaches – albeit one that is theoretically complex – is the way in which they would impact on the introduction of fixed cost regimes. Prior to the introduction of the Fast Track regime Woolf and commentators around his inquiry suggested that it was sensible, and indeed inevitable, that a rationing of procedure in the Fast Track should be accompanied by a rationing of costs. Certainly, work submitted to the Inquiry by Zuckerman, together with research by the author,⁷⁷ suggested that there was potential and some advantages in moving to a fixed or capped cost system. This would have particular advantages for the LEI and AEI industry as it would make costs more predictable. If costs are unpredictable then this invites underwriters to put more fat on the premium as they are unclear as to exactly what their downsides would be. The effect is to limit competitive pressures on premium levels.

The current situation is that the Government has stepped back from introducing a fixed cost regime other than for the costs of the Fast Track trial, presumably on the basis that they would like the Fast Track to settle down before they move on to further change.⁷⁸

CONTINGENCY FEES AND ETHICS

Do contingency fee arrangements represent a greater challenge to ethics than conditional fee arrangements? Yarrow and Abrams⁷⁹ have carried out the only major study into the workings of CFAs. Their work was carried out prior to the introduction of recoverability and helps us to understand contingency fees because in many cases a contingency fee split of damages going to the lawyer would not be very much different to the deduction of a success fee and AEI premium. While Yarrow and Abrams recognise that CFAs offer particular challenges to solicitors to ensure that they put their client's interests first, they recognise that conflicts of interest are endemic to the funding of litigation and inherent in a relationship between professional and lay client. Their work is limited in its scope. There has been no large-scale research into outcomes using solicitors' files and, indeed, access would be very difficult to organise. Despite these strictures the Yarrow and Abrams research is useful. In comparison Graffey's work⁸⁰ is less helpful. Graffey is vehemently opposed to the contingency fee and its cousin the CFA. She reminds us of the frightening picture drawn by the Royal Commission on Legal Services in 1979⁸¹ of lawyers dipping their hands in the mire of contingency fees and becoming corrupt:

⁷⁶ *C.f.* teenage children and trainers!

⁷⁷ For A. Zuckerman, see *Access to Justice: Final Report*, Chapter 7, para. 14; J. Peysner and N. Armstrong, "What Price the Fast Track?" (1997) J.P.I.L. 287.

⁷⁸ It could be argued that the retention of conditional fees where the risk is reflected in a mark-up based on the fee will act as a break on enthusiasm for fixed fees. After all, if basic costs are going to go down then the success fee goes down. Some modelling needs to be done to determine whether or not risk is adequately reflected in a maximum 100% mark-up on restricted costs. If not, this would suggest that greater risk should be reflected in greater reward.

⁷⁹ Yarrow and Abrams "Conditional Fees: The Challenge to Ethics" 2(2) *Legal Ethics*

⁸⁰ C. Graffey "Conditional Fees: Key to the Courthouse or the Casino" 1(1) *Legal Ethics*.

⁸¹ Cmnd.7648, 1979, para

“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.”

We have experienced CFAs for some years and contingency fee arrangements in pre-litigation and in the employment tribunals. Has the bloodcurdling prospect outlined above emerged? There is simply no evidence of an outpouring of corruption. While it would not be unexpected that Geoff Hoon MP, when Parliamentary Secretary to the Lord Chancellor’s Department, constantly repeated a mantra that he never received any complaints about CFAs but did constantly about legal aid, there is equally no evidence that trial judges or procedural judges make adverse comparisons between lawyers acting on CFAs and “ordinary litigation”. At the expense of repetition, all financing arrangements for litigation contain ethical issues and perils. CFAs or contingency fees do not stand out as offering unique dangers.

AN INCOMPLETE REFORM

It is apparent that the introduction of the changes in litigation financing, together with the procedural changes introduced following Woolf, constitutes a radical new and interlinked approach to dispute resolution. The financing reforms constitute a typically pragmatic English solution to a problem. It is not inevitable that an unresearched and un-piloted scheme is bound to be a failure – far from it – but neither is it bound to be a success. Problems have been revealed, such as recoverability, and there will be more. We must ensure that access to justice is protected at all costs. In the author’s view the reform effort is not complete: CFAs are a transitional phase, and it is time to open up the debate on what might replace or supplement them.

A Menu of Alternatives

One method is to combine contingency fees with transferred costs. This approach breaks the link between the reward and the costs and links it to the recovery, or in defence the money saved.⁸² All or part of the contingency fee could be then be recovered. This could be done in tranches with more of the contingency fee being recovered as the case progresses to give the defendant an incentive to offer an early settlement. The current arrangements under Part 36 of the Civil Procedural Rules would be retained to penalise the claimant in costs and interest if a reasonable offer is refused.

Another alternative is the “Big Bang”. This involves introducing contingency fees *and* removing transferred costs, except perhaps for disbursements such as expert fees and court fees. This will abolish the need for success fees, AEI and the contingency fee itself will not be recoverable. This is the author’s preferred option and would be a particularly suitable approach in personal injury litigation.⁸³ To address this we need to consider further the role of costs and the potential for using costs as economic levers to influence behaviour. Removing both sides’ costs from personal injury work simply

⁸² See R. O’Dair and J. Davis, “Contingency, good; conditional, bad?” (2000) *Litigation Funding*, April at p. 2.

⁸³ Of course, this system would be equally relevant in employment cases where there is now a compensation limit of £50,000 in unfair dismissal cases and unlimited damages for discrimination. But equally there is no need to do this because it is *already* possible to use contingency fees in this area because they are not classed as litigation! The task is to restrict any attempt (particularly from the Bar) to limit their use in this area and, indeed, publicity should be given of their availability when instructing a solicitor to broaden access.

restores the position for defendants to the position before Legal Aid was abolished when, barring exceptional circumstances, they could not recover costs from claimants. There is no evidence that failure to be able to recover costs from legally aided plaintiffs forced insurers into settling at any cost. Insurers always took into account the “floodgates” argument.⁸⁴ Contingency fees should be capped at 25% of general damages recovered pending further research into whether or not this is a viable level and whether pecuniary damages, *e.g.* loss of earnings, might be included.

Arguments for the Big Bang Approach

The introduction of litigation insurance often involves merely chasing money round. Thus, Lloyd’s names will be in syndicates that write AEI business and public liability, *e.g.* motor business. At least two insurance companies offer both liability and litigation insurance, and are thus in a “heads I win: tails you lose” situation. While the liability insurers have vehemently resisted recoverability in *Callery v Gray*,⁸⁵ perhaps they may simply be buying time to allow reserving against these new liabilities and, in the long run, they will be content as long as the position is certain and they can clearly estimate their future liabilities. Perhaps, at that stage they might start taking over the AEIs?

Costs, additional liabilities and the recovery arrangements consequent on them introduce transaction overheads that create grit in the system, unnecessarily increasing overall litigation costs. The additional liabilities are not subject to direct competitive pressures and, therefore, are likely to be too high. Contingency fees, by comparison, encourage claimants’ lawyers to be efficient: they are not rewarded for effort but skill. Without costs and recoverability the client is offered a simple transparent system; essentially: “If you recover £1000 your lawyer will deduct £25.”

This system will not lead to a litigation explosion because lawyers will still risk manage: if they do not win they do not get paid and they will not be protected by “both sides’ costs” litigation insurance.

What else needs to be done to make a contingency fee system work?

Part 36 offers would be retained to encourage both sides to make sensible offers to settle in penalty of costs⁸⁶ and penalty interest.⁸⁷ Will the proposed system have any role for AEI? They will still operate as introducers of liquidity by advancing cash to firms or acting as collateral for banks using their AEI acquired experience and statistical information of claims records. They will offer “stop loss cover” to firms and, therefore, protect the public and partners against calamities caused by backing too many losing cases. There will be no requirement for them to offer insurance cover on a case-by-case basis.

The major difficulty that must be overcome is to reform personal injury damages. An unrecoverable contingency fee reduces the claimant’s damages, which are at *resitutio* level only. Therefore, claimants subsidise lawyers. The resolution lies in an understanding that general damages for pain, suffering and loss of amenity have no objective reality. They are value judgments based on precedent and policy.⁸⁸ Restitution is what judges individually or through the Judicial Studies Board consider to be fair. If so how

⁸⁴ Insurers feel that there is a danger that settling weak cases will simply stimulate more cases.

⁸⁵ Unreported, Chester County Court, 29 Jan 2001

⁸⁶ This is the only time when costs rear their head.

⁸⁷ This would be rather like the former system of obtaining a costs order against the Legal Aid Fund when the assisted person failed to beat a payment in.

⁸⁸ The clearest example is bereavement damages.

can it be claimed that deducting 25% from them is inherently unjust? These damages have been described as follows:⁸⁹

“an attempt to measure the immeasurable. . .notional or theoretical compensation, to take the place of that which is not possible, namely actual compensation.”⁹⁰

to convert the degree of worsening (involved in physical injury) into monetary value for the purposes of compensation calls for the application of some arbitrary conversion table.⁹¹”

An attempt to systematise this approach was made by the Law Commission in its report *Damages for Non Pecuniary Loss*.⁹² It conducted a survey of public attitudes as to the “right” level for a range of damages for specific injuries. It also noted that awards had not kept pace with inflation. On this basis it proposed a general increase in awards biased towards more serious cases.⁹³ In a novel approach it did not propose legislation unless the Court of Appeal could not deal with the issue. The Court in *Heil v. Rankin*⁹⁴ considered a series of cases and took careful note of submissions from liability insurers and the Treasury on behalf of the National Health Service Litigation Authority. Its decision introduced some increases but not to the extent recommended by the Law Commission. In particular, the Court expressed concern that large increases would not only substantially increase premiums, but would do so at a stroke. This is implicit in a judge-made decision that what was valued at X should really have been valued at X+Y. Overnight increase in damages would create considerable cash flow problems and strain insurance company reserves.

It is clear that the common law route is not available to a reform intended to raise damages overall. Legislation would be required to introduce a single (henceforth index-linked) increase in general damages that would underpin a contingency fee system. Such an increase would allow the subsidy by claimant to the lawyer to be shared and matched by the general public through increased general liability premiums.

CONCLUSION

The introduction of risk-managed litigation is economically efficient, encourages lawyers to be more skilful and less wasteful and widens access to lawyers to a range of citizens who were outside legal aid eligibility⁹⁵ without unduly disadvantaging those who were inside the increasingly threadbare legal aid net. The current conditional fee arrangements backed by insurance are an ingenious response to the need to protect claimants from costs. They require that claimants, who retain a theoretical liability for costs, are given information about funding arrangements, none of which they understand. Unfortunately, this praiseworthy attempt to protect consumers results in a scheme of Byzantine intricacy replete with opportunities for satellite litigation. It is simply too complex. By comparison the contingency fee offers the merit of transparency and simplicity. It deserves a fair hearing.

⁸⁹ See P. Havers QC, “General Damages Raised by One Third” (2000) J.P.I.L (March), at p. 123.

⁹⁰ *Rushon v. NCB* [1953] 1 Q.B. 495, per Romer L.J. at 502.

⁹¹ *Fletcher v. Autocar Transporters Limited* [1968] 2 Q.B. 322, per Diplock L. J. at 340D.

⁹² L.C. No. 257 (1999) Law Commission

⁹³ Many claimants in smaller cases, such as whiplash, receive more than they expect.

⁹⁴ [2000] 3 All E.R. 97

⁹⁵ This includes the vast majority of people in work and even those on high benefits.