

## Abolish contingency fees and conditional fee agreements

(An extract from *Democratic Civilisation or Judicial Supremacy?*  
*A discussion of parliamentary sovereignty and the reform of human rights laws*  
by David G. Green; published by Civitas on Friday, March 11<sup>th</sup>)

We should cancel contingency fees based on lawyers taking a share of the civil damages, including the new damages-based agreements (DBAs). Conditional fee agreements (CFAs) – often called no-win-no-fee agreements – should also be cancelled to reduce the number of cases that are primarily driven by the desire of lawyers for financial gain.

Conditional fee agreements were made legal by the Courts and Legal Services Act 1990 and implemented from 1995. Lawyers who won a case were allowed to increase their fees by a percentage of their normal fees, but initially such ‘success fees’ could not be recovered from the losing side. However, from April 2000 the practice was permitted.<sup>i</sup>

For most of our history conditional fees were illegal under common law and the strongest opponents were the lawyers themselves. Now that we have had CFAs for some years we can see that the fears of earlier generations were understandable and that the laws against ‘maintenance’ and ‘champerty’ were justified. Maintenance was the name for funding or supporting litigation by another person and champerty was taking a share in the spoils of victory. These laws still have some legal force but have been progressively weakened since 1967.

Both maintenance and champerty gave rise to criminal and civil (tortious) liability. Blackstone listed them as among the offences against public justice.<sup>ii</sup> He described maintenance as:

an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party, with money or otherwise, to prosecute or defend it ... This is an offence against public justice, as it keeps alive strife and contention, and perverts the remedial process of the law into an engine of oppression.

It was illegal to support another’s lawsuit, with ‘money, witnesses, or patronage’, but a person could ‘maintain the suit of his near kinsman, servant, or poor neighbour, out of charity and compassion, with impunity.’<sup>iii</sup>

Champerty was a kind of maintenance:

being a bargain with a plaintiff or defendant ... to divide the land or other matter sued for between them, if they prevail at law. ... In our sense of the word it signifies the purchasing of a suit or right of sueing; a practice so much abhorred by our law, that it is one main reason why a *chose* in action, or thing of which one hath the right but not the possession, is not assignable at common law; because no man should purchase any pretence to sue in another’s right.

He adds that these ‘pests of civil society, that are perpetually endeavouring to disturb the repose of their neighbours, and officiously interfering in other men’s quarrels, even at the hazard of their own fortunes, were severely animadverted on by the Roman law.’<sup>iv</sup>

In 1993, Lord Mustill accepted much the same reasoning when giving judgment in the House of Lords:

My Lords, the crimes of maintenance and champerty are so old that their origins can no longer be traced, but their importance in medieval times is quite clear. The mechanisms of justice lacked the internal strength to resist the oppression of private individuals through suits fomented and

sustained by unscrupulous men of power. Champerty was particularly vicious, since the purchase of a share in litigation presented an obvious temptation to the suborning of justices and witnesses and the exploitation of worthless claims, which the defendant lacked the resources and influence to withstand.<sup>v</sup>

This was long after the 1967 Criminal Law Act abolished criminal and civil liability for maintenance and champerty, following a Law Commission report in 1966. The Act, however, left room for champerty and maintenance to be enforced as a matter of public policy. It included a provision that abolishing liability did not 'affect any rule of law as to cases in which a contract is to be treated as contrary to public policy or otherwise illegal'.<sup>vi</sup> As a result, the Bar and the Law Society continued to prohibit contingency fee arrangements and the courts continued to regard them as unlawful. The view of the courts was stated clearly by Lord Denning in 1975:

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

In another case in 1980 he expressed strong disapproval of lawyers who charged a fee payable only if the case was won:

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

Denning reflected prevailing legal opinion at the time and in 1979 the Royal Commission on Legal Services had unanimously rejected contingency fees because it feared they would have a corrupting influence on lawyers:

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

The Thatcher Government proposed to introduce CFAs in 1989 but the Bar strongly opposed their plans. However, a limited scheme was introduced for solicitors in 1995 when a success fee of up to 25 per cent of normal fees was permitted. Soon afterwards 'after-the-fact insurance' began to develop covering the fees of the rival solicitor and the disbursements of both solicitors. (The fees of the client's solicitor were covered by the CFA.) Sometimes the client paid the premium, sometimes the lawyer paid and, in some cases, nothing was payable until the case was concluded.<sup>x</sup>

In 1998 Lord Irvine proposed to change the rules so that the winner could recover his insurance premium and his success fee from the loser. The Legal Aid Board warned that his reforms would lead to 'lawyer-driven litigation' but the 1999 Access to Justice Act extended CFAs to all civil cases except those involving the welfare of children. The Act (with effect from 2000) also allowed insurance premiums and success fees to be recovered from the losing side. Criminal work was still excluded.<sup>xi</sup> Indeed lawyers and judges who work in the criminal courts remain untainted by these changes in civil law.

The final report of the Jackson review of civil litigation costs came out in 2010 and led to further changes. The report examined third-party funding (mainly by insurers), including after-the-event insurance policies. The sector was unregulated and its position was somewhat ambiguous under the laws of champerty and maintenance. Lord Justice Jackson recommended that it should be permitted so long as it was regulated by a code of conduct. Third-party funders that complied with the code would not be guilty of champerty or maintenance.<sup>xii</sup> A code was introduced in 2011.

Later regulations gave further stimulus to damages-based (contingency) fees. Under the 2013 Damages-Based Agreements Regulations, a cap was placed on the proportion of damages that could be taken as a success fee: 25 per cent for personal injury cases, 35 per cent for tribunal cases, and 50 per cent for others. However, successful parties could no longer recover success fees from the losing party or recover the premium paid for after-the-event insurance. Moreover, both sides in a dispute were obliged to provide detailed budgets to the court and to stick to them. Any higher costs had to be sanctioned in advance by the court.

The Law Society, representing solicitors, opposed contingency fees for many years, and as late as 1998 it supported CFAs but not contingency fees. However, by the time of the Jackson review opinions were shifting. Solicitors had become accustomed to contingency fees in tribunal cases because they were classified as 'non-contentious'. Jackson remarked that this classification was 'an oddity, to say the least' because the procedure in employment tribunals was just like adversarial litigation.<sup>xiii</sup> Because they had experience of making money from tribunals, and no doubt tempted by the rich rewards earned by American lawyers, solicitors changed their view. Evidence of the corrupting effect on justice in America was played down and 'access to justice' was played up as an excuse for increasing money-making opportunities.

The longstanding fears of judges who had enforced the laws of champerty and maintenance were disregarded. The smokescreen of increasing 'access to justice' for the least well-off members of society has proved to be a very effective device for opening up vast new opportunities for money-making by exploiting private disputes. For many years to be free was to be able to go about your life, without ever having to speak to a lawyer or go near a court from one year to the next. If you obeyed the law, costly encounters with lawyers and courts could easily be avoided. It is now widely accepted that these relaxations of the law have permitted a vast increase in lawyer-driven litigation.

When the preliminary report of his review came out in 2009 Lord Justice Jackson conceded that liability insurers complained that costs paid to lawyers were disproportionate to the damages paid to claimants; that defamation proceedings had become excessive; that costs were increased by the procrastination of liability insurers; and that there had been an 'explosion' of litigation about costs themselves. In 2008 the Lord Chancellor had said that the behaviour of some lawyers in 'ramping up their fees' was 'nothing short of scandalous'.<sup>xiv</sup> Moreover, the cost of personal injury claims to the NHS had weakened its ability to provide comprehensive care and numerous perverse human rights cases had undermined respect for the law.

In a speech in 2014 reviewing progress since his report was published Lord Justice Jackson went so far as to say that:

Between April 2000 and April 2013 the CFA regime was an instrument of injustice and, on occasions, oppression. It meant that one party litigated at massive costs risk, while [the] other

party proceeded at no or minimal costs risk. None of those objectionable features are present in hybrid DBAs [damages-based agreements].<sup>xv</sup>

He thought that the DBAs introduced in 2013 would bring an end to the injustices he described and was annoyed that they had not been more widely used. He thought pressure from large companies, who were the ones most likely to be sued, was to blame:

I suspect that the real opposition to hybrid DBAs comes from those who oppose DBAs in principle. Many large organisations who are on the receiving end of claims find the notion of DBAs abhorrent. ... Understandably, a regime which prevents people bringing meritorious claims suits their interests. A set of DBA Regulations which no-one uses is admirable from that viewpoint.'

He referred to the evidence given to him by the general counsel representing FTSE 100 companies. His Preliminary Report of 2009 summed up their fears. Their overriding concern was to avoid the introduction of 'US style' litigation in the UK, such as no cost shifting, contingency fees, class actions, vast discovery, huge irrecoverable costs for defendants, and the majority of settlement proceeds going to lawyers. The counsel viewed 'with abhorrence' a regime in which litigation was conducted as a speculative business by lawyers who enrolled plaintiffs through advertising campaigns.<sup>xvi</sup>

By 2014, he had little sympathy for their fears. Many voices, however, have noted that since 1995 reform has promoted lawyer-driven litigation. It also increases the power of pressure groups anxious to assert their interests without regard to the common good. They have the money to support lengthy legal disputes.

He continues to believe, however, that the system can be reformed by tinkering with cost controls. In a speech in January 2016 Lord Justice Jackson argued that the ending, in April 2013, of the regime of recoverable no-win-no-fee success fees and after-the-event insurance premiums had cut one layer of excessive cost. Previously they had been 'a massive driver of high costs and inefficiency'. From that date, courts only allowed 'proportionate costs'. Nevertheless, he thought that more needed to be done, and advocated the imposition of fixed costs for claims up to £250,000.

Now is the time to restore the integrity of the legal profession by complete abolition of both CFAs (no-win-no-fee agreements) and contingency fees (damages-based fees). There are still many members of the legal profession who disapprove of recent trends and want to return their sector to its true vocational roots.

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- i The Access to Justice Act 1999 (in force from April 2000) amended the Courts and Legal Services Act 1990.
  - ii Blackstone, W., *Commentaries on the Laws of England*, University of Chicago Press, Facsimile of the First Edition (1765-69), 1979, vol. 4, p. 371.
  - iii Blackstone, *Commentaries*, vol. 4, p. 134.
  - iv Blackstone, *Commentaries*, vol. 4, p. 135.
  - v *Giles v. Thompson* 1 AC at 153.
  - vi 1967 s 14(2).
  - vii *Wallersteiner v. Moir* (No. 2) 1 All ER 849 [1975]
  - viii *Trendtex Trading Corp. v. Credit Suisse* [1980] 3 All ER 721
  - ix Final Report 1979, Cmnd 7648, p. 176.
  - x For a good account of the changes see Zander, M., 'Will the revolution in the Funding of Civil Litigation in England Eventually Lead to Contingency Fees?', 52 DePaul L. Rev. 259, 2002.
  - xi Zander, pp. 269-70.
  - xii Lord Justice Jackson, *Review of Civil Litigation Costs: Preliminary Report*, May 2009, vol. 1, p. 163.
  - xiii Jackson, 2009, *Preliminary Report*, vol. 1, p. 191.
  - xiv Jackson, 2009, *Preliminary Report*, vol. 1, p. 2.
  - xv Jackson, Law Society Speech: Commercial Litigation: The Post-Jackson World, October 2014. <https://www.judiciary.gov.uk/wp-content/uploads/2014/10/litigation-post-jackson-world.pdf>
  - xvi Jackson, 2009, *Preliminary Report*, vol. 1, p. 99.