The English Costs War, 2000–2003, and a Moment of Repose

Stephen E. Kalish
University of Nebraska College of Law

Follow this and additional works at: https://digitalcommons.unl.edu/nlr

Recommended Citation
Available at: https://digitalcommons.unl.edu/nlr/vol83/iss1/5
The English Costs War, 2000–2003, and a Moment of Repose

TABLE OF CONTENTS

I. Introduction ............................................. 114
II. American and Traditional English Litigation Funding Systems ............................................. 116
III. Important Reports and Factors Supporting Change in England ............................................. 121
IV. The First Revised Litigation Funding System ............... 125
V. After-the-Event Insurance and the Second Revised Litigation Funding System .................... 130
VI. The Consequences of the Second Revised Litigation Funding System ..................................... 133
   A. Claims Management Firms ................................ 134
   B. The Satellite Litigation ..................................... 138
      1. Fundamental Principles and Reasonableness ... 138
         a. The First English Cases .................... 138
         b. Brief Comparison with the United States Supreme Court ............................ 144
      2. Deconstructing the After-the-Event Insurance Premium ..................................... 146
      3. Technical Challenges Based on Tensions Between the Second Revised Litigation Funding System and the Indemnity Principle .......................... 151
VII. Conclusion: A Moment of Repose ....................... 158

I. INTRODUCTION

In both the United States and England, accident victims, even in cases of small fender benders, are often entitled to compensation from negligent defendants, and, realistically, the defendants' liability in-

© Copyright held by the NEBRASKA LAW REVIEW.
* Margaret R. Larson Professor of Legal Ethics, University of Nebraska College of Law. B.A., J.D., & LL.M., Harvard University. The Nebraska Law Review, especially Mr. Kevin Corlew, has made many helpful editing suggestions. Additionally, he and others have done exemplary work in cite-checking difficult English materials.
surers. Accident claimants in the two countries, however, have different ways of funding their claims and litigation. In the United States, claimants use the American-style contingent fee agreement to pay for lawyers. The agreements are contingent in that a lawyer only gets paid if her client prevails. They are “American-style” in that the lawyer's fee is an agreed percentage of the recovered damages. In England, claimants have relied on legal aid and the two-way cost-shifting “English Rule,” pursuant to which a prevailing party can recover his solicitor's fees and litigation costs, including counsel’s fees, from the losing litigant.

Over the last decade, there have been dramatic changes in the English litigation funding system for many areas of law, particularly personal injury (with the exception, to date, of clinical negligence). The English eliminated legal aid and suddenly introduced the conditional fee agreement, a type of contingent fee to be explained infra, without changing the English Rule. One commentator has argued that a contingent fee system and the English Rule are logically incompatible and analogized this dramatic shift to having an American hamburger stand in St. Paul’s Cathedral. Between 2000 and 2003, there were constant disputes, as claimants and their representatives pushed the new rules to the outer limits and defendant liability insurance companies resisted in any way they could. Some have likened the period to one of “guerrilla warfare.”

This Article will explain the contentious debate. Part II will compare the American and the traditional English way of funding personal injury litigation, particularly minor road accident cases. Part III will discuss some background factors that influenced the recent changes in England. Part IV will examine the first revised litigation funding system, and Part V will demonstrate how the development of

1. This Article applies equally to England and Wales. The author simply refers to England for convenience. There are two branches of the English legal profession. Solicitors constitute one branch. Statutes, regulations and the Law Society govern them with a rigorous set of regulatory and ethical rules. Solicitors frequently instruct independent barristers for legal expertise, legal opinions, and advocacy. Barristers, often called counsel, are members of the Bar. At present, the Bar Council is the primary regulatory body. As a general rule, a lay client may only directly instruct a solicitor. Since much of this Article focuses on the relationship between client and professional, the author will primarily address issues related to solicitors.

2. Additionally, membership associations, such as labor unions, have played a large role in assisting claimants in bringing their actions.


4. Id.

after-the-event insurance, to be explained infra, and the second revised litigation funding system ameliorated some problems, but generated new ones. Part VI will discuss the consequences of the second revised litigation funding system, with particular emphasis on the development of claims management companies, the extensive satellite litigation and, where appropriate, comparisons to the United States Supreme Court's resolution of similar problems. Part VII will conclude by noting that there is now a moment of repose in the struggle, but no guarantee that dramatic disagreement will not, in one form or another, reappear.

II. AMERICAN AND TRADITIONAL ENGLISH LITIGATION FUNDING SYSTEMS

Accident victims in the United States often retain a professional lawyer to assist them in pursuing their claims. Although there are lay negotiators in some jurisdictions, they are not common, and in many places they are prohibited by broad interpretations of "unauthorized practice of law" statutes. Claimants, regardless of their wealth, usually fund their actions with an American-style contingent fee. These "no win, no fee" agreements generally assure claimants that if they should lose, they pay no professional fee, and, if they should win, their lawyer will be entitled to a percentage of their recovered damages. In all jurisdictions, these fees must be reasonable and courts have supervisory powers. In some states, there is little additional regulation, while in others there are elaborate rules and regulations governing permissible percentages (that may vary for different stages of the case), disclosures to the client, and formal documentation.

As to other litigation costs, such as experts, investigators, and doctors, the traditional rule had been that claimants had to remain ultimately liable for all these expenses. However, in the past, there often was a tacit understanding that, at least if the lawyer advanced the costs, the lawyer would not seek to collect these costs. More recently, in light of the practice and the desire to make lawsuits affordable, lawyers can advance these litigation costs on a contingent basis. There are few litigation funding firms in the United States. The practice of

7. See Model Rules of Prof'l Conduct R. 1.5(c) (1983).
8. See Model Code of Prof'l Responsibility DR 5-103(B) (1980) (requiring that the client remain ultimately liable for the expenses and costs of litigation).
9. See Model Rules of Prof'l Conduct R. 1.8(e) (1983) (permitting the lawyer to advance costs and expenses of litigation and providing that repayment may be contingent on the outcome of the case).
10. A litigation funding company advances money to a claimant in exchange for a percentage of recovered damages, or it may provide a nonrecourse loan, only repayable if the claimant should prevail. See generally Susan Lorde Martin, Fi-
advancing money for litigation costs in exchange for a percentage of the recovery is troublesome, and many believe these funding agreements constitute champerty and are unenforceable.¹¹

The American-style contingent fee system has always been controversial for a number of reasons. Among the critiques, and those most relevant to this Article, are:

(1) **Conflicts of Interests:** The lawyer has an ownership interest in the lawsuit and the recovery. This aligns the lawyer's interest with that of his client's. Still, the client's and the lawyer's interests may diverge. Settlement negotiations are a common example. The lawyer may be tempted to recommend a quick settlement in order to recover her fee, even though it would be to the client's advantage to continue the action.

(2) **Strong and Weak Suits:** A claimant with a small but meritorious case may find it difficult to retain a lawyer. Since the lawyer's fee will be a percentage of damages, there will be little incentive for a lawyer to represent the client. On the other hand, a claimant with a potentially large recovery will easily find a lawyer, regardless of the merits of his case. This may encourage meritless, or even fraudulent, lawsuits.

(3) **Fees Related to Work Done or Damages and Making the Claimant Whole:** Since American-style contingent fees allow the lawyer a percentage of the recovered damages, lawyers may easily achieve a windfall profit. The lawyer may earn substantial fees for minimal work. Furthermore, prevailing claimants are never made completely whole. The lawyer will take her fee out of the client's compensatory recovery.

¹¹. Maintenance is “the giving of assistance, encouragement or support to litigation by a person who has no legitimate interest in the litigation nor any motive recognized by the court as justifying the interference,” and champerty is “the maintenance of an action in consideration of a promise to give the maintainer a share in the proceeds or subject matter of the action.” *Lord Chancellor's Dept., Contingency Fees* para. 2:2, at 3, 1989, Cm. 571, at 3 [hereinafter *Contingency Fees*].
In England, claimants have not traditionally been permitted to fund accident litigation with contingent fee agreements. These agreements were champertous. Although the Criminal Law Act of 1967 decriminalized champerty, such agreements have, until recently, remained contrary to public policy and unenforceable at common law. Moreover, it was unprofessional for an English lawyer to provide legal services pursuant to a contingency fee arrangement.

Claimants traditionally funded their claims privately, with public legal aid, or with the support of an institutional organization, such as a labor union. Privately funded litigation initially placed the entire burden of fees and expenses on the claimant. However, if the claimant prevailed, she was entitled to recover her lawyer's fees and other litigation costs from the losing party. Conversely, if she lost, she would have to pay her own legal costs and, additionally and consistent with the English Rule, the other side's costs as well. This cost-shifting, litigation funding arrangement is often called the "English Rule." One important traditional element of the English Rule, that became relevant in the conditional fee agreement and after-the-event insurance debates, is that recoverable fees and costs must always be "reasonable."

12. Id. para. 2.3, at 3.
13. See Solicitors’ Practice Rules R. 8(1) (1990), available at http://www.guide-online.lawsociety.org.uk. The Practice Rules provided: “A solicitor who is retained or employed to prosecute any action, suit or other contentious proceeding shall not enter into any arrangement to receive a contingency fee in respect of that proceeding . . . .” Id.; Contingency Fees, supra note 11, para. 2.4, at 3 (quoting Solicitors’ Practice Rules R. 8(1) (1988)).

At the time, Rule 18(2)(c) of the Solicitors’ Practice Rules defined contingency fee as “any sum (whether fixed or calculated as a percentage of the proceeds or otherwise howsoever) payable only in the event of success in the prosecution of any action, suit or other contentious proceeding.” In spite of this prohibition, some solicitors tacitly or informally agreed to forego the collection of their fee if their client should lose. This was called taking the case “on spec.” Michael Zander, Will the Revolution in the Funding of Civil Litigation in England Eventually Lead to Contingency Fees?, 52 DePaul L. Rev. 259, 262 (2002).

14. As noted above, not infrequently, membership associations, such as unions, assist a claimant and his solicitor. The Collective Conditional Fee Agreement is the form of the conditional fee agreement used by these organizations. This Article will not explore the issues raised by the institutional assistance and the corresponding Collective Conditional Fee Agreement.

15. Commentators debate the pros and cons of various fee arrangements. The empirical evidence, however, as to the effects of one or another regime are sparse. In the end, both at the macro and micro level, we are hard pressed to find strong differences in behavioral patterns that can be tied to fee arrangements. This does not mean that fee arrangements do not matter; rather, it is indicative of the complexity of the effects of fee arrangements. The various effects tend to cross-cut in significant ways. The result is often that clear evidence of effects is difficult to find.

There is an elaborate cost-assessment or taxation system designed to implement the English Rule. Specialized judges, or taxing masters, resolve disputes over recoverable fees and costs. Of course, most routine cases settled with respect to damages, fees, and costs. In these negotiations, recoverable fees and costs may have been an important part of these negotiations, and there is some evidence that lawyers did not always aggressively pursue a claimant's case. Tacit collusion among repeat players, such as solicitors and defendant insurance companies, where the companies agree to a high reasonable fee in exchange for the solicitor's recommendation of a low settlement amount, may be one reason.

The English Rule has always been controversial for a number of reasons. Among the critiques, and those most relevant to this Article, are:

(1) **Conflicts of Interests:** Most obviously, since the solicitor's fee does not vary with the recovery, the solicitor may be less inclined to pursue the claimant's case aggressively. The client and the solicitor's interests are not aligned. The solicitor may want to increase her hours, not necessarily the client's damages. Moreover, the solicitor may often be tempted to recommend settlement with high recoverable fees and a low damage award.

(2) **Strong and Weak Suits:** The English Rule is a two-way cost-shifting rule. If the claimant should lose, he would have to pay his own solicitor's fees and costs, plus the prevailing party's solicitor's fees and costs. Some risk-averse claimants, regardless of how meritorious their cases, are thereby discouraged from pursuing claims.

(3) **Fees Related to Work Done or Damages and Making the Claimant Whole:** Prevailing claimants are generally fully compensated. A solicitor receives her fee from the losing party, not from the prevailing claimant's recovery. Although the claimant and the solicitor's interests are not perfectly aligned, the English Rule minimizes lawyer windfall profits. The fee does not increase arbitrarily with the size of the recovery. Finally, the English Rule encourages solicitors to handle small cases.

---

16. Until recently, taxing masters had no jurisdiction over disputes that settled before the issuance of formal papers. For many litigants, this discouraged early agreements. The new Civil Procedure Rules provide a procedural mechanism for parties that settle a case to have the amount of costs resolved by a taxing official. See Eng. Crv. P.R. pt. 36 (2004) (“Offers to Settle and Payments into Court”), available at http://www.dca.gov.uk/civil/procrules_fin/contents/parts/part36.htm#rule36_13. This procedure is called a “cost only” procedure.
The traditional standard for recoverability has traditionally been reasonableness. More recently, pursuant to the new English Civil Procedure Rules, proportionality has also become central to costs assessments. The proportionality requirement is not, however, only a ratio of fee to recovery. If this were the case, the English Rule would have some of the defects of the American-style contingent fee. Solicitors would be reluctant to take modest cases. In *Home Office v.*

---


18. Party-to-party costs are examined in this Article. These costs refer to what a prevailing party (receiving party) can recover from a loser (paying party). The English Civil Procedure Rules provide:

(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.

(2) Dealing with a case justly includes, so far as is practicable . . . .

(c) Dealing with the case in ways which are proportionate—
(i) to the amount of money involved;
(ii) to the importance of the case;
(iii) to the complexity of the issues; and
(iv) to the financial position of each party . . . .


Also, the assessments discussed here are standard ones. Assessments done on an indemnity basis are more in the nature of a penalty, or, at least, more discretionary with a taxing officer. Rule 44.4 provides:

(1) Where the court is to assess the amount of costs (whether by summary or detailed assessment) it will assess those costs—
(a) on the standard basis; or
(b) on the indemnity basis,
but the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount.

(2) Where the amount of costs is to be assessed on the standard basis, the court will—
(a) only allow costs which are proportionate to the matters in issue; and
(b) resolve any doubt which it may have as to whether costs were reasonably incurred or reasonable and proportionate in amount in favour of the paying party.

(3) Where the amount of costs is to be assessed on the indemnity basis, the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party.


19. The English Civil Procedure Rules are supplemented with Practice Directions. The Practice Direction for Rule 44 explains:

In applying the test of proportionality the court will have regard to Rule 1.1(2)(c). The relationship between the total of the costs incurred and the financial value of the claim may not be a reliable guide. A fixed percentage cannot be applied in all cases to the value of the claim in order to ascertain whether or not the costs are proportionate.
Lord Woolf explained that there were often necessary costs in even small cases. He articulated a two-part test in order to explain the relationship of costs to damages. If the total costs were proportionate to the damages, the particular cost items need only be reasonable, and if the total costs were not proportionate to the damages, particular cost items must be necessary and reasonable.

Public legal aid was another important way English claimants could fund accident litigation. In the United States, legal aid has generally been unavailable for accident victims' claims. In England, shortly after World War II, the Government adopted an extensive legal aid system that has traditionally been available for accident victims' claims. In this judicare system, qualifying claimants could retain any lawyer willing to work for legal aid. To qualify, the claimant must have met means and merit tests. Since there was no single monetary cut-off point, as in the usual American legal aid system, many middle income claimants, who contributed some funds to the process, qualified for assistance. In fact, until recently much of England's personal injury litigation, especially small claims, was at least partially funded by legal aid.

III. IMPORTANT REPORTS AND FACTORS SUPPORTING CHANGE IN ENGLAND

As late as 1979, the Royal Commission on Legal Services confidently concluded that an American-style contingent fee system was inappropriate in England. The Report stated:

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-ex-

---

In any proceedings there will be costs which will inevitably be incurred and which are necessary for the successful conduct of the case. Solicitors are not required to conduct litigation at rates which are uneconomic. Thus in a modest claim the proportion of costs is likely to be higher than in a large claim, and may even equal or possibly exceed the amount in dispute.


21. Id. at 775.
22. Id. at 782.
23. Legal assistance is left to lawyer pro bono services, or, for the poorest of people, legal aid staff attorneys. Initiated during the Johnson presidency, and changed dramatically during the Nixon presidency, the national Legal Services Corporation funds neighborhood legal aid offices, staffed by lawyers who assist qualified clients. There is a single financial cut-off line. Moreover, the American legal aid system does not assist accident injury claimants.
amination, groundless legal arguments, designed to lead the courts into error and competitive touting.24

Ten years later, Lord Chancellor Mackay shocked the legal community with a controversial Green Paper, Contingency Fees, that focused on the legal profession and made the once-heretical suggestion that contingent fees, or some variations thereof, might be acceptable in England.25 He mentioned the American-style contingent fee, but his principal emphasis was on two other “no win, no fee” arrangements. The “speculative fee” allowed the solicitor her regular fee if the claimant prevailed, but no fee if the client lost. The “conditional fee agreement” (“CFA”) allowed the solicitor her regular fee, plus a “success uplift,” determined as a percentage of the solicitor’s regular fee, if the client prevailed. The success uplift was to be calibrated to risk undertaken, not damages recovered. If the client lost, the solicitor received nothing.26 The Lord Chancellor suggested these new fee arrangements would permit claimants inexpensive access to the legal system, encourage a greater level of commitment by the solicitor, and might encourage healthy competition among solicitors.27

The time was ripe for such a suggestion. Important changes in professional regulation, legal aid, consumer protection, and civil procedure provided an impetus for the development. There was growing skepticism about antiquated professional regulations. Governments of both parties rigorously examined the professional regulatory arrangements for uncompetitive consequences. Since it was believed that competition was a spur to innovation and change, all restrictive practices, such as the ban on contingent fees, were suspect.28 Often, over professional resistance, old Dickensian rules were challenged.29 Was it necessary for Queen’s Counsel to be assisted by a junior barrister? Why should only barristers have the right to audience, regardless how qualified a solicitor might be? Should all lay clients be prohibited from directly instructing counsel? Should solicitors have a monopoly on the conveyancing practice?30

25. Contingency Fees, supra note 11, para. 1.4, at 1.
26. Id. para. 5.4, at 14.
27. Id. para. 1.5, at 1–2.
28. Id. para. 3.18, at 8 (“Rules which were developed to prevent interference with the administration of justice in feudal times may no longer be appropriate to the demands of the public for the delivery of efficient and business-like legal services.”).
30. Solicitors once had a monopoly on conveyancing and the fees it generated. Recently, the government has terminated this monopoly, and, due in part to the loss of fees, solicitors became more open to “no-win, no-pay” fees. See Herbert M.
There was also a growing dissatisfaction with publicly funded legal aid. The criticism was reaching a crescendo in the early 1990s. Many believed that legal aid recipients abused the system. It was, moreover, too expensive and there were too many frivolous suits. One spectacular loss, for example, involved claims concerning benzodiazapine, in which legal aid paid out £40 million before withdrawing support before the case came to trial. There were also several highlighted cases in which undeserving wealthy persons took advantage of the social system. The Government reduced public expenditures by stiffening the legal aid means test, thereby discouraging middle income claimants from pursuing legal resolution of their disputes.

In addition, there was a growing sensitivity to consumer protection and a concern with informed choice. Professionals were no longer as trusted as they once had been. Some clients needed protection from their own solicitors and all clients needed adequate information to make informed decisions. These concerns resulted in the adoption of the more detailed and rigorous Solicitors' Costs Information and Client Care Code. These ethics rules emphasize the importance of providing clients with the "best information possible" about the costs and financial implications of their lawsuits. The primary objective of these rules is to make certain "that clients are given the information they need to understand what is happening generally and in particular on: (i) the cost of legal services both at the outset and as a matter progresses; and (ii) responsibility for clients' matters."

Finally, there were substantial critiques of the entire civil justice system. Lord Woolf, in his impressive 1996 report, Access to Justice, asked whether the system was providing adequate access to justice and the legal system. The answer was no—it was too expensive. He recommended changes—many of which were implemented in the Civil Procedure Act of 1997, the Access to Justice Act of 1999, and amend-
ments to the Civil Procedure Rules—designed to reduce costs generally, and, more specifically, to make costs predictable and proportionate to the nature of the dispute. Some of the most important recommendations to reduce costs were a tiered judicial system, with different operating rules for different levels, and more active judicial management. Of particular relevance to this Article, Lord Woolf's report called for the development of protocols to encourage set-

39. Lord Woolf, in *Access to Justice*, emphasized the importance of costs considerations. The following is quoted from Chapter 7:

The importance of costs

1. I began the chapter on costs in the interim report by saying: "The problem of costs is the most serious problem besetting our litigation system."

2. The year which has elapsed since the interim report has not caused me to alter that assessment. Costs are a significant problem because:

   (a) litigation is so expensive that the majority of the public cannot afford it unless they receive financial assistance;
   (b) the costs incurred in the course of litigation are out of proportion to the issues involved; and
   (c) the costs are uncertain in amount so that the parties have difficulty in predicting what their ultimate liability might be if the action is lost.

3. The adverse consequences which flow from the problems in relation to costs contaminate the whole civil justice system. Fear of costs deters some litigants from litigating when they would otherwise be entitled to do so and compels other litigants to settle their claims when they have no wish to do so. It enables the more powerful litigant to take unfair advantage of the weaker litigant. The scale of costs per case has an adverse effect on the scope of the legal aid system. It also adversely affects the reputation of our civil justice system abroad and may be making this country less attractive for overseas investment and as a forum for the settlement of commercial disputes. As I pointed out in the interim report, it is incorrect to assume that high costs are not a problem merely because they are met out of a relatively deep pocket or are passed on in insignificant amounts to individual consumers. They still constitute an unnecessary cost to the economy as a whole and are not acceptable however they are distributed.

5. Costs are central to the changes I wish to bring about. Virtually all my recommendations are designed at least in part to tackle the problems of costs. They are intended to:

   (a) reduce the scale of costs by controlling what is required of the parties in the conduct of proceedings;
   (b) make the amount of costs more predictable;
   (c) make costs more proportionate to the nature of the dispute;
   (d) make the courts' powers to make orders as to costs a more effective incentive for responsible behaviour and a more compelling deterrent against unreasonable behaviour;
   (e) provide litigants with more information as to costs so that they can exercise greater control of the expenses which are incurred by their lawyers on their behalf.

tlements before formal proceedings were issued.\textsuperscript{40} It also recommended a procedure to resolve questions of costs without requiring litigants to initiate a formal lawsuit.\textsuperscript{41} The Government adopted all these recommendations. Thus, a skepticism about practice traditions, a reduction in the public legal aid commitment, a sensitivity to client concerns, and an emphasis on an efficient and affordable legal system informed the funding changes.

IV. THE FIRST REVISED LITIGATION FUNDING SYSTEM

The Courts and Legal Services Act of 1990 revised the then-existing funding system by legitimating (pursuant to implementing regulations) conditional fee agreements ("CFAs") for certain cases in specified circumstances.\textsuperscript{42} Although there was strident opposition to

\begin{footnotesize}
\begin{enumerate}

\item See WOOLF, ACCESS TO JUSTICE, supra note 38. Prior to implementation of Lord Woolf’s reforms in the Access to Justice Act of 1999, an order for costs could only be made in the action in which substantive relief was claimed. See Callery v. Gray, [2001] 3 All E.R. 833, 845 (C.A.). To remedy this procedural impediment to early settlement, the Civil Procedure Rules were amended to permit cost taxation in an independent procedure. This became known as a “cost only” or “Section 8” procedure. See supra note 16. Civil Procedure Rule 44.12A states:

\begin{enumerate}
\item This rule sets out a procedure which may be followed where—
\begin{enumerate}
\item the parties to a dispute have reached an agreement on all issues (including which party is to pay the costs) which is made or confirmed in writing; but
\item they have failed to agree the amount of those costs; and
\item no proceedings have been started.
\end{enumerate}
\item Either party to the agreement may start proceedings under this rule by issuing a claim form in accordance with Part 8.
\end{enumerate}


\item The Courts and Legal Services Act provides in relevant part:

\begin{enumerate}
\item In this section “a conditional fee agreement” means an agreement in writing between a person providing advocacy or litigation services and his client which . . . .
\item provides for that person’s fees and expenses, or any part of them, to be payable only in specified circumstances;
\item complies with such requirements (if any) as may be prescribed by the Lord Chancellor . . . .
\end{enumerate}

\begin{enumerate}
\item Where a conditional fee agreement provides for the amount of any fees to which it applies to be increased, in specified circumstances, above the amount which would be payable if it were not a conditional fee agreement, it shall specify the percentage by which that amount is to be increased. . . .
\end{enumerate}
\end{enumerate}

\end{enumerate}
\end{footnotesize}
any form of contingent fee system from a number of interest groups, within one year the Government announced its willingness to implement CFAs, whereby a solicitor for a prevailing claimant might enter into a "no win, no fee" contract with a success uplift based on a percentage of the solicitor's regular fee. The government rejected the American-style contingent fee as having too many "undesirable side effects," not the least of which were that there was no correlation between recovery and risk and that solicitors would be discouraged from taking small cases. Still, one commentator believed that there had

(3) Subject to subsection (6), a conditional fee agreement which relates to specified proceedings shall not be unenforceable by reason only of its being a conditional fee agreement.

(8) Where a party to any proceedings has entered into a conditional fee agreement and a costs order is made in those proceedings in his favour, the costs payable to him shall not include any element which takes account of any percentage increase payable under the agreement.

Courts and Legal Services Act, 1990, c. 41, § 58 (Eng.).

43. One particular fear was that the introduction of conditional fees would be the first step to the total elimination of legal aid. Others believed that the new arrangements would encourage a "compensation culture." In retrospect, both predictions seem appropriate. See Abel, supra note 3, at 257-59 (discussing the intensity of the debate).

The title of the Abel's article, An American Hamburger Stand in St. Paul's Cathedral: Replacing Legal Aid with Conditional Fees in English Personal Injury Litigation, comes from his quoting of an American expatriate who was opposed to the introduction of the American-style contingent fee in the English system. See id.

44. See Lord Chancellor's Department, Legal Services: A Framework for the Future, 1989, Cm. 740.

45. The Lord Chancellor's Department commented:

The Green Paper [on contingency fees] stimulated lively debate on the acceptability in principle of any contingency fee arrangement, and on the differences between those jurisdictions where it is permitted in some form or other and the legal and commercial arrangements in England and Wales. There was a clear consensus that it would not be right in principle, and would be likely to have a number of undesirable side-effects, for a lawyer to be permitted to undertake a case in return for some percentage of whatever damages might be received. That form of contingency fee was also thought likely to create an unacceptable degree of conflict of interest between the lawyer and his client, which could result in his being unable to give the client or the court advice of the required degree of impartiality. There was, however, little objection to the proposal that arrangements following the model of the Scottish speculative action (payment of normal fees only if successful) should be allowed in England and Wales, and some support for the proposition that the client and his lawyers should be able to agree an uplift to those costs when acting on this basis. There was, moreover, a very clear consensus that the general rule that costs follow the event should not be changed.

Id. para. 14.2, at 41.
been a titanic shift in the foundation of the legal profession. Lawyers now had a financial stake in the outcome.

The Bar's abandonment of its "cab-rank rule" in light of this dramatic change illustrates the impact. The cab-rank rule is one of the Bar's most fundamental professional principles. It requires that a competent barrister be available to all clients. A barrister cannot pick and choose among clients who are able to pay her fee.

"No win, no fee" agreements, however, put the barrister at financial risk. Even if she should prosper in the long run, there may be difficult times. Solicitors, through partnership arrangements, can share these risks. Barristers, on the other hand, must be independent professionals; they cannot join in a risk- and profit-sharing business arrangement. Recognizing the tension between availability to all

46. See Richard L. Abel, The Professional as Political: English Lawyers from the 1989 Green Papers Through the Access to Justice Act 1999 (available in the Schmid Law Library at the University of Nebraska College of Law) (giving a full account of the dispute) ("The Government's most radical reform was transferring the cost of litigation from the state to the parties.").

Many opposed changes in the legal aid system. One commentator called the recommended changes Orwellian, and claimed that the English legal aid system was the "most efficient of all public services," and that it was regrettable that it would be replaced by "the despoiled stock in trade of the ambulance chasers of America." Abel, supra note 3, at 297. See also Colleen P. Graffy, Conditional Fees: Key to the Courthouse or the Casino?, 1 LEGAL ETHICS 70, 80 (1998).

47. Graffy, supra note 46, at 70.

48. The Code of Conduct for barristers provides:

A barrister in independent practice must comply with the 'Cab-rank rule' and accordingly except only as otherwise provided in paragraphs 603 604 605 and 606 he must in any field in which he professes to practise in relation to work appropriate to his experience and seniority and irrespective of whether his client is paying privately or is publicly funded:

(a) accept any brief to appear before a Court in which he professes to practise;
(b) accept any instructions;
(c) act for any person on whose behalf he is instructed;
and do so irrespective of (i) the party on whose behalf he is instructed (ii) the nature of the case and (iii) any belief or opinion which he may have formed as to the character reputation cause conduct guilt or innocence of that person.


49. One commentator noted:

In this respect, as generally, the Bar's prohibition against barristers in England and Wales entering into partnerships can indeed be regarded as the means by which the Bar 'deprives itself of the advantages of the most helpful form of organisation between working [people]'. Furthermore, there seems to be little ethical justification for the rule which, as Abel has observed, is one of the Bar's 'restrictive practices limiting internal competition' between juniors. It is however ostensibly justified by the need to ensure continued application of the cab-rank principle and to
and taking a financial risk (i.e., in effect becoming an insurer), the Bar Council jettisoned its fundamental cab-rank rule and it now permits a barrister to refuse a CFA client for this reason alone.\(^{50}\)

There was no immediate rush to use CFAs, and the Lord Chancellor took five years to promulgate the implementing regulations, known as "Regulations of 1995."\(^{51}\) The Regulations of 1995 applied to a limited class of cases, primarily personal injury suits. CFAs that complied with the regulations were enforceable. The Regulations of 1995 set a one hundred percent maximum success uplift. Since there was no experience and no consensus as to what figure would be suitable, the Lord Chancellor apparently chose an uplift sufficient to encourage solicitors to represent claimants with an even chance of success.\(^{52}\)

The Regulations of 1995 were uncomplicated. Section 3 focused on the required content of the CFA, such as that the CFA had to state "whether or not the amount payable is limited by reference to the

avoids conflicts of interest that might reduce access to barrister's services. It is based on the view that competition is best served by maintaining the Bar as a pool of sole practitioners who "compete vigorously on equal terms."


52. The Law Society developed a model conditional fee agreement that provided that no success fee should be greater than maximum of twenty-five percent of the recovered damages. Barristers accepted this figure, and, if counsel worked on a CFA, the combined recovery of solicitor and barrister should not exceed this twenty-five-percent maximum. Graham Robinson, The CFA is Here to Stay—A Litigator's Guide to Conditional Fee Agreements and Other Funding Arrangements, 2001 J. PERS. INJ. L. 1, 44–51.

Not surprisingly, many solicitors used this twenty-five-percent figure as a matter of course. One commentator has suggested that in practice this was an indirect American-style contingency fee. Zander, supra note 13, at 267.

It is generally accepted that if the chances of success are no better than 50 per cent the success fee should be 100 per cent. The thinking behind this is that if a solicitor were to take two identical cases with a 50 per cent chance of success in each it is likely that one would be lost and the other won. Accordingly the success fee (of 100 per cent) in the winning case would enable the solicitor to bear the cost of running the other case and losing.

amount of any damages recovered on behalf of the client.\textsuperscript{53} Section 4 emphasized appropriate client care and communication with the client. The CFA had to state that immediately before it was entered into, the legal representative had "[drawn] the client's attention to matters" relating to legal fees and costs.\textsuperscript{54}

The implementation of this first revised litigation funding system, and its extension in 1998 to a broader range of cases, did not, however, slow the debates regarding deregulation, legal aid, consumer protection, and civil procedure. In the next few years, the Government published several important papers and reports relevant to the costs issues. As referred to supra, Lord Woolf's 1996 report, \textit{Access to Justice},\textsuperscript{55} was enormously influential. In the same year, the Lord Chancellor issued his white paper, \textit{Striking the Balance—The Future of}

\begin{itemize}
\begin{itemize}
\item An agreement shall state—
\begin{itemize}
\item (a) the particular proceedings or parts of them to which it relates (including whether it relates to any counterclaim, appeal or proceedings to enforce a judgment or order);
\item (b) the circumstances in which the legal representative's fees and expenses or part of them are payable;
\item (c) what, if any, payment is due—
\begin{itemize}
\item (i) upon partial failure of the specified circumstances to occur;
\item (ii) irrespective of the specified circumstances occurring; and
\item (iii) upon termination of the agreement for any reason;
\end{itemize}
\item (d) the amount payable in accordance with sub-paragraphs (b) or (c) above or the method to be used to calculate the amount payable; and in particular whether or not the amount payable is limited by reference to the amount of any damages which may be recovered on behalf of the client.
\end{itemize}
\end{itemize}
\textit{Id.} § 3.
\item \textsuperscript{54} Id. § 4. Section 4 provides:
\begin{itemize}
\item (1) The agreement shall also state that, immediately before it was entered into, the legal representative drew the client's attention to the matters specified in paragraph (2).
\item (2) The matters are—
\begin{itemize}
\item (a) whether the client might be entitled to legal aid in respect of the proceedings to which the agreement relates, the conditions upon which legal aid is available and the application of those conditions to the client in respect of the proceedings;
\item (b) the circumstances in which the client may be liable to pay the fees and expenses of the legal representative in accordance with the agreement;
\item (c) the circumstances in which the client may be liable to pay the costs of any other party to the proceedings; and
\item (d) the circumstances in which the client may seek taxation of the fees and expenses of the legal representative and the procedure for so doing.
\end{itemize}
\end{itemize}
\textit{Id.}
\item \textsuperscript{55} See Woolf, \textit{Access to Justice}, supra note 38.
\end{itemize}
Legal Aid in England and Wales. In 1997, Sir Middleton published his Review of Civil Justice and Legal Aid. This last report reflected a growing governmental consensus that CFAs could virtually displace legal aid. More controversially, Sir Middleton suggested that it was time for England to seriously consider the American-style contingent fee. The English Rule and the fact that juries do not usually set damages would ameliorate American-style abuses. Sir Middleton reported:

I also think that the time is now ripe to reconsider whether contingency fees—where the fee is a proportion of the amount recovered rather than an uplift to the normal bill—should also be permitted. There is no essential difference in principle between conditional and contingency fees. Indeed, in some ways the latter may be preferable. Contingency fees create an incentive to achieve the best possible result for the client, not just a simple win. And they reward a cost-effective approach in a way that conditional fees, where the lawyers' remuneration is still based on an hourly bill, do not. Opponents of contingency fees usually cite the experience of them in the United States of America. However, considering the differences between the two jurisdictions—notably the cost-shifting rule and the fact that juries here do not generally set damages—we should re-assess whether those concerns may be misplaced.

V. AFTER-THE-EVENT INSURANCE AND THE SECOND REVISED LITIGATION FUNDING SYSTEM

In spite of these dramatic changes in legal aid and litigation funding, the new system did not instantaneously assure access to justice for all legitimate claimants. There remained two significant problems for risk-averse parties. First, pursuant to the English Rule, a losing claimant might be liable for the prevailing party's solicitor's fees and litigation costs. Second, since the success uplift was not recoverable, the claimant was responsible for it, and, therefore, even a prevailing claimant would not recover all his damages.

To remedy the first problem, the Law Society, with several insurance companies, developed a new after-the-event ("ATE") insurance policy. This type of policy covered risks associated with losing a lawsuit. The early policies indemnified the loser for the prevailing party's

57. SIR PETER MIDDLETON, DEP’T FOR CONSTITUTIONAL AFFAIRS, REPORT TO THE LORD CHANCELLOR (1997) (reviewing civil justice and legal aid), available at http://www.dcs.gov.uk/middle/index.htm. Some have argued that Sir Middleton was insufficiently sensitive to the need for legal aid. See, e.g., Graffy, supra note 46, at 84–85.
58. See MIDDLETON, supra note 57, § 5.50.
59. Id. § 5.50.
solicitor's fees and litigation costs. The policies soon expanded to cover the litigant's own nonrecoverable costs.\(^\text{60}\)

The insurance companies primarily sold ATE insurance through solicitors, who acted as their agents. This was efficient in that the solicitor who assessed litigation risk to determine her own success uplift could also apply the analysis to an insurance premium. The development and marketing of ATE insurance, however, was difficult. Insurers first underestimated their liabilities, and the early premium revenues were insufficient to cover the costs. In part this was due to cherry picking. If a claimant had a solid claim, there was little need for ATE insurance; thus, solicitors tended to recommend ATE policies only to claimants with weak cases. Moreover, solicitors would often delay recommending a policy until they determined how strong the case was. Not infrequently, this did not occur until after the case failed to settle during the mandatory settlement procedures. As a result, the premium-paying pool only included claimants with weak or contested cases. This led to high premiums. In order to spread the risk among more claimants, thereby reducing insurance premiums, ATE insurers soon required their agent–solicitors to recommend the insurance to all accident claimants at their first meeting.

Although ATE insurance addressed the first problem, it aggravated the second. Since neither the ATE premium nor the success uplift were recoverable by the prevailing party, it was possible that a prevailing claimant would pay a substantial percentage of recovered damages for fees and the insurance premium. Popular investigative reporters publicized cases in which claimants lost substantial portions of their recovered damages to fees, costs, and premiums.

The Access to Justice Act of 1999\(^\text{61}\) offered a dramatic solution to these two problems. This is the second revision of the funding system. These changes, as will be discussed, also generated what some have called "guerrilla warfare" in satellite cost litigation.\(^\text{62}\) The Act applied the English Rule to success uplifts and ATE premiums.\(^\text{63}\) The prevail-

\(^{60}\) After 2000 and the second revised litigation funding system, insurance companies not only were willing to defer payment of the premium to the end of the lawsuit, but they also agreed not to charge any premium above a recoverable amount. Zander, supra note 13, at 267-69.

\(^{61}\) Access to Justice Act, 1999, c. 22 (Eng.).

\(^{62}\) See infra section VI.B.

\(^{63}\) Section 27 of the Access to Justice Act amended Section 58A of the Courts and Legal Services Act to, inter alia, provide: "A costs order made in any proceedings may, subject in the case of court proceedings to rules of court, include provision requiring the payment of any fees payable under a conditional fee agreement which provides for a success fee." Access to Justice Act, 1999, c. 22, § 27 (Eng.). The Access to Justice Act also added a new section to the Courts and Legal Services Act to, inter alia, provide:

Where in any proceedings a costs order is made in favour of any party who has taken out an insurance policy against the risk of incurring a
The party would be able to recover both of these, and, therefore, he would now be fully compensated. Risk-averse claimants no longer had to fear litigation. If they prevailed, they recovered all fees and the insurance premium. If they lost, they paid no fees, the insurance company paid the prevailing party's costs, and, although they might have been liable for the insurance premiums, creative financing and insurance coverage soon made it apparent that claimants would not even be responsible for the premium.

The Lord Chancellor's Department promulgated the CFA Regulations of 2000 to implement the second revised litigation funding system in April 2000. The Regulations were exceedingly complicated and detailed because they compromised among a number of important concerns and interests. They offered an alternative to legal aid; reassured risk-averse claimants; guaranteed that a prevailing claimant would keep all the recovered damages; regulated conflicts of interest; mandated professional communication and careful client care; encouraged early settlement; and, finally, assured paying parties that they would have a mechanism for challenging excessive fees, success uplifts, and insurance premiums.

Section 2 delineated the required content of an enforceable CFA agreement. Section 3 was added to the earlier Regulations. Since success fees were now recoverable, it was necessary for the solicitor to set out "the reasons for setting the percentage increase at the level stated in the agreement." This would assure, among other goals, that if

liability in those proceedings, the costs payable to him may, subject in the case of court proceedings to rules of court, include costs in respect of the premium of the policy.

Id. § 29.

The Lord Chancellor's Department commented:

Under the changes that are being made the uplift in fees and insurance costs will be recoverable. This will not only mean that someone claiming money will keep more of any damages that are recovered, but also that it will be easier to bring a case which does not involve a claim for money and it will make conditional fee agreements and after the event insurance suitable for defendants.


After 2000, insurance companies not only were willing to defer payment of the premium to the end of the lawsuit, but they also agreed not to charge any premium above a recoverable amount. Zander, supra note 13, at 267–69.


CONSULTATION PAPER, supra note 64, para. 26. The Lord Chancellor's Department explained:

When the terms of the conditional fee agreement are agreed the legal representative should produce written reasons for his or her client setting out the level of uplift charged. This requirement would provide the client with contemporary information on the factors which informed the
there should be a challenge to the reasonableness of the fee, there
would be a contemporaneous explanation for the rate. Section 4 was
an elaborate client-care, informed-consent regulation. It required that
the "legal representative" shall inform the client of an array of mat-
ters, such as whether there is insurance, whether other methods of
financing are available, whether the legal representative thinks any
particular method of financing is appropriate. The legal representa-
tive had to communicate all these matters orally, and some of the mat-
ters had to be communicated both orally and in writing. Many
believed that these client-care regulations were better left to profes-
sional codes. Moreover, it was ironic that such detail was provided
when the claimant had less reason to need it. After all, if the claimant
lost, he did not pay, and if he won, he could recover the fees, expenses,
and premium.

VI. THE CONSEQUENCES OF THE SECOND REVISED
LITIGATION FUNDING SYSTEM

Since claimants in routine traffic cases almost always recovered
some damages (usually in a settlement), they were normally the pre-
vailing party. As such, where once they had relied on themselves and
legal aid for funding, they were effectively able to shift the funding of
litigation, including conditional fees, success uplifts, and after-the-
event ("ATE") insurance premiums, to defendant liability insurance
companies. There were at least two important consequences. First,
this dramatic shift resulted in a flourishing claims management busi-
ness. Frequently called "claims farmers," these lay and unregulated
firms fostered claims and soon commanded a large percentage of
claimants' business, such as routine traffic accident cases. Sometimes
they worked with solicitors; at other times they were in competi-
tion. Second, defendant liability insurance companies resisted the
solicitor's decision to set the level of the success fee, and would provide
the court with information upon which to decide whether that part of the
success fee that is to be recoverable is fair and reasonable if it is chal-
lenged on final assessment. It would not only reduce the negative effect
of hindsight on the final assessment. Preparing a written risk assess-
ment which not only specifies what part of the success fee relates to the
solicitor's risk in costs, but which also reflects the position when the con-
ditional fee agreement was entered into would assist the court in decid-
ing whether the level set was appropriate given the facts at that time
. . . . , and would also go some way towards satisfying client care
requirements.

Id.

68. See id. para. 9.

69. Generally speaking, there were two types of firms. Claims assessors were busi-
nesses that agreed to negotiate on behalf of claimants, and claims management
companies were businesses that coordinated all relevant personnel. Both were
and remain unregulated.
shifting of litigation funding and the ambulance-chasing techniques of claims management firms, aggressively challenging the recoverability of all costs. At the least, this “guerrilla warfare” over recoverable costs has generated much wasteful and expensive satellite and test litigation that, among other things, delayed payments and reduced the necessary cash flow to claimants' representatives.

A. Claims Management Firms

In England, lawyers do not have a monopoly, as they do in many American states, on the management of legal claims. Since there is no broad ban on the unauthorized practice of law (with the exception of courtroom practice), nonprofessional firms compete directly with solicitors for claimants. On the one hand, this encourages some meritorious victims to initiate legal actions. Claims management firms are user-friendly. They manage the processes, the professionals, and the legal system in ways that are convenient for claimants with little experience with the legal system. On the other hand, claims management firms might easily corrupt the processes by initiating nonmeritorious suits, stirring up unwarranted litigation, and, in some cases, exploiting their own clients. During the first two years of the second revised litigation funding scheme, two controversial companies, Claims Direct and The Accident Group (“TAG”), dominated the field. They attracted claimants with extensive television commercials and they aggressively solicited claimants with direct personal contact, often in railroad stations or shopping malls. It was sometimes difficult for a person to walk down the street without being


The Access to Justice Act 1999 has introduced new provisions that will allow recovery from the losing party in a claim the success fee and the premium in addition to damages and solicitor's costs. Some commentators have suggested that this will cause a withering away of claims assessors business. The reason is that claims assessors operating on a contingency fee basis will be uncompetitive faced with solicitors all of whose costs will be recoverable from the loser. We take the view that consumers who receive appropriate information may well consider that solicitors are a better bargain but this is not inevitable. To some extent the person who makes the first contact with the client is likely to pick up the business. Also, some clients might find claims assessors more user friendly to deal with than solicitors or barristers.

Id. para. 104 (citation omitted).

asked if he had recently been injured. Critical investigative reporting exposed abuses, such as unwarranted and fraudulent claims, excessive fees, and inattention to certain cases. Both companies have had serious legal and financial problems, and both declared bankruptcy.\textsuperscript{72}

As to operating procedures, different firms used similar approaches. After contacting the claimant and investigating his claim to ascertain that it had a better-than-even chance of success, a firm employee, or perhaps a franchised case management agent, would then meet with the claimant, often at the claimant's home, and assist the claimant with scheduling and paperwork.\textsuperscript{73} If necessary, the agent

\textsuperscript{72} As of June 2004, five large claims management firms had declared bankruptcy. "Ethical" Option Invaro is Latest Claims Firm to Go to the Wall, \textit{LEGAL WEEK}, June 24, 2004.

\textsuperscript{73} There are a number of companies engaged in representing claimants. See BLACKWELL, \textit{supra} note 70. The Blackwell report describes some of the differences between different sorts of companies:

Overwhelmingly, personal injury claims are either withdrawn or result in settlement without the issue of court proceedings. However, whilst solicitors can issue court proceedings, claims assessors are limited to obtaining instructions from clients to negotiate settlements of claims for personal injury or death. As they cannot issue a case in court this poses the central conundrum of their work: does their inability to threaten proceedings mean that defendants are more likely to make low settlement offers and, in turn, do they have a financial incentive to accept such offers? The Committee has no evidence on which to base such a conclusion, although it does not necessarily follow that this is not the case for the reasons set out above.

Claims assessors earn their income by charging the clients for whom they act. Whilst solicitors operate in the same way in most cases of personal injury, insurance companies who settle claims pay damages and solicitor's costs. The solicitor may then make a further charge to the client but often the solicitor will be content with what is recovered from the defendant. Conversely, the charging system adopted by claims assessors is usually "no win no fee" and on a contingency basis. This means that the claims assessor takes a percentage of the damages recovered and nothing if the negotiation is unsuccessful. That percentage is not regulated although it may be subject to an element of protection under normal consumer law. However, such protection will be of little value as the settlement cheque will be paid to the assessor who will then deduct the costs. This leaves the only recourse open to a dissatisfied client as being to sue the assessor which is unlikely to happen.

In the course of the Committee's work we became aware of the increasing importance in the field of personal injury claims of claims management companies. Whilst claims management companies may in detail operate in different ways, their fundamental purpose and structure is to develop arrangements with a wide range of the service providers who are usually involved in personal injury cases in particular solicitors but sometimes also barristers, litigation insurers and funders, medical experts and others. One at least also has arrangements with claims managers who visit clients or potential clients in their homes and liaise between the client and the other providers. If an individual believes that he or she may have a case they can contact the claims man-

\textsuperscript{72} As of June 2004, five large claims management firms had declared bankruptcy. "Ethical" Option Invaro is Latest Claims Firm to Go to the Wall, \textit{LEGAL WEEK}, June 24, 2004.

\textsuperscript{73} There are a number of companies engaged in representing claimants. See BLACKWELL, \textit{supra} note 70. The Blackwell report describes some of the differences between different sorts of companies:

Overwhelmingly, personal injury claims are either withdrawn or result in settlement without the issue of court proceedings. However, whilst solicitors can issue court proceedings, claims assessors are limited to obtaining instructions from clients to negotiate settlements of claims for personal injury or death. As they cannot issue a case in court this poses the central conundrum of their work: does their inability to threaten proceedings mean that defendants are more likely to make low settlement offers and, in turn, do they have a financial incentive to accept such offers? The Committee has no evidence on which to base such a conclusion, although it does not necessarily follow that this is not the case for the reasons set out above.

Claims assessors earn their income by charging the clients for whom they act. Whilst solicitors operate in the same way in most cases of personal injury, insurance companies who settle claims pay damages and solicitor's costs. The solicitor may then make a further charge to the client but often the solicitor will be content with what is recovered from the defendant. Conversely, the charging system adopted by claims assessors is usually "no win no fee" and on a contingency basis. This means that the claims assessor takes a percentage of the damages recovered and nothing if the negotiation is unsuccessful. That percentage is not regulated although it may be subject to an element of protection under normal consumer law. However, such protection will be of little value as the settlement cheque will be paid to the assessor who will then deduct the costs. This leaves the only recourse open to a dissatisfied client as being to sue the assessor which is unlikely to happen.

In the course of the Committee's work we became aware of the increasing importance in the field of personal injury claims of claims management companies. Whilst claims management companies may in detail operate in different ways, their fundamental purpose and structure is to develop arrangements with a wide range of the service providers who are usually involved in personal injury cases in particular solicitors but sometimes also barristers, litigation insurers and funders, medical experts and others. One at least also has arrangements with claims managers who visit clients or potential clients in their homes and liaise between the client and the other providers. If an individual believes that he or she may have a case they can contact the claims man-
would explain CFAs and ATE insurance. The management firm then orchestrated the lawsuit and the professionals, including solicitors, insisting that all professional participants comply with its carefully drafted operations manual. This was to assure efficiency and quality control. The management firm directed the claimant to a panel solicitor (who would take the case with a conditional fee agreement, with or without a success uplift), experts (including doctors), and counsel (sometimes requiring consultation). Additionally, the management firm or a close affiliate not infrequently offered litigation support services, such as investigating witnesses and taking their statements. In some cases, the management firm required that its panel solicitors pay for these support services. In the Claims Direct plan, for example, the solicitor paid £395 for each case. Later, defendant liability insurance companies challenged the bona fides of this payment.

Before 2000, the financial plans of claims management firms were not unduly complex. Claims Direct, for example, in addition to selling franchises to claims agents, used a model similar to a litigation funding firm in the United States—it charged a successful claimant a percentage (i.e., thirty percent) of recovered damages. If the claimant
prevailed, the solicitor sought to recover fees, costs, and disbursements, even including the solicitor's required payment for litigation services. If the claimant lost, the solicitor received nothing, and the management firm covered the claimant's own costs as well as the prevailing party's costs.

With the inauguration of the second revised litigation system, the financial arrangements became more complex and obscure. In effect, some firms sought to profit by inflating recoverable costs, such as success fees and insurance premiums, at the expense of defendant liability insurance companies. Claims Direct, for example, nominally served as an agent to sell ATE insurance policies for a risk underwriter. After the management firm arranged for a bank to advance the premium, the risk underwriter reallocated the premium in a complex and obscure way, so that, at the end of the day, the management firm received a substantial part of the total premium. The insurance underwriter, for example, contracted for insurance management services from the claims management firm or an affiliate. As will be discussed infra, defendant liability insurance companies challenged the bona fides of these premiums, claiming that it was an insurance premium in name only.

The claimant had the best of all worlds. If he prevailed in his lawsuit, he recovered his entire damages and the professionals recovered their CFA fees, uplifts, respective costs, and the insurance premium.

[But, in this case, there was no] danger . . . that the insurer might be tempted for his own personal gain to inflame the damages, to suppress evidence or even to suborn witnesses. Furthermore, . . . the company makes its profits from the insurance not from the litigation, it does not divide the spoils but relies upon the fruits of the litigation as a source from which the insured can satisfy her liability for the premium in return for the provision of a genuine service, namely the ATE insurance cover which is external to the litigation.

Id.

Also, consistent with this expansive approach, the Court of Appeal, in Gulf Azov Shipping v. Idisi, [2004] EWCA Civ 292, [2004] All E.R. (D) 284, recently held that a third party litigation funding company would not be responsible for costs in the event that the funded party lost the lawsuit. The Court believed that this was necessary to assure that all persons had access to justice. Lord Phillips wrote:

Public policy now recognizes that it is desirable, in order to facilitate access to justice, that third parties should provide assistance designed to ensure that those who are involved in litigation have the benefit of legal representation. Intervention to this end will not normally render the intervener liable to pay costs. If the intervener has agreed, or anticipates, some reward for his intervention, this will not necessarily expose him to liability for costs. Whether it does will depend upon what is just, having regard to the facts of the individual case. If the intervention is in bad faith, or for some ulterior motive, then the intervener will be at risk in relation to costs occasioned as a consequence of his intervention.

Id. para. 54.

78. See infra subsection VI.B.2.
If the claimant lost, there was no fee pursuant to the CFA agreement, and the ATE insurance covered the prevailing party’s costs, the claimant’s costs, and, in many cases, the ATE insurance premium.

B. The Satellite Litigation

Defendant insurance companies found this new scheme intolerable. Particularly aggravating was their perception that since claimants risked nothing, they had no incentive to monitor the fees, the uplifts, or the premiums, and therefore the sky was the limit. There was no initial check on the amounts. In what some have called a “guerrilla war,” the defendant insurance companies took every opportunity to challenge elements of the second revised litigation funding system between 2000 and 2003. In the aggregate, there were large amounts at stake, and even if a defendant liability insurance company should lose a case, the delay in payment was important. Expensive and time-consuming satellite litigation became the norm in many courts. Several important courts—the Court of Appeal, the House of Lords, and the Supreme Court Taxing Office (in a series of complicated test cases), among others—addressed related issues raised by the second litigation funding system. The litigation fell roughly into three categories: (1) an analysis of fundamental principles and reasonableness; (2) a deconstruction of the recoverable ATE insurance premium; and (3) a series of technical challenges premised on the incompatibility of the second revised litigation funding system and the indemnity principle. It was not until the summer of 2003, three years after the second revised litigation funding scheme was initiated, that there came a moment of repose.

1. Fundamental Principles and Reasonableness

a. The First English Cases

The Callery v. Gray cases (Callery (No. 1)) and Callery (No. 2) in the Court of Appeal and the combined appeals in the House of Lords were the first leading cases. They involved, as did most of the early litigation, routine traffic accident cases. The Court of Appeal and the House of Lords grappled with the fundamentals and the reasonableness of the CFA, the success uplift, and the ATE insurance premium. The English Rule had always prohibited a prevailing party from recovering more than reasonable fees and costs. To explicate certain fundamental principles associated with reasonableness, the Court of Appeal in Callery No. 1 raised two questions: When would it

81. Callery v. Gray (Nos. 1 & 2), [2002] 3 All E.R. 417 (H.L.) (deciding the appeals from Callery No. 1 and Callery No. 2 together) [Callery (H.L.)].
be reasonable for a claimant to sign a CFA with a success fee and to take out an ATE policy?; and, with respect to the CFA, What percentage success uplift would be reasonable in any given case?

Defendant liability insurance companies asked the court to focus on each individual case in deciding if the fees and success uplift were reasonable. Since risks differed in each individual case, they argued that it would never be reasonable to enter into a CFA with a success uplift until the solicitor knew, or had a good idea, of the actual risk. From their perspective, there was little doubt that the first meeting of claimant and solicitor was too soon since the case might settle during the protocol period, in which case there would be no risk.

In Callery No. 1, Lord Woolf rejected this individualistic approach and adopted a broader perspective. For him (and he was not reversed), the major issue was whether an early commitment to a CFA with a success uplift was needed to encourage legitimate claimants to bring their suits and to encourage solicitors to take these routine cases. The purposes of the second revised litigation funding system was to facilitate access to justice on the part of those who could not afford the costs of litigation and to reduce the burden on legal aid.\(^\text{82}\)

With these goals in mind, he believed that it was reasonable to “take a global view” of the problem.\(^\text{83}\) He believed, as a practical matter, that claimants and solicitors would not proceed unless they could enter into a CFA at the earliest possible moment.

In determining the appropriate success uplift percentage, Lord Woolf did not focus on the risk in an individual case; instead, he continued his broad analysis. The issue was what was necessary for a solicitor “carrying on litigation business on a large scale” to achieve a “reasonable return overall.”\(^\text{84}\) Where the solicitor carries on a large-scale litigation business, it is necessary to permit the solicitor to claim an uplift sufficient to provide him with a reasonable return overall on a particular class of litigation.\(^\text{85}\) Lord Woolf then rather arbitrarily concluded that the maximum success uplift in these routine traffic accident cases should be no more than twenty percent.\(^\text{86}\) He worried,

---

83. Id. para. 93, at 853.
84. Id. paras. 82-83, at 851.
85. Id. para. 83, at 851.
86. Id. para. 133, at 860. One commentator believed that Lord Woolf had simply “pick[ed] a figure out of the air.” Michael Zander, Where Are We Now on Conditional Fees—Or Why this Emperor Is Wearing Few, If Any, Clothes, 65 Mod. L. Rev. 919, 925 (2002).


Halloran v Delaney... was concerned with an extremely simple road traffic accident claim which was swiftly settled for £1,500 with a mini-
however, that even this figure was too high, and he recommended a two-stage conditional fee with a lower percentage uplift if the case settled early in the litigation process.\footnote{Callery No. 1, [2001] 3 All E.R. paras. 104-16, at 855-57.}

Lord Woolf recognized the “inevitable [macro] consequences” of the second revised litigation funding system. Where once the claimant and the taxpayer, through the public support of legal aid, bore the costs for these routine accident cases, the costs were now shifted to defendant insurance companies through the payment of small success uplifts. Since these payments kept the efficient, large-scale firm in business with a reasonable return overall, the insurance companies were, in effect, funding all litigation, including that of losing claimants.\footnote{See id. paras. 96-100, at 853-54.} Lord Woolf was not alarmed. Since the same liability insurance companies were frequently repeat players in the system, any given company would, in the long run, make many small success fee payments rather than a few large ones.\footnote{See id. para. 99, at 854.} This was not only as a generation of fuss and bother. In para. 32 of my judgment I referred to the court’s description of Callery v Gray as a “modest and straightforward claim for compensation for personal injuries resulting from a traffic accident . . . where there was no special feature that raised apprehension that the claim might not prove to be sound”. In paras [34]-[36] I suggested the approach that judges should adopt in future when appraising the appropriateness of a success fee “in claims as simple as this”.

Subsequent events have shown that I should have expressed myself with greater clarity. The type of case to which I was referring was a case similar to Callery v Gray and Halloran v Delaney in which, to adopt the "ready reckoner" in \textit{Cook on Costs} 2003, p.545, the prospects of success are virtually 100 per cent. The two-step fee advocated by the court in Callery v Gray (No. 1) is apt to allow a solicitor in such a case to cater for the wholly unexpected risk lurking below the limpid waters of the simplest of claims. It did not require any research evidence or submissions from other parties in the industry to persuade the court that in this type of extremely simple claim a success fee of over 5 per cent was no longer tenable in all the circumstances. The guidance given in that judgment was not intended to have any wider application.

\textit{Id.} paras. 100-01.

\footnote{Callery No. 1, [2001] 3 All E.R. paras. 104-16, at 855-57.}

\footnote{See id. paras. 96-100, at 853-54.}

\footnote{See id. para. 99, at 854.} Lord Woolf explained:

If the new regime is to achieve its object, the legal costs of claimants whose claims fail should fall to be borne by unsuccessful defendants in the manner described in [93] above. On these appeals the Court has to decide whether to permit liability for success fees to be apportioned in relatively small amounts among many unsuccessful defendants, or to insist on an approach under which they will be borne in much larger amounts by those unsuccessful defendants who persist in contesting liability.

In relation to claims arising out of road accidents, where defendants will be insured, the same insurers will often be sharing the costs involved, whether in the form of many uniform small uplifts or fewer large uplifts.

\textit{Id.}
eral matter substantively fair, but if the success uplift was based on individual cases, there would be a perverse result. Defendants with the best cases (and therefore cases in which the claimants' solicitors would necessarily seek higher success fees to cover the legitimate risks involved) would, in the event of losing, be forced to pay a higher uplift amount than would a defendant with a weaker case. Lord Woolf explained:

If the latter alternative [i.e., success uplift based on individual cases] is adopted, the defendants who contest liability will not share liability for costs in a manner which is equitable. Where there is a strong defence which it is reasonable to advance, a larger uplift will be [more] appropriate than where a defendant unreasonably persists in contesting liability despite the fact that the defence is weak. Thus the more reasonable the conduct of the defendant, the larger the uplift that he will have to pay if his defence fails.90

Defendant insurance companies also challenged the recoverability of ATE insurance premiums. A similar question arose in the ATE insurance context as it had in the CFA context: When was it reasonable to take out ATE insurance? The insurance companies again argued that since the risk in an individual case would not be known at the first meeting of claimant and solicitor, it was, ipso facto, unreasonable to purchase insurance at that time. If the case might easily settle during the mandatory protocol period, there would be no need for ATE insurance. In Callery No. 1, the Court of Appeal (Lord Woolf) again took a broad approach to the issue and concluded that it was reasonable for a claimant to purchase an ATE insurance policy at his first meeting with his solicitor. First, Lord Woolf referred to the ATE insurers' experience with cherry picking and stressed the importance of including all claimants, including those with low-risk cases, in the insurance pool. This would keep the premium cost at a reasonable level.91 Second, without ATE insurance, risk-averse claimants would be reluctant to seek legal recourse.92

90. Id.
91. See id. (discussing that “unless the policy is taken out before it is known whether a defendant is going to contest liability, the premium is going to rise substantially” and that in such circumstances cover may not be available).
92. Although the courts agreed that it was reasonable to take out an after-the-event insurance policy at the inception of the relationship, they still insisted that solicitors make at least some inquiry to assure that there is not another convenient way to fund the claimant's litigation. In another important case in 2001, Sarwar v. Alam, [2001] 4 All E.R. 541 (C.A.), the claimant had been a passenger in the defendant's car. The solicitor agreed to take the case on a conditional fee basis, and the claimant bought an after-the-event insurance policy at that first meeting. It was later discovered that the driver's before-the-event insurance policy would have afforded the passenger adequate legal insurance to maintain the case. Under these circumstances, it was not reasonable to recover the after-the-event insurance premium from the losing opponent. The solicitor, at this first meeting, had an obligation to make sure that claimants did not have other ways, such as insurance, to maintain the case. This would not require an exhaustive search,
Lord Woolf recognized that ultimately the insurance companies paid the litigation funding costs, but he thought that this was a fair result. As with CFAs and success uplifts, the question was whether a particular defendant insurance company would pay many low ATE premiums or a few high ones, and since the same liability insurers engaged in the business, it did not matter over a large range of cases. Moreover, Lord Woolf reminded insurance companies that they were the ultimate beneficiaries of ATE insurance. Without these policies in place, it would, as a practical matter, be unlikely that even prevailing insurance companies would recover their costs. Many individual claimants simply did not have the resources. ATE insurance, in essence, created a resource pool for the insurer’s own ultimate benefit.93

The House of Lords decided the appeals from Callery No. 1 (together with the Callery No. 2 appeals94) one year later on June 27, 2002.95 All the Lords except one—Lord Scott of Foscote, who voted for reversal—dismissed the appeals. They all believed that regardless of the merits, these issues were best left to the Court of Appeal and the lower courts.96 Thus, Lord Woolf’s analysis remains decisive. Still, all the Law Lords had serious misgivings about the second revised litigation funding system.97

but, at the least, the solicitor should request that his client bring relevant insurance policies, etc., to the first meeting. Id. para. 45, at 554.

93. See Callery No. 1, [2001] 3 All E.R. para. 99, at 854 (“So far as insurance premiums are concerned, these will produce cover which benefits the defendants, for they will ensure that costs are awarded against unsuccessful claimants and that such awards are satisfied.”).

94. Callery No. 2 will be discussed infra. See infra notes 114–24 and accompanying text.

95. Callery v. Gray (Nos. 1 & 2), [2002] 3 All E.R. 417 (H.L.) [Callery (H.L.)].

96. For example, Lord Bingham of Cornhill wrote:

For these reasons (and those given by my noble and learned friends Lord Nicholls of Birkenhead and Lord Hope of Craighead) I would dismiss this appeal. In doing so I would not wish to discount either the risk of abuse or the need to check any practices which may undermine the fairness of the new funding regime. This should operate so as to promote access to justice but not so as to confer disproportionate benefits on legal practitioners or after the event insurers or impose unfair burdens on defendants or their insurers. I feel sure that district and costs judges, circuit judges and in the last resort the Court of Appeal can be relied on to maintain a fair and publicly beneficial balance between competing interests.

Id. para. 10, at 422. The Law Lords were told that some 150,000 cases awaited the outcome. Zander, supra note 86, at 919.


Lord Bingham of Cornhill remarked on the obvious force in the appellant’s contention that even the 20% success uplift provided a generous level of reward for Mr. Callery’s solicitors, and given the minuscule risk of failure which his claim apparently presented, that it would have been
First, the Law Lords believed that claimants operated in a "costs-free and risk-free zone." Since claimants would never be responsible for the uplift or the insurance premium, they would be indifferent to the amounts they agreed to pay their solicitors and the insurance companies. The only check, most of the Lords believed, was "how much the costs judge will allow on an assessment against the liability insurer."99

Second, the Lords strongly suggested that Lord Woolf's broad approach was inappropriate. They thought decisions with respect to risks ought to be made in each individual case.100 Taxation judges were accustomed to making comparative judgments about costs one case at a time. When there was no good basis for comparison, the reasoning would, by necessity, be circular. The Court explained:

[S]olicitors offering motor accident personal injury CFAs have no incentive to compete on the success fees they charge. So the next question is whether a decision of a costs judge, or the Court of Appeal on appeal from a costs judge, is the best way of compensating for the absence of price competition in the market. The traditional function of the costs judge, or taxying master, as he used to be called, was to decide what fees were reasonable by reference to his experience of the general level of fees being charged for comparable work. But this approach only makes sense if the general level of fees is itself directly or indirectly determined by market forces. Otherwise the exercise becomes circular and costs judges will be deciding what is reasonable according to general levels which costs judges themselves have determined. In such circumstances there is no restraint upon a ratchet effect whereby the highest success fees obtainable from a costs judge are relied upon in subsequent assessments.101

Taxation judges, moreover, were certainly not competent to make decisions about what would be a "reasonable rate of return" for a "large scale" law firm. Indeed, what did these words mean? These were more appropriately legislative or regulatory matters. "Once one invokes a global approach designed to produce a reasonable overall return for solicitors, one moves away from the judicial function of the

reasonable to await a reply from Mr. Gray before obtaining ATE insurance cover. What might reasonably be interpreted as disquiet was also obvious in the speeches of Lord Hoffman and Lord Hope of Craighead, who categorised the claimant's exposure to risk as being 'at the worst, minimal'. Nonetheless, the House of Lords emphasised that responsibility for monitoring and controlling the developing practice in the field of conditional fees lies with the Court of Appeal. That being so, the Lords would not interfere with its decision.

Lord Scott of Foscote dissented, his speech including a detailed analysis of CFAs, together with careful explanation of the fact that the costs of each case are to be quantified for the claim in question and on the nature of the particular claim.

Id. 98. Callery (H.L.), [2002] 3 All E.R. para. 12, at 422.
100. See id. para. 114, at 443.
101. Id. para. 32, at 426.
costs judge and into the territory of legislative or administrative
decision.”

Third, the Law Lords were generally skeptical about the practical-
ity of such a broad approach. Early CFAs with success uplifts might
not be necessary to encourage legitimate claims. Solicitors might, as a
marketing ploy, for example, take the case on a speculative ba-
imum.103 The Law Lords also suspected that this “different kind of taxation”
argument for recoverable insurance premiums was fundamentally un-
fair. Lord Woolf’s argument, based on a wide pool of premium payers
(what the Law Lords called the “many should pay for the few” princi-
ple), did not fit the facts. It was not the other insured claimants who
ultimately paid for premiums; rather, it was their losing opponents in
litigation.104

b. Brief Comparison with the United States Supreme Court

The introduction of the CFA into a funding system that used the
English Rule was the root cause of the problems. Although in the con-
xtext of public interest litigation, the United States Supreme Court
dealt with a similar set of problems in the mid-1980s and early
1990s.105 On the basic issues, most of the Justices were aligned with

102. Id. para. 35, at 427. Lord Hoffman elaborated:
It seems to me likely (although reliable statistical evidence is not pres-
ently available) that the costs which can reasonably be expended in a
small personal injury claim conducted in accordance with the protocol
and which settles within the protocol period are unlikely in the great
majority of cases to vary much from the statistical mean. The present
case—letter before action acknowledgment of liability, medical report
and a relatively brief negotiation—must be fairly typical. It involves
standardised legal services at a fairly low level. This would suggest that
these costs—both the basic costs and the success fee—should be fixed by
the rules which apply in all but exceptional circumstances. I understand
that such a system is under consideration by the Civil Justice Council. A
legislative decision to fix costs at levels calculated to provide adequate
access to justice in the most economical way seems to me a more rational
approach than to leave the matter to individual costs judges. If it is con-
sidered the most appropriate way to secure value for money when the
expenditure is borne by the public as a whole (as for example, in the
fixing of graduated fees for criminal legal aid) it should be no less appor-
tionate when the expenditure is borne by a section of the public, namely
the motorists. Not only would this be more likely to keep the actual
costs within reasonable levels but it would also greatly reduce the cost of
disputes over costs. We were told that no less than 150,000 cases
awaited the outcome of your Lordships’ decision in this case.

Id. para. 36, at 427–28.

103. See id. paras. 111–12, at 442–43.

104. See id. para. 112, at 443.

105. See City of Burlington v. Dague, 505 U.S. 557 (1992); Pennsylvania v. Delaware
Valley Citizens’ Council for Clean Air, 483 U.S. 711 (1987) [Delaware Valley II];
(1986) [Delaware Valley I].
the Law Lords, rather than the Court of Appeal. In the United States, contingent fee agreements were, of course, a common way to fund litigation. After the federal government introduced one-way fee shifting to advance certain social causes, such as in the Solid Waste Disposal Act, the Supreme Court, in *Dague, Delaware Valley I*, and *Delaware Valley II*, answered the question: Would the prevailing party's lawyer be able to recover her fee plus a contingency enhancement to compensate her for the risk that she might lose the case and be paid nothing?107

The principal disagreement among the Justices was analogous to the disagreement among Lord Woolf and the Law Lords. Should the focus be on a risk assessment in an individual case as the Law Lords argued? Or, is it better to emphasize a broader approach to determine if the fee arrangement is necessary to assure the availability of legal services, as Lord Woolf believed?

All the Justices agreed that the initial starting point for determining recoverable legal fees was the "lodestar" method. This method primarily factored hours and billing rates. With such a starting point, was a contingency enhancement to cover risk reasonable? The plurality, led by Justices White and Scalia, used, as the Law Lords did, an individualistic approach to conclude that there should be no enhancement. First, it would often be difficult to assess the precise risk in each case, particularly given the fact there was no comparable market for the services. Second, the lodestar methodology would cover the problem in each separate case. Since more difficult cases would be riskier and more difficult to prove, they would take more time and more senior talent, and, therefore, pursuant to the lodestar approach, a prevailing litigant would be entitled to a higher reasonable fee.108 If a contingency fee enhancement were allowed, the end result would be a higher fee and, essentially, a double recovery.

Third, many of the Justices were skeptical about whether the contingency fee was necessary to attract competent counsel. Justice White believed that competent counsel, often provided by organizations devoted to a cause, could readily be found in most cases.109 Fourth, contrary to Lord Woolf's reasoning, Justice Scalia noted different perverse consequences of providing a contingency enhancement based on risk and difficulty.110 Since less meritorious law suits tended to be riskier, affording a contingency enhancement based on risk and difficulty would encourage the filing of these unwanted suits.

108. *Dague*, 505 U.S. at 563; *Delaware Valley II*, 483 U.S. at 726.
Several Justices dissented. Their focus, as was Lord Woolf's, was
global. The issue was whether a contingency fee enhancement was
necessary to encourage lawyers to represent clients in these important
cases. Justice Blackmun believed that to focus on a particular case
was fundamentally unsound. He was concerned, as was Lord Woolf,
with providing a reasonable return overall on a particular class of liti-
gation. A contingency enhancement for prevailing parties would ef-
cfectively assure civil rights lawyers willing to take these cases the
economic stability to take additional cases.1

The underlying flaw in all of these objections is that the appropriate enhance-
ment for risk does not depend, in the first instance, on the degree of risk
presented by a particular case. Enhancement for risk is not designed to equal-
ize the prospective returns among contingent cases with different degrees of
merit. Rather, it is designed simply to place contingent employment as a whole
on roughly the same economic footing as noncontingent practice, in or-
der that such cases receive the equal representation intended by Congress.
Enhancement compensates attorneys for the risk of nonpayment associated
with contingent employment, a risk that does not exist in noncontingent
cases.1

2. Deconstructing the After-the-Event Insurance Premium

In Callery No. 2, and later in Claims Direct, the Court of Ap-
peal explored the scope of the recoverable after-the-event ("ATE") in-
surance premium. This was not a trivial issue. As has been noted,
some claims management firms served as agents for risk underwrit-
ers, who reallocated a substantial part of the total insurance premium
to these firms for their services. To many, the total premium was not
really an "insurance" premium. The Claims Direct Test Cases and The
Accident Group Test Cases focused more closely on what was a re-
coverable premium.

Two weeks after Callery No. 1, the Court of Appeal, in Callery No.
2, more carefully discussed the meaning of the statutory language re-
lated to the recoverability of ATE insurance premiums. Section 29
of the Access to Justice Act of 1999 provided:

111. Delaware Valley II, 483 U.S. at 744–47 (Blackmun, J., dissenting).
112. Justice O'Connor refined Justice Blackmun's "as a whole" approach by looking at
cases "as a class." Still, she was in general agreement that it was unwise to ex-
amine risk and difficulty in each individual case. See Dague, 505 U.S. at 576
(O'Connor, J., dissenting); Delaware Valley II, 483 U.S. at 731–34 (O'Connor, J.,
concurring).
113. Delaware Valley II, 483 U.S. at 745–46 (Blackmun, J., dissenting) (third empha-
sis added) (citations omitted).
All E.R. 590 (C.A.) [The Accident Group Test Cases].
Woolf was absent. The House of Lords reluctantly affirmed.
Where in any proceedings a costs order is made in favour of any party who has taken out an insurance policy against the risk of incurring a liability in those proceedings, the costs payable to him may, subject in the case of court proceedings to rules of court, include costs in respect of the premium of the policy.\textsuperscript{118}

Lord Phillips stated that section 29 insurance covered “the risk of incurring a costs liability that cannot be passed on to the opposing party.”\textsuperscript{119} How widely, however, did this phrase reach?

In addressing these issues, Lord Phillips made three important points, all of which would become relevant in the costs war. First, he determined that, regardless of the reasons why the claimant failed to recover costs, ATE insurance could cover him. This would even be true, for example, if the claimant could not recover costs due to his own fault, such as his refusal to accept a reasonable settlement offer, or to his own dilatory actions. The costs remained “a liability that cannot be passed on to the opposing party.”\textsuperscript{120} Second, Lord Phillips decided that, as a matter of principle, ATE insurance could cover the claimant against his own costs, including the insurance premium. Insurance covered the risks of a fortuity, and the fortuitous reason that the claimant could not recover these costs was that he did not prevail in his lawsuit.\textsuperscript{121} Finally, and almost as an unexplored afterthought, he concluded that the £350 premium in the \textit{Callery} litigation was reasonable.\textsuperscript{122}

\begin{flushleft}
\textsuperscript{118} \textit{Id.} para. 6, at 5 (quoting Access to Justice Act, 1999, c. 22, § 29 (Eng.)).
\textsuperscript{120} \textit{Id.}
\textsuperscript{121} \textit{See id.} para. 38, at 11.
\textsuperscript{122} \textit{Id.} paras. 30–31, at 10.
\end{flushleft}

The court did express one reservation with respect to this expansive interpretation. It was uncertain if a recoverable section 29 premium would cover the full premium rebate (if claimant should lose) or the partial premium rebate or the ring-fencing of damages.

In this context our only reservation arises in relation to the premium rebate provision in condition 6. As we have indicated, however, this is of no practical significance in the present case and we consider that it is better that the issue of whether the cost of such cover is recoverable under section 29 should be dealt with in a case where this matters.

\textit{Id.} para. 62, at 16.

\textsuperscript{122} \textit{Id.} para. 70, at 17.
In the course of his analysis, Lord Phillips drew an important
distinction that would soon become relevant in the "guerrilla warfare." The recoverable section 29 premium was limited to that part of the premium that was properly allocatable to insurance benefits, not to other noninsurance benefits. If the total premium covered other contractual benefits in its bundled basket of services, it was suggested that the prevailing party could not recover the related part of the premium. In deciding this matter, Lord Phillips also explained to judges, who would have to decide these matters in the future, that their analytic focus should not be on how the insurance company used the revenues, for that question is one of internal business operations.

In the Claims Direct litigation, the Court of Appeal further explored the meaning of recoverable ATE premium. It referred a number of questions to the Chief Taxing Master for his opinion. Illustrative of how bitter the costs struggle had become by this time, the litigants even disputed and appealed the Taxing Master's procedural approach to the issues. In March 2002, the Court of Appeal resolved the procedural issue by refusing to interfere with the Master's approach. The Court, however, reiterated its Callery No. 2 distinction that the recoverable premium only related to that portion that was for insurance benefits and not collateral benefits.

Lady Justice Arden also added some refinements to Lord Phillips's distinction between insurance benefits and contracted-for collateral benefits. First, recoverable section 29 insurance premiums were not so severely limited as to exclude reasonable marketing and managing expenses, such as sales commissions. Moreover, these legitimate insurance services need not be handled in-house and the risk insurer could outsource the work to another company. Second, she recommended that one important way to ascertain if a section 29 premium was reasonable was to use a cross-check and compare the total costs.

---

123. See id. para. 12, at 6.
125. See In re Claims Direct Test Cases, [2002] EWCA Civ 428, paras. 29–32 (C.A.) [Claims Direct No. 1].
126. See id. paras. 7, 12.
127. See id. para. 44. Lady Justice Arden wrote:
   In my judgment, premium is not necessarily limited to payments paid on inception of cover, but could include any further amounts paid by, or on behalf of the insured, pursuant to terms agreed with the insurer. The premium could also include sums paid to the benefit of the insurer. We are told that the insurer has, in effect, outsourced claims administration. The cost of this is borne by Claims Direct on behalf of underwriters. Any part of the sum paid by the insured which is devoted to this purpose may be capable of forming part of the premium.

   Id.
128. Id.
associated with an ATE-insurance-based approach to the total costs of funding litigation with alternative funding methods.  

One year later, in February 2003, after receiving the Taxing Master's lengthy report of 236 paragraphs, the Court of Appeal addressed some of these important substantive issues. The claims management firm argued, of course, that the entire premium was recoverable. The defendant liability insurance companies were particularly skeptical about the reallocation to the claims management firm for insurance services. Lord Justice Brooke essentially agreed with the insurance companies, stating that in exceptional cases where a bundle of services are provided, it is appropriate for the taxing master "to lift the veil and to be influenced by what was actually being

129. Lady Arden explained:

Nevertheless, in my judgment, the comparison between the cover provided by these appellants and other means of financing litigation, including other insurance cover, is a relevant consideration to which the appellants could properly bring to the attention of the Senior Costs Judge. I say this, bearing in mind the general purposes of the new methods of funding litigation introduced by the 1999 Act and by the fact that it is obviously highly desirable in the interests of justice that these methods should be competitive. A premium may not be reasonable if there are alternative ways of providing the same funding at significantly less expense.

Id.

130. In re Claims Direct Test Cases, [2003] 4 All E.R. 508 (C.A.) [Claims Direct No. 2].

131. The English Civil Procedure Rules are supplemented with Practice Directions. Section 11:10 of the Practice Direction for Rule 44 explains:

In deciding whether the cost of insurance cover is reasonable, relevant factors to be taken into account include:

(1) where the insurance cover is not purchased in support of a conditional fee agreement with a success fee, how its cost compares with the likely cost of funding the case with a conditional fee agreement with a success fee and supporting insurance cover;

(2) the level and extent of the cover provided;

(3) the availability of any pre-existing insurance cover;

(4) whether any part of the premium would be rebated in the event of early settlement;

(5) the amount of commission payable to the receiving party or his legal representatives or other agents.


The Claims Direct No. 1 Court said that "[t]he second preliminary issue sought by the appellants seeks to confine the inquiry by the Senior Costs Judge to comparing the premium paid by the claimants in these test cases with alternative methods of financing litigation, rather than into the reasonableness of the particular components of the premium." [2002] EWCA Civ 428, para. 45.

132. The Court adopted the following definition for premium: "The premium is the consideration required of the assured in return for which the insurer undertakes his obligation under the contract of insurance." Claims Direct No. 2, [2003] 4 All E.R. para. 25, at 516 (quoting MacGillivray on Insurance Law para. 72 (9th ed. 1997)).
provided in return for the premium allocation." In other words, they were to deconstruct the premium. Lord Justice Brooke gave the following simple analogy:

It was not, in my judgment, the intention of Parliament when it enacted section 29 of the 1999 Act to overload the recoverable premium by adding to the costs customarily embraced by such a premium the costs which a company like [the claims management company] had to incur if insurers were to accept the risk at all. I would look equally askance at the recoverability, in similar circumstances, of a premium for a fire policy which included the cost the insured had to incur in installing and maintaining a sprinkler system as a condition for his insurance cover, or a premium for a household insurance policy which included the cost of installing and maintaining a burglar alarm.

The Lord Justice distinguished two aspects of the services bundled in the insurance premium. Initial insurance services were either related to the claimant's application for ATE insurance or were related to reports made to the insurance company. Continuing insurance services were more closely connected with necessary litigation management, and were similar, if not identical, to the litigation services Claims Direct had provided solicitors for a fee in its first business plan described.

Lord Justice Brooke found only the first group (i.e., initial insurance services) part of the recoverable premium. He believed that it was most unlikely that the second set of litigation management services had mysteriously morphed into the ATE insurance:

There is a particular feature here which is bound to excite attention. The services provided for the claimants were in most respects identical under the Portfolio Scheme and the Claims Direct Protect Scheme. How then can it be said that all the claims handling services (previously remunerated out of Claims Direct’s 30% share of the award in successful cases) suddenly became insurance services when an ATE insurance element was added to the package? This consideration alone is sufficient to put a costs judge on inquiry.

Lord Justice Brooke finally noted that if these collateral benefits were truly litigation services, as he believed they were, then this was the sort of work normally done by solicitors. Since a solicitor could outsource this work, a prevailing party, in proper circumstances,

134. *Id.* para. 88, at 528.
135. These benefits included: the completion of the claims management firm’s form; arranging for the client to complete a credit agreement form; forwarding the application form; monitoring the conduct of the appointed representative during the course of the legal proceedings and reporting to the insurance company; and maintaining relevant financial information for the insurance company. *Id.* para. 52, at 521.
136. These benefits included: obtaining further information for use by solicitors; obtaining witness statements from clients, witnesses, and experts; and arranging for the claimant to attend appropriate medical examinations and reviews by cost draftsmen. *Id.* paras. 53–54, at 521–22.
137. *Id.* para. 69, at 524–25.
might recover the costs, not as part of the insurance premium, but rather as a normal disbursement.138

The Court of Appeal slashed the £1,250 ATE premium; it held that only half was recoverable pursuant to section 29. The Court then insisted on a proportionality cross-check of this total. The Court guessed the total litigation costs if a solicitor had taken the claim pursuant to a conditional fee agreement with a reasonable success uplift.139 Although the figures were not precise, the Court was satisfied the its determination of the recoverable amount of the premium was not disproportionate to this alternative funding method.140

3. Technical Challenges Based on Tensions Between the Second Revised Litigation Funding System and the Indemnity Principle

Defendant liability insurance companies also raised a number of technical challenges to conditional fee agreements ("CFAs") in the second revised litigation funding system.141 All were premised on a fun-

138. See id. para. 43, at 521. The Court stated:
   Other activities, although nominally undertaken for the benefit of underwriters, formed no part of the actual insurance since they were part of a normal claims handling service. If these services had not been carried out by the claims managers, they would have been carried out by solicitors in the normal way. To the extent that this work was reasonable and proportionate it might instead be recoverable as costs on behalf of a successful claimant.

Id.

139. Given the difficulty of this cross-check, the Court added that if there was sole reliance of section 11.10(1) of the Costs Practice Direction—the proportionality standard—for determining reasonableness, there would be more uncertainty than if the "deconstruction" method was followed. See id. para. 98, at 529–30.

140. In May 2003, the Chief Taxing Master further deconstructed the meaning of a recoverable section 29 premium in The Accident Group Test Cases Tranche 2 Issues, No. PTH 0204771 (Sup. Ct. Costs Office May 15, 2003), at http://www.court-service.gov.uk/judgmentsfiles/j1740/sharratt_v_central_bus_co.htm. The Master concluded that the ATE insurance policy covered, among other things, the losing claimant's own costs, the costs of funding the bank loan, the prevailing party's costs, and the ATE insurance premium.

   The Chief Taxing Master discussed these issues at length. In deconstructing the policy, he decided that the part of the premium associated with the following two benefits was not recoverable: the portion related to insuring the borrowing costs associated with the payment of the premium, and the amount associated with the solicitor's payment for litigation services.

   The Master also addressed whether the part of the premium associated with the ATE insurance benefit that would indemnify the claimant, in the event of a loss, for the premium itself was recoverable. Although he did not resolve the issue, he emphasized circularity of this benefit. If the policy covered the premium, this would justify a higher premium, resulting in greater risk, justifying a still higher premium. See id. paras. 249–52.

141. One of the earliest challenges tested the new CFAs against the requirements of the Consumer Credit Act of 1974. It was not uncommon for after-the-event insur-
damental tension caused by the indemnity principle. These skirmishes have caused most of the expensive and time-consuming satellite litigation. Although the Access to Justice Act of 1999 provided a means for abrogating the indemnity principle in certain cases, there was no clear modification until the 2003 Regulations.

Although the indemnity principle's origins are uncertain, it is a well-established concomitant to the English Rule. The principle provides that a prevailing party can only recover fees and costs for which he is legally obligated. Thus, if a contingent fee arrangement was unenforceable, a prevailing party who had no obligation to pay it would not be entitled to recover it from the losing litigant. In light of uncertainty with respect to the indemnity principle, solicitors and claimants frequently disguised the true nature of their CFAs. Although it was tacitly understood that claimants would be under no obligation to pay, this was not stated clearly in their agreements. This nontransparency frequently led to confusion and uncertainty.

Defendant insurance companies seized on this principle as a means of thwarting the paying of CFA fees, success uplifts, and insurance premiums. During the period from 2000 to 2003, they claimed that they were always entitled (1) to examine the CFA, (2) to determine if the CFA included the required content, and (3) to ascertain if the legal representative had adequately informed the client of the CFA's provisions. If the CFA was defective or if the client-care provisions had not been complied with, then, the companies argued, the CFA was unenforceable, and, therefore, pursuant to the indemnity principle, unrecoverable. To many this seemed like nitpicky and obstructionistic behavior. Although these technical challenges were often dropped before the detailed assessment, they were designed in

ance companies not to require the premium payment until after the lawsuit, and, if the amount recovered was less than the premium, to require payment of only that amount, and, if the claimant lost, not to require any payment at all. In Tilby v. Perfect Pizza Ltd., No. MC 003838, at paras. 14–17 (Sup. Ct. Costs Office Feb. 28, 2002), at http://www.courtservice.gov.uk/judgmentsfiles/j1231/Tilby_v_PerfectPizza.htm, the paying party argued that this type of arrangement constituted the granting of credit, and, therefore, must comply with the processes set out in the Consumer Credit Act of 1974. Senior Costs Judge Hurst denied the claim. Although many insurance premiums were paid at the inception of the policy, there had been no established practice for the after-the-event insurance policy. Relying on the observation that "litigants in general might be put off litigating if they had to pay significant amounts of money, such as insurance premiums at the outset of their claim," id. para. 34, together with the lack of established practice, the judge held that there was no need to comply with the consumer protect law. The claimant could therefore recover the insurance premium. Id. paras. 37–42.

part to delay payments. This materially disrupted the cash flow of those large-scale firms that handled many claimants' cases.

Parliament and the courts had, perhaps inadvertently, invited this reaction. Prior to the revised litigation funding systems, conditional fees would have clearly been champertous and unenforceable. The CFA regulations changed this, but due to restrictive and narrow interpretation, there remained a great deal of room to explore for technical violations.

At first, it appeared that the courts would interpret the CFA regulations liberally. In 1998, in *Thai Trading Co. v. Taylor*, the Court of Appeal quickly extended the regulatory reach. Lord Millet concluded the first revised litigation funding systems ushered in a new era in litigation funding. If there was no substantive harm, such agreements would be enforceable. He wrote:

> Current attitudes to these questions are exemplified by the passage into law of the Courts and Legal Services Act of 1990. This shows that the fear that lawyers may be tempted by having a financial incentive in the outcome of litigation to act improperly is exaggerated, and that there is a countervailing public policy in making justice readily accessible to persons of modest means. Legislation was needed to authorise the increase in the lawyer's reward over and above his ordinary profit costs. It by no means follows that it was needed to legitimise the long-standing practice of solicitors to act for meritorious clients without means, and it is in the public interest that they should continue to do so.

This permissive attitude, however, was soon halted. The Access to Justice Act of 1999 addressed the issue by clearly stating that only complying CFAs were enforceable and "any other conditional fee agreement shall be unenforceable." In 1999, in *Awwad v. Geraghty & Co.*, the Court of Appeal determined, at least for lawyers, this meant what it said.

---

143. See id. para. 46, at 606.
144. This was of particular concern to those firms that had invested in costly information technology in order to develop a large-scale personal injury compensation practice. Id. para. 39, at 605.
145. The Access to Justice Act authorized enforceable CFAs that complied with the regulations for those persons who "conduct litigation or provide advocacy services." Access to Justice Act, 1999, c. 22, § 27 (Eng.) (amending Courts and Legal Services Act, 1990, c. 41, § 58 (Eng.)).
147. Id. at 790.
150. In *Awwad*, Lord Schiemann wrote:

> But it is a subject upon which there are sharply divergent opinions and where I should hesitate to suppose that my opinion, or that of any individual judge, could readily or convincingly be regarded as representing a consensus sufficient to sustain a public policy. The difficulties and delays surrounding the introduction of conditional fee agreements permit-
The insurance companies first claimed that they should be able to examine CFAs in order to determine if there had been compliance. Claimants, of course, resisted that position, fearing that the companies would "scour CFAs for defects." In the spring of 2003, in *The Accident Group Test Cases*, the Court of Appeal clearly addressed the issue. Lord Justice Brooke understood that there must be a balancing of interests between a claimant and her solicitor's privacy rights and the appropriate protection of the paying party's rights. He concluded that ordinarily claimants ought to disclose their agreements. There was nothing in the legislation indicating paying parties were not entitled to this minimal protection. At the least, they should be able to examine the evidence. "[I]t should become normal practice for a CFA to be disclosed for the purpose of costs proceedings in which a success fee is claimed." In distinguishing what appeared to be contrary caselaw, he emphasized that the CFA disclosures were not the traditional type of costs disclosure (e.g., hours of work), but that they were, instead, considerably more complex. Since compliance questions were issues of law, it was sensible to permit the paying party to effectively argue its case. If the receiving party needed to protect some information, he concluded that confidential information could be redacted. Moreover, the claimant could always elect not to...
disclose the CFA and rely on other evidence to prove an enforceable fee.157

The Accident Group Test Cases next addressed the issue of whether any defect in the required content of the CFA rendered it unenforceable.158 Although many of the content provisions were designed to protect clients, the insurance companies examined them for defects anyway. In Pratt v. Bull, one of the appealed cases in The Accident
Group Test Cases, Judge Cotterill had expressed his aggravation with such arguments. "The defendants were not ‘white knights’ trying to protect the claimant, but were attempting to mount a potentially profitable exercise by exploiting any deficiency in the claimant’s paperwork or procedure.”

Another one of the appealed cases, Dunn v. Ward, illustrates the problem. Section 2(1)(d) of the Regulations of 2000 provided that the CFA must specify the potential amounts a claimant might have to pay and “whether the amounts are limited by reference to the damages which may be recovered on behalf of the client.” This was certainly an important provision, and it invited confusion with American-style contingent fees.

In Dunn, the solicitor had used a poorly drafted Law Society’s Model CFA that did not comply with the regulation in all its particulars. The insurance companies argued that this made the CFA unenforceable. Lord Justice Brooke concluded otherwise. In light of the entire agreement that “spelt out with sufficient clarity” the claimant’s potential liability, it was a departure that would not materially impact on the claimant’s ability to make an informed decision. The CFA was thus held enforceable.

Speaking more generally, Lord Justice Brooke offered a materiality test, designed to provide guidance in the future with respect to the enforceability of CFAs. He asserted that in each particular case, the judge should decide if the minor departure “either on its own or in conjunction with any other such departure in this case, had a materially adverse effect either upon the protection afforded to the client or upon the proper administration of justice.” In short, it was not the defendant’s role to point out minor defects in provisions that were designed to protect others. The Lord Justice recognized each case must be decided on its own, but this process ought not to encourage insurance defendants to “trawl” for violations:

This is not to encourage paying parties to trawl through the facts of each case in order to try to discover a material breach. Quite the reverse. At the state when the agreement has been made, acted upon, and success for the client has been achieved, it is most unlikely that any minor shortcoming which the paying party might discover in the agreement or the procedures leading up to its


162. See id. paras 141–54, at 628–30.

163. See id. paras 125, 130, at 625, 626.

164. Id. para. 107, at 622. Regardless of whether or not the CFA was enforceable, the ATE insurance premium and other litigation costs were recoverable. See id. paras. 114–15, at 623–24.
making will amount to a material breach of the requirements or mean that the applicable conditions have not been sufficiently met.\textsuperscript{165}

Additionally, defendants also challenged the enforceability of CFAs when the legal representative had not complied with the client information and care provisions of the Conditional Fee Agreements Regulations of 2000. Part 4 of the Regulations of 2000 (the client-care provision) required that a "legal representative" must explain CFAs and ATE insurance to claimants.\textsuperscript{166} Did the "legal representative" have to be a solicitor? Since claims management firms orchestrated the legal procedures, it was generally more cost efficient for them to use their own lay agent to explain these procedures than to rely on a solicitor, who may not have been assigned to the case. In one lower court case during this period, \textit{English v. Clipson},\textsuperscript{167} Judge Wharton found that "[t]he panel solicitor [who eventually would handle the case] has no direct contact with the client before he signs up to the CFA, the ATE policy or the CCA loan agreement."\textsuperscript{168} Rather, the employee of The Accident Group ("TAG"), "whom the solicitor has not instructed directly, about whose expertise the solicitor is entirely ignorant, over whom the solicitor has no control, and, arguably, for whom the solicitor has no responsibility" was the person who communicated with the client.\textsuperscript{169}

In \textit{Sharratt v. London Central Bus Co. (No. 1)},\textsuperscript{170} another TAG test case, the Court of Appeal concluded that the legal representative need not be a solicitor. Lord Justice Brooke affirmed the Chief Taxing Master who had decided that it was the quality of the communicated information that was important. He had written that "[q]uestions may arise as to whether the agent is competent to carry out the required tasks, or indeed if the task has actually been carried out competently. These, however, are questions of quality which are not for this judgment."\textsuperscript{171} Lord Brooke added, however, that there must still be professional supervision of the agent:

\begin{quote}
\textit{[I]t is sufficient if we make it clear that it will be in theory permissible for a solicitors' firm to delegate the performance of its regulation 4 duties to an organisation like TAG, and for TAG to sub-delegate to its representatives, provided that in so doing the solicitor is not abandoning the supervisory responsibilities required of him by Practice Rule 13.07 and the Guide to Professional Conduct para. 3.07.}\textsuperscript{172}
\end{quote}

\begin{flushleft}
\textsuperscript{165.} \textit{Id.} para. 109, at 622.\textsuperscript{166.} See Conditional Fee Agreements Regulations, (2000) SI 2000/692, at § 4.\textsuperscript{167.} \textit{Id.}\textsuperscript{168.} \textit{Id.}\textsuperscript{169.} \textit{Id.}\textsuperscript{170.} \textit{Id.}\textsuperscript{171.} \textit{Id.}\textsuperscript{172.} Sharratt v. London Cent. Bus Co. Ltd. (The Accident Group Test Cases), \textit{[2003] 4 All E.R.} 590 para. 216, at 642–43 (C.A.) \textit{[The Accident Group Test Cases]}.\textsuperscript{172}
\end{flushleft}
It should not be surprising that such a dramatic shift in the funding of English litigation ushered in such a contentious struggle. At least with respect to routine traffic accident claims, the fundamental shift from public to private funding and the ultimate cost shift from claimants to defendant liability insurance companies initiated a confused, quarrelsome, and bitter debate. Under the second revised litigation system from 2000 to 2003, satellite litigation became the norm as aggressive claims management firms (some of which were “ambulance chasers”), solicitors, barristers, and defendant liability insurance companies battled over principles and detail.

Still, the courts resolved a number of substantive issues. In determining the reasonableness of success uplifts in routine cases, courts should examine them in a “global” way in order to assure that there are available solicitors for this type of work. In examining the after-the-event (“ATE”) insurance premium, courts should deconstruct the premium to make certain that only those amounts related to insurance benefits are counted.

The courts have also answered some important procedural questions. On the one hand, it is hoped that prevailing parties will reveal their conditional fee agreements (“CFAs”). On the other hand, only material defects in a CFA’s content or material noncompliance with client care and disclosure provisions will render the CFA unenforceable and, therefore, nonrecoverable.

Finally, throughout the period from 2000 to 2003, the Civil Justice Council, an advisory board with responsibility for overseeing and coordinating the modernization of the civil justice system, focused on these issues. Its membership includes senior judges, lawyers, consumer and commercial representatives, legal advisers, and academics. In late December 2001, the Council implemented the “Big Tent,” a discussion forum designed to include all interest groups and parties affected by the costs issues. Its working groups, discussions, conferences, and sponsored research have introduced an element of civility that has set the mood for the current peace.173

This Article does not suggest that the battle is over. Some future disputes, for example, may implicate constitutional and human rights issues. In King v. Telegraph Group Ltd.,174 the Court of Appeal had to decide if a judge could issue an order capping costs in a defamation lawsuit by a claimant with a CFA but no ATE insurance. Lord Justice Brooke noted that “defamation proceedings, however, represent a po-

---


tential infringement of the right to freedom of expression guaranteed
by ECHR Article 10(1)."175 Where freedom of expression is at issue, it
would be unfair to submit defendants to unlimited costs. The judge
recognized that such a result might infringe on a claimant's opportu-
nity to instruct first-class counsel, but this would "be a small price to
pay" to eliminate the "chilling effect on a newspaper exercising its
right to freedom of expression."176

Still, there have been some important developments since early
summer 2003 that have helped to foster a moment of repose. These
developments are the introduction of simpler CFA regulations, the
abrogation of the indemnity principle, and the adoption of a predictable
cost system for routine traffic accident cases. Additionally, in June
2003, the Department for Constitutional Affairs sought wide consulta-
tion with an eye to further reform.

The Conditional Fee Agreements (Miscellaneous Amendments)
Regulations of 2003 ("CFA Regulations of 2003"), which went into ef-
fect in June 2003, deal with one set of problems by introducing a sim-
plicated CFA.177 In those cases where the client would be liable to pay

175. Id. para. 96.
176. Id. paras. 99, 102.
2003/1240. Section 2 of Regulation 2 provides:

(1) This regulation applies to a conditional fee agreement under which,
except in the circumstances set out in paragraph (5), the client is
liable to pay his legal representative's fees and expenses only to the
extent that sums are recovered in respect of the relevant proceed-
ings, whether by way of costs or otherwise.

(2) In determining for the purposes of paragraph (1) the circumstances
in which a client is liable to pay his legal representative's fees and
expenses, no account is to be taken of any obligation to pay costs in
respect of the premium of a policy taken out to insure against the
risk of incurring a liability in the relevant proceedings.

(3) Regulations 2, 3 and 4 do not apply to a conditional fee agreement to
which this regulation applies.

(4) A conditional fee agreement to which this regulation applies must—
(a) specify—
(i) the particular proceedings or parts of them to which it relates
(including whether it relates to any appeal, counterclaim or
proceedings to enforce a judgment or order); and
(ii) the circumstances in which the legal representative's fees
and expenses, or part of them, are payable; and
(b) if it provides for a success fee—
(i) briefly specify the reasons for setting the percentage increase
at the level stated in the agreement; and
(ii) provide that if, in court proceedings, the percentage increase
becomes payable as a result of those proceedings and the le-
gal representative or the client is ordered to disclose to the
court or any other person the reasons for setting the percent-
age increase at the level stated in the agreement, he may do
so.

(5) A conditional fee agreement to which this regulation applies may
specify that the client will be liable to pay the legal representative's
his solicitor's fees and expenses "only to the extent that sums are recovered in respect of the relevant proceedings, whether by way of costs or otherwise," the CFA Regulations of 2000 will no longer apply. Instead, the simplified CFA modifies and abbreviates the required content and streamlines the client-care and information provisions. All that is necessary is that "the legal representative must inform the client as to the circumstances in which the client may be liable to pay the legal representative's fees and expenses, and provide such further explanation, advice, or other information as to those circumstances as the client may reasonably require." Since the claimant's fee and expense obligation is limited to recovered amounts, this reduced protection makes sense.

On June 29, 2004, the Department for Constitutional Affairs published a report called Making Simple CFAs a Reality: A Summary of Responses to the Consultation Paper Simplifying Conditional Fee Agreements and Proposals for Reform. The report confesses error with respect to earlier regulations. It states that although designed to

---

fees and expenses whether or not sums are recovered in respect of the relevant proceedings, if the client—
(a) fails to co-operate with the legal representative;
(b) fails to attend any medical or expert examination or court hearing which the legal representative reasonably requests him to attend;
(c) fails to give necessary instructions to the legal representative; or
(d) withdraws instructions from the legal representative.

(6) Before a conditional fee agreement to which this regulation applies is made, the legal representative must inform the client as to the circumstances in which the client may be liable to pay the legal representative's fees and expenses, and provide such further explanation, advice or other information as to those circumstances as the client may reasonably require.

Id. at Reg. 2 § 2.

In addition, the Lord Chancellor issued an order to implement section 31 of the Access to Justice Act of 1999, abrogating the indemnity principle. Access to Justice Act 1999 (Commencement No. 10) Order, (2003) SI 2003/1241 art. 2. The Civil Procedure Committee also amended Rule 43.2 to the same effect:

Where advocacy or litigation services are provided to a client under a conditional fee agreement, costs are recoverable under Parts 44 to 48 notwithstanding that the client is liable to pay his legal representative's fees and expenses only to the extent that sums are recovered in respect of the litigation, whether by way of costs or otherwise.

... In [previous] paragraph ... , the reference to a conditional fee agreement is to an agreement which satisfies all conditions applicable to it by virtue of section 58 of the Courts and Legal Services Act 1990.


179. Id.

protect consumers, "It is now clear that the provisions have generally played a limited role in this regard and have in practice only served to make CFAs far too complex, less transparent and open to technical challenges from defendants seeking to reduce their exposure to costs or to avoid payment altogether."\textsuperscript{181}

The CFA Regulations of 2003,\textsuperscript{182} as well as accompanying amendments to the Civil Procedure Rules, also revoke the troublesome indemnity principle in complying CFA situations.\textsuperscript{183} The Explanatory Note provides:

This in effect abrogates in relation to this type of conditional fee agreement the so-called indemnity principle—the principle that the amount which can be awarded to a party in respect of costs to be paid by him to his legal representatives is limited to what would have been payable by him to them if he had not been awarded costs. \textit{Solicitors will to this extent be able to agree lawfully with their clients not to seek to recover by way of costs anything in excess of what the court awards, or what it is agreed will be paid, and will no longer be prevented from openly contracting with their clients on such terms.}\textsuperscript{184}

Finally, in October 2003, pursuant to amendments to the Civil Procedure Rules, a predictable recoverable costs system became effective for routine traffic accident cases that settled for less than £10,000.\textsuperscript{185} In those cases, the recoverable costs are fixed at £800 plus a percentage of damages in excess of £5,000. Additionally, claimants could recover a limited set class of disbursements as well as an agreed upon success fee.\textsuperscript{186} As of June 2004, the normal success fee in these cases was set at 12.5 percent.\textsuperscript{187} More recently, fixed fees, or predictable costs, have been extended to third-party employers' liability accident claims. This may be the wave of the future. Welcoming the agreement that made such an extension possible, the Chairman of the Civil Justice Council, Lord Phillips of Worth Matravers, Master of the Rolls, stated:

\textsuperscript{181}. \textit{Id.} at 17.
\textsuperscript{183}. The Department for Constitutional Affairs will also work to modify the indemnity principle in other areas as well. \textit{See MAKING SIMPLE CFAS A REALITY, supra} note 180, at 20–23.
\textsuperscript{186}. As with any regulatory arrangement there will, of course, be problems. What, for example, constitutes a routine traffic accident case? Also, the scaled fees do not include counsel's fees, disbursements (e.g., expenses), or the ATE premium. In some cases, the new proposal may discourage quick settlements. Solicitors may delay serious settlement discussion until after issuance of formal legal papers in order to avoid the limited scaled fees. Only time will tell how difficult and contentious the application of these new methods will be in practice.
\textsuperscript{187}. Press Release, Department for Constitutional Affairs, Improvements to "No Win No Fee" Arrangements for Personal Injury Claims (May 28, 2004) (available in the Schmid Law Library at the University of Nebraska College of Law).
This agreement extends the predictable costs scheme further, and maintains welcome momentum. For a third time, senior representatives of both claimant and defendant interests have managed to develop a workable solution to a sensitive and contentious area of litigation, under the Civil Justice Council's successful mediation model.  

Finally, the Foreward to the Consultation Paper *Simplifying CFAs* sets the tone for future developments, and hopefully, civil debate:

In April 2000 the Government made significant changes to the way in which personal injury cases are funded by introducing recoverable success fees and after-the-event (ATE) insurance premiums from opponents and removing [personal injury cases] from legal aid scope (apart from in clinical negligence cases). This shift was designed to increase access to justice and strike a fairer balance between claimants and defendants. Individuals who could not afford to litigate privately, despite having good cases, were given the opportunity to do so more easily. Making a personal injury claim became no longer the preserve of the wealthy or poor, but open to all with good cases. The reforms also provided defendants with a fairer system in which they could recover costs in successfully defended cases.

The reforms are now over three years old and we all need to think about what we can learn from this period, whether the regime could be better designed in the light of that experience and what further changes to secondary legislation may be needed.

This tone was continued in the Department's next consultation paper, *Making Simple CFAs a Reality*. The report included draft regulations to simplify all CFAs. In addition, it called for still further consultation with respect to all the issues discussed in this Article.

Before, however, ending on such a peaceful note, there is still ample opportunity for contentious activity. For better or worse, there is now rampant competition for claimants. Although this will certainly be beneficial for some, the opportunities for abuse (of claimants, defendants, and the system) are obvious. Some have claimed that there is now a "compensation culture," fueled in good part by the aggressive solicitation of law suits. The most active players will be the claims management firms and competitive solicitors, and, if anything, their activities will continue.

Claims management firms remain unregulated as a specific business. In May 2003, the Parliamentary Secretary at the Lord Chancellor's Department expressed an interest in possible abuses by overly aggressive companies. She was also aware, however, that management firms' competitive tactics and efficient operations provided many

188. Press Release, Department for Constitutional Affairs, A Third Success for the Civil Justice Council in Bringing an End to the "Costs War" (June 8, 2004) (available in the Schmid Law Library at the University of Nebraska College of Law).


190. MAKING SIMPLE CFAS A REALITY, supra note 180.

claimants easy access to the justice system. Speaking to a conference of personal injury lawyers, the Secretary said:

Recent test cases have or are involving leading claims managers and aspects of their business models. I am though quite certain that provided claims management companies and similar intermediaries act responsibly and with probity they can expand access to justice for people with good claims and provide helpful claims management services to solicitors. While improper approaches to vulnerable people must be of concern, it is of equal importance that people who may have been injured by others' negligence should have access to help to seek compensation.

If individuals are to enforce their rights they need to be aware of the ways in which they can enforce them. Marketing approaches, including advertising, provided it is not misleading or dishonest, assist in raising awareness.\(^\text{192}\)

Other reform groups are more insistent that there be greater control. The Better Regulation Task Force, in *Better Routes to Redress*,\(^\text{193}\) has called for the Office of Fair Trading to approve an industry sponsored Code of Practice that would spell out how claims management firms should operate.\(^\text{194}\) The claims management business sector had for too long been characterized by "hard-sell advertising and direct-marketing which encouraged people to 'have a go' even if there was little chance of actually achieving the large payout being dangled as an inducement."\(^\text{195}\) Also, they earned their money "by non-transparent and complex systems of referral fees and charges."\(^\text{196}\) The Task Force warned that if the industry could not develop a Code, then the Department for Constitutional Affairs should regulate the industry.\(^\text{197}\)

Solicitors have begun to compete for clients, having developed expensive computerized systems for the handling of many claims. Solicitor firms have also engaged in extensive advertising, often cooperating in order to present a united front against claims management firms. One common advertising theme explains how solicitors are not American ambulance chasers, implying that management firms are. One such firm explained, "The ambulance-chasing solicitor identifies the client first and seeks to persuade them to sue. We identify the potential action . . . and if we think there is a case, we say this to the public at large."\(^\text{198}\) Other solicitors have begun an advertising campaign that, among other things, provides for an advance on the recovered

\(^{192}\) *Id.*


\(^{194}\) *Id.* at 20.

\(^{195}\) *Id.* at 21.

\(^{196}\) *Id.*

\(^{197}\) *Id.* at 20.

There is once again serious discussion of a full-scale adoption of the American-style contingent fee method of litigation funding. Other solicitors have joined claims management firm panels in an effort to assure a flow of clients. Chief Taxing Master Hurst examined one aspect of this situation in Claims Direct (Tranche 2). As noted supra, Claims Direct had required its panel solicitors to retain an affiliated company for litigation services. In other words, solicitors were required to outsource this litigation work. Solicitors who represented prevailing claimants tried to recover this disbursement. Master Hurst, however, denied recoverability. He held that this disbursement was a thinly disguised referral fee. As such, it was a clear violation of the Solicitor's Introduction and Referral Code that ethically prohibited solicitors from rewarding "introducers by the payment of commission or otherwise." It was therefore unrecoverable. He wrote:

> It is quite clear that the £395 plus VAT is the price which the panel solicitor must pay in order to obtain the work. If the panel solicitor is not prepared to pay, the work goes elsewhere. This is not a question of client choice but of MLSS effectively selling work to panel solicitors. Panel solicitors have the option of rejecting a case, if for some reason they do not wish to take it on, but if they do wish to take it on they cannot avoid having to pay the fixed price.

The Court of Appeal affirmed the Chief Taxing Master on May 20, 2004 in Sharratt v. London Central Bus Company (No. 2): The Accident Group Test Cases. Lord Justice Buxton wrote that the following factors supported the Master's conclusion:


200. See BETTER REGULATION TASK FORCE, supra 193, at 29.


(3) Solicitors must not reward introducers by the payment of commission or otherwise.

(4) Solicitors should not allow themselves to become so reliant on a limited number of sources of referrals that the interests of an introducer affect the advice given by the solicitor to the clients.

(5) Solicitors should be particularly conscious of the need to advise impartially and independently clients referred by introducers. They should ensure that the wish to avoid offending the introducer does not colour the advice given to such clients.

Id. at § 2(3)-(5).

203. Claims Direct (Tranche 2), para. 83.

i. The fee was compulsory for any solicitor wishing to be sent cases by TAG. It was not open for him to make other arrangements for investigation work.

ii. The amount of the fee was standard in all cases.

iii. . . . [T]he amount of the fee far outstripped any reasonable charge for the work done.205

These decisions, however, may not impede solicitors efforts to gain clients, either through claims management firms or directly. The Blackwell Committee had recommended that the Law Society reconsider its referral rules so solicitors could compete on a level playing field in personal injury work and take account of commercial business development practices.206 In particular the Committee referenced the ban on referral fees, saying the public might benefit from a system that encouraged unqualified persons to refer cases to specialist solicitors.²07 The Committee stressed, however, the importance of referral fees being disclosed:

The Law Society should reconsider its Practice Rule barring payment for referrals, in the light of the activities in the personal injury market of claims management companies and their panel solicitors. We consider that the public interest might well benefit from a system that encouraged non-qualified persons to refer cases to qualified persons or less specialist solicitors to refer to more specialist ones. However, where such a relationship existed, this should be made clear to the consumer, to whom details of all referral fees should be disclosed, and any charges made transparent. These are matters within the jurisdiction of the self-regulated professions but we conclude that it would be timely for these bodies to give close examination to the need to level the playing field so that the self-regulated professions can compete more freely with the non-qualified section.208

205. Id. para. 41, at 335.
206. See BLACKWELL, supra note 70, para. 37.
207. In fact, there have been long-standing debates over the propriety of referral fee rules. For example, one Law Society working group, suggested eliminating the ban in 2001:

Solicitors face growing competition from other professions and businesses offering the same services as solicitors, e.g. in the field of financial services, and from the growing number of client referral services such as 'claims management' companies. Often these other providers can pay for referrals. This could mean that members of the public requiring these services are less likely to be referred to a solicitor. There is a public interest in competition between providers and it is in the interests of both the public and the profession for solicitors to be able to compete on a level playing field. This has been recognised by the Government.


208. BLACKWELL, supra note 70, para. 150 (citation omitted).
In March 2003, The Law Society's Council liberalized its rules and amended the Solicitors' Introduction and Referral Code of 1990 by adding a new Section 2A.209 These new rules level the playing field so that solicitors can both cooperate and compete with claims management firms.210

There is a moment of repose in the costs war. While the first "guerilla war" cast claimants, including their solicitors and ATE insurance companies, against defendant liability insurance companies, the next set of contentious issues may focus on competitive issues between claims management firms and solicitors, including whether England should permit claimants to fund litigation with an American-style contingent fee.

209. The new Section 2A to the Solicitors' Introduction and Referral Code of 1990 provides:

Section 2A: Payments for referrals
(1) A solicitor must not make any payment to a third party in relation to the introduction of clients to the solicitor, except as permitted below.
(2) Solicitors may enter into agreements under this Section for referrals of clients with introducers who undertake in such agreements to comply with the terms of this Code.
(3) A solicitor may make a payment to a third party introducer only where immediately upon receiving the referral and before accepting instructions to act the solicitor provides the client with all relevant information concerning the referral and, in particular, the amount of any payment.
(4) The solicitor must also be satisfied that the introducer:
   (a) has provided the client with all information relevant to the client concerning the referral before the referral took place and, in particular, the amount of any payment;
   (b) has not acquired the client as a consequence of marketing or publicity or other activities which, if done by a solicitor, would be in breach of any of the Solicitor's Practice Rules and in particular by "cold calling"; and
   (c) does not, under the arrangement, influence or constrain the solicitor's professional judgement in relation to the advice given to the client.
(5) If the solicitor has reason to believe that the introducer is breaching terms of the agreement required by this Section the solicitor must take all reasonable steps to procure that the breach is remedied. If the introducer persists in breaches the solicitor must terminate the agreement in respect of future referrals.
(6) A solicitor must not make a referral payment if at the time of the referral the solicitor intends to act for that person with the benefit of legal aid, or in any criminal proceedings.
(7) For the purpose of sub-section (1) above, a payment includes any other consideration but does not include normal hospitality, proper disbursements or normal business expenses.
