ACCESS TO JUSTICE: A CASE FOR CONTINGENCY FEES IN SINGAPORE

This article examines the nature of contingency fees and global trends towards its adoption. It also analyses the ongoing debate about the advantages and ill-effects that allegedly accompany the use of such a fee structure. Finally, the article focuses on the inadequacies of legal aid and other mechanisms designed to ensure that all Singaporeans have access to justice and concludes that it is time for us to consider introducing various forms of contingency fees to ensure that no one is locked out of the legal system.

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I. Introduction

1 Over the last three decades, there has been growing dissatisfaction with the contingency fee system in the United States of America. While its benefits are apparent, contingency fee agreements, often known as "no win, no pay" agreements, have been roundly criticised and blamed for causing the "litigation explosion" and a host of other social ills. Its critics are numerous, ranging from the popular press to politicians to industries particularly affected by the rise in personal injury claims, such as the insurance industry. More recently, several legal scholars and social observers have provided some credibility to these views by putting forward theories and empirical data which they suggest, support the conclusion that contingency fees encourage litigation and unethical practices, overcompensate lawyers, inflate damages as well as raise insurance premiums.[1] The alarm brought about

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1 See, *eg*, Stewart Jay, "The Dilemmas of Attorney Contingent Fees" (1989) 2 Geo J Legal Ethics 813; Lester Brickman, "Contingent Fees without Contingencies: Hamlet without the Prince of Denmark?" (1989) 37 UCLA L Rev 29; Lester Brickman *et al*, *Rethinking Contingency Fees* (1994); Walter K Olson, *The Litigation Explosion* (1991); Victor E Schwartz, "White House Action on Civil Justice Reform: A Menu for the New Millennium" (2001) 24 Harv J L & Pub Policy 393; *Contingency Fee Abuses: Hearings on Contingency Fee Abuses Before the Senate*

by this tide of opinion was so strong that the US Senate Committee on the Judiciary held hearings on alleged contingency fee abuses in 1995.[2] It is therefore surprising that concurrent with this period of increasing hostility, a type of contingency fees was recommended and sanctioned in England, thereby reversing a rule that has been in place for centuries and kicking up a storm of controversy in the English bench and bar.[3]

2 England is not the only Commonwealth jurisdiction to have turned to contingency fees as a means of providing access to justice to its populace. Currently, many jurisdictions give cognisance to various forms of contingency fees and others, such as Australia, are in the process of evaluating it at a national level.[4] This trend has arisen with the growing awareness that because of rising legal costs and limited governmental resources, the traditional mechanism for providing access to justice to the poor – government-sponsored legal aid – is presently ill-equipped to provide meaningful assistance to the average person on the street, who often finds the gates to the courthouse firmly locked because of the costs and risks that litigation entails. Perhaps another reason for this trend is the fact that these states are experiencing a shift in ideology away from social welfarism, well aware of the moral hazards[5] associated with state-sponsored services that can also be provided by the private sector.

Committee on Judiciary, 104th Congress (1995) (hereinafter *Hearings*) (Statement of Lester Brickman).

2 *Hearings*, *supra*, n 1.

3 Stella Yarrow & Pamela Abrams, "Conditional Fees: The Challenge to Ethics" (1999) 2(2) Legal Ethics 192; Richard L Abel, "An American Hamburger Stand in St Paul's Cathedral: Replacing Legal Aid with Conditional Fees in English Personal Injury Litigation" (2001) 51 DePaul L Rev 253. Since 1995, solicitors in England and Wales have been allowed to charge conditional fees, a type of contingency fees. For an account of the reforms and a description of the fee structure: see *infra*, Section I(D).

4 In 1994, Australia's Attorney General and Minister for Justice appointed the Access to Justice Advisory Committee to make recommendations on reform of the justice system in order to "enhance access to justice and render the system fairer, more efficient and more effective". Under its terms of reference, the committee was to look into, *inter alia*, the use of contingency fees in federal matters since several states had already sanctioned its use for state litigation: Access to Justice Advisory Committee, *Access To Justice: An Action Plan* (1994) at pp xxiii–xxiv.

5 The term "moral hazard" originates from insurance practice, where it refers to the tendency of insured persons to behave in a way that increases the probability or size of the loss upon the purchase of insurance. For example, a person with theft insurance will be less careful in ensuring that his belongings are securely kept. See Robert Cooter & Thomas Ulen, *Law And Economics* (3rd Ed, 2000) at p 395. This tendency, however, has become recognized as a broader overreaching phenomenon which occurs whenever people, by virtue of contracts they enter into or free services they receive, experience less incentive to act in the way they otherwise would.

3 Despite the dramatic improvements in efficiency brought about by reforms to the Singapore legal system in the 1990s, there is nothing to suggest that legal costs in Singapore have bucked the upward trends experienced in other jurisdictions. Indeed, recently compiled data suggest that costs are increasing,[6] and Singaporean politicians have raised this concern in Parliament.[7] It is true that legal costs in Singapore are still extremely competitive relative to other countries.[8] However, that does not mean that they are affordable. State-sponsored legal aid remains in the domain of the very poorest and the majority of the population, who fall into the lower-middle income group, find it prohibitively expensive to engage in litigation, even if they have good causes of action. For this group of people, embarking on a suit is extremely risky and they are effectively denied access to the justice system. Considering Singapore's limited resources and the government's abhorrence of social welfarism, the best solution for this problem is if litigation can be funded by the private sector *via* lawyers.

4 The problem with suggesting a reform such as the adoption of contingency fees is that it is usually quickly dismissed because of the association of the fee structure with social ills sensationalised by the American media. As one commentator observes:

6 See Ministry Of Law, Singapore, *Census Of The Legal Industry And Profession 2001* at p 53. Data from this recent census suggests that the billable rate of law firms and lawyers steadily increased from 1998 to 2000 as a majority of law firms raised their billable rates during this period. Between 1999 and 2000, more than 50% of the law firms which responded to the census indicated that they had raised their rates and of these law firms, more than 53% stated that they had increased their rates by more than 20%. By contrast, slightly less than 2% of the law firms reported that they had lowered their rates. This suggests that the cost of legal services rose significantly between 1999 and 2000. While the increase in rates between 1998 and 1999 was probably not as marked as in the following year, it was still significant. Thirty per cent of the law firms reported that they had raised their billable rates and of these firms, 72% stated that they had raised their rates by more than 20%. In that year, 5.5% of the law firms polled lowered their rates. While there is no available data on changes in billable rates prior to 1998 and it may be argued that the years 1998–2000 were anomalous in that they marked a period of tremendous economic growth after the Asian Financial Crisis, it cannot be denied that legal costs have been rising.

7 That legal costs are rising was brought up in parliament by Members of Parliament ("MPs") Associate Professor Chin Tet Yung and Mr Sin Boon Ann: *Singapore Parliamentary Debates, Official Report* (9 March 2001) cols 520, 522–523.

8 Singapore's Minister for Law, Professor S Jayakumar, responding to comments by MP Associate Professor Chin Tet Yung that legal costs have risen, stated that "lawyers' fees are determined largely by market forces. Are they too high or too low? … According to Asia-Pacific Legal 500, 'Singapore's legal market is extremely competitive. Fees remain at relatively low levels, particularly among Singaporean clients who, as a result, receive some of the best value legal advice in the world.' Compared to their international counterparts, Singapore lawyers are cheap": *Singapore Parliamentary Debates, Official Report* (15 May 2002) col 1211.

> In my reading of current non-American debates over the contingency fee, one of the persistent objections raised against it is the *argumentum ad Americanum* – the argument that to introduce the contingency fee is to set oneself on the path to litigious ruination which America currently represents.[9]

Contingency fees have, without question, failings and I will not attempt to suggest otherwise. However, to simply dismiss a potentially useful mechanism because of its association with symptoms of an allegedly diseased legal system is flawed for two reasons. First, there may have been a misdiagnosis by its would-be physicians; and second, there is nothing which compels us to believe that other legal systems, with their own unique characteristics, will suffer the same fate as the United States. Apart from this, I believe that our quick dismissal of contingency fees also arises from an ignorance of the historical reasons why such a fee structure was outlawed in England, as well as how it functions in the United States.[10]

5 As we consider ways in which to attain such important ideals as equal access to justice, it is imperative that we set aside our preconceptions and the anecdotal evidence that have been heaped onto us by the American media and its sympathisers. Instead, we have to understand the historical roots of the rules against contingency fees, tackle the complex policy issues at the heart of the contingency fee debate and rely on hard facts and theory. As such, I propose to examine the roots and nature of the contingency fee system, as well as the arguments raised by its critics. Armed with this knowledge, an objective analysis can be undertaken to determine if the fee structure, or a version of it, would be beneficial for Singapore.

6 Section I of this paper defines "contingency fees" and discusses how the rule against contingency fees evolved in England and was abandoned in the United States. It will also describe how jurisdictions, in particular England and Wales, have turned to contingency fees in search of a realistic way of providing access to justice. Section II analyses the contingency fee debate in the context of its main advantage – providing equal access to justice – and the ethical dilemmas confronting the use of contingency fees. Finally, Section III will discuss the need for contingency fees in Singapore, whether this will put our legal system in

[9] David Luban, "Speculating on Justice: The Ethics and Jurisprudence of Contingency Fees", in Charles Sampford & Stephen Parker, *Legal Ethics And Legal Practice: Contemporary Issues* (1996) at pp 89, 90.

[10] Philip A Thomas, "Contingency Fees: A Case Study for Malaysia" (1981) 10 Anglo-Am L Rev 37 at 38.

peril and the best possible regulatory framework for the implementation of a fee structure that will promise greater access to justice.

Section I – understanding contingency fees

A. Unravelling the terms

7 One of the reasons why the *argumentum ad Americanum* is so often resorted to is the fact that the term "contingency fee" has been used rather loosely. This has led to some confusion in the ongoing debate about its merits and faults since many people have a specific preconception about what contingency fees are. It would therefore be valuable to begin our examination by defining the term.

8 Literally, "contingency fee" simply means, as the word "contingent" suggests, a fee that is payable on the occurrence of an event. The event referred to is commonly understood to mean either a settlement or the successful litigation by a plaintiff's lawyer. If this were the definition of "contingency fee", then costs awarded under the English rule requiring the losing litigant to pay the victor's legal fees,[11] known as the "fee-shifting rule" in the United States, would be a type of contingency fee. However, the term "contingency fee" is only used in the context of solicitor-and-client costs as opposed to party-and-party costs. As such, the proper definition of the contingency fee is a fee charged by a lawyer for his services only if the lawsuit is successful or favourably settled out of court.[12]

9 It is important to note that because of its common association with the standard contingency fee charged by American lawyers, which generally takes the form of a percentage of the monetary damages recovered, contingency fees have been mistakenly taken to necessarily include this characteristic. This is the position in England[13] and may well be the position that Singapore takes,[14] although not every jurisdiction

11 Civil Procedure Rules 1998 (SI 1998 No 3132 L.17) (UK), r 44.3(2); Rules of Court (Cap 332, R 5, 2004 Rev Ed), O 59 r 3(2).

12 *Black's Law Dictionary* (7th Ed, 1999).

13 See, *eg*, The Royal Commission on Legal Services, *Final Report* (Cmnd 7648, 1979) at p 176; Lord Chancellor's Department, *Contingency Fees* (Cm 571, 1989) at p 1; *Halsbury's Laws of England* (4th Ed, 1998), vol 9(1) at para 852. In the Royal Commission's report, "contingency fee" was defined as "an arrangement by which a lawyer agrees to act for a client on the basis that, if damages are recovered, the lawyer will receive an agreed proportion of them, while if the case is lost he will receive nothing."

14 There has been no judicial or legislative statement to this effect, although this understanding of contingency fees seems to be reflected in r 37(b) of the Legal

subscribes to such a view.[15] As such, one must be careful, when considering criticisms against contingency fees, to identify the specific characteristic of contingency fees that is being criticised and refrain from condemning all the various forms of contingency fees since some may not share this characteristic.

10 As the above discussion indicates, there are several types of contingency fees. The one characteristic that they all share is the "no win, no pay" feature, which shifts the risk of the plaintiff's legal costs of litigation, in the event that he is unsuccessful, to his lawyer.[16] Apart from this feature, the nature of the compensation varies, as the following description of the various types of contingency fees shows:

(a) Speculative fee. Under a speculative fee arrangement, a lawyer agrees with the client that he will charge the client his normal hourly fee only if a settlement is arrived at or if the case is successfully litigated.[17] As such, the lawyer's fees are tied to the number of hours he works.

(b) Conditional fee. Also known as "uplift fees", the conditional fee is almost identical to the speculative fee, except that the lawyer and client agree upon a percentage premium, called an "uplift", which is added to the lawyer's normal fee in the event of success.[18] So for example, if a lawyer and his client agree to a conditional fee with a 20% uplift, the former would get his normal hourly fees plus 20% of this figure if, and only if, his client succeeds in getting a recovery.

Profession (Professional Conduct) Rules (Cap 161, R 1, 2000 Rev Ed) which, under the heading "Contingency fees prohibited", states that "An advocate and solicitor shall not enter into any negotiations with a client — (a) for an interest in the subject matter of litigation; or (b) except to the extent permitted by any scale of costs which may be applicable, for remuneration *proportionate to the amount which may be recovered* by the client in the proceedings" [emphasis added].

15 Australia, for example, takes the conventional view that contingency fees are merely fees payable upon successful recovery or settlement: see Access To Justice Advisory Committee, *supra*, n 4 at 177; Vince Morabito, "Federal Class Actions, Contingency Feeds, and the Rules Governing Litigation Costs" (1995) 21 Monash U L Rev 231 at 242.

16 Jay, *supra*, n 1 at 814.

17 Access To Justice Advisory Committee, *supra*, n 4 at p 177; Luban, *supra*, n 9 at 91; Richard O'Dair, "Legal Ethics and Legal Aid: The Great Divorce?" (1999) 52 Current Legal Probs 419 at 420; Morabito, *supra*, n 15 at 242.

18 Access To Justice Advisory Committee, *supra*, n 4 at p 177; Luban, *supra*, n 9 at p 91; O'Dair, *supra,* n 17 at 421.

(c) Percentage contingency fee. This is the type of contingency fees most often utilised in the United States. Under this arrangement, the lawyer retains an agreed-upon portion, usually a third, of the money recovered by his client.[19] This presupposes that there is either a settlement or an award for damages.

(d) Fixed contingent fee. The fixed contingent fee arrangement is one where the lawyer is given an agreed-upon lump sum payment upon the successful resolution of the case.

While the percentage contingency fee is by far the most popular form of contingency fees used in the United States, many variations and hybrids of the above fee structures have been created and utilised. Often, various features of the different types of contingency fees are combined. For example, the speculative fee may be combined with the fixed contingent fee such that a lawyer is paid his hourly fee plus an agreed-upon sum if the case is settled or successfully litigated. Similarly, the speculative fee can be combined with the percentage contingency fee, whereby a lawyer agrees to charge a lower speculative fee in exchange for a percentage of the money recovered by his client.[20] Then there are also various types of percentage contingency fees.[21] Under one strain, the percentage of the monetary recovery that a lawyer is entitled to depends on the stage at which monetary recovery is obtained. So he gets a certain percentage, say 25%, if the case settles early, a larger percentage if the case goes to trial, and an even higher percentage if an appeal is necessary.[22] The lawyer and client can also agree on an arrangement whereby the percentage varies based on the sum recovered. So the lawyer may get 40% of the first $10,000, 30% of the next $20,000 and 10% of any sum above $30,000. There are numerous combinations and arrangements which can be arrived at and each has different advantages and disadvantages.

19 Access To Justice Advisory Committee, *ibid* at p 177; Luban, *supra,* n 9 at p 91; Morabito, *supra,* n 15 at 242.

20 Jay, *supra,* n 1 at 814.

21 For a description of the different variants of contingency fees used in America, see Herbert M Kritzer, "The Wages of Risk: The Returns of Contingency Fee Legal Practice" (1998) 47 DePaul L Rev 267 at 286–288.

22 In his study of contingency fee cases in Wisconsin, Herbert Kritzer found that 39% of contingency fee cases relied on a variable percentage. And, of these cases, the most common pattern called for a contingency fee of 25% if the case did not go to trial and 33% if the case went beyond this point. If the case resulted in an appeal, the fee rose to 40% or more: *ibid.*

11 Before launching into a discussion on contingency fees, it is also useful to identify alternative compensation mechanisms, since it is quite fruitless to analyse the fee structure in a vacuum, without comparison with the other ways that lawyers are paid. Traditionally, lawyers charge an *hourly fee* for the work that they do for their clients. They get paid for this work based on the number of hours put in, regardless of the outcome of the litigation. Another fee arrangement which is sometimes relied on is the *fixed fee*. This is an agreed-upon lump sum payment which the lawyer receives, regardless of the time he puts into the case and regardless of the outcome of the litigation.

B. A historical perspective of contingency fee jurisprudence and legislation

(i) The traditional English rule

12 The English rule against the use of contingency fees arose out of the doctrines of maintenance and champerty, which were born in England's feudal past.[23] Maintenance is the giving of assistance or encouragement to a litigant by a person who either has no interest in the litigation, or lacks a justification for his interference that is recognised by law.[24] Champerty is a subset of maintenance, whereby assistance in an action is granted in consideration of a promise to give the maintainer a share of the damages or subject matter of the action.[25] As in many areas of the common law, these doctrines have evolved to accommodate broader purposes than that intended by their originators.[26]

13 The doctrine of champerty dates back to the thirteenth and fourteenth centuries when there was a power struggle between the English kings and the semi-autonomous feudal barons. Turning away from armed conflict as a means of securing larger estates and lands, lords, barons and other powerful men relied on corrupt courts as a means to extract property from others. Wielding incredible influence and wealth, these men either held positions or had contacts in the courts and were often happy to assist others in their court actions, financially

23 See generally, Thomas, *supra*, n 10; Percy H Winfield, "The History of Maintenance and Champerty" (1919) 35 Law Q Rev 50.

24 *Halsbury's Laws of England*, *supra*, n 13 at para 850.

25 *Ibid.*

26 Thomas, *supra*, n 10 at 43. It should be noted that although some scholars like Winfield believe that it is highly questionable if maintenance and champerty are of common law origin, this is the view that is widely held and courts have, through time, developed the concepts under the common law. See Winfield, *supra*, n 23 at 56–58; The Law Commission, *Proposals For Reform Of The Law Relating To Maintenance And Champerty* (1966) at p 3.

or otherwise, in exchange for a share of the subject matter of the suit, which was usually real property. This led to the development of the doctrine of champerty as enacted in a series of early statutes. As stated by Lord Philimore in *Neville v London "Express" Newspaper, Ltd*:

> A perusal of these statutes shows that in the days when they were enacted the ordinary subject of the king found great difficulty in procuring a fair trial when his adversary was in some privileged position. Sometimes the king's officers were induced by a bribe or by the offer of a share of the spoil to favour his adversary. Sometimes great men gave countenance to his adversary, sometimes confederacies were formed to support unjust claims of defences. And the statutes are directed against maintenance, champerty and confederacy or conspiracy, while embracery or subornation or perjury were some of the means used to secure these unlawful ends.[27]

From the above account, it is clear that the doctrine of champerty was developed to counter corruption and abuse in the English court system.[28] It should be noted that none of the early statutes against champerty were meant to specifically regulate lawyers or promote legal ethics. Instead, they were directed at a group comprising clerks of justices, sheriffs and other royal officials.[29]

14 After corruption was brought under control and the struggle between the crown and its feudal lords subsided, the courts shifted the focus of champerty to another concern: if individuals with no interest in a suit were allowed to encourage and/or assist others in a court action, litigation might be increased and this would cause the society to be more litigious.[30] Apart from this, there may also have been a concern that maintainers with an interest in legal proceedings had an incentive to pervert the judicial process.[31] As such, statutes were subsequently

27 [1919] AC 368 at 427.

28 This view is supported by the fact that the earliest statutory provision prohibiting champerty, which stated that "[n]o officer of the King by themselves, nor by other, shall maintain pleas, suits or matters hanging in the King's courts, for lands, tenements, or other things, for to have part or profit thereof by covenant made between them; and he that doth, shall be punished at the King's pleasure", was immediately followed by a statute that forbade any sheriff or King's officer from receiving any reward for doing his office on pain of punishment: Winfield, *supra*, n 22 at 59 (quoting 3 Edw I (St West I), c 25, and citing 3 Edw I (St West I), c 26).

29 Thomas, *supra*, n 10 at 45; Winfield, *supra*, n 23 at 59.

30 Thomas, *supra*, n 10 at 46.

31 As Lord Denning stated in *Re Trepca Mines Ltd* [1962] 3 All ER 351 at 355, "[t]he reason why the common law condemns champerty is because of the abuses to which it may give rise. The common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses." It should be noted that there are scholars

enacted that provided for the general prohibition of both champerty and maintenance. These of course applied to lawyers[32] and as such, contingency fees were outlawed. It should be noted that the basis for the prohibition – that such conduct will lead to an undesirable level of litigiousness – is still one of the most common reasons why critics of contingency fees oppose its use.[33]

15 The doctrines of maintenance and champerty were founded on considerations of public policy.[34] Yet it left impecunious Englishmen, who could not afford legal representation, often without redress when they had been wronged. Hence, in 1649, John Warr could say with indignation:

> The inhabitants of [England] are lost in the law, such and so many are the references, orders and appeals, that it were better for us to sit down by the loss than to seek for relief … The price of right is too high for a poor man.[35]

Despite such problems, the English courts continued to bar all contingency fee contracts.[36]

16 Not all judges were satisfied with applying these rules, though. In *Ladd v London Road Car Co*, Chief Justice Russell expressed the

who are more sceptical towards the *bona fides* of this legal development. For example, Stephan Landsman believes that "there were other, more powerful, motives for English efforts against contingency agreements. By far the most important of these was a growing antipathy among the upper classes to litigation, especially if mounted by plaintiffs of modest means. The theme of curtailing access to court echoes through English legal history. It is perhaps most prominent in England's adoption of a "loser pays" rule whereby the defeated litigant is required to pay not only the judgment (if there is one) but the attorney fees of his victorious opponent as well as his own fees. Such an arrangement substantially increases the risks associated with litigation and inhibits access except for the wealthy or extremely courageous": Stephan Landsman, "The History of Contingency and the Contingency of History" (1998) 47 DePaul L Rev 261 at 263.

32 Hence, Sir Henry Hobart, Chief Justice of Common Pleas could clearly state, by 1617, that "[i]f an attorney follow a cause to be paid in gross, when it is recovered, that is champerty": Peter Karsten, "Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940" (1998) 47 DePaul L Rev 231 at 232–233 (quoting *Box v Barnaby* (1611) 1 Bulst 176, 80 ER 266 at 266).

33 See *infra*, Section II.

34 *Alabaster v Harness* [1895] 1 QB 339 at 342.

35 Karsten, *supra*, n 32 at 231 (quoting John Warr, *The Corruption And Deficiency of The Lawes of England Soberly Discovered* (1649)).

36 *Ibid* at 233 n 9.

willingness to accept the legitimacy of speculative fees when he stated that:

> In reference to the subject of speculative actions generally, I think it right to say, on the part of the Profession and the class of persons who were litigants in such cases, that it was perfectly consistent with the highest honour to take up a speculative action in this sense – viz., that if a solicitor heard of an injury to a client and honestly took pains to inform himself whether there was a bona fide cause of action, it was consistent with the honour of the profession that the solicitor should take up the action. It would be an evil thing if there were no solicitors to take up such cases, because there was in this country no machinery by which the wrongs of the humbler classes could be vindicated. Law was an expensive luxury, and justice would very often not be done if there were no professional men to take up their cases and take the chances of ultimate payment.[37]

Unfortunately, such enlightened observations were not heeded and the rule against contingency fees was subsequently codified in other legislation and codes of ethics regulating the legal profession in England.[38]

17 Meanwhile, the crime of maintenance and champerty fell into disuse and became "a dead letter" in English law.[39] As torts, the two actions became extremely difficult to succeed in since courts began narrowing the scope of these actions in keeping with changed notions of public policy.[40] They did this by broadening the definition of "interest" which a person could have as well as the lawful justifications that could be used as defences in order to escape liability. This was thought necessary as courts began to recognise that the majority of civil actions brought in the latter half of the twentieth century have been supported by some association, insurer, or by the state itself.[41] As a result of these

37 (1990) 110 Law Times 80.

38 For example, the Solicitors Act 1957 (c 27), s 65(1)(b), states that nothing in the Act shall give validity to "any agreement by which a solicitor retained or employed to prosecute any action, suit or other contentious proceeding, stipulates for payment only in the event of success in that action, suit or proceeding." This provision was retained under the Solicitors Act 1974 (c 47), s 59(2)(b), which deals with fee agreements for contentious business. In terms of subsidiary legislation, the Solicitors' Practice Rules 1936–1975, r 4(3), states that "[a] solicitor who is retained or employed to prosecute any action suit or other contentious proceeding shall not enter into agreement or arrangement to receive a contingency fee in respect of that action, suit or other contentious proceeding". This rule is currently embodied in the Solicitors' Practice Rules 1988, r 8(1).

39 The Law Commission, *supra*, n 26 at p 4.

40 *Halsbury's Laws of England*, *supra*, n 13 at para 851.

41 *Ibid* at para 854; The Law Commission, *supra*, n 26 at p 5.

developments, the English Law Commission, in 1966, after considering the policy and law of maintenance and champerty then prevailing, recommended that the "common law and statutory misdemeanours of maintenance and champerty be abolished".[42] This recommendation was accepted and criminal and tortious liability for maintenance and champerty were abolished in 1967 *via* s 13 and s 14(1) of the Criminal Law Act 1967. Despite these developments, the doctrine of champerty survived because the Law Commission felt that champertous agreements should remain unlawful whilst the Law Society looked into the question of contingency fee arrangements.[43] As such, for the purposes of contract law, all champertous agreements in violation of this doctrine are still considered illegal and unenforceable as contrary to public policy.[44]

18 Although the doctrine of champerty still exists, the English courts have arguably whittled it down to non-existence, except in the area of lawyer-client contingency fee agreements. In the recent House of Lords decision of *Giles v Thompson*[45], which involved a company hiring a car to the plaintiff in a road accident case, the court held that there was no champerty when the company effectively took over the litigation to recover the car hire cost in the plaintiff's name. This was because the court felt that the agreements did not tend to "corrupt public justice." In coming to this decision, Lord Mustill stated:

> I believe that the law on maintenance and champerty can best be kept in forward motion by looking to its origins as a principle of public policy designed to protect the purity of justice and the interests of vulnerable litigants. For this purpose, the issue should not be broken down into steps. Rather, all the aspects of the transaction should be taken together for the purpose of considering the single question whether … there is wanton and officious intermeddling with the disputes of others in where the meddler has no interest whatever, and

42 The Law Commission, *supra*, n 26 at p 7.

43 *Ibid*.

44 *Halsbury's Laws Of England*, *supra*, n 13 at para 850.

45 [1994] 1 AC 142. This case was one of three recent cases that redefined the doctrines of champerty and maintenance, the other two being *Trendtex Trading Corp v Credit Suisse* [1982] AC 679 and *Brownton Ltd v Edward Moore Inbucon Ltd* [1985] 3 All ER 499. Despite these developments, some scholars feel that the liberal approaches adopted by these cases "must necessarily be few and far between and it is perhaps time for more wide-ranging reform via legislative means": Andrew Phang Boon Leong, *Cheshire, Fifoot and Furmston's Law of Contract: Second Singapore And Malaysian Edition* (1998) at 640–641; see also *Halsbury's Laws of Singapore* (2000) vol 7 at para 80.290.

> where the assistance he renders to one or the other is without justification or excuse.[46]

He then elaborated that:

> The question must be looked at first in terms of the harmfulness of this intervention … Is there any realistic possibility that the administration of justice may suffer, in the way in which it undoubtedly suffered centuries ago? None, so far as I can see, or at any rate none with which the skills and coercive powers of the contemporary judge are unable to grapple.[47]

19 What then, are we left with, when we consider a champertous contingency fee agreement? Is there a realistic possibility that the administration of justice will suffer if we allow the use of such agreements? Would it make a difference if the administration of justice would not suffer significantly if such agreements were used? Obviously the ancient public policy concern of increasing litigiousness is no longer considered valid by the English courts. Would the current policy concern disappear, too, with time? The English Court of Appeal seems to have felt that it had, when in *Thai Trading Co (a firm) v Taylor*,[48] it disregarded the Solicitors' Practice Rules and held that at common law, speculative fee agreements were no longer illegal as against public policy. However, in the more recent Court of Appeal decision of *Awward v Geraghty & Co (a firm)*, the court felt that "the court in *Thai Trading* case may have been in error in asserting that breach of a professional rule did not involve any illegality."[49]

20 It appears from the above cases that at the beginning of the twenty-first century, the doctrines of champerty and maintenance have lost much of their meaning, but for their application to contingency fees agreements. The main reason for their longevity in this area is the fact that they were codified, in their historical form, in the rules and legislation regulating the legal profession.[50] It is therefore important that as we consider the merits and faults of such agreements, we should not allow history and precedent to cloud our minds as to their validity today. As the English Green Paper on contingency fees concluded:

46 *Giles v Thompson*, *supra*, n 45 at 164.

47 *Ibid.*

48 [1998] QB 781.

49 [2000] 1 All ER 608 at 622. For a commentary on this case, see Neil Andrews, "Common Law Invalidity of Conditional Fee Agreements for Litigation: 'U Turn' in the Court of Appeal" (2000) 59 CLJ 265.

50 *Re Trepca Mines Ltd*, *supra*, n 31 at 355.

> 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.[51]

(ii) The Singapore position

21 The law on champerty and maintenance in Singapore seems to mirror developments in England.[52] In *Lim Lie Hoa & Anor v Ong Kance Rebecca*[53], the Court of Appeal cited *Trendtex Trading Corp v Cre'dit Suisse*[54] and *Giles v Thompson*[55] with approval, indicating that it is likely that the liberal approach adopted in the English cases would be applied in Singapore.

22 As for contingency fee agreements, Singapore's Legal Profession Act and the Legal Profession (Professional Conduct) Rules,[56] as with their English counterparts,[57] enshrine the doctrines of maintenance and champerty. Section 107(1)(b) of the Legal Profession Act states that no lawyer shall:

> … enter into any agreement by which he is retained or employed to prosecute any suit or action or other contentious proceeding which stipulates for or contemplates payment only in the event of success in that suit, action or proceeding.

Furthermore, in avoidance of any doubt, s 107(3) clearly states that "[a] solicitor shall, notwithstanding any provision of this Act, be subject to the law of maintenance and champerty like any other person." On the other hand, r 37(b) of the Professional Conduct Rules merely addresses percentage contingency fees, outlawing any agreement "for remuneration proportionate to the amount which may be recovered by the client in the proceedings". These provisions, and their predecessors, have been consistently applied in a number of cases such as *Lau Liat Meng v Disciplinary Committee*[58] and *Law Society of Singapore v Chan*

51 Lord Chancellor's Department, *Contingency Fees*, *supra*, n 13 at p 8.

52 Phang, *supra*, n 45 at p 641.

53 [1997] 2 SLR 320.

54 *Supra*, n 45.

55 *Ibid*

56 Cap 161, 2001 Rev Ed; and Cap 161, R 1, 2000 Rev Ed (hereafter referred to as the "Professional Conduct Rules").

57 *Supra*, n 38.

58 [1965–1968] SLR 9.

Chow Wang,[59] where percentage contingency fee agreements were struck down as champertous.

(iii) The American experience

23 Today, every state in the United States permits some form of contingency fees or other. However, this was not always the case.[60] The English doctrines of maintenance and champerty made their way across the Atlantic and into American jurisprudence in the nation's infancy, wielding an especially strong influence over jurisdictions traditionally bound to Westminster, such as Massachusetts.[61] Although the use of contingency fees emerged in the early part of the nineteenth century, reputable lawyers considered them unlawful and courts routinely voided such fee agreements on the grounds of champerty.[62] Despite these initial setbacks, the number of contingency fee agreements increased in the 1820s and by the 1850s, they found acceptance amongst a large number of judges and legislators. For example, in a landmark decision, the state of New York banned all rules regulating the costs of fees of attorneys in 1848.[63] In other states such as New Jersey, Texas, Utah, Arkansas, Missouri, New Hampshire and Illinois, the courts took the lead in bringing about change in this area.[64]

24 The main driving force for the acceptance of contingency fees in the United States was the belief that without it, many people from humble backgrounds would not be able to enforce their legal rights. Indeed, even before it found judicial acceptance, the contingency fee agreement was relied upon by increasing numbers of poor settlers with

59 [1972–1974] SLR 636.

60 For a detailed account of the United States' initial acceptance and subsequent rejection of champerty rules in relation to contingency fees, see Karsten, *supra*, n 32.

61 In *Thurston v Percival* (1823) 18 Mass (1 Pick) 415, for example, the Massachusetts High Court conceded that the contingency fee was "useful and convenient, where one has a just demand which he is unable from poverty to enforce". However, it felt bound by the English champerty statutes and common law precedent and principles: Karsten, *supra*, n 32 at 239.

62 See Karsten, *supra*, n 32 at 234–235, especially the cases cited in n 22. As pointed out by Karsten, the application of the rule may also have been due to early abuses by lawyers.

63 Brickman, "Contingent Fees Without Contingencies", *supra*, n 1 at 36. According to Brickman, New York's Field Code of 1848 "repealed the statutes regulating lawyers' fees, thereby dealing the champerty impediment a major blow and contributing significantly to the legitimation of contingency fees."

64 See Karsten, *supra*, n 32 at 241–242.

land claims in newly settled states.[65] Coupled with this problem was the fact that along with the Industrial Revolution came an increased number of industrial accidents that produced a large number of working-class plaintiffs with legitimate claims, but no means of pursuing them.[66] Confronted with such real problems and the need to provide justice for the populace, jurists and legislators were compelled to make a paradigm shift in their thinking. In part due to the moral force of the argument that the poor should not be effectively denied access to the courts, as well as the fact that such agreements were already being made clandestinely, contingency fees found rapid acceptance across the continent. Although not every state was quick to accept the propriety of contingency fees, the United States Supreme Court could declare, by 1877, that "[t]he proposition [that contingency fees are legal] is one beyond legitimate controversy."[67] This is remarkable, considering that the changes took place in a span of less than 50 years and occurred a century before most jurisdictions in the Commonwealth started making similar changes.

25 The use of contingency fees in the United States has come a long way since the mid-nineteenth century. Today, although the majority of people relying on the fee structure are still tort victims who cannot otherwise afford to embark on an expensive litigation exercise, contingency fees are used by many different entities in a host of different cases. They are used in, *inter alia*, labour and commercial disputes, antitrust cases, civil rights claims, environmental actions, enforcement of intellectual property rights, corporate reorganisations as well as securities litigation and other types of class action suits,[68] both by plaintiffs as well as defendants.[69] What is more, many corporate entities as well as government agencies have turned to contingency fee lawyers to pursue claims.[70]

65 *Ibid* at 236.

66 Brickman, "Contingent Fees Without Contingencies", *supra*, n 1 at 37.

67 *Stanton v Embrey* (1877) 93 US 548 at 556.

68 Jay, *supra*, n 1 at 813–814; Richard W Painter, "Litigating on a Contingency: A Monopoly of Champions or a Market for Champerty?" (1995) 71 Chi-Kent L Rev 625 at 626.

69 Defence lawyers are sometimes paid a premium (in terms of a lump sum payment or a higher hourly fee) if the defence is successful and may either be paid nothing or a lower fee if the defence fails.

70 Margaret Cronin Fisk, "Corporate Firms Try Contingency", *National Law Journal* (27 October 1997) at p 1. As demonstrated below in Sections II and III, most of the problems which contingency fees cause arise from the ignorance and poor bargaining power of plaintiffs, as well as their inability to manage and monitor the inherent conflict problems which accompany the use of contingency fees. Large corporations and government entities have the resources to manage these tensions

C. Global trends towards greater access to justice and contingency fees

26 Although contingency fees are relied upon most commonly in the United States, one of the biggest myths of the contingency fee, and one that supports the *argumentum ad Americanum*, is that it is uniquely American.[71] Nothing is further from the truth. While not many jurisdictions outside the United States allow percentage contingency fees, a sizeable number of jurisdictions, both based on the common law and civil law traditions, have come to accept and embrace the use of the fee structure in some area or other. Some examples of such countries are France, Italy, Luxembourg, Portugal, Japan, Greece, the Dominican Republic and Brazil.[72]

27 Within the Commonwealth, except for Ontario, all of Canada's provinces and territories permit the use of percentage contingency fees.[73] In a series of reforms between 1968 and 1986, most of these provinces began to allow contingency fees and it is probably a matter of time before Ontario will move in this direction.[74] Indeed, the Canadian Bar Association – Ontario and the Law Society of Upper Canada have both issued reports supporting the use of contingency fees in Ontario.[75]

28 Outside North America, the Irish Republic allows its lawyers to charge speculative fees[76] and recently, Brunei has also jumped on the bandwagon, allowing percentage contingency fees of up to 30% of damages recovered at trial or 40% if there is an appeal.[77]

and at the same time, can harness the ability of contingency fees to incentivise their attorneys. As such, contingency fees have become increasingly popular amongst such entities.

71 Herbert M Kritzer, "Seven Dogged Myths Concerning Contingency Fees" (2002) 80 Wash U L Q 739 at 744. For an example of this misperception, see Olson, *supra*, n 1 at p 37.

72 Kritzer, "Seven Dogged Myths", *supra*, n 71 at 746–747.

73 See *ibid* at 745 n 21; Stephen Kines, "Contingency Fees: Access to Justice or Abscess of Justice" (1995) 17 Advoc Q 323 at 328–329.

74 Kines, *supra*, n 73 at 329. It should be noted that Ontario already permits the use of contingency fees in class action suits and several recent Ontario Court of Appeals decisions have upheld the principle of lawyers relying on such fees. Kritzer, "Seven Dogged Myths", *supra*, n 71 at 745 n 21.

75 Kines, *ibid* at 323–326.

76 Kritzer, "Seven Dogged Myths", *supra*, n 71 at 745.

77 Cases where such contingency fees are allowed include defamation actions, actions for personal injury, and actions in respect of any commercial action: Phang, *supra*, n 45 at 641 n 302 (citing the Legal Profession (Contingency Fee) Rules 1994 (No S 17/1994)).

29 In Australia and New Zealand, the courts seem to have taken the lead in this area. As early as 1935, the New Zealand Supreme Court in *Sievwright v Ward* paved the way when Ostler J boldly declared that:

> If a solicitor (or a partner of a firm of solicitors) has honestly investigated a client's case, and honestly come to the conclusion that the client has a good cause of action or a good defence to an action, then, so long as he makes no bargain with his client to take a share of the proceeds, he does not, by advancing money for disbursements and by conducting the case without having received any payment on account of his costs, commit the wrong of either champerty or maintenance. I think further that, whether the solicitor does this without any prior agreement with his client, or whether he makes a prior agreement either that in any case he shall be repaid such costs and disbursements, or that he should be paid only out of the proceeds of the suit, and that if there are no proceeds the solicitor will bear the loss, the result is the same: the solicitor would be guilty of no wrong. To hold otherwise would be against the public interest.[78]

Then, after quoting the passage from *Ladd v London Road Car Co* reproduced above[79], the learned judge stated that:

> In the statement quoted it is said that solicitors may lawfully take the chance of ultimate payment. In many cases the solicitor must know the client to be so poor that unless the action succeeds he will never be able to pay the costs, and the only chance he has of recovering them is out of the proceeds of the judgment. It is the taking of that chance which, in my opinion, the Court of Appeal has said is not only lawful, but consistent with the highest professional honour.[80]

30 The Australian High Court found this reasoning so persuasive that it also endorsed the use of speculative fees in 1960, through its decision in *Clyne v NSW Bar Association*.[81] Since then, other types of contingency fees have been sanctioned in several Australian states. In 1993, South Australia permitted its lawyers to enter into conditional fee arrangements with a maximum 100% uplift to scale fees that would have been charged,[82] and New South Wales followed suit in 1994, when it allowed conditional fee arrangements with a maximum uplift of

78 [1935] NZLR 43 at 47.

79 *Supra*, n 37.

80 *Supra*, n 78 at 48.

81 (1960) 104 CLR 186 at 203–205.

82 Access to Justice Advisory Committee, *supra*, n 4 at pp 179–180 n 12 (citing the Legal Practitioner's Act 1981, ss 41–42; and the Law Society of South Australia's Professional Conduct Rules, r 8.10).

25%.[83] Since then, Queensland has allowed its barristers to charge conditional fees with a maximum uplift of 50%[84] and after the Law Institute of Victoria and the Victorian Law Reform Commission recommended the liberalisation of lawyers' fees, Victoria began to allow conditional fees with an uplift of up to 25%.[85] The use of conditional fee arrangements appears to be gaining momentum in Australia and will probably expand to all the other states. This was certainly the hope of the Australian Access to Justice Advisory Committee, which recommended, in 1994, that:

> The Commonwealth should encourage those States that have not yet done so to permit lawyers to enter into contingency fee agreements with their clients, where such agreements provide for an uplift fee above the lawyer's normal rates. If all States have not acted to permit contingency fees within a specified period (say, one year), the Commonwealth should legislate to provide for uplift contingency fee agreements in matters within federal power.[86]

31 Finally, in the United Kingdom, Scotland has had a long tradition of permitting the use of speculative fees[87] and recently introduced conditional fees.[88] Similarly, England and Wales have recently allowed their solicitors to reach conditional and speculative fee arrangements with their clients. In fact, the English government has considered this experiment so successful that it intends to expand the use of conditional fees. Of late, there has even been talk of opening the market for legal services further by allowing percentage contingency fees, representing a major victory for liberals who have been advocating change in the legal profession. The English experience will be extremely instructive to any jurisdiction considering the adoption of contingency fees and therefore warrants greater attention. As such, I will deal with these reforms in greater detail below.

32 When one considers the globalisation of the use of contingency fees, three observations can be made. First, although each country's system of contingency fees is somewhat different, the assertion that

83 *Ibid* at 180 nn 15–16 (citing the Legal Profession Act 1987, ss 186–188).

84 Australian Law Reform Commission, *Review Of The Civil Justice System* (Discussion Paper 62, 1999) at para 6.51 n 78 (citing the Barristers' Rules, r 102A(d)).

85 *Ibid* (citing the Legal Practice Act 1996, s 98).

86 Access to Justice Advisory Committee, *supra*, n 4 at p 188.

87 Lord Chancellor's Department, *Contingency Fees*, *supra*, n 13 at 3.

88 Painter, *supra*, n 68 at 627 n 10 (citing Scotland's Law Reform Act of 1990 (Miscellaneous Provisions), s 36).

contingency fees are unique to the United States is clearly false.[89] So, too, is the assertion that the percentage contingency fee is peculiarly American.[90] This rebuts the often-made arguments that the effects of contingency fees are so bad that no other nation but the United States allows it and that dependence on the fee structure will bring a legal system down the road of self-destruction. Indeed, many states and bar associations have carefully studied the American legal system as well as its reliance on percentage contingency fees and have concluded that because of fundamental differences in their legal systems, the problems faced in the United States are unlikely to accompany the use of contingency fees in their jurisdictions, especially if well regulated.[91]

33 Second, whereas the use of speculative fees is now uncontroversial, there has been a recent trend, among the Commonwealth jurisdictions outside North America, towards the use of conditional fees rather than percentage contingency fees. This may in part be attributed to the more cautious and conservative attitudes of the legislators in these jurisdictions, who fear that unrestrained percentage contingency fees would, as it is perceived to have done in the United States, lead to abuses by rogue lawyers.[92]

34 Finally, a theme that seems to underlie some of these developments is the commonly held belief that equal access to justice has, through increasing legal costs, become illusory. Even jurisdictions with state-sponsored legal aid have realised that more has to be done to

89 Kritzer, "Seven Dogged Myths", *supra*, n 71 at 747.

90 *Ibid*.

91 For example, the 1989 Green Paper on contingency fees concluded that "[t]he lessons to be drawn from the US experience are that the unrestricted use of contingency fees appears to be undesirable. The differences between the jurisdictions are, however, such that the worst excesses of US contingency fee arrangements should not develop in England and Wales. It is the combination of such factors as a jury's ability to award damages, the absence of any rule that the loser pays the winner's costs, the possibility of punitive damages and the use of class actions, none of which is present in England and Wales, which, taken together with the ability to use contingency fees, gives rise to the worries about the US system": Lord Chancellor's Department, *Contingency Fees*, *supra*, n 13 at 9. Similarly, the Ontario's section of the Canadian Bar Association concluded, in its 1988 report supporting the implementation of contingency fees in Ontario, that "[t]here are a number of aspects of the Canadian judicial system, most importantly party and party costs awards, a maximum general damage award level and legal aid, that distinguish the way in which contingency fees operate in other Canadian jurisdictions and would likely operate in Ontario as opposed to the United States": Kines, *supra*, n 73 at 324 (quoting Canadian Bar Association – Ontario, *Opening Doors to Stirring Up Strife: The Implementation of Contingent Fees in Ontario* (1988)).

92 See Lord Chancellor's Department, *Contingency Fees*, *supra*, n 13 at 9.

ensure that the man on the street has the ability to enforce his rights. Indeed, upon the publication of a consultation paper entitled "Access to Justice with Conditional Fees", Lord Chancellor Irvine of Lairg admitted before the House of Lords that one of the reasons why the English government was advocating the utilisation of conditional fees was that:

> At present the legal aid system is failing us all. It is failing the many millions of people on modest incomes who do not qualify for legal aid and who simply cannot contemplate going to law because of the potential costs if they lose.[93]

35 Similarly, Australia's Attorney-General and Minister for Justice constituted the Access to Justice Advisory Committee because of their belief that there was a pressing need to "address the "crisis of confidence" in the institutions fundamental to the rule of law in a democratic society."[94]

D. Recent inroads in England – the conditional fee experiment

36 In a sense, the recent shift in mindset in England *vis-à-vis* contingency fees is an enigma. As pointed out above, the English courts have historically viewed the fee structure with immense suspicion and just twenty years ago, the Royal Commission on Legal Services, after undertaking a study of the fee structure, concluded that it did not "believe that a system of this type would work well in this country and would give rise to serious dissatisfaction".[95] Amongst the reasons cited for this view were the Commission's beliefs that the fee structure would lead to lawyers acting against their clients' interests and indulging in "undesirable practices" prejudicial to the administration of justice.[96] Although the government agreed with this conclusion in 1983,[97] the wheels of change were set into motion just six years later, when the Lord Chancellor's Department published a Green Paper on contingency fees that carefully examined the contingency fee system and concluded that it was appropriate to consider introducing speculative and conditional fees in England and Wales as a precursor to permitting a restricted form of the percentage contingency fee.[98] Slightly over a year later, the Courts

93 Speech by Lord Irvine before the House of Lords on 4 March 1998, available at <http://www.lcd.gov.uk/laid/lacon2.htm>.

94 Access To Justice Advisory Committee, *supra*, n 4 at p xxix.

95 The Royal Commission On Legal Services, *supra*, n 13 at p 177.

96 *Ibid.*

97 Lord Chancellor's Department, *The Government's Response to the Report of the Royal Commission on Legal Services* (Cmnd 9077, 1983) at p 18.

98 Lord Chancellor's Department, *Contingency Fees*, *supra*, n 13 at p 14.

and Legal Services Act 1990 was enacted and in 1995, lawyers were allowed to charge speculative and conditional fees after the Lord Chancellor, Lord Mackay, announced the restrictions that would apply to the scheme.[99]

37 Under the restrictions laid down by the Lord Chancellor in 1995, conditional fees with a maximum uplift of up to 100% could be charged for certain types of cases. The 100% figure was arrived at because the Lord Chancellor felt that:

> [W]hilst a low uplift might prove attractive in cases with a very good chance of success, it was right to allow lawyers to take cases with a risk, up to 50-50. In the Bar's guidelines, cases up to this level of risk are described as having a reasonable chance of success. In consideration of all the arguments, this seemed to me the right, logical basis for determining the maximum uplift.[100]

The Lord Chancellor did not lay down any other substantive restrictions as he felt that "lawyers and clients should have the freedom to agree [on] an uplift which is appropriate to the case and not be subject to unnecessary regulations."[101]

38 Although the changes in England and Wales occurred swiftly, there was no lack of opposition, especially from the English bench and bar.[102] Sceptics felt that the decision was hasty and driven by a government alarmed by the increases in legal aid expenditure through the last decade.[103] At every stage of the government's consideration of this issue, where different variants of contingency fees were suggested and examined, the Bar Council objected[104] and judges protested. Furthermore, just before Lord Mackay's promulgation of the rules governing the use of conditional fees, an attempt was made by Lord Ackner to statutorily cap the uplift to 20% and restrict it to a proportion of damages recovered. However, his motion in the House of Lords lost by five votes.[105]

99 Lord Mackay, "Reducing Risks for Clients", *Law Society's Gazette* (5 July 1995) at p 10.

100 *Ibid*.

101 *Ibid*.

102 For a detailed account of the changes, the process it entailed and its critics, see Abel, *supra*, n 3; Colleen P Graffy, "Conditional Fees: Key to the Courthouse or the Casino?" (1998) 1(1) Legal Ethics 70; Yarrow & Abrams, *supra*, n 3.

103 Graffy, *supra*, n 102 at 85–86.

104 *Ibid* at 80.

105 Abel, *supra*, n 3 at 271.

39 In 1998, the new Lord Chancellor, Lord Irvine, announced the success of the conditional fee experiment.[106] In less than three years, thirty thousand people had relied on the fee structure to bring personal injury claims, many of whom were unable to afford pursuing their claims but did not qualify for legal aid. As such, Lord Irvine stated his intention of extending the use of conditional fee agreements to all but family and criminal cases.[107] Furthermore, he announced plans for legal aid resources then used to fund monetary or damage claims to be channelled to other types of actions and social welfare matters.

40 Despite Lord Irvine's glowing report, not all the data on England's conditional fee experiment has been positive. An independent study conducted by the Policy Studies Institute ("PSI") has revealed statistics that shed some light on both the success as well as potential failures in England's conditional fees system.[108] Nevertheless, it is extremely likely that the English government will continue pressing forward in the liberalisation of legal services, no doubt cheered on by proponents of the percentage contingency fee such as Sir Peter Middleton. In his report to the Lord Chancellor made two years after the initiation of the conditional fee experiment, Sir Middleton claimed that "there seems to be a widespread consensus that conditional fees have worked well and achieved their primary purpose of improving access to justice for those who do not qualify for legal aid"[109] and went so far as to suggest that:

> [T]he 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

106 See *supra*, n 93.

107 The restrictions were removed in 1998, and in another report the Lord Chancellor indicated that the government intended to allow the use of conditional fees in some types of family cases as well, such as the division of matrimonial property: see Lord Chancellor's Department, *Modernising Justice: The Government's Plans for Reforming Legal Services and the Courts* (Cm 4155, 1998) at p 24.

108 The study concludes that "[m]any of the potential problems identified before conditional fees were introduced seem to have been successfully addressed. However, there are still two areas of difficulty, and these are the two most crucial elements to the success of the scheme: the estimation of risk and the calculation of the uplift": Stella Yarrow, *The Price Of Success; Lawyers, Clients, And Conditional Fees* (1997) at pp xvii, 92–93.

109 Sir Peter Middleton, *Report To The Lord Chancellor* (1998) at p 83.

> 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.[110]

Section II – Deconstructing the contingency fee debate

41 The contingency fee debate is extremely complex because of the large number of arguments that have been put forward for and against the use of the fee structure. Often, each argument has a corresponding counterargument, which may or may not be supported by convincing empirical data. While they can be viewed individually, I believe that the vortex around which the contingency fee debate revolves lies in two focal points of disagreement. The first focuses on the attorney-client relationship and has at its core, the question of whether resort to contingency fees increases the lawyer's propensity to breach the fiduciary duties he owes to his client. The second area of dispute centres on the effects of contingency fees on the legal system and society in general.

42 Apart from this distinction, it should be noted that the contingency fee debate has largely surrounded the percentage contingency fee. This can be attributed to the fact that historically, most of the research and academic literature on contingency fees originated from the United States, where the percentage contingency fee was (and is) the most prevalent form of contingency fees used by lawyers. Moreover, percentage contingency fees are commonly alleged to have the most serious impact on lawyers' incentives to breach their duties and to stir up litigation. Be that as it may, considering the alternative forms of contingency fees that have been permitted in the recent global developments described above, I believe that it is important to also examine the debate in the context of conditional and speculative fees.

43 In analysing the contingency fee debate and considering whether contingency fees can play a crucial role in a common law jurisdiction, one cannot ignore the seminal article by Marc Galanter, "Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change".[111] In his article, one of the most often-cited works in American literature on the litigation process, Professor Galanter demonstrates how structural flaws in the Anglo-American legal system

110 *Ibid* at 84.

111 Marc Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change" (1974) 9 Law & Soc'y Rev 95.

are prone to favouring Repeat Players ("RPs"), large institutions such as insurance companies and government agencies, over One-Shotters ("OSs"), typically the tort victim, in the litigation game. Through selective litigation and settlement strategies, RPs are able to bring about the development of rules that favour them instead of OSs, who, because of the nature of their contact with the litigation process, are not equipped to deal with RPs on an equal footing. Apart from identifying this problem, Professor Galanter focuses on, *inter alia*, the development of a system whereby OSs are organised to form RPs such that they would be able to gain equality with RPs in the litigation process.

44 For the purposes of this paper, Professor Galanter's characterisation of the OS and RP is especially useful since the people who would most likely rely on contingency fees fit the description of the OS. Many of them do not have prior experience with the law and their participation in the litigation process is often a once in a lifetime event. For them, litigation is not only unfamiliar and daunting, but also expensive, considering their limited economic resources. Even if the OS can afford litigating his rights, he is on unfamiliar ground and is thus extremely risk averse. On the other hand, many institutional defendants tend to be RPs, who routinely play the litigation game and have immense resources at hand.[112] For them, the particular action is not of significant importance. They seek the development of favourable rules and the cultivation of reputations that would deter future claims. Another important observation is the fact that lawyers, and especially law firms, have important characteristics that put them in the category of RPs. They are constantly engaged in the litigation process and have significantly more resources than the average OS.

45 Having set the framework for this section, I will first proceed to describe the one argument in favour of contingency fees which is relatively uncontroversial – that it provides access to justice which is otherwise unavailable to many people, before moving on to discuss the conflicts of interest that may arise between a lawyer and his client because of contingency fees. Thereafter, I will deal with the group of arguments that claim that contingency fees lead to increased litigation and unethical practices by lawyers outside of the attorney-client relationship.

[112] Of course not every tortfeasor or party guilty of infringing the rights of an OS is an RP. However, many tortfeasors are insured and the party directing the defence will inevitably be his RP insurance company. In terms of other claims, parties who deliberately infringe the rights of others and are unwilling to reach a reasonable settlement will tend to be RPs, who believe that they will be able to deter the enforcement of rights or minimize settlement amounts through litigation and settlement strategies. See *infra*, Section IIB(ii).

A. Equal access to justice: the need for contingency fees

46 In order to understand the context of the contingency fee debate, it is imperative for us not to view it in isolation of the benefits that contingency fees confer. In the course of its history, contingency fees have been lauded for various reasons, some of which have been discredited, while others remain significant. For example, it has traditionally been thought that contingency fees are advantageous since they align the interest of the client with that of the attorney, who would work harder to succeed in the litigation to ensure that he receives some payment.[113] While this is sometimes true, critics have demonstrated powerfully that often, contingency fees tend to create conflicts of interest rather than align interests.

47 I believe that another benefit of contingency fees is that they solve the adverse selection problem often faced by OS plaintiffs, in the sense that when they rely on this fee structure, plaintiffs are not forced to depend on the supposedly objective advice of their hourly fee lawyers, who have an incentive to litigate and lengthen the litigation process since they are paid by the hour. Like the car dealer that credibly signals that his cars are of a high quality by warranting their performance, the contingency fee lawyer "puts his money where his mouth is" by expressing his willingness to be paid only upon a successful recovery, which signals to the client that he has a reasonable to good prospect of success. Ultimately, however, even this advantage is not as important as the primary reason why contingency fees were allowed to take root in the United States in the first place, which is to ensure equal access to justice.

48 For rights not to be reduced to meaninglessness, all individuals in a democratic society, whether rich or poor, should have equal access to justice. Not only does this lead to greater economic efficiency (as I will argue below), the very foundations and legitimacy of the rule of law as enshrined in the *Magna Carta* and the constitutions of the United States and Singapore, rest on the ability of *all* individuals to enjoin the state and other individuals from infringing their rights, and/or to seek compensation for the infringement of such rights.[114] Without such a

[113] This view has been subscribed to since the middle of the nineteenth century. For example, the Illinois Supreme Court reasoned, in 1857, that contingency fee agreements "constituted a better guaranty for fidelity, energy and proper zeal from one's attorney than the fee certain": Karsten, *supra*, n 32 at 241 (quoting *Newkirk v Cone* (1857) 18 Ill 499). The English government also seems to take this view: see Lord Chancellor's Department, *Contingency Fees*, *supra*, n 13 at pp 7–8.

[114] Indeed, the constitutions of most democratic states include a provision to the effect that everyone is equal before the law. For example, Art 12(1) of the Singapore Constitution (1992 Rev Ed) declares that "[a]ll persons are equal before the law and

principle, our society will be reduced to the unacceptable one described in George Orwell's *Animal Farm*, where all are equal before the law but some are more equal than others.

49 In recognition of this fundamental norm, even the most vitriolic critics of the contingency fee system in United States have not advocated its abolition.[115] Instead, they call for reforms which essentially leave the "no win, no pay" characteristic of contingency fees untouched. This is significant since it is the "no win, no pay" element of the fee arrangement that allows impecunious plaintiffs to secure the services of a lawyer. Similarly, despite the frenzied attack on contingency fees by the American media, several polls have shown that a majority of Americans do not believe that contingency fees should be outlawed.[116] Even attempts at legislative reform in this area have faced stiff opposition.[117]

50 That low wage earners should not be effectively prohibited from pursuing reasonable causes of action can hardly be objected to. That is

entitled to the equal protection of the law". Similarly, the Fourteenth Amendment of the United States Constitution guarantees its citizens "equal protection of the law".

115 Ted Schneyer, "Legal-Process Constraints on the Regulation of Lawyers' Contingent Fee Contracts" (1998) 47 DePaul L Rev 371 at 376 n 23; Marc Galanter, "Anyone Can Fall Down a Manhole: The Contingency Fee and Its Discontents" (1998) 47 DePaul L Rev 457 at 468. See *Hearings*, *supra*, n 1 (Statement by Lester Brickman).

116 In a 1982 poll which asked what was the fairest way for a plaintiff to compensate his lawyer, 32% of the people polled picked the contingency fee, 31% selected the hourly fee and 31% chose the fixed fee. In another poll, conducted in 1985, a majority of the people felt that contingency fees caused lawyers to take on a lot of cases and encouraged people to sue for inflated amounts even if they did not have a strong case. Nevertheless, 73% of the people polled recognized that the contingency fee gave everyone, even the impecunious, access to the courts because they did not have to pay anything in advance, or anything at all if they lost in the litigation context. Finally, in a 1986 poll, 73% of the people polled stated that they believed that it was very important (41%) or somewhat important (32%) for the contingency fee system to be retained in the United States. Galanter, "Anyone Can Fall Down a Manhole", *supra*, n 115 at 459–460. It is significant that all the polls were commissioned by insurance companies, which have an interest in lobbying for the abolition or stricter regulation of contingency fees.

117 California, for example, has had difficulty passing laws to restrict the fees earned by contingency fee lawyers in state referenda. In 1988, Proposition 101, which sought to place limitations on contingency fees for auto insurance claims, lost 86% to 13%. At the same time, Proposition 106, designed to limit contingency fees in all tort cases to 25% for the first $50,000 awarded, 15% for the next $50,000, and 10% of any amount above $100,000, was defeated 57% to 43%. Eight years later, in 1996, Proposition 202, which limited fees by contingency fee lawyers to 15% of any early settlement offer, whether or not that settlement was accepted, was defeated 51% to 49%: *ibid* at 462–463.

why jurisdictions which outlawed contingency fees in the past generally addressed the legal needs of such people by either regulating legal fees, providing state-sponsored legal assistance or putting in place mechanisms of comprehensive social insurance.[118] But these substitutes are by no means flawless. Fee regulation has the effect of distorting the market for legal services[119] and comprehensive social insurance suffers from moral hazard problems. Legal aid, as will be discussed below, is necessarily limited in scope and will be available to only a small segment of the population. This has two effects. First, there will be people who do not qualify for legal aid and cannot afford the litigation costs of taking out an action. This, as stated above, is an undesirable state of affairs. Second, there will also be a large group of people, who may not be impecunious and may be able to afford litigation, but who would nevertheless be extremely unwilling to undertake an action. Is this really a problem, since it is easy to conclude that if individuals choose not to take out an action when they can afford to do so, it must be because the probability of winning is low, or that the legal costs are likely to be larger than the amount recovered? In such circumstances, one can argue that it is economically efficient and socially desirable that court action is not resorted to. Although these conclusions seem intuitive, I believe that they do not bear out in reality and by virtue of their status as OSs, many people who can afford to vindicate their rights in courts are routinely denied access to justice.

51 This element of the access to justice argument is quite subtle and counterintuitive, and can best be explained *via* the use of economic theory. Under conventional economic theory for litigation, a potential plaintiff will only commence a suit if his expected return ("ER") for the action is positive, *ie*, ER > 0. Expected return can be derived by adding up all the possible outcomes of a particular action multiplied by the probabilities that such outcomes would eventuate. In the United States, expected return is obtained by multiplying the probability of success ("P") by the amount that would be recovered if the plaintiff is successful at trial ("R") less the legal costs that would have to be incurred ("C") and subtracting the probability of failure multiplied by the costs he would incur in such a circumstance.[120] The formula for a plaintiff relying on the hourly fee to undertake litigation can thus be expressed as:

118 Mary Ann Glendon, *A Nation Under Lawyers* (1994) at p 54.

119 Such distortions can detrimentally affect the economy and society. For example, if legal fees are set below the market price dictated by demand and supply, the supply of legal services would decrease, thus leading to an inadequate and inefficient amount of legal services provided.

120 It should be noted that this economic model is simplistic in the sense that the amount that will be recovered in a trial is usually also subject to uncertainty. If this uncertainty is factored into the equation, the precise formula for expected return

$$[P \times (R - C)] - [(1 - P) \times C] > 0$$ [121]

The formula reflects returns for two possible outcomes. The first portion of the formula represents the outcome if the plaintiff succeeds and the second portion represents the outcome if he fails. It should be noted that in both scenarios, the client has to bear his own legal costs. So, assuming that a plaintiff believes, or is advised, that he has a 50% chance of succeeding in his cause of action and will get $100,000 in damages if he succeeds, the expected return of going to trial is $20,000[122] if the legal costs he will incur, based on an hourly fee, is $30,000. In such a situation, the potential plaintiff will, if he is an economically rational actor, commence the action, since he stands to gain by commencing the action. This is the position in the United States, where all parties to an action bear their own costs.

52 The scenario is a lot more complicated in the United Kingdom and Singapore, where the fee-shifting rule dictates that the loser in a trial has to bear his opponent's legal costs. In such a situation, a plaintiff's expected return is reduced by the probability that he will lose and be liable for his opponent's costs on top of his own legal costs. On the other

should take into account the probability of the various sums being recovered. However, for the sake of simplicity, this paper will only focus on simplified equations that take into account one possible recovery amount.

[121] This formula can be rewritten as $(P \times R) - C > 0$. It should be noted that this formula and those below are premised on there being no alternative means, such as settlement, for resolving the dispute. So if the plaintiff wins, he receives a certain award and if he does not, he gains no compensation. While this can be criticized as unrealistic, the purpose of excluding alternative methods of dispute resolution from consideration is to show the maximum gains and costs that a plaintiff will experience if he litigates. Furthermore, as will be argued below, settlement is often not a real option for plaintiffs since RP defendants will make ridiculously low settlement offers, if at all, because of the poor bargaining position of the OS plaintiff.

For the purposes of this paper, miscellaneous litigation expenses such as fees for expert witnesses and disbursements have not been factored into the economic models discussed. In reality, such fees are borne by the plaintiff under the hourly fee system and under the contingency fee system, the lawyer and his client may agree that the lawyer's cut takes into account these additional expenses or that the client will bear these expenses if the action succeeds. In the cases where the client has to bear such expenses, the formula would include an additional variable which would represent these costs.

Finally, for the sake of simplicity, this paper also assumes that the costs incurred by a plaintiff and a defendant, as well as the costs that will be awarded by the court in the event that either party wins, are equal. Needless to say, this assumption is not realistic since RP defendants will tend to spend more in terms of legal costs. Also, since courts will only award reasonable legal costs upon a party's success, party-and-party costs awarded tend to be lower than the losing party's solicitor-and-client costs.

[122] $[(\$0.5 \times (\$100,000 - \$30,000)] - (0.5 \times \$30,000) = \$20,000$.

hand, it is increased by the probability that he will win and have to pay no costs. In such a scenario, the appropriate formula for a plaintiff to undertake litigation is as follows:

$$(P \times R) - [(1 - P) \times 2C] > 0$$

So, assuming that legal costs on both sides are $30,000 and the probability of him succeeding in recovering $100,000 is 50%, the potential plaintiff's expected return would be $20,000[123]. In such a situation, an economically rational actor would also commence the action, since there is a positive expected return.

53 Based on the above economic model for litigation behaviour, one would expect that if he can afford to finance the litigation, a potential plaintiff will undertake an action if the expected value of going to trial is positive. Conversely, if such a plaintiff does not commence an action, it is because the probability of success and/or recovery is low or the costs of litigation will be higher than the recovery. As pointed out above, this supports the argument that it is better if such actions were not commenced.

54 If we expect or demand that all plaintiffs act rationally in this way, then perhaps the argument can be made that we do not need contingency fees so long as we provide legal aid to all plaintiffs who have a reasonable cause of action but who cannot afford legal representation. However, there are a significant number of plaintiffs who do not act according to this model. This has been demonstrated by studies done by economists in the United States, who have shown that like low-income individuals, middle-income individuals are extremely reluctant to file meritorious claims in the absence of contingency fees or some form of legal insurance.[124] There are at least two explanations for this.

55 First, the economic model requires that the rational actor assess accurately the different variables in the formula, although he has, as an OS, little or no expertise in assessing the probability of success, the amount that he would recover and his total legal costs.[125] The source of this information lies in the realm of his lawyer and the potential plaintiff has every reason not to trust the estimates of his lawyer, because the

123 (0.5 x $100,000) – (0.5 x 2 x $30,000) = $20,000.

124 Jay, *supra*, n 1 at 814.

125 *Ibid* at 815.

latter has no economic incentives to provide accurate information.[126] Indeed, the converse is true. A conflict of interest exists between the hourly fee lawyer and his client since the hourly fee lawyer has no economic interest in the outcome of the litigation but only that it is initiated and carried through to the end. As such, he has every incentive to inflate the variables that would cause a potential plaintiff to initiate an action, even if a proper estimate would lead the plaintiff to conclude that the expected value of the litigation is negative and that he should simply let the matter rest. Even if the lawyer behaves ethically and attempts to objectively provide the plaintiff with information on the probability of success, recovery and legal fees, he will never be able to accurately estimate these variables since some variables are beyond his capacity to accurately estimate. Of course an experienced litigator may be able to estimate probability of success and recovery. But legal costs can increase unexpectedly, such as when the opponent decides to engage in a war of attrition and takes out many interlocutory applications that will cause the action to become a lot more expensive.[127] This can easily turn a positive expected return to a negative one and a potential plaintiff could be put off by the fear that this would eventuate.[128]

56 The second explanation, in part related to the first, is the fact that OSs tend to be risk or loss averse.[129] One can argue that such psychological tendencies are irrational and should not be taken into

126 This is not to say that plaintiffs do not trust their hourly fee lawyers. Because of the imbalance in knowledge and skill, OS clients usually have no choice but to repose their trust in their lawyers once they decide that they will litigate.

127 Even if the plaintiff may recover such costs in the event that he wins the action, he could face cash flow problems in the interim. Furthermore, legal costs for RPs are generally lower than for OSs. This may be counter-intuitive since RPs tend to retain lawyers from larger and more prestigious firms. However, if such costs are incurred in an attempt to deter other claims, then such costs may be cost-effective if divided over all the potential claims that are avoided because the RP develops a reputation for being an aggressive fighter: see Timothy M Swanson, "The Importance of Contingency Fee Agreements" (1991) 11 Oxford J Legal Stud 193 at 209.

128 The English government clearly views this as a problem. See Lord Chancellor's Department, *Modernising Justice*, *supra*, n 107 at 21.

129 The concept of "loss aversion" was demonstrated by Daniel Kahneman and Amos Tversky, whose studies showed that decision-makers tend to irrationally "attach greater weight to prospective losses than to prospective gains, even when what is a gain or loss may depend on how the outcome is framed in relation to an arbitrary reference point": Robert H Mnookin *et al*, *Beyond Winning* (2000) at p 161. See also Cooter & Ulen, *supra*, n 5 at p 395. Risk aversion, on the other hand, is the phenomenon where people "consider the utility of a certain prospect of money income to be higher than the expected utility of an uncertain prospect of equal expected monetary value": *ibid* at p 46. In other words, a person is risk averse if he prefers a lower certain monetary income to a higher uncertain monetary income. Loss aversion and risk aversion are related concepts and for the purposes of this paper, references to risk aversion should be taken to include both concepts.

account. However, it should be noted that this is not a phenomenon that affects only a small section of society.[130] Most OSs are risk averse to a certain extent[131] and it is not unnatural for people to focus on the fact that there is a significant risk that they may lose a large sum of money. This is because like a single coin flip, litigation is a big gamble for them. So in the examples provided above, it is true that the potential plaintiff stands a 50% chance of recovering $70,000 or $100,000 if he wins. But there is also a significant 50% chance that he would lose $30,000 or $60,000, depending on whether the fee-shifting rule applies.[132] Everything turns on the outcome of the litigation and the large variance between gain and loss may overwhelm him, especially in the light of the fact that he would already have suffered an initial loss brought about by the tort or other injury caused to him. The RP defendant, on the other hand, is by definition able to play the odds in a risk neutral fashion.[133] Like a person betting not on a single coin flip but a thousand coin flips, it knows that it will win in about 500 flips and all risks that it will lose in a single coin flip are diversified away.[134] In other words, even if it loses a particular case, a RP knows that it is able to attain its expected return in the long run and that any variance from the average expected return will not be far from the mean.

57 As can be seen from the above discussion, apart from impecunious plaintiffs, there is a class of rational actors that may *effectively* have no access to justice because of the structure of the legal and cost systems. If RPs were as risk averse as OSs, this would not be a problem, since they would then be inclined to come to a satisfactory settlement with OSs. Unfortunately, because of the nature of the RP, it is in a far superior position from a litigation, and therefore settlement, perspective. Apart from the fact that it has huge economic resources at

130 In recognition of the universality of this phenomenon, economists and finance specialists usually attribute an attitude of risk aversion to individuals. On the other hand, they usually assume that business entities are risk-neutral: see Cooter & Ulen, *supra*, n 5 at p 47.

131 Because of the diminishing marginal utility of income, people who have less financial resources tend to be more risk averse than richer people. However, this does not exempt rich people from the phenomenon. The larger the amount that could be lost, the more risk averse the rich person will be as well: *ibid* at p 46.

132 These figures demonstrate how a plaintiff under a system which is dictated by the fee-shifting rule is more risk averse than his peers in the United States since the rule causes plaintiffs to face a "double or northing" prospect when it comes to legal costs: see Swanson, *supra*, n 127 at 202.

133 *Ibid* at 194; Luban, *supra*, n 9 at p 112.

134 For a detailed but simple explanation of risk diversification, see Ronald J Gilson & Bernard S Black, *The Law and Finance of Corporate Acquisitions* (2nd Ed, 1995) at pp 81–98.

its disposal, the RP does not have to overcome the psychological and agency obstacles that OS plaintiffs face.

58 In the face of such inequality, contingency fees provide a ray of hope for OSs. Risk aversion is removed or minimised when this is resorted to since the OS plaintiff knows that if he loses, he will not have to cover his lawyers' legal costs. Risk is shifted to his lawyer and based on the above economic model, the plaintiff in the United States relying on a percentage contingency fee will litigate when:

$$[P \times (R - NR)] - [(1 - P) \times \$0] > 0$$

where ("N") represents the percentage of recovery which the plaintiff's lawyer will be entitled to. This formula can be reduced to:

$$P (R - NR) > 0$$

As can be seen from the left side of the formula, it will always be more than zero if R is more than zero. So, as long as there is some possibility of a claim for a sum of money, the plaintiff will sue, leading to the objection that percentage contingency fees drive increased litigation. The plaintiff has no basis for restraint since he stands to lose nothing and can only gain through prosecuting a claim.

59 In England and Singapore, the formula for litigating when reliance is placed on percentage contingency fees is, again, more complicated. Because of the fee-shifting rule, the formula for litigating is:

$$[P \times (R - NR + C)] - [(1 - P) \times C] > 0$$

Using the above example, the expected return for a contingency fee plaintiff with a 50% chance of recovering $100,000, whose lawyer will take 30% of the damages recovered, and who faces an opponent whose hourly legal costs are estimated at $30,000, would be $35,000.[135] Note that while the expected return has increased, this will not always occur. However, the plaintiff is less risk averse since, as the equation indicates, he only risks losing one set of legal costs (his opponent's) if he loses. It is significant to note that unlike in the equation for the American plaintiff, the English or Singaporean plaintiff can have a negative return, especially if the probability of success or anticipated recovery is low, and/or the hourly legal fees of the opponent is expected to be high. This

[135] $0.5 \times [\$100{,}000 - (0.3 \times \$100{,}000) + \$30{,}000] - (0.5 \times \$30{,}000) = \$35{,}000$.

remains a restraint that will prevent plaintiffs from litigating in all circumstances and serves as a check on a flood of litigation.

60 What if speculative and conditional fees were relied on? In the case of speculative fees, the formula for American plaintiffs would be:

$$[P \times (R - C)] - [(1 - P) \times \$0] > 0$$

Again, because the American plaintiff suffers no loss if he loses, he has every incentive to litigate and is not risk averse. English and Singaporean plaintiffs, would litigate, on the other hand, where:

$$[P \times (R - C)] - [(1 - P) \times C] > 0$$

This equation can be reduced to:

$$PR - C > 0$$

and clearly demonstrates that, as with the use of percentage contingency fees, English and Singaporean plaintiffs are less risk averse since they only have to pay one set of legal costs if they lose. Moreover, their expected return can also be negative if anticipated recovery and the probability of success is low, and/or hourly fees of the defendant's lawyers are high, *ie*, $PR > C$.

61 Finally, turning to conditional fees, the formula for American plaintiffs is:

$$[P \times (R - UC)] - [(1 - P) \times \$0] > 0$$ [136]

where ("U") represents the percentage uplift that the plaintiff's lawyer would be entitled to if the action is successful. Interestingly, an American plaintiff relying on this type of contingency fees faces the possibility of a negative expected return. This can occur if hourly fees incurred and the percentage uplift agreed upon are high, and/or the recovery is low. In such a situation, the American plaintiff will have to be very careful in evaluating his choices since his recovery can be totally swallowed up by his lawyer's fees. In fact, he may be personally liable to his lawyer for additional costs even if he should win. Ironically, he would be better off losing in such a situation. The same can be said for English and Singaporean plaintiffs, who will sue if:

$$P \times [R - (U \times C)] - [(1 - P) \times C] > 0$$

[136] This can be rewritten as $P(R - UC) > 0$.

Indeed, the possibility of a negative expected return is even higher for these plaintiffs, since they also have to bear their opponent's costs if they lose. However, they will still be less risk averse than under the hourly fee system.

62 From the above analysis, it is clear that contingency fees are useful as a mechanism to empower OS plaintiffs. Not only do they provide impecunious people with the ability to commence actions (since there are no payments to be made during the litigation process and in the event that they fail in their actions), they also afford risk averse people the opportunity of passing some of their risk to their lawyers, who like RP defendants, can diversify the risks through the large number of cases they handle. This is a powerful incentive to consider adopting the contingency fee mechanism. However, various forms of contingency fees have different effects on a plaintiff's motivation to litigate. This will be dealt with in further detail below but essentially, the economic models for the various types of fees show that in the United States, the use of conditional fees can temper the powerful incentives for plaintiffs to litigate. In jurisdictions which have the fee-shifting rule in force, the use of contingency fees will not lead to the same effects as those experienced in the United States, but each type of contingency fee will nevertheless have a different impact on a plaintiff's incentive to litigate. This is an important insight, since it demonstrates that accepting the use of contingency fees is not an all-or-nothing proposition. In deciding if a jurisdiction should turn to the use of contingency fees, it is always open to the legislature to choose a form that would have less marked an effect on a plaintiff's incentive to litigate.

B. Contingency fees and inherent conflicts of interest

63 One of the main objections to the use of contingency fees is the fact that reliance on it leads to many agency problems between the attorney and his client. The two leading scholars in this area are Professors Lester Brickman and Herbert Kritzer, both of whom have been called to testify before the Senate Judiciary Committee of the US Congress on alleged contingency fee abuses.

64 Brickman's view is that the percentage contingency fee system skews lawyers' incentives and that this has brought about the degeneration of the American tort system. According to him, contingency fee lawyers are excessively compensated and their desire for additional surplus leads them to act against their clients' and society's interests. Together with the Manhattan Institute, Brickman advocates reform and has proposed a framework that has garnered the support of

some American scholars, practitioners and judges.[137] Kritzer, on the other hand, has tried to demonstrate that the evidence relied upon by such would-be reformers is not sufficiently substantiated. For example, in a series of empirical studies, he reports that contingency fee lawyers do not, on average, earn significantly more than their peers who charge by the hour. As such, he claims that the potential conflicts of interest are currently held in check. These are important issues in the current debate on contingency fees and I will seek to analyse them by focusing on the two main areas of dissension: the alleged excessive compensation of contingency fee lawyers and apparently large incentives for such lawyers to act against their clients' interest.

65 In considering the possible conflicts of interest that may arise from the use of contingency fees, it is important to bear in mind that the contingency fee is not uniquely vulnerable to these possibilities. One of the inherent tensions found in the attorney-client relationship arises from the lawyer's duty to act in the sole interest of the client and his right to fair compensation.[138] All compensation structures suffer from the same inherent conflict – that lawyers want to get the highest possible compensation but this conflicts with their duty to ensure that their clients pay the smallest amount possible for their services because of their clients' ignorance of legal matters.[139] So, an hourly fee lawyer will face the temptation of breaching his fiduciary duties by overstating the hours he works, putting in more hours than is required for the efficient resolution of the case, discouraging settlement or encouraging litigation, since any of these will maximise the number of his billable hours and accordingly maximise his total fees. Of course, the large majority of lawyers under the hourly fee system do not breach their fiduciary obligations to their clients. They may be restrained by ethics, morality, the fear of sanction, or simply the belief that their reputations for integrity are worth more in the long run than immediate gains through

137 Brickman, *Rethinking Contingency Fees*, *supra*, n 1. Judge John T Noonan of the Ninth Circuit Court of Appeals wrote the foreword for the book and the preface was penned by Professor Derek Bok, the former President of Harvard University.

138 Jay, *supra*, n 1 at 817; Brickman, "Contingent Fees Without Contingencies", *supra*, n 1 at 48.

139 This is a defining characteristic of the legal profession. As stated in Pamela Abrams *et al*, "Access to Justice: The Collision of Funding and Ethics" (1998) 3 Contemp Issues Law 59 at 59–60: "[p]rofessionalism deals with asymmetries in knowledge and power between the producers and recipients of legal services by placing responsibility for defining client need, and the means of meeting this need, on the producer of services. This is the rationale for both self-regulation and professional ethics. … The legal profession has traditionally sought to justify its claim to professional privilege on the basis that membership of the profession requires that members be prepared to sacrifice their own interests to those of their individual clients and the social good."

overreaching. Such considerations will, it is submitted, no doubt also prevail over lawyers working under the contingency fee system. It is therefore fruitless to highlight conflict problems raised by contingency fees unless we ask the crucial question: are they likely to lead to greater conflicts of interest in the attorney-client relationship? In other words, are the incentives that may motivate a contingency fee lawyer to breach his fiduciary duties greater than those faced by the hourly fee lawyer, whose salary is tied to the number of hours he works or the number of billable hours he is required to bill?

(i) Excessive compensation

66 Over the last two decades, there has been a growing resentment towards the amount of money that American contingency fee lawyers have been making. The media routinely publishes reports of huge jury verdicts and lawyers earning millions, even billions of dollars, thus creating the illusion that all contingency fee lawyers are reaping windfalls at their clients' expense. However, jury verdicts reported by the media "tend to represent extreme outliers"[140] and what these reports understate is the fact that contingency fee litigation can also lead to losses and financial ruin for lawyers, as described in Jonathan Harr's book, *A Civil Action*[141]. In this section, I will discuss the theory behind contingency fee compensation as well as important arguments made by Brickman and Kritzer concerning this issue.

67 It has traditionally been thought, and accepted, that contingency fees should always be higher than hourly fees for every given case. This is because an economically rational lawyer will only take up a case on a contingency fee basis if he is able to get more than that which he would get under the hourly fee system.[142] The argument for this is that under the hourly fee system, the lawyer gets paid simply for his services and regardless of the outcome of the litigation, his compensation is certain. On the other hand, the contingency fee lawyer shoulders the risk that he will not be paid if the plaintiff obtains no monetary recovery. In other words, the risk that the client normally bears, *ie* that he has to pay his lawyer's fees should he lose, is transferred to the contingency fee lawyer and the latter is entitled to a premium to

140 Kritzer, "The Wages of Risk", *supra*, n 21 at 269.

141 Jonathan Harr, *A Civil Action* (1995).

142 Jay, *supra*, n 1 at 837; Richard A Posner, *Economic Analysis of Law* (6th Ed, 2003) at p 584; Murray L Schwartz & Daniel J B Mitchell, "An Economic Analysis of the Contingent Fee in Personal-Injury Litigation" (1970) 22 Stan L Rev 1125 at 1150–1154.

compensate him for accepting the risk.[143] In a sense, this is a form of insurance which the client purchases from the lawyer.[144]

68 Apart from this, the contingency fee lawyer also provides financing to his client, a service that the traditional hourly fee lawyer does not provide. The contingency fee lawyer is not paid throughout the course of the litigation and usually provides the upfront cash for disbursements and other extraneous expenses, such as the fees of expert witnesses.[145] For this additional service, the contingency fee lawyer should be paid the time value of money, *ie* interest, on the money he invested on behalf of his client. Again, depending on his understanding with his client, the contingency fee lawyer may not be able to recover these funds if the litigation is unsuccessful. If so, the lawyer takes on additional risk traditionally borne by the client and should be compensated by a further premium.

69 A corollary to the above justification of higher compensation for a contingency fee lawyer is that the premium he is paid above that which an hourly fee lawyer earns should be proportionate to the risks that he bears, the anticipated length of the litigation and the work that he expects to put into the case in order that it will most likely succeed.[146] Conditional fees provide the best example of how the premium can be arrived at. Ignoring the financing aspects of the conditional fee and assuming that there is a 50% chance of success, the conditional fee lawyer would insist on an uplift of at least 100%. This is because the lawyer's expected return for taking up the case would then be equal to that of an hourly fee lawyer.[147]

143 Jay, *supra*, n 1 at 815.

144 Kritzer, "The Wages of Risk", *supra*, n 21 at 270. It should be noted, however, that unlike the usual insurance policy, the lawyer is not entitled to the premium if the event insured against occurs: Jay, *supra*, n 1 at 816. This in itself would justify an increased premium.

145 Kritzer, "The Wages of Risk", *supra*, n 21 at 270. As pointed out by Stewart Jay, this is of fundamental importance to many tort victims, whose main substantive assets are their causes of action. This is because most institutional lenders "will find the risks associated with many cases too expensive to predict, or they may even be prohibited by law from being assigned the type of claim as collateral". Jay, *supra*, n 1 at 814. See also Charles W Wolfram, *Modern Legal Ethics* (1986) at p 528.

146 Brickman, "Contingent Fees Without Contingencies", *supra*, n 1 at 31.

147 Assuming that anticipated hourly fees would amount to $30,000, a conditional fee lawyer has a 50% chance of being paid $60,000 (because of the 100% uplift) and a 50% chance of getting $0. His expected return in such a case would be $30,000 [0.5 x $30,000 x 2], the same as that of an hourly fee lawyer.

70 How, then, are percentage contingency fees justified, since the lawyer's fee is pegged to the recovery and not the actual number of hours he works? It is often said that the larger the potential recovery, the more likely it is that the case will require more effort by the lawyer. Furthermore, the chance of success and other risks are reflected in the percentage agreed upon by the lawyer and his client. So, for example, in a risky case, the percentage contingency fee lawyer will demand for 50% of the recovery whereas in a less risky case, he will only ask for 30%.

71 In his article, "Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?",[148] Brickman dealt a serious blow against percentage contingency fees by arguing that empirical evidence demonstrates that contingency fee lawyers are systematically overcharging their clients. The basis for his conclusion is that although the probability of success for tort plaintiffs has increased through the decades and there has been an accompanying rise in damages awarded, contingency fee lawyers still continue to insist on taking a third or more of the damages recovered.[149] Furthermore, liability in many types of cases, such as aviation accidents and product liability cases, is almost certain and the defendants usually settle. Lawyers representing victims in such cases need not invest much time or resources to secure compensation, nor do they bear more than marginal risk. Since there is no risk, there is no contingency and the premiums that accompany contingency fees should not be high. Yet percentage contingency fee lawyers routinely charge a significant percentage of the recovery in such cases, thus justifying the conclusion that the percentage they charge bears no correlation to the risks involved in the case. In addition to this, Brickman argues that the fact that percentage contingency fee lawyers are almost virtually uniform in asking for a third of the recovery indicates that there is no correlation between the risk borne by the lawyer and the fee charged. These are powerful arguments that cannot be taken lightly, especially since Brickman claims that such practices by lawyers lead them to earn fees of $1,000, $5,000, even $25,000 and $50,000 per hour when their fees are divided by the number of hours they put into a particular case.[150]

148 Brickman, "Contingent Fees Without Contingencies", *supra*, n 1.

149 *Ibid* at 100, 105–106; Brickman, *Rethinking Contingency Fees*, supra, n 1 at pp 20–22; *Hearings*, *supra*, n 1 (Statement of Lester Brickman). Galanter implicitly challenges this assertion by pointing out evidence that the typical contingency fee percentage in New York from 1900 to the 1950s was 50% and that this subsequently fell to 36% several years after the mid-1950s: Galanter, "Anyone Can Fall Down a Manhole", *supra*, n 115 at 470.

150 Hearings, *supra*, n 1 (Statement by Lester Brickman).

72 Brickman's analysis demonstrates what a blunt compensatory mechanism the percentage contingency fee is. As stated above, one of the justifications for the percentage contingency fee is the belief that the larger the anticipated recovery, the more effort is expected to be expanded by the lawyer. However, this assumption, while occasionally true, is more often than not false.[151] This is because most disputes are settled and settlement usually entitles the percentage contingency fee lawyer to receive his percentage of the recovery. It is therefore not the size of the recovery that determines the necessary level of effort but the stage of the litigation process at which the settlement is reached. So, for example, a percentage contingency fee lawyer working on a potential claim for $100,000 may be able to settle his claim after expending about 20 hours of work. On the other hand, he may settle at the door of the courthouse for $100,000 after investing 100 hours. In both scenarios, the recovery amount, and hence the lawyer's fee, is the same but it bears no direct relationship to the amount of time that the lawyer actually put into the case. It is therefore impossible to determine reasonableness by looking at the percentage negotiated. A fee based on 50% of the award could be reasonable where the case is risky and the lawyer has invested a significant amount of effort into it. On the other hand, a 10% fee could be excessive under other circumstances.[152]

73 In response to Brickman's challenge, Kritzer has argued that while it is true that most percentage contingency fee cases yield some recovery, the assertion that such cases involve little risk for lawyers "misses the real contingencies of contingency fee practice".[153] This is because the contingency fee lawyer faces other significant risks. For example, there is the uncertainty about the amount that would be recovered and hence, the amount that he would receive for his efforts. Then there is the uncertainty about the cost, both in terms of effort and expenses, that would be incurred in order to obtain the recovery. Finally, there is also considerable uncertainty about the time it will take before recovery is obtained.[154] These uncertainties, according to Kritzer, could easily tip a percentage contingency fee lawyer into the red, as compared to simply taking a case on an hourly basis. So, even if recovery is assured, the amount recovered may be so low that considering the amount of effort and funds he put into the case, he is better off charging an hourly fee. The argument follows that this is a

151 Jay, *supra*, n 1 at 840.

152 *Ibid* at 829–830.

153 Kritzer, "Seven Dogged Myths", *supra*, n 71 at 748.

154 Ibid.; Kritzer, "The Wages of Risk", *supra*, n 21 at 271.

significant risk which the client has transferred to the contingency fee lawyer and he should be compensated for it accordingly.[155]

74 Another significant claim made by Kritzer is that despite the commonly held view that lawyers routinely receive windfall fees from percentage contingency fee work, this is a myth. In discussing this claim, it is useful to consider the term "effective hourly rate" ("EHR"), which is generally used in the contingency fee debate. EHR is a useful way of reducing a percentage contingency fee lawyer's earnings for a single case to a measure that can be easily compared with an hourly fee lawyer's earnings. EHR is derived by dividing the percentage contingency fee lawyer's cut of the damages by the number of hours he worked on the case.[156] So if he receives $30,000 and spends 100 hours on the case, the EHR is $300 per hour.

75 While Kritzer acknowledges that there are contingency fee cases where lawyers earn an EHR of $1,000 or more, he argues that we know little, if anything at all, about the frequency of such cases or what the typical hourly rate is.[157] As such, it cannot be said with any certainty that lawyers are systematically overcharging and reaping windfalls from their clients. What is more, Kritzer asserts that relying on EHR as a measure of a lawyer's return is misleading since it simply reveals the rate that a lawyer earns in a particular case. It can be very high, if the odds play out in his favour or extremely low, in a case where he recovers very little. Indeed, it can even be negative, if the action fails and he has provided funding in terms of fees for expert witnesses and his paralegals. To get a more accurate picture of a lawyer's compensation, it is therefore more useful to consider the hourly returns from his "overall portfolio" of

155 *Hearings*, *supra*, n 1 (Statement by Herbert Kritzer). In effect, Kritzer is saying that Brickman's analysis is flawed because he has not accounted for additional risk and services provided by a contingency fee lawyer. This mistake was also made by the Royal Commission on Legal Services, when it stated in its final report that "if contingency fees were to be allowed here, it would either be necessary for the plaintiff to risk having to bear the defendant's costs, while escaping his own, or for his lawyer to undertake that in the event of failure he would not only forgo his own fee but would also pay the costs of the successful defendant. To guard against this, he would wish for a contingent fee amounting to a large proportion of the damages, giving an excessively high reward if the claim succeeded" [emphasis added]. The Royal Commission On Legal Services, *supra*, n 13 at 177. If a lawyer accepts more risk than that which he normally shoulders, he would not be excessively compensated unless the additional proportion of the damages he receives for taking on the risk is not commensurate to the risk of having to pay the defendant's costs. He would simply be compensated for an additional service he is providing.

156 Jay, *supra*, n 1 at 837; Kritzer, "Seven Dogged Myths", *supra*, n 71 at 762; Kritzer, "The Wages of Risk", *supra*, n 21 at 271.

157 Kritzer, "Seven Dogged Myths", *ibid* at 762.

cases.[158] This can be measured by adding up all the fees that a lawyer receives from his percentage contingency fee cases and dividing this by the total number of hours he worked on those cases. This produces the "mean hourly return" ("MHR")[159], which averages out the outlying EHRs of atypical cases handled by the lawyer.

76 Using his own empirical study of lawyers in Wisconsin, Kritzer showed that the median EHR for contingency fee lawyers was almost the same as the median hourly rate charged by these lawyers.[160] This indicated that in the typical case, the contingency fee lawyer did not do better than the hourly fee lawyer. However, data from this study and another one on federal civil cases produced for the Administrative Office of the US Courts showed that the mean effective hourly rate earned by percentage contingency fee lawyers was considerably higher than the mean hourly rate earned by hourly fee lawyers. This indicated that contingency fee lawyers were able to obtain large effective hourly rates in a small number of cases. When the top 10% of hourly fee and contingency fee cases were removed from the data, the mean effective hourly rate of contingency fee lawyers was not unjustifiably higher than the mean hourly rate earned by hourly fee lawyers. As such, Kritzer concluded that

> Clearly, there are profits to be made from contingency fee work. While it is the top 10% of cases that tend to produce the most significant profits, the typical contingency fee practitioner can expect even the remaining 90% of cases to produce over a portfolio of cases a fee premium amounting to 25% to 30% over what hourly fee work generates.[161]

77 Although Brickman has argued that Kritzer's studies are not representative of contingency fee practice in the United States, there is great persuasiveness in his data.[162] If, as Kritzer argues, for most of his

158 *Ibid*; *Hearings*, *supra*, n 1 (Statement by Herbert Kritzer).

159 Kritzer, "Seven Dogged Myths", *ibid* at 763.

160 *Ibid* at 767.

161 *Ibid* at 772.

162 In his testimony before Congress, Brickman, without referring to Kritzer's research directly, stated that "[t]hose who argue that contingency fee abuses do not exist often rely on studies performed more than 20 years ago including a study of the Wisconsin bar that I have critiqued as methodologically unsound. Even when this data is updated, relying on data for Wisconsin lawyers as indicative of national trends demonstrates a lack of comprehension of the dimensions of contingency fee abuses. … The focus of tort litigation in the United States is in states such as Texas, Alabama, Florida, California, Hawaii, and parts of New Jersey, Massachusetts, New York and elsewhere; these are states and regions [which] have litigiousness measures that are double, triple and quadruple those of Wisconsin." *Hearings*,

contingency fee cases, the typical contingency fee practitioner earns a premium of only 25% to 30% over what his hourly fee work yields, then the claim that contingency fee lawyers are unjustly compensated is exaggerated.

78 Despite the positive findings in Kritzer's studies, I have a difficulty with his position *vis-à-vis* contingency fees. While he acknowledges that there are cases where EHRs are obscenely high and that a percentage contingency fee lawyer's top 10% of cases tend to produce the most significant profits,[163] Kritzer simply dismisses such variability, and the potential for big "jackpots", as "the essence of the contingency fee".[164] It is submitted that such "jackpot" cases, rare as they may be, provide tremendous incentives for lawyers to gamble with their client's interests[165] and indulge in some of the undesirable practices discussed in the next section. Apart from this, while some variability in EHRs can certainly be dismissed as part of the contingency fee system, the same cannot be said of the "jackpots". The speculative and conditional fee systems, for example, effectively deny lawyers such undeserved "jackpots", which result from unexpectedly high recoveries or early settlements[166].

supra, n 1 (Statement by Lester Brickman). This criticism seems unfounded, since Kritzer's several studies have relied on recent data from a large number of different jurisdictions (including some mentioned by Brickman as being states with a higher level of tort litigation) and sources. Furthermore, in his recent paper, "Seven Dogged Myths", *supra*, n 71 at 771–772, Kritzer painstakingly demonstrated how his evidence from Wisconsin is consistent with data from a recent study on federal cases.

163 Kritzer, "Seven Dogged Myths", *ibid* at 772. In an earlier work, Kritzer, relying on the same data from Wisconsin, concluded that "[t]he returns from contingency fee practice are at best "somewhat" better than what lawyers earn from hourly fee practices" and "[a] small segment of cases produces substantial "profits", but few lawyers are able to tap into this segment of cases on a routine basis": Kritzer, "The Wages of Risk", *supra*, n 21 at 302. See also Herbert M Kritzer, "Lawyer Fees and Lawyer Behavior in Litigation: What Does the Empirical Literature Really Say?" (2002) 80 Tex L Rev 1943 at 1976–1977.

164 Kritzer, "Seven Dogged Myths", *ibid* at 767.

165 This is acknowledged by Kritzer, who explains that one of the strategies that a contingency fee lawyer may try to adopt "is to try to produce a substantial flow of cases in order to be able to get an occasional "hit". The idea here is that most cases average out between those producing a return above the market hourly rate and those producing a return below that hourly rate. The lawyer is looking for the small segment of cases that can be extremely profitable, either because that segment produces a high fee or because it produces a quick fee": Kritzer, "The Wages of Risk", *supra*, n 21 at 304.

166 In such a scenario, the number of hours expanded is very low, thus yielding a high EHR.

79 Another problem with Kritzer's arguments is that they ignore one of Brickman's core points, which is that in most cases, percentage contingency fee lawyers usually charge a flat one-third fee. Perhaps, as Kritzer's studies show, Brickman is wrong in accusing lawyers of systematically overcharging their clients. However, the fact remains that in a large number of cases, the percentage charged is the same, even though the levels of risk involved would in all probability be different.[167] The only conclusion that one is left with is that in these cases, the lawyers are not applying their minds to the risks involved and are simply charging a fixed percentage of any recovery. In some cases they take in a larger fee and in others, little or nothing. Having observed such behaviour, some academics have argued that this is not necessarily a negative development, since it is effectively a type of insurance for plaintiffs which is serviced by the contingency fee lawyer.[168] Brickman is vehemently opposed to such a justification and argues that such behaviour by lawyers is unethical since they owe fiduciary duties to each client not to overcharge and a lawyer is not excused from such duties simply because he undercharges others.[169] This argument is no doubt right and it is disturbing to note that lawyers are effectively overcharging in a significant number of cases. While this may be due to the fact that estimating risks is notoriously difficult, it is problematic since there are clients who are being unfairly treated.

80 Ultimately, I believe that it is unfair to say that percentage contingency fee lawyers are being excessively compensated. The data suggests otherwise and the fee structure at least has the benefit of ensuring that the plaintiff will be guaranteed a percentage of the

167 Indeed, Kritzer's Wisconsin study found that in 57% of the percentage contingency fee cases surveyed, the lawyers charged a flat one-third fee. Furthermore, he has highlighted data from a study of federal civil cases, which show that a one-third contingency fee was charged in 55% of the contingency fee cases studied. Kritzer, "Seven Dogged Myths", *supra*, n 71 at 760; Kritzer, "The Wages of Risk", *supra*, n 21 at 286.

168 Kritzer, "The Wages of Risk", *ibid* at 305; Wolfram, *supra*, n 145 at p 528.

169 Brickman, *Rethinking Contingency Fees*, *supra*, n 1 at p 22; Brickman, "Contingent Fees Without Contingencies", *supra*, n 1 at 32 n 5. This is also the view of Jeffrey O'Connell, who referred to an eminent personal injury lawyer's admission that "contingent fee personal injury lawyers are unilaterally and improperly robbing Peter to pay Paul: overcharging some clients in order to undercharge others" and said, "[n]ow some cross subsidization is inevitable in pricing many types of services. But when charges of a third or more of recovery are admittedly being improperly charged by professional fiduciaries, that has to be a cause of great concern for the profession thus misbehaving and for society in general … Robbing Peter to (maybe) pay Paul is simply inconsistent with the attorney's fiduciary duty to deal fairly with each of his or her clients": Jeffrey O'Connell, "Early Offers as Contingent Fee Reform" (1998) 47 DePaul L Rev 413 at 415.

recovery.[170] However, the fee structure suffers from four problems *vis-à-vis* excessive compensation. First, there is no mechanism in place to force lawyers to actively evaluate risks and link these risks to the fees that they charge. Second, like the bundling of various products, the percentage contingency fee makes it difficult to see what premium the lawyer is charging for the various services he is providing. Third, because of the omnipresent possibility that a settlement will be reached, the percentage contingency fee is a blunt tool for compensating lawyers for their services and this leads to other ethical issues.[171] Last and most importantly, because a large majority of contingency fee clients are OSs, there is no equality of bargaining power between them and their lawyers.[172] Indeed, many of them are not even aware that they are able to negotiate for lower fees. To make matters worse, they are wholly dependent on their lawyers in the estimation of risk, which effectively allows contingency fee lawyers to dictate their own terms.

81 The speculative fee does not suffer from all the above problems since the lawyer using it is not compensated for any risk and charges by the hour. As for the conditional fee, the only serious problem is the fourth problem, as the discussion in Section III will explain. Finally, it is significant to note that the hourly fee system is not immune from the possibility of excessive fees as well. Mechanisms such as the taxation of costs have been developed to keep overreaching in check and there is no reason why similar mechanisms cannot be devised to curtail such behavior when lawyers use contingency fees.

170 In cases where the recovery is low, hourly, speculative and conditional fees may consume such a substantial portion of the recovery that a percentage contingency fee may be better for the client. Of course this theoretically does not occur in jurisdictions which have the fee-shifting rule. However, party-and-party costs awarded to a plaintiff are often less than the solicitor-and-client costs he has to pay his lawyer. Moreover, if the claim ends in a settlement, the plaintiff's settlement amount will be reduced by his solicitor's costs.

171 Jay, *supra*, n 1 at 840–841, 857. This characteristic of the percentage contingency fee may have far-reaching consequences, as the following section will demonstrate, since it may cause lawyers to "invest too little time to develop their cases fully enough to maximize their clients' net recovery": Schneyer, *supra*, n 115 at 393.

172 This inequality in bargaining power is why Federal District Judge Charles Kocoras believes that contingency fee agreements should be regulated. According to him, "the free market system is inadequate to prevent unfairness and improprieties" since "the free market system requires a parity of knowledge on the part of the bargaining parties, and this circumstance rarely exists. Lay plaintiffs do not have the same ability to appreciate and evaluate risks of litigation, the nature and length of pretrial investigations and discovery, and a variety of other considerations commonly understood by experienced attorneys": Charles Kocoras, "Contingent Fees – A Judge's Perch" (1998) 47 DePaul L Rev 421 at 421.

(ii) Agency problems in settlement

82 Apart from the lawyer's temptation to charge excessively, academics have identified conflicts of interest that strike at the heart of the claim that contingency fees provide the right incentives for lawyers to put in their best efforts in order to achieve the best possible outcomes for their clients. These critics argue that due to the inherent nature of the contingency fee (or at least the percentage contingency fee), lawyers constantly face the temptation of not working the optimal number of hours for their clients and this conflict is amplified when a settlement offer is made by their opponents. Indeed, economic studies and models have been devised to show how the interests of contingency fee lawyers and their clients diverge under such circumstances.[173] This is an extremely important insight since most cases are settled, which indicates that there is a lot of room for abuse by contingency fee lawyers. In this paper, I will focus on the theories behind settlement and negotiation in order to demonstrate and analyse the conflict problems.

83 Without going into a detailed economic analysis of the conflicts of interest, the basic premise behind this problem arises from the fact that a plaintiff and his lawyer's interests can never be perfectly aligned.[174] Although percentage contingency fee lawyers bear a significant portion of the risks of litigation in that they do not get paid if their clients' actions fail, they only enjoy a percentage of the increased recovery bought about by any additional work they do. As Samuel Gross observes:

> On the one hand, the marginal cost to the client of the lawyer's time is zero; therefore, it might be in the client's interest for the lawyer to spend vast amounts of time to increase the recovery in a case, even by a small sum. On the other hand, even a sensible investment of additional time might be uneconomical for the lawyer, who receives only a third of the return for her work.[175]

173 For excellent economic analyses and models of the relationship between an attorney and his client's interests in the settlement context, see Kevin M Clermont & John D Currivan, "Improving on the Contingent Fee" (1978) 63 Cornell L Rev 529; Geoffrey P Miller, "Some Agency Problems in Settlement" (1987) 16 J Legal Stud 189; Schwartz & Mitchell, *supra*, n 142.

174 Miller, *supra*, n 173 at 190. There is arguably no way of devising a method that perfectly aligns the interests of lawyers and their clients under all circumstances. While Clermont & Currivan, *supra*, n 173, have formulated a way to perfectly align client and attorney interests by combining the hourly and percentage contingency fee structures, this alignment can only occur under very narrow circumstances, which makes this alternative extremely inflexible and of limited use. See Jay, *supra*, n 1 at 864–866.

175 Samuel R Gross, "We Could Pass a Law … What Might Happen if Contingent Fees Were Banned" (1998) 47 DePaul L Rev 321 at 335.

As such, there are circumstances when the percentage contingency fee lawyer has an incentive to secure his client's acceptance of a settlement offer early in the litigation process, even if it could be in his client's interest to litigate further as this might yield a further offer or award in excess of the initial offer.

84 This problem is especially acute when a lawyer is already at capacity in terms of work output. The opportunity cost of investing in a case with an offer on the table increases because it means that the lawyer will have less time to either work on his hourly fee cases or to invest in other contingency fee cases. To such a lawyer, the EHR is of his greatest concern, not his absolute return. So a lawyer who has spent 50 hours on a case would, assuming that he is entitled to 33% of the damages or settlement sum, rather settle a case at $100,000, than to expend 150 hours to see the case through to the end of the trial, even if he expects that the court would award $150,000 in damages. This is because settling would yield him an EHR of $660 per hour as opposed to $330 if he goes to trial. The lawyer would only discourage settlement when the settlement offer yields an EHR that is below his EHR should he take the case to trial and when he has no other outstanding cases through which he can put his time to more efficient use.

85 As demonstrated above, there are occasions when percentage contingency fee lawyers have strong incentives to procure their clients' agreement to a settlement. This they are able to do because their OS clients are often wholly dependent on them for advice and will normally accept the advice without seeking a separate opinion. If the settlement offer is relatively close to the amount that the lawyer believes he can secure through trial, the conflict may not lead to significant problems. However, this conflict undermines the ability of plaintiffs' lawyers to be effective bargaining agents since defence lawyers aware of this tension are able to manipulate the negotiation process in their favour.

86 From the perspective of negotiation theory, the other shortcoming of the percentage contingency fee is that a lawyer working on this basis is "more likely to emphasize monetary outcomes in negotiating settlements".[176] This obviously results from the fact that the lawyer's compensation is tied to monetary recovery and not the overall outcome of a settlement. While such a limitation does not preclude a reasonable settlement agreement, it can prevent an optimal settlement

[176] *Hearings*, *supra*, n 1 (Statement of Herbert Kritzer).

since the negotiators will not be able to generate non-monetary but yet value-creating options as a corollary to interest-based negotiation.[177]

87 Despite these problems, commentators such as Kritzer have argued that the triggering of such conflicts of interest is merely theoretical, since it is usually rational for a lawyer to disregard his EHR for a particular case because a quick settlement against his client's interest may affect his future. First, if he develops a reputation for being an ineffective negotiator who will sell out his clients at a low settlement figure, he will not receive many referrals, which is an important source of employment for contingency fee lawyers.[178] Second, if he gains a reputation for being a weak negotiator who will settle quickly, he will not get top-dollar settlement offers from insurance adjustors and defense attorneys and this will impact on his future earnings.[179] While such arguments are not without merit, one cannot deny that contingency fee lawyers do face the temptation to encourage settlements that are not in their clients' interests. Be that as it may, it is submitted that the use of contingency fees *will* actually confer significant negotiation and settlement benefits to OS plaintiffs and that these outweigh the risk that a conflict of interest *may* cause lawyers to act improperly. This is best demonstrated by comparing the OS plaintiff's bargaining power under the hourly fee system with that under the contingency fee system.

88 As described in the above section on access to justice, the prospect of litigating under the hourly fee system is a daunting one for OS plaintiffs, who either cannot afford legal fees or are risk averse to the possibility of failing in their action. In such a situation, the bargaining position of an OS plaintiff is extremely weak, even though his best alternative to a settlement ("BATNA")[180] – going to trial and enforcing his legal rights – may be quite high in terms of expected value. The RP defendant, on the other hand, is not averse to the risks of a trial because it is constantly engaged in litigation. Furthermore, though risk neutral, the RP will not simply agree to settle at a sum equal to its expected value of the litigation since it is well aware that most OS plaintiffs either

177 See Roger Fisher *et al*, *Getting to Yes* (2nd Ed, 1991) at chs 3 and 4; Robert H Mnookin *et al*, *Beyond Winning* (2000) at p 37. It should be noted, however, that this failing impacts not only the OS but also the RP since the potential for value creation is lost to both parties.

178 Kritzer, "Seven Dogged Myths", *supra*, n 71 at 775; Kritzer, "Lawyer Fees and Lawyer Behavior", *supra*, n 163 at 1972.

179 Kritzer, "Seven Dogged Myths", *ibid* at 774.

180 Best Alternative To a Negotiated Agreement: Fisher, *supra*, n 177 at 100.

cannot afford to litigate, and/or are risk averse to the rigours of the litigation process.[181]

89 Due to the structure of such a legal system, an OS plaintiff cannot credibly threaten to move to his BATNA.[182] He effectively has no BATNA or his BATNA is very low. This leads to great inequality in bargaining power, and OS plaintiffs in jurisdictions without the contingency fee will either be left without a remedy or be forced to accept settlements that are greatly discounted from the value or expected value of their claims.[183]

90 I believe that empirical evidence gathered in England before its adoption of the conditional fee system supports the above conclusion.[184] According to several studies, 85% to 90% of accident victims did not attempt to file tort claims and enter into the tort compensation system.[185] This is a startling figure which "raises serious issues concerning the 'access to justice'".[186] Of course one can question such a conclusion on the ground that many tort victims, especially those with good claims, may have settled earlier and therefore did not need to commence any actions. Such a possibility is remote considering the findings of another study, which found that 50% of plaintiffs in such cases received an offer of settlement during the "pleadings stage" of litigation, about 44% received an offer 12 months before the trial, and

181 Robert H Mnookin, "Negotiation, Settlement and the Contingent Fee" (1998) 47 DePaul L Rev 363 at 365.

182 Gross, *supra*, n 175 at 337.

183 As noted above, most Commonwealth jurisdictions that do not allow contingency fees provide some form of legal aid to the lowest income-earning group in the society. If this aid covers all legal costs, then eligible plaintiffs would be in the same bargaining position as plaintiffs in contingency fee jurisdictions. In fact, as legal aid will not lead to the conflict of interests that contingency fees bring about, beneficiaries of legal aid will be in an even better bargaining position. However, in most jurisdictions that provide such assistance, the plaintiff has to cover a portion of the costs. In such a situation, the bargaining power of the plaintiff is somewhere in between that of a plaintiff with no legal aid and one who has complete legal aid. Another significant fact, also referred to above, is that legal aid covers only a small segment of the population and the majority of the population will still have to struggle in order to afford steadily increasing legal costs.

184 The evidence can be found in the Oxford Study on Personal Injury Compensation (the "Oxford Study"), the Taxed Cases Study on Bargaining in Litigation (the "Taxed Cases Study"), the Civil Justice Review Study of Personal Injury Litigation (the "Civil Justice Review Study") and the work of the Royal Commission on Civil Liability and Compensation for Personal Injury (the "Pearson Commission"). These studies are referred to in Swanson, *supra*, n 127 at 201.

185 Swanson, *supra*, n 127 at 196 (citing the Pearson Commission and Oxford Study).

186 *Ibid* at 194 (citing the Pearson Commission and Oxford Study).

when the lawyers were at the steps of the court (one month before trial), the prospect for receiving an offer jumped markedly to 70%.[187] On the theory that insurance companies would have settled many of the worthy claims earlier, it is strange that they settled or made so many settlement offers after the remaining "less worthy" claims were filed. It is even more surprising that this practice was more acute just before trial, even though a large amount of legal costs would have already been incurred. Being risk neutral, RP defendants would have had no impetus to settle in order to avert risk. Another interesting statistic that clearly refutes this theory is that in three studies, the plaintiffs prevailed in 66% to 75% of the cases that went to trial.[188] Finally, it is significant that normal plaintiffs who were uninsured against costs received significantly fewer offers of settlement in all stages leading up to a trial as compared with plaintiffs who had legal aid (effectively partial insurance) or their unions' support (effectively full insurance).[189] All this data clearly demonstrate that RP defendants are extremely selective in the cases they settle and that there is a direct correlation between a plaintiff's bargaining power and his ability to see an action to the end.[190]

91 There is no reason to believe that an RP defendant would feel compelled to settle even worthy cases when a plaintiff is an OS who does not qualify for legal aid and is not assisted by a union. By refusing to settle or negotiate, RPs are able to weed out plaintiffs who cannot afford to commence an action. Moreover, even if plaintiffs commence actions, the inequality in bargaining power increases with time, as they find it more and more expensive to see their actions through to the end. It is therefore not surprising that the above studies show that of the 50% of plaintiffs who received settlement offers in the first stages of their suits, 65% accepted their offers immediately.[191] While there are no statistics on the ratios of the settlement sum to the value of the claim, one study, the *Taxed Cases Study*, found that plaintiffs who refused the insurance

187 *Ibid* at 201 (citing the Taxed Cases Study).

188 *Ibid* at 214 (citing the Taxed Cases Study, the Oxford Study and the Civil Justice Review Study).

189 *Ibid* at 209 (citing the Taxed Cases Study).

190 As stated by Timothy Swanson, "[p]laintiffs stand a much better than even chance of winning the action throughout the UK court system; this figure alone is indicative of the fact that insurers are not being very selective in the cases that they allow to continue through the process. However, closer inspection of the data reveal that the insurers are in fact being very 'selective' in some cases and very 'not-selective' in others": *ibid* at 210.

191 *Ibid* at 201 (citing the Taxed Cases Study).

companies' final offer and went to trial were awarded, on average, damages that were 400% higher than the final offers they received.[192]

92 With regard to the agency costs[193] in such a system, both the RPs and their lawyers, who are paid by the hour, have the same interest – to prolong the litigation. As such, agency costs are at a minimum. In contrast, the OSs' lawyers, if they are able to retain any, have divergent interests from that of their clients. Arguably, the lawyers would rather prolong the litigation since they are paid by the hour and would be paid regardless of the outcome of the action. The OSs, on the other hand, would rather settle early in order to eliminate the risks of a trial as well as the unnecessary incurrence of legal costs. The agency costs are high and OSs are in a bad negotiating position for two reasons. First, the RPs' lawyers, when they negotiate with the OSs' lawyers, know of their interest in prolonging litigation; and second, there is a danger that due to the "perverse" incentives generated by the hourly fee system,[194] the lawyers "may "collude" to exacerbate conflict".[195]

93 The contingency fee mechanism radically alters the balance of bargaining power between the OS plaintiff and RP defendant.[196] This is because the plaintiff does not incur any legal expenses if he loses and is therefore not as risk averse as the plaintiff under the hourly fee system. Furthermore, the plaintiff's lawyer under this system acts as a financier of the plaintiff's litigation expenses. These features erode the superior bargaining position of the defendant RP, which is now confronted with a real prospect of litigation. Not only will RPs lose out in the long run if they refuse to settle cases at their expected value, the deterrent effect of being aggressive litigants is decreased. They can no longer bully potential claimants into accepting small settlements, if at all, by threatening or showing that they are willing to follow through with the litigation and swamping the claimants with litigation costs. This is because the claimants do not bear the costs and their lawyers, who presumably have made a fair assessment of the merits of the case, will not capitulate merely at the prospect of going to trial. Suddenly, the

192 *Ibid* at 210 (citing the Taxed Cases Study).

193 The term "agency costs" refers to "the costs the principal must incur to keep an agent loyal and to the losses that occur as a result of agent disloyalty that are not worth preventing": J C Coffee, "Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions" (1986) 86 Colum L Rev 669 at 680 n 680.

194 Swanson, *supra*, n 127 at 217.

195 Ronald J Gilson & Robert H Mnookin, "Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation" (1994) 94 Colum L Rev 509 at 513.

196 O'Dair, *supra*, n 17 at 423; Swanson, *supra*, n 127 at 217.

BATNA of the RPs has deteriorated and under such circumstances, risk neutral RPs would prefer to avoid long-drawn litigation together with its associated costs and settle close to the expected value of the litigation rather than to resort to tactics that deny OSs of the expected value of their claims.[197] As stated by Richard O'Dair, "this gives lawyers a considerable ethical opportunity in the sense that it offers them an opportunity to contribute to a process leading to more just outcomes than would occur if the plaintiff were personally liable for costs."[198]

94 As can be seen from the above analysis, the percentage contingency fee is a great equaliser of bargaining power for OSs, the only wrinkle being that the OSs' lawyers may not be able to negotiate settlements that are close to the expected return and could be inclined to encourage their clients to settle at that sum. Nevertheless, there is every reason to believe that this sum would be significantly higher than if the OS plaintiff was not permitted to retain a lawyer on a percentage contingency fee basis. In circumstances where the offer is very low, such that the contingency fee lawyer's EHR is below that of his hourly fee cases or other contingency fee cases, the RP knows that the plaintiff's lawyer will not favour and encourage settlement. Moreover, it is significant to remember that the conflict of interest only arises when the percentage contingency fee lawyer is operating at full capacity. In circumstances where a lawyer has spare time, he would prefer to maximise his absolute rather than EHR yield. Ironically, under such circumstances, an hourly fee lawyer faces a conflict of interest with his client since he would want to maximise the number of hours he works and would, absent other restraints, engage in more work than is efficiently necessary.[199] Ultimately, when one considers the potential for abuse when contingency fees are relied upon, we must remember that:

197 It should be noted that Galanter does not seem to believe in the contingency fee's ability to powerfully aggregate negotiating power for OSs as he believes that "[t]here is a serious case to be made that the contingency fee underperforms in marshaling the cases of one-shot individual litigants contending with repeat-playing corporate antagonists": Marc Galanter, "Anyone Can Fall Down a Manhole", *supra*, n 115 at 474–475.

198 O'Dair, *supra*, n 17 at 426.

199 Theoretically, when the hourly fee lawyer is working at full capacity, there are no conflicts of interest since he is indifferent to the cases he is working on and will presumably seek only his client's best interests. However, when he is not working at full capacity, he would maximize his earnings by stirring up litigation or working more hours on a case than is optimal. The incentive to resort to such unethical conduct is not theoretical, as the United Kingdom's legal aid crisis demonstrated. According to the former Lord Chancellor, Lord Mackay, the astronomic rise in legal aid expenditure was fuelled by "supplier-induced demand" stimulated by lawyers looking for alternatives to privately paying work during the British recession of the late 1980s and early 1990s. He also felt that this problem was exacerbated by the hourly fee system relied upon to compensate lawyers providing

> [T]he question for assessing the contingency fee must be 'compared to what?' Many clients will be unable to afford a lawyer on a non-contingency basis, and for such clients the choice is between a somewhat sub-optimal settlement and no compensation at all. Moreover, one would expect that most clients who are poor enough to require a contingency fee and who have suffered injury will prefer an earlier settlement to a later one, even if the later one is larger, and in such cases, the conflict … disappears.[200]

95 That percentage contingency fees confer benefits that may offset potential conflicts of interest does not mean that we should blindly accept this as the best possible fee structure available. Conditional fees, for example, may be a better alternative since they do not give rise to the same conflicts of interest, while at the same time sharing the positive characteristics of percentage contingency fees. A plaintiff relying on this fee structure has the same bargaining power as a plaintiff using a percentage contingency fee lawyer since he also has a lawyer who is financing the litigation and bearing some of the risks of the litigation. On the other hand, since the conditional fee lawyer's compensation is not pegged to the size of the settlement but the number of hours he spends on the case, he has no incentive to settle early and will press for the largest possible settlement.[201] A corollary to this, however, is that a conditional fee lawyer experiences the same conflicts of interest that confront hourly fee lawyers.[202] In order to maximise his compensation, the conditional fee lawyer may, if there is a high probability of success, press for continued litigation rather than settlement even though the latter may be in his client's best interests.[203] As such, conditional fees are not a perfect solution. However, they do lead to a better result than the hourly fee system. While the same potential conflicts of interest abound, the OS plaintiff is in a far superior bargaining position.

96 Of all the various types of contingency fees, speculative fees are probably the most inferior in terms of conflicts of interest. This is because the speculative fee lawyer bears all the risks of the trial but is not compensated at all for assuming that risk. He is, therefore, risk averse and will be inclined to favour settlement unless he is very certain that he

legal aid services: Abrams *et al*, *supra*, n 139 at p 63. Furthermore, it should be noted that even when working at full capacity, an overworked hourly fee lawyer may not act in his client's interests since he will tend to work fewer than the optimal number of hours than is in his client's interests. There may be no conflict but "[a]t best, the certain hourly fee leaves the lawyer indifferent to the client's economic interests": Clermont & Currivan, *supra*, n 173 at 536.

200 Luban, *supra*, n 9 at p 119.

201 Jay, *supra*, n 1 at 861.

202 *Ibid*.

203 Kritzer, "Lawyer Fees and Lawyer Behavior", *supra*, n 163 at 1975.

will succeed at trial. Armed with the knowledge of this, the RP defendant will consistently make low ball offers. Nevertheless, the OS plaintiff would be in a better bargaining position than if he did not have a lawyer on this basis.

97 Considering the above analysis, it is submitted that a single correct answer to the question of which fee system is the best in minimising the risk of a conflict of interest between a lawyer and his client cannot be reached. The answer depends on whether the lawyers in the legal system are operating at full capacity or have excess capacity. In the former scenario, the conditional fee is the best fee structure whereas in the latter, the percentage contingency fee is the best. However, in the context of the contingency fee debate, it should be noted that based on the assumptions stated above, the hourly fee is inferior under both scenarios.

C. The impact of contingency fees on society and the legal system

98 A resounding refrain of critics opposed to contingency fees is that they have an extremely negative influence on the society and legal system in which they inhabit. Indeed, English and early American jurists feared that permitting contingency fees would cause their societies to become undesirably litigious as a result of lawyers stirring up litigation.[204] Similarly, they feared that granting lawyers an interest in the outcome of litigation would jeopardise their independence as officers of the court and lead to unscrupulous conduct that would undermine the administration of justice.[205] Contemporary critics continue this tradition by pointing to anecdotal evidence of American litigiousness and increasing unethical behavior by its contingency fee lawyers,[206] claiming that these are caused by the use of contingency fees.

(i) Increased litigation and litigiousness

99 As indicated in the introduction to this paper, one of the pillars of the *argumentum ad Americanum* is the belief that the contingency fee lawyers in the United States are bringing the country to its knees. Proponents of this argument will turn to observations by the American media,[207] politicians[208] and corporate leaders[209] that the "litigation

204 See *supra*, n 30 and the accompanying text. See also Karsten, *supra*, n 32 at 240.

205 See *supra*, n 31 and the accompanying text.

206 Graffy, *supra*, n 102 at 75.

207 See for example, "Hold Down Awards to Ease the Crisis", *USA Today* (6 June 1986) at p 12A col 1, where the commentator says, "[e]verybody in the USA suddenly seems to want to sue anybody with liability insurance coverage. The explosion of

explosion" or "hyperlexis" has engulfed the country. Indeed, statistics have been brandished[210] and the American media has worked itself into a frenzy over the increased litigiousness of American society. Despite these assertions, one wonders how much of this hysteria has been rhetoric and how much has been truth.

100 At the height of the alleged litigation crisis in the mid-1980s, Marc Galanter published a paper entitled "The Day After The Litigation Explosion"[211], which objectively evaluated the evidence relied on by advocates of the view that the United States was suffering from a crisis. Examining data on cases filed in the federal courts in 1975 and 1984, Galanter argued that the increases in the number of cases filed were not necessarily reflective of a trend towards litigiousness and could be attributed to other factors.[212] Apart from this, he pointed out that arguably more accurate statistics gathered on cases filed in the American state courts showed that "American litigation rates does [*sic*] not suggest that rates of civil court filings are dramatically higher than in the recent

litigation has choked court dockets. And too few lawyers tell potential clients that some cases are a waste of time … The greed has turned the temple of justice, long a hallowed place, into a pigsty". Quoted in Marc Galanter, "The Day After the Litigation Explosion" (1986) 46 Maryland L Rev 3 at 4.

208 For example, in 1986, Senator McConnell observed in the American Congress that "[h]ardly a day goes by that we do not hear or read of the dramatic increase in the number of lawsuits filed, of the latest multimillion dollar verdict, or of another small business … that has had its insurance cancelled out from under it": 132 Cong Rec S948 (Daily Ed, 4 February 1986). Quoted in Galanter, "The Day After the Litigation Explosion", *ibid* at 3.

209 For example, in 1986, the chairman of the Board of the National Association of Manufacturers said, "[l]ike a plague of locusts, US lawyers with their clients have descended upon America and are suing the country out of business. Literally. The number of product liability suits and the size of jury awards are soaring. Filings of personal injury cases in federal courts have jumped 600% in the past decade. Product liability suits filed in federal courts doubled from 1978 to 1985. In 1974, the average product liability jury award was $345,000. Last year it averaged more than $1 million. … Product liability suits have brought a blood bath for U.S. businesses and are distorting our traditional values. We're now the most litigious country on earth – one of every fifteen Americans filed a private civil suit last year": Dee, "Blood Bath", *Enterprise* (vol 10, March/April 1986) at p 3. Quoted in Galanter, "The Day After the Litigation Explosion", *ibid* at 4.

210 *Hearings*, *supra*, n 1 (Statement by Lester Brickman).

211 Galanter, "The Day After the Litigation Explosion", *supra*, n 207.

212 For example, Galanter argued that the huge increases in federal court cases brought between 1975 and 1984 can be accounted for by increases in recovery of overpayment and social security cases, which was "the result of deliberate and calculated official policy" by the American government. Similarly, he notes that of the large number of product liability cases brought between 1974 and 1984, a significant number, more than a quarter, were asbestos cases. These are "destined to diminish over the coming decades: *ibid* at 17, 25.

past."[213] This clearly undermines the myth of the American litigation explosion and the claim that contingency fees had a role in leading to this disaster.

101 In considering American litigiousness, another important issue that should not be ignored is how it measures up to the litigation levels of other countries. It is often said that the United States is the most litigious country in the world and this assertion is readily accepted across the globe. However, even this claim is questionable. In a study by Galanter in 1983, he observed that litigation rates in the United States were comparable with the rates in England, Ontario, Australia, Denmark and New Zealand and were by no means the highest amongst the countries he researched.[214] In a recent, more comprehensive study on global litigation rates conducted by Christian Wollschläger in the mid-1990s, it was discovered that the United States tailed Germany, Sweden, Israel and Austria in litigation rates.[215] The next most litigious country was the United Kingdom. Several questions are raised by this data. If indeed contingency fees are the cause of American litigiousness, why are countries without this fee structure as litigious, or more litigious, than the United States? It is also interesting to note that in the Wollschläger study, Greece, Portugal, New Zealand and Japan, countries that have some form of contingency fees, were ranked far below the United States. If the use of contingency fees will lead to a "litigation explosion", why did this not occur in these countries? There is probably no simple explanation to these questions. However, a reasonable conclusion is that a society's propensity to litigate is dictated by a host of factors that may be unique to that jurisdiction. It would therefore be simplistic to simply point to contingency fees as the main culprit for the rise in litigiousness in America, if any.[216] Furthermore, it cannot be assumed that any

213 *Ibid* at 7. In addition, Galanter pointed out that in the state courts, "[f]ilings of civil cases surged faster than population from 1978 to 1981, but from 1981 to 1984, when the litigation explosion lore would lead us to expect an intensification of litigiousness, per capita rates of filing actually declined. During this period, filings in small claims courts – the courts most readily accessible to ordinary Americans also fell. Tort filings rose steadily, but over the six-year period they grew by 9% while population grew by 8%": *ibid* at 6.

214 Marc Galanter, "Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) about our Allegedly Contentious and Litigious Society" (1983) 31 UCLA L Rev 4 at 52–55.

215 Christian Wollschläger, "Exploring Global Landscapes of Litigation Rates" in Jurgen Brand & Dieter Strempel, *Soziologie Des Rechts: Festschrift Fur Erhard Blankenburg Zum 60., Geburtstag* (1998) at p 577.

216 As stated by Kritzer, "[a]ttributing cross-national differences in patterns of professional behavior entirely to the presence or absence of specific fee rules is highly questionable": Kritzer, "Lawyer Fees and Lawyer Behavior in Litigation", *supra*, n 163 at 1983.

jurisdiction that adopts the use of contingency fees will become as litigious as the United States.

102 Even if we were to reject the above studies in favour of the view that American society has reached an undesirable level of litigiousness, this litigiousness may have been caused by a host of other factors apart from contingency fees. This view is supported by economic theory, which suggests that the use of contingency fees will not cause lawyers to stir up a flood of litigation. In the above section on access to justice, the economic models suggested that contingency fee plaintiffs in the United States have every incentive to litigate, regardless of the probability of success. While true, that is only one side of the coin. Ultimately, contingency fee lawyers will not agree to take on all cases, both good and bad, because the market will discipline those who indulge in cases with a low probability of success, or cases where expected returns are below the lawyers' standard hourly fee. So, if a lawyer stirs up litigation and indiscriminately accepts all the cases he encounters, he will fail to recoup the opportunity cost of his time spent, as well as the miscellaneous expenses incurred, in the low probability cases. After several of these cases, the rational lawyer will be extremely careful to take on only cases where there is a reasonable chance of success.[217] Indeed, because the economic self-interest of the lawyer compels him to decline cases with poor prospects of success, the very structure of the contingency fee ensures that frivolous cases are efficiently sieved out.[218] As such, Kritzer has aptly referred to contingency fee lawyers as the "gatekeepers" of the civil justice system.[219] Moreover, his research shows that this theory is borne out in the real world. Contrary to the caricature of the ambulance-chasing contingency fee lawyer, Kritzer found, in a study of Wisconsin attorneys, that contingency fee lawyers are quite selective of the cases they take on, generally turning down at least as many cases as they accept, and more often turning down significantly more cases than they accept.[220]

217 Clermont & Currivan, *supra*, n 173 at 571.

218 Posner, *supra*, n 142 at p 585.

219 Herbert M Kritzer, "Contingency Fee Lawyers as Gatekeepers in the Civil Justice System" (1997) 81 Judicature 22; *Hearings*, *supra*, n 1 (Statement by Herbert Kritzer). This was one of the considerations of the English when they adopted the conditional fee system. For example, the Green Paper stated that "it is unrealistic to suppose that lawyers, as professional people running businesses, would willingly take on cases where there was very little real prospect of success. The solicitor invited to act on a contingency basis will have to make a rigorous assessment of the likely chances of success and the possible amount of damages recoverable." Lord Chancellor's Department, *Contingency Fees*, *supra*, n 13 at 7.

220 Kritzer, "Contingency Fee Lawyers as Gatekeepers", *supra*, n 219 at 26; Kritzer, "Lawyer Fees and Lawyer Behavior", *supra*, n 163 at 1976. See also Kritzer, "Seven Dogged Myths", *supra*, n 71 at 756–757, where Kritzer refers to a Texas study where

103 I have not come across any comparable studies for hourly fee lawyers. However, under the hourly fee system, the lawyer has theoretically no incentive to decline cases with a low probability of success since he is paid regardless of outcome. As such, one can argue that contrary to popular opinion, adopting the contingency fee will lead to less litigiousness. This should not be taken to mean that there would necessarily be less litigation, since there may be an increase in the overall number of cases as litigation would be an option to plaintiffs who previously could not afford to litigate. However, this increase will be led by cases which lawyers think have a high probability of success. Conversely, more cases will be settled and there may be a decrease in cases with low probabilities of success. One can only speculate as to whether overall levels of litigation will rise or fall. However, if litigiousness is defined as the propensity to litigate cases where the probability of success is low, then the use of contingency fees will lead to less litigiousness.

104 There is one caveat to the above analysis. Since expected return is not only a function of probability of success, but also the anticipated recovery in the event of success, an economically rational contingency fee lawyer may also take on cases with a low probability of success if the anticipated recovery is very high.[221] To demonstrate this point, consider a contingency fee lawyer with two cases before him. In the first case, there is a 60% chance of successfully recovering $100,000 and in the second, there is a 20% chance of successfully recovering $300,000. If the lawyer were able to charge a fee of one third of the recovery, he would theoretically be indifferent as to which case to accept because his expected return for both cases is the same – $20,000[222]. This is despite the fact that one case clearly has a good chance of succeeding whereas the other is more likely to fail. Therefore the challenge for contingency fee proponents is to devise a system whereby the latter cases do not make it to the system since they are socially inefficient to prosecute. This challenge is perhaps met by the use of conditional and speculative fees since the expected return of lawyers relying on such fee structures is pegged to the hourly fee as opposed to the monetary recovery sought by the plaintiff. To the speculative or conditional fee lawyer, the size of the anticipated recovery is ultimately not as important as the probability of success of a case because no matter how high the anticipated recovery is,

the take-up rate by contingency fee lawyers ranged from between approximately 18% to 35%, depending on the type of lawyer. These figures are particularly surprising since Texas is arguably a far more litigious state than Wisconsin and one would have assumed that the take-up rate would be higher.

221 Gross, *supra*, n 175 at 342.

222 In the first case, expected return is 1/3 x (0.6 x $100,000) = $20,000. Similarly, the expected return for the second case is 1/3 x (0.2 x $300,000) = $20,000.

the lawyer will still get the same amount of fees.[223] It is therefore apparent that conditional and speculative fee lawyers are better gatekeepers than percentage contingency fee lawyers.

(ii) Higher insurance premiums and uncompetitive industries

105 Two other charges levelled against contingency fees are that they have led to higher insurance premiums in the United States and the loss of profitability, even collapse, of many of its companies which have become saddled with massive tort claims.[224] These criticisms are related to the above section on increased litigiousness, which sought to demonstrate that the use of contingency fees leads to the increased litigation of high probability cases and not increased litigiousness. A corollary to this is that RP defendants would have to make more high-value settlement offers since they would be forced to negotiate under the "shadow of the law"[225]. This would in turn lead to higher insurance premiums and decreased profits (or increased losses) for corporations. However, to the extent that this occurs, it is submitted that this is not necessarily a bad thing.

106 Critics often fail to recognise that apart from performing a compensatory function, litigation results in other benefits[226] and actually leads to increased economic efficiency for society. Corporations are subject to tort and other claims when they breach their duties or contravene the rights of others. If they are insured, their insurance companies will compensate the victims and increase insurance premiums. Otherwise, the corporations will have to bear the cost of compensating the victims of their injurious actions. Under both

223 A speculative or conditional fee lawyer is not entirely indifferent to the size of the plaintiff's recovery since it is possible for the recovery to be less than the lawyer's fee if he is successful. Under such circumstances, it will not be in the lawyer's interest to accept the case. Note, however, that this only occurs in cases where the anticipated recovery is very low. As this figure rises, the lawyer becomes more and more indifferent to its size.

224 This argument has been picked up in other jurisdictions. For example, a Senate report on contingency fees in Australia argued that in the United States, "[t]he result of the heightened risk of excessive damages being awarded has been that the cost of insurance, particularly for those likely to be sued, has in some cases become crippling. Two badly affected activities has been manufacturing and medicine. Litigation has been blamed for the decline of the US as a manufacturing power": Luban, *supra*, n 9 at p 118 (quoting the Senate Standing Committee on Legal and Constitutional Affairs, Parliament of the Commonwealth of Australia, *Cost Of Legal Services And Litigation Discussion Paper No 3 – Contingency Fees* (1991) at p 9).

225 Robert H Mnookin & Lewis Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88 Yale LJ 950 at 997.

226 Marc Galanter, "The Day After the Litigation Explosion", *supra*, n 207 at 31.

situations, the corporations' costs increase and their profits (or losses) decrease (or increase). Is this a bad thing? Considering the efficiency of the entire economy as a whole, economic theory actually states that this is ideal since the increased costs borne by the corporations, known as internalisation, are reflective of the total costs created by their activities, which would otherwise go unaccounted for. As stated in a standard economic treatise:

> Divergences between private and social costs and benefits are an important source of market failure. Firms that impose costs on society that they do not bear themselves will be motivated to produce too much.
>
> …
>
> Allocative efficiency requires that the price (the value that consumers place on the marginal unit of output) be just equal to the marginal social cost (the value of resources that society gives up to produce the marginal unit of output). When there are harmful externalities, marginal social cost and *marginal private cost*, the cost borne by the producer, will diverge.
>
> By producing where price equals marginal private cost, and thereby ignoring the externality, the firm is maximizing profits but producing too much output. The price that consumers pay just covers the marginal private cost but does not pay for the external damage. The *social benefit* of the last unit of output (the market price) is less than the social cost (marginal private cost plus the social cost imposed by the externality). Reducing output by one unit would reduce both social benefit and social cost, but would reduce social cost by more, because social cost is larger. Thus reducing output by one unit would save economic resources and increase efficiency. The market fails to achieve efficiency because of the externality.
>
> Making the firm bear the entire social cost of its production is called *internalizing* the externality. This will cause it to produce at a lower output. Indeed, at the optimal output, where the externality is completely internalized, consumer prices would just cover all of the marginal social cost of production – marginal private cost plus the externality. We would have the familiar condition for economic efficiency that marginal benefits to consumers are just equal to the marginal cost of producing these benefits. The difference here is that some of the marginal social cost takes the form of an externality.[227]

107 To best demonstrate this concept, let us assume that corporations are, by law, not required to compensate tort victims for injuries they caused through their operations. Under such a scenario,

[227] Richard G Lipsey & K Alec Chrystal, *An Introduction To Positive Economics* (8th Ed, 1995) at 443–444.

the costs on a corporation's accounting books, known as private costs, will not take into account all the societal costs, or externalities, that are incurred *via* the corporation's injurious activities. As such, the corporation, perceiving costs to be lower than they actually are, will, in a competitive market, increase output to maximise profit. More of the economy's resources would thus be allocated to creating a product than is optimal under market equilibrium. The societal benefit of increased consumption will, under economic theory, be less than the societal costs incurred in creating the product and the corporation would be inefficiently employing resources best diverted to other products.

108 On the other hand, if the corporation is forced to "internalize the externality" by paying damages for its tortious conduct, or if the invisible hand of self-interest compels a corporation to make safer products or devise operations that are less prone to injuring others because it would otherwise incur increased costs in the form of tort liability, the increased costs will cause the corporation to lower production to the optimal level of output that is efficient for society. This not only leads to greater allocative efficiency, but also a society with more responsible corporate behaviour, safer products and a cleaner environment.

109 As for the complaint that contingency fee litigation causes corporations to become uncompetitive or fail, the simple response to this is that such litigation does nothing but expose the inefficiencies of such corporations since it reveals hidden costs. It is inaccurate to say that the litigation *causes* corporations to be inefficient or unprofitable since it is the corporations' behaviour that leads to litigation and findings of liability against them. To the extent that businesses fail because of actions brought against them, this leads to a more efficient reallocation of society's resources to more efficient corporations or other industries where societal costs equal societal benefits.

110 There is, therefore, nothing inherently bad about increased litigation, increased insurance premiums and failing corporations, so long as the extent to which the latter two consequences are caused by wasteful litigation and litigation costs are minimised.

(iii) Unscrupulous conduct by lawyers

111 The last major objection to the contingency fee is that if a lawyer's interests are tied to his client's success in court, he will be tempted to employ unscrupulous means in order to achieve success. Resorting to perjury, the fabrication of evidence, accident faking and other forms of deception, the lawyer's role as an officer of the court will be undermined and the administration of justice will be dealt a severe blow. This reasoning and its conclusion are not far fetched, as the history of the doctrines of champerty and maintenance will remind us. Contingency fees undoubtedly provide great incentives for a lawyer to

crave success in court and accompanying such cravings is the temptation to engage in unscrupulous conduct. Indeed, anecdotal evidence of such conduct abounds in the United States[228] and it would be foolish to ignore their existence.

112 Rather than condemn contingency fees for the unscrupulous conduct they allegedly encourage, I would like to make two observations which I believe are noteworthy in relation to this issue. First, a lawyer would only be tempted to engage in unscrupulous behaviour if his expected return for a particular case rises dramatically through such conduct. Otherwise, it would not be economically rational to risk the drastic sanctions that would be meted out if he were exposed. Since conditional and speculative fee lawyers' remuneration are not tied to the size of the recovery but rather the number of hours they work, there is little danger that they will be inclined to risk their reputations and careers in order to win a particular case, which would merely yield a few extra dollars. The same is not true for percentage contingency fee lawyers, who can dramatically increase their compensation if they can improve the probability of success in a case where the anticipated recovery is extremely high. A simple example will demonstrate this. Assuming that a percentage contingency fee lawyer anticipates that $2m will be awarded if liability is established, he may attempt to falsify evidence to improve his chances of success from 10% to 80% rather than turning down the case or settling it at $200,000. If he charges a standard one third fee, the lawyer gets nothing if he does not accept the case, takes home about $67,000 if the case is settled at its expected value, but reaps a huge gain of about $670,000 if he engages in unlawful conduct.

113 Second, a percentage contingency fee lawyer's propensity to descend to unethical conduct, or at least the magnitude of the lawyer's temptation to do so, is directly related to the size of the anticipated recovery, since the more the lawyer stands to gain, the more he will be tempted to resort to unlawful conduct.[229] Of course, if the probability of success were high, then there would be no necessity for the lawyer to engage in such conduct.

114 What these observations indicate is that a contingency fee lawyer's propensity to engage in unscrupulous behaviour is not driven by the fact that he will only be paid if he succeeds, as is commonly argued, but by the size of the anticipated recovery and the pegging of his remuneration to the size of the recovery. Hence, the lower the level of

228 See, *eg*, Olson, *supra*, n 1 at pp 32–33.

229 Painter, *supra*, n 68 at 669.

damages awarded by a jurisdiction, the lower the propensity for percentage contingency fee lawyers to breach their duties as officers of the court. Also, the level of damages becomes irrelevant if conditional or speculative fees are relied upon. The lawyer is most likely to be ensnared when the level of anticipated damages is high and he is paid on a percentage contingency fee basis. Based on this analysis, one would expect the number of incidences of unscrupulous behaviour to be high in the United States, with its wide use of the percentage contingency fee system accompanied by the possibility of large awards that may include punitive damages.

115 Finally, in condemning the percentage contingency fee system, one cannot ignore the fact that similar incentives are not absent under the hourly fee system. As pointed out by a commentator, hourly fee lawyers from large, prestigious litigation firms in the United States have resorted to so-called "Rambo litigation" tactics and cannot be relied upon as being independent facilitators of justice. They:

> … practice a scorched-earth, rock 'em-sock 'em litigation style for other, equally compelling, reasons: their ability to attract clients in mega-cases depends on their reputation for giving no quarter; their clients have large budgets, permitting immense investments of lawyer time and energy (or perhaps the firms occasionally run the meter); the clients in turn want to see lots of smoke and flames for their money. These considerations provide just as powerful a pecuniary incentive as the contingency fee. … [I]t is simply bizarre to imagine that the need to impress and attract remunerative, corporate clients has less effect on solicitors' independence (in non-litigation matters as well as litigation) than the contingency fee. The implied premise of the independence argument – that non-contingency-fee lawyers faithfully discharge their duties to the court or to justice even when these conflict with their client's interests, whereas contingency fee lawyers would not – is not merely false, but damnably false.[230]

116 Ultimately, it is not sufficient for us to simply blame a particular fee structure for bringing about undesirable behaviour. There are a myriad of reasons why lawyers will or do indulge in such conduct. Rather than simply considering their incentives, we need to devise mechanisms to identify errant lawyers, put into place a system of sanctions that would deter such behavior and continually nurture a sense of duty and integrity in our profession.

[230] Luban, *supra*, n 9 at p 120.

Section III – Contingency fees in Singapore

117 Having considered the arguments for and against the use of contingency fees, this paper turns to consider if Singapore would benefit from its use. I will first discuss the inadequacies of Singapore's legal aid system, the inadequacies of other means of reducing litigation costs, and then deal with the types of contingency fees that should be adopted in Singapore.

A. Inadequacies of the legal aid system

118 As stated above, equal access to justice is a fundamental norm that few will object to. Indeed, Singapore's provision of legal aid is itself implicit acceptance of this norm. Thus, when legal aid was first introduced in Singapore in 1956, the explanatory note to the bill that introduced the Legal Aid & Advice Ordinance declared that:

> [I]t should not be impossible for a person without means to seek redress through the courts … It is of little comfort to the poorer citizen that the laws of his country are fair and just and that the courts are impartial, if, in practice, he is debarred from access to the courts through lack of funds.[231]

119 More recently, member of Parliament ("MP") Associate Professor Chin Tet Yung, repeated this refrain when he criticised the inadequacies of the legal aid system, which he felt was inaccessible to many Singaporeans:

> [T]he quality of a legal system is to be found in how accessible it is to those who seek justice. If costs are prohibitive for people of limited means, then the legal system will mean little, no matter how up-to-date it is.[232]

Considering that legal aid was designed to ensure equal access to justice, the key question to ask in a jurisdiction relying on it is how accessible it is to people who would otherwise be denied access to the justice system. In England and Wales, the judgment rendered has been that such access has been too inadequate. In Singapore, the government has tried to ensure that legal aid remains relevant by regularly updating the eligibility requirements, also known as the "means test", so as to keep it in line with growing legal costs.[233] This, however, does not mean that the

231 K S Rajah, *The Legal Aid In Singapore* (1973) at p 1 (quoting from GN Supp No 29/1956).

232 *Singapore Parliamentary Debates, Official Report* (9 March 2001) col 520.

233 In the last decade alone the means test was updated twice, in 1995 and 2001. As stated by the Minister of State for Law, Associate Professor Ho Peng Kee, the

level of legal aid is ideal or even adequate. It merely represents the balance struck by the government between the limited resources at its disposal and a sufficient level of subsidy to ensure that people in the poorest segment of the population have access to legal services which they cannot otherwise afford.[234]

120 While there has been no published study that details the accessibility of legal aid to the people of Singapore, general observations can be made from the recent census of 2000.[235] Under s 8(2) of the Legal Aid and Advice Act (Cap 160, 1996 Rev Ed), an applicant for legal aid may only be granted assistance if the applicant has reasonable grounds for "taking, defending, continuing or being a party" of an action. Furthermore, he must satisfy the recently updated means test laid out in the second schedule to the Act.

121 Under the means test, the applicant must not have disposable capital of more than $7,000 *and* a disposable income of more than $10,000 per annum. "Disposable income" is defined as income of the applicant together with income of his or her spouse (if any), after deducting $2,000 per annum for each dependent, $3,000 for the applicant, $1,000 for rent (if any), and the applicant's contribution to the Central Provident Fund ("CPF").[236] In other words, to qualify for legal aid, a person must not have more than $7,000 in assets or cash in his bank account[237] and his annual income must be lower than

Ministry of Law "periodically reviews the means test to make legal aid available to a larger number of low-income applicants": *Singapore Parliamentary Debates, Official Report* (9 March 2001) col 526.

234 Part of this decision is no doubt also influenced by the government's traditional loathing of welfare mechanisms.

235 The following analysis and conclusions are not precise because the data published by the Singapore Department of Statistics on the 2000 census of the population is not broken down sufficiently into categories and income groups that would allow precise analysis of the number of people who do not qualify for legal aid but who would be hard pressed to raise funds to commence an action. Nevertheless, rough estimates from the data do reveal that a significant number of people simply cannot afford to engage in litigation or would be extremely risk averse to enforcing their rights by virtue of the fact that their income streams are not large enough for them to be sufficiently indifferent to the prospect of losing in an action.

236 Legal Aid and Advice Act (Cap 160, 1996 Rev Ed), Second Schedule, para 4.

237 This requirement is relaxed under certain circumstances. For example, savings of an applicant who is 60 years old and above of up to $30,000 are excluded; and so are the moneys in his Central Provident Fund account, his clothing, furniture and tools of trade. Furthermore, any dwelling-house owned and exclusively used by the applicant assessed at an annual value of not more than $7,710 or a Housing and Development Board flat owned and exclusively used by the applicant as his home is not included: Legal Aid and Advice Act, *ibid*.

$15,500.[238] If the applicant is married, the combined annual disposable income of the family unit cannot be above $17,500 and for each additional dependent, the family is allowed an additional $2,000 in income per annum. Taking the typical Singaporean family of four with two dependents,[239] the applicant's annual family income must not exceed $21,500, or just under $1,800 per month, in order to qualify for legal aid. Moreover, the family must have less than $7,000 in savings, a sum equivalent to less than four months of income.

122 The foregoing figures show how little an applicant must have and own before he qualifies for legal aid and the means test obviously reveals the intent of parliament to help only the poorest in Singapore society. Indeed, the percentage of people who qualify for legal aid is not large. Of the 923,325 households in Singapore, 245,160 households, or 26.6%, have a monthly income of less than $2,000.[240] This figure obviously does not give the best indication of the number of families eligible for legal aid since such households include different numbers of working adults and dependents as well as different numbers of family nuclei.[241] A more useful statistic is the fact that of the 236,117 four-person households in Singapore, only 43,630,[242] or 18.5%, earn less than $2,000 and would qualify for legal aid. Another notable statistic is the number of households with two working persons earning less than $2,000. Only 18,946 of 347,024 such households, or 5.5%, qualify for legal aid.[243] These figures only reflect the maximum disposable income criterion of the means test and would obviously be significantly lower

238 This figure includes the $3,000 deductible for the applicant and the $2,500 that is deductible as being his CPF contribution for the year.

239 The median and average number of people in a household is approximately four and the median and average number of working people in a family is approximately two: see Leow Bee Geok, *Census Of Population 2000*, vol 5 at pp 80, 86–87.

240 *Ibid* at 83–84.

241 *Ibid* at 83, 86–87.

242 *Ibid* at 86. This figure accounts for the number of households in Singapore with four people who earn a total of less than $2,000 per month. As a statistic that reflects the number of such households that qualify for legal aid, it is overstated since the threshold for the average family of four to pass the disposable income element of the means test is just under $1,800.

243 *Ibid* at 87. This conclusion cannot be taken as definitive since this figure represents households with monthly incomes of less than $2,000 and does not take into account the fact that these households with 2 working persons may have no or different numbers of children or dependents.

once the maximum disposable capital requirement is factored into the equation.[244]

123 It cannot be doubted that people eligible for legal aid are in no position to engage in litigation. However, that the percentage of the population eligible for state-subsidised legal aid is low does not necessarily mean that the level of access to justice is low. The other side of the coin is how affordable litigation is to the class of plaintiffs who are not eligible for legal aid. Again, I have unfortunately come across no published papers on the level of legal costs in Singapore. However, there is reason to believe that these costs have been rising and are outside the range of affordability for most Singaporeans.

124 In a recent parliamentary debate, MP Mr Sin Boon Ann, who is also an attorney, commented that a three-day trial in a subordinate court "can easily set a party back by $10,000, and even higher if the party has to bear the other side's legal cost as well".[245] This estimate is a conservative one, especially when one considers the cost guidelines for the Magistrates' Courts listed in O 59 of the Rules of Court (Cap 322, R 5, 2004 Rev Ed). Under Part IV of Appendix 2 to O 59, costs that the Magistrates' Courts can award, in cases apart from non-injury motor accident cases, are $3,000 to $6,000 for cases where the damages claimed or awarded are less than $20,000; $4,000 to $12,000 for cases where the damages are between $20,000 to $40,000; and $5,000 to $18,000 for cases where the damages are between $40,000 and $60,000. Under Part V of Appendix 2, which deals with non-injury motor accident cases, costs of $3,800 to $6,000 may be awarded for actions that are settled or concluded for more than $10,000 on the first day of trial and up to $3,000 for each additional day of trial.

125 Considering that costs awarded tend to be higher for more complicated cases and for cases tried in the District Court and High Court, it is likely that party-and-party costs will be significantly higher in most other cases. And, these are only the costs that will be awarded to the plaintiff if he succeeds in his action, which can be less than the solicitor-and-client costs which he has to pay to his lawyer. If he loses in his action, he will have to pay at least double these costs since he will have to bear both his solicitor-and-client costs as well as the party-and-

244 Unfortunately, the published data from the recent census does not include information that will allow an estimate of the number of households that meet the disposable income threshold but not the disposable capital requirement. Nevertheless, it is not unreasonable to expect that a large number of such households are currently excluded from legal aid because the disposable capital threshold is very low.

245 *Singapore Parliamentary Debates, Official Report* (3 September 2001), col 526.

party costs. As such, the plaintiff stands to lose, assuming the best-case scenario of a non-injury automobile accident action in the Magistrates' Court, between $8,000 to $12,000 if the trial is concluded on the first day and up to $6,000 for each additional day that the trial proceeds. As for other types of cases in the Magistrates' Courts, the plaintiff stands to lose up to $36,000 in legal costs if his case involves a claim of up to $60,000. Bearing these figures in mind, it would not be difficult to envisage costs in excess of $20,000 in most cases that are litigated to the end.[246] Indeed, I believe that this is an extremely conservative estimate, especially when one considers that costs would be much higher in District Court and High Court cases.[247] Be that as it may, for illustrative purposes, I will consider the ability of Singaporeans to afford a trial that costs $20,000.

246 It can be argued that most cases are settled and are not litigated to the end. However, as stated in the section above on settlement and conflicts of interest, the bargaining power of a plaintiff is directly related to his ability to see through the litigation to the end. It is therefore imperative that we consider the total costs that a potential plaintiff would have to incur.

247 Costs awarded by the courts will no doubt vary from case to case, depending on their individual circumstances. However, some litigation lawyers I interviewed estimated that for the usual case in the High Court, party-and-party costs awarded are about $10,000 for each day of trial. In the District Courts, the figure lies in the $6,000 to $8,000 range. This means that factoring in the fee-shifting rule, costs of approximately $20,000 is the minimum if the plaintiff loses in the High Court and $12,000 if he loses in the District Courts. These figures do not include costs awarded at interlocutory proceedings, which would in all probability inflate the total cost of litigation.

The above estimates seem to be supported by case law, as demonstrated in the Court of Appeal's decision in *Tan Boon Hai v Lee Ah Fong* [2002] 1 SLR 10. That case involved the costs awarded for a trial that was settled after a nine-day hearing before the High Court. An Assistant Registrar initially assessed the costs at $100,000 even though she felt that the factual and legal issues in dispute were not complex, the trial was not document-heavy and the parties did not need to prepare additional affidavits or undergo the usual discovery process because the evidence had been adduced in earlier proceedings for an interlocutory injunction. She subsequently reduced her assessment to $70,000 on account of the fact that though the defendants in the case were represented by three separate sets of solicitors, there had been considerable overlap between the work done by the different sets of solicitors. On appeal to the High Court, G P Selvam J held, in *Tan Boon Hai v Singapore Hainan Kwee Kuan* [2001] 2 SLR 496 at 502, that "it would be reasonable and proper to start off with a base or benchmark of $10,000 per day and scale it up". He then proceeded to uphold the Assistant Registrar's initial award of $100,000 and set aside her subsequent award of $70,000. On appeal, the Court of Appeal reversed the High Court's decision and upheld the Assistant Registrar's $70,000 award. Considering the peculiar facts of this case, it is reasonable to assume that for the normal case, party-and-party costs for a nine-day trial in the High Court would be assessed at about $10,000 a day. With regard to costs awarded at District Court hearings, it is pertinent to note that the High Court consciously declined to intervene in the case of *Overseas Union Insurance Ltd v Home & Overseas Insurance Co Ltd* [2002] 2 SLR 497, where a District Judge awarded a party $39,000 in costs for a four-day trial.

126 As stated above, any applicant for legal aid cannot have disposable capital of more than $7,000. This means that a person with $15,000 in savings would not qualify, even though he would not be able to afford litigating a simple claim. What is more, the median monthly household income in Singapore is $3,607.[248] After CPF contributions are deducted, the median annual household income is $34,627. This effectively means that in 50% of Singapore households, a plaintiff who chooses to commence a simple action risks more than half of his entire family's annual disposable income. Similarly, the median monthly household income for four-person households is between $3,500 and $4,000.[249] So 50% of households which fit the description of the typical Singaporean family face the same hurdles. One can only imagine how risk averse most plaintiffs will be if the actual level of costs for the average case is markedly higher than $20,000.

127 Any attempt to pinpoint an income level at which litigation will become affordable for a person or household will at best involve arbitrary line drawing. In an ideal world, all plaintiffs with good causes of action will have access to the legal system such that they will get the best settlement possible. This is not possible under the legal aid scheme since all governments have to operate under budgetary constraints. As such, Singapore, like any other jurisdiction that values important norms such as justice and economic efficiency, must either improve access to the courts by lowering litigation costs, allowing OS litigants to rely on the contingency fee, and/or providing them with alternative methods of dispute resolution that will give them a more optimal outcome than that which they currently receive.

B. Alternatives to the contingency fee

128 To the credit of the Singapore government, judiciary and various private bodies, efforts have been made to widen access to justice. As pointed out above, the means test for legal aid has been updated a number of times. Apart from this, efforts have been made to ensure that legal costs are minimised, especially for cases where the claims are small. For example, the Small Claims Tribunals were set up for the adjudication of small claims where parties do not want to rely on lawyers. Furthermore, there has also been a push towards the use of alternative forms of dispute resolution which are cheaper and quicker to engage in than litigation. Some of these developments have had a tremendous impact on the legal landscape in Singapore. However, the

248 Leow Bee Geok, *supra*, n 239 at p ix.

249 *Ibid* at 87.

critical question is whether they sufficiently empower the OS litigant and are adequate in scope.

(i) Small Claims Tribunals

129 Since their creation in 1984, the Small Claims Tribunals have quickly become an important avenue for the average Singaporean to resolve disputes involving small amounts of money. In the years 2001, 2002 and 2003, 33,768, 36,610 and approximately 33,840 claims were filed before the Tribunals respectively.[250] These figures are significant when compared with the number of writs of summonses that were filed in the subordinate courts in the corresponding periods – 45,706, 44,967 and approximately 53,180 in 2001, 2002 and 2003 respectively.[251]

130 There are two chief advantages of pursuing a claim through the Small Claims Tribunal. First, court fees are a lot cheaper. Second, parties before the tribunals must represent themselves and cannot secure the services of a lawyer.[252] The advantages of precluding the use of lawyers are two-fold. Not only are legal fees thereby obviated, the OS litigant is empowered to the extent that he is almost equal with any RP defendant. Indeed, the large number of claims dealt with by the Small Claims Tribunals is a testament to their success.

131 Despite their importance, the Small Claims Tribunals only provide a limited form of access to justice. This is because their jurisdiction is very limited in scope. For example, the Tribunals only have the jurisdiction to hear claims that relate to a dispute arising out of a contract for the sale of goods or provision of services, or tortious claims involving property that has been damaged. Furthermore, such claims have to be taken out within one year from the accrual of the cause of action, cannot involve a non-injury motor vehicle accident, and cannot exceed $10,000.[253] In the face of these limitations, the obvious question is why they exist and whether they can be removed.

132 The main limitations to the reliance on Small Claims Tribunals come from their very advantage – that the parties' legal costs are minimised since lawyers cannot be involved in the process and hearings

250 *Subordinate Courts Annual Report 2002* at p 54; *Subordinate Courts Annual Report 2003* at p 69.

251 *Ibid*.

252 Parties before the tribunal must represent themselves and cannot secure the services of a lawyer. Small Claims Tribunal Act (Cap 308, 1998 Rev Ed), s 23(3).

253 The jurisdictional limit is $20,000 if both parties agree to submit to the Tribunals' jurisdiction: Small Claims Tribunal Act, *ibid*, ss 2 and 5.

are shortened by way of compromises in terms of procedural requirements. For example, the Referees of the Tribunals need not give effect to strict legal forms or technicalities generally required in courts of law[254] and need only "determine the dispute according to the substantial merits and justice of the case".[255] Furthermore, the Tribunals are not bound by the rules of evidence and evidence tendered to a tribunal need not even be given under oath or affirmation.[256] Such sacrifices in procedural justice are required in order to provide efficient and inexpensive "justice" for people who would otherwise not be able to afford to litigate the dispute or consider it economically inefficient to do so.[257] At the same time, it is because of the greater risk that injustice might occur that the jurisdiction of the Tribunals cannot be increased to incorporate large claims and disputes concerning complex causes of action. As it is, the jurisdiction of the Tribunals has already been increased markedly from the time of its inception, when only claims of up to $2,000 could be brought.

133 Ultimately, the Small Claims Tribunals serve as a good forum for the resolution of minor disputes since aggrieved parties would otherwise consider it uneconomical to commence an action. However, they are an imperfect substitute for normal litigation and there can be no justification for forcing an impecunious person to accept "rough" justice simply because he cannot afford to litigate his claim in a court, especially if his claim is sizeable.

(ii) Mediation

134 In terms of providing greater access to justice for the masses, another important initiative is the push towards using alternative methods of dispute resolution, especially mediation, in order to bring about a swifter, and therefore cheaper, resolution of disputes. The

254 Small Claims Tribunal Act, *ibid*, s 12(4).

255 *Ibid*.

256 Small Claims Tribunal Act, *ibid*, s 28.

257 When the Small Claims Tribunal Act was first enacted in 1984, Opposition MP Mr J B Jeyaretnam expressed concerned that justice could be compromised when Referees were not obliged to follow the rules of evidence. In reply, Minister Professor S Jayakumar stated that the imposition on the rules of evidence "would conflict with the objective of keeping the proceedings as informal as possible. If the laws of evidence were to apply, as we know, the evidentiary rules are fraught with technicalities which no layman will be able to understand": *Singapore Parliamentary Debates, Official Report* (24 August 1984) cols 2012, 2016. In other words, if the rules of evidence had to be followed strictly, not only would the hearings take longer, parties would not be able to handle their own cases and lawyers would be necessary, thus forcing up costs and defeating the whole object of the Small Claims Tribunals.

Singapore courts, especially, have strived to get cases mediated and this effort has generally been considered a success.[258] Similarly, in the private sector, efforts have been made to deal with various kinds of disputes through mediation. One example of this is the new Insurance Disputes Resolution Organisation ("Idro"), which was set up as a "one-stop centre for insurance inquiries, claim disputes and complaints about market conduct and service standards".[259]

135 There is no doubt that when cases are successfully mediated, the costs savings can be substantial.[260] This is because the amount of time taken to mediate a case is usually a lot shorter than the adjudication process. Furthermore, the prospect of a successful settlement through mediation is high[261] and this form of dispute resolution is ideal, considering that it is conciliatory and reinforces the Confucian roots that underlie Singapore society. Despite these advantages, one must bear in mind that although mediation may provide parties with a cheaper and more pleasant process of dispute resolution, it does not follow that it is the best way of providing Singaporeans with access to justice, at least meaningful access to justice. This is because mediation may not lead to an optimal settlement outcome.

136 A crucial observation about mediation that should not be ignored is that, as with negotiation, it operates within "the shadow of the law".[262] OS litigants who go for mediation know that if their disputes

258 For a detailed survey of the Singapore courts' initiatives in mediation, see Laurence Boulle & Teh Hwee Hwee, *Mediation: Principles, Process, Practice* (2000) at ch 9. In the years 2001, 2002 and 2003, 5,167, 7,329 and approximately 7,390 cases were respectively mediated at the Subordinate Courts' e@dr Centre respectively: *Subordinate Courts Annual Report 2002* at p 54; *Subordinate Courts Annual Report 2003* at p 69. These figures are high, compared with the number of writs that are filed each year in the Subordinate Courts: see n 251 and the accompanying text.

259 Currently, for mediation cases, Idro charges members of the public a nominal $50 whereas the insurer has to pay $500: see Lorna Tan, "New, Low-Cost Avenue to Settle Insurance Claims", *The Straits Times* (28 February 2003). It should be noted that this new organisation does not provide legal assistance and advice to plaintiffs but rather seeks to mediate a settlement.

260 This is supported by research in the United Kingdom, Australia and the United States: see Laurence Boulle & Miryana Nesic, *Mediation – Principles Process Practice* (2001) at pp 57–59.

261 The experience in Singapore has been that the use of mediation has produced high rates of settlement: see Boulle & Teh, *supra*, n 258 at pp 201, 226–228. Research in the United Kingdom has also revealed the same phenomenon: see Boulle & Nesic, *supra*, n 260 at pp 55–56.

262 As pointed out by Boulle and Nesic, "Where a dispute has been packaged and labeled as a legal one, where lawyers have taken an active role, where each side has counsel's opinion and where the mediation is connected to the court system or takes place within a statutory framework, the shadow will be a strong one; the

are not successfully mediated, they would have to go through the expensive and risky trial process. This is a great bargaining chip for the RP litigant, who may become unreasonable and insist on a settlement amount that is skewed in its favour. Such behaviour cannot be avoided because, unlike the Small Claims Tribunals, mediation does not "level the playing field" by correcting the imbalance in bargaining power between the RP and OS litigants. It should be noted that even advocates of mediation acknowledge that mediation is not suitable when there is substantial party imbalance.[263] As Lim Lan Yuan opines:

> Mediation should be avoided when there is a serious inequality in the parties' capacity to negotiate. In mediation, it is the parties themselves who fashion the solution to their problems. The neutral has no power and can offer no evaluation or assessment of the proposed solutions. Thus, the mediator cannot correct power imbalances or errors of judgment. He or she cannot protect a clearly weaker party, or counsel, from a stronger or subtler opponent. If negotiation between the parties is not likely to result in a balanced settlement, mediation should be avoided. Power relations constitute a major problem with the mediation process since the more powerful party has less incentive to compromise or acknowledge the recommendations of a neutral third party that has no recourse to legal sanction. Parties with unequal power bases would be unlikely to produce equal compromises and fair decisions.[264]

Such imbalances may explain why studies from the United States have shown that claimants in civil cases may be able to achieve higher judgments at trial than in mediation and the experience of the Central London County Court Mediation Pilot was "that the average settlements achieved in mediated cases were lower than those achieved amongst the sample of cases where mediation was rejected or where mediation was not offered".[265]

137 Despite the above arguments, mediation can increase access to justice and be especially useful when two OS litigants are embroiled in a dispute. In such circumstances, both parties have a strong incentive to settle and as there is no imbalance in power, an optimal settlement that is in the interest of both parties would probably be reached. When an OS faces an RP, on the other hand, mediation is only meaningful when the power imbalance is corrected. As highlighted above, the contingency fee levels the playing field substantially and within its shadow,

parties in mediation will be more directly influenced by the likely outcome of the dispute were it to be litigated": Boulle & Nesic, *supra*, n 260 at pp 32–33.

263 *Ibid* at 65; Lim Lan Yuan, *The Theory & Practice Of Mediation* (1997) at p 62.

264 Lim, *ibid*.

265 Boulle & Nesic, *supra*, n 260 at p 65.

mediation can actually ensure a more optimal and equitable outcome for traditionally disadvantaged litigants.

(iii) Streamlining the litigation process

138 A third way of making litigation cheaper for an OS is to streamline the litigation process in order to make it more efficient. For example, a by-product of the recent reforms to streamline the rules on discovery was probably the reduction of time lawyers have to spend on discovery.[266] This would presumably translate to lower fees, which would in turn make litigation more affordable.

139 There are probably other ways of streamlining the rules of civil procedure, which would, if implemented together, have a noticeable effect on legal costs. However, as indicated in the section above on the Small Claims Tribunals, the streamlining of procedure usually means sacrificing, at least to a certain extent, the requirements of justice. For example, limited discovery means that there is a greater likelihood, even if lawyers behave ethically and disclose all documents which *they* consider relevant, that parties will not get potentially useful evidence. Ultimately, the requirements of justice will have to be balanced with the need for cost-efficient civil procedure and in this regard, it is submitted that access to justice should not be an overriding factor. Reform in this area should certainly be carefully implemented lest they lead to unjust results that defeat their very purpose.

140 Furthermore, even if the reform of civil procedure can lower litigation costs, it has to be borne in mind that such streamlining cannot eliminate all costs and more importantly, the risk that a party may lose in litigation. The latter is the greatest fear for the OS litigant, who would have to bear not only his solicitor-and-client costs, but also his opponent's party-and-party costs. Lower costs may make litigation more palatable for such a litigant but, he would nevertheless still be risk

266 As pointed out by the Singapore Court of Appeal in *Tan Chin Seng v Raffles Town Club Pte Ltd* [2002] 3 SLR 345, whereas the former rules governing discovery prescribed open-ended criteria which gave rise to abuses and difficulties in application, the criteria adopted by the new rules are more specific. As a result of the recent amendments, documents which had to be discovered under the concept of "train of inquiry" are no longer discoverable under the present O 24 r 1 of the Rules of Court. Apart from the documents which a party intends to rely on, the only documents that are presently discoverable are those which could (a) adversely affect the party's own case; (b) adversely affect another party's case; or (c) support another party's case. This would no doubt have had an impact on the number of documents that are subject to discovery and reduce the possibility of lawyers flooding their opponents with boxes of useless documents. As such, the time that lawyers have to spend on discovery would have decreased, leading to lower costs for their clients.

averse, which is the primary obstacle when considering the issue of access to justice in the context of jurisdictions subject to the fee-shifting rule.

(iv) Reforming the cost system

141 Finally, another possible means of improving access to justice is to reform the cost system in Singapore. In this regard, it should be noted that the conclusions on legal costs and the affordability of litigation referred to above were solely premised on lawyers' fees. Other elements of litigation costs, such as court fees, Electronic Filing System ("EFS") fees and disbursements were not factored into the equation. While these other elements may be substantial, they do not form a significant part of total litigation costs[267] and as such, any meaningful reform will have to be directed at lawyers' fees.

142 One obvious way of keeping legal costs down is to cap lawyers' fees. However, such interference will impact the market for legal services negatively. If the hourly fees that litigators can charge are capped, it will be more lucrative for lawyers to turn to other types of legal work, thus depriving the legal system of lawyers. Corresponding to this decrease in the supply of litigators would be an increase in the demand for their services and this will result not only in the inefficient allocation of resources, but also greater inefficiency in the administration of justice. Ultimately, the capping of lawyers' fees for contentious matters will lead to a fall in the quality of legal work done by litigators as well as a decrease in the number of talented litigators, who will turn to other areas of practice. Fee-capping is therefore not a real option in terms of reforming Singapore's cost system.

143 Another alternative is to reduce the obstacles that lie in the path of the risk averse OS litigant by removing the fee-shifting rule altogether. This option is not ideal since the fee-shifting rule plays a fundamental role in sieving out frivolous and entirely unmeritorious claims. Furthermore, the rule has the benefit of ensuring that the victor of the litigation process, whose rights and conduct have been vindicated, is not disadvantaged by the costs of defending or pursuing the action.[268]

267 Significantly, the courts have recently reduced EFS fees in a move to reduce such additional costs.

268 This, of course, presumes that the party-and-party costs awarded are equal to the victor's solicitor-and-client costs, which as pointed out above, is seldom the case. However, the fee-shifting rule does reduce the party's solicitor-and-client costs by the amount of the party-and-party costs.

144 If the fee-shifting rule is to be retained, the only other way to assist the risk averse OS litigant would be to provide some form of insurance which will cover his costs should he lose. Apart from the use of quasi-insurance mechanisms such as contingency fees, one alternative is legal expenses insurance ("LEI"), an insurance that covers a person for legal costs that may be incurred or awarded against him in the future.[269] This type of insurance has become very successful in Germany where a majority of households have some form of LEI or other.[270] Though available in the United Kingdom, they are not as popular.[271] The problem with LEIs is that though they have an advantage over contingency fees in that successful plaintiffs do not have to share their proceeds with their lawyers, moral hazards accompany their use, which may explain why litigiousness has become a big problem in Germany.[272]

145 In conclusion, there are, apart from the use of contingency fees, some options that can be pursued in order to make litigation more affordable or accessible for OS litigants in Singapore. However, these options have significant limitations and generally do not impact upon a person's ability to commence an action as dramatically as the adoption of a contingency fee regime. Indeed, some of the options mentioned above, such as the use of mediation as an alternative form of dispute resolution, would actually be complemented by the use of contingency fees.

C. Contingency fees – good for Singapore?

146 In Section II of this paper, I detailed the key benefit of contingency fees and how the fee structure, particularly in the form of the percentage contingency fee, has been criticised for creating certain

269 Abrams *et al*, *supra*, n 139 at 67.

270 *Ibid*; Gross, *supra*, n 175 at 330.

271 Abrams *et al*, *supra*, n 139 at 67; Painter, *supra*, n 68 at 632 n 34. It should be noted, however, that the British government intends to encourage the growth of this form of insurance: Lord Chancellor's Department, *Modernising Justice*, *supra*, n 107 at 21–22.

272 Unlike with the use of contingency fees, no gatekeepers exist when a legal system relies on LEI for the provision of access to justice. Since the plaintiff knows that his costs are covered, he has no incentive to restrain himself from litigating. Similarly, his attorney has little incentive to refuse representation, no matter how frivolous the case, since he is paid regardless of outcome. As a result of such a moral hazard, Germans complain that "[t]here are people in Bavarian villages who've started court proceedings because cocks crowed too loud, cow bells were too noisy and church bells rang too early for them." Indeed, in the recent study by Wollschläger referred to above in n 215, Germany was ranked as the most litigious country in the world. Insurers in Germany blame the reliance on LEI for this phenomenon: Painter, *supra*, n 68 at 632 n 34. *Cf* Gross, *supra*, n 175 at 331.

ethical tensions within the attorney-client relationship as well as having an undesirable impact on society. I sought to demonstrate that because of the nature of the attorney-client relationship, conflicts of interest are inherent in any compensation structure and that when we speak about suppressing such conflicts, we can only speak in relative and not absolute terms. Clearly the more that a lawyer stands to gain through unethical conduct under a particular fee structure, the greater the incentive to engage in such behaviour. In this section, I seek to highlight differences between the Singapore and American legal systems that would have an impact on the behaviour of lawyers. Although commentators like Kritzer have strived to demonstrate that percentage contingency fee arrangements do not lead to negative societal effects, it is submitted that the differences between the two legal systems are such that even if these commentators are wrong and percentage contingency fees do cause lawyers to stir up litigation and engage in unscrupulous conduct, the full brunt of the alleged malpractices by American lawyers will not be felt in Singapore.

147 As pointed out in Section II, the factor that has the largest impact on percentage contingency fee lawyers stirring up unwanted litigation and engaging in unscrupulous practices is the amount of damages that is anticipated from a particular action. The higher the expected damages, the more likely a lawyer would accept a case that is not likely to succeed and the larger the incentive for him to abandon his duty to the court in favour of engaging in illegal behaviour in order to improve his chances of success. In the United States, the level of damages awarded is notoriously high. Anecdotal evidence of multimillion-dollar awards for tortious conduct abound and this phenomenon can be attributed to two main factors. First, under American law, general damages are determined by juries. Secondly, juries also have the liberty to award large sums of money to plaintiffs in the form of punitive damages.[273] The second factor, especially, has had a significant impact on contingency fee litigation.[274]

273 Despite the general acceptance of punitive damages in the United States, such awards are far from uncontroversial. As noted by a commentator, "no remedial issue has received more public, judicial, and scholarly analysis and criticism than punitive damages" and "[c]oncerns over the subjectivity of punitive damages awards have generally been voiced in terms of excessiveness": James M Fischer, *Understanding Remedies* (1999) at pp 694, 706.

274 As pointed out by Brickman, "[p]unitive damages are increasingly a function of contingent fee financing of tort litigation. The increasing propensity to award punitive damages in tort cases and indeed, in contract cases, and of assessing punitive damages against insurance companies for failure to offer policy limit settlements are examples of trends in judicial decision making which are quite expansionary and significantly impact wealth transfer. Perhaps most significant from the point of view of future wealth transfer is the Judiciary's acceptance of a new role for punitive damages: to supplement the jury's ability to punish and deter

148 Two explanations may account for why punitive damages are such an unwieldy horse in contingency fee litigation in the United States. First, they are available in a large number of cases. So long as a defendant has engaged in "socially deplorable conduct, such as fraud, or has acted wrongfully with an improper motive or intent, such as the desire to harass, vex or annoy", a claim for punitive damages can be made.[275] Indeed, intent to injure is not even always necessary, since some courts have held that deliberate conduct which exposes others to the risk of injury may also support an award of punitive damages.[276]

149 The other explanation is that the discretion to award punitive damages as well as the power to set the level of such awards are given to juries. Vulnerable to impassioned pleas for retribution and punishment, juries can make excessive awards. Indeed the United States Supreme Court has recognised this as a problem and has recently attempted to curb such excesses. Unfortunately, it has not made a resolute stand on this issue, nor has the level of damages it has considered reasonable been really satisfactory.[277]

egregious conduct with the authority not simply to implement policy, but also to set policy as if it were a legislature or regulatory commission … [S]uch policy-making by juries through the use of punitive damages is often capricious and haphazard. Because the awards are sought by plaintiffs' lawyers seeking to maximize their rates of return, consistency is often a casualty of these litigation wars." Brickman also highlights that if a lawyer "will receive not $10,000 upon prevailing but $1 million (or more), something, beyond just additional effort (measured in units of time) may be anticipated. While there is vast range of action between increased efforts and fraudulent behavior, the dividing line is a wide brackish expanse. Plaintiff lawyers, responding to the winner-take-all incentive, constantly push the limit on what can be argued to the jury. Over time the standard shifts. It is today quite typical in asbestos litigation for plaintiff lawyers to argue in the punitive damages phrase: Don't let these foreign corporations get away with this; just because they're rich doesn't mean that they can come into our community and put profits before people's lives": *Hearings*, *supra*, n 1 (Statement by Lester Brickman).

275 Fischer, *supra*, n 273 at p 696.

276 *Ibid* at 697.

277 *Ibid* at 706. The United States Supreme Court recognized this problem in *BMW of North America v Gore* (1996) 517 US 559, and promised change by declaring that an excessive punitive damages award was a violation of a defendant's right to substantive due process and therefore unconstitutional. In the more recent decision of *State Farm Mutual Automobile Insurance Company v Campbell* (2003) 123 S Ct 1513, the Supreme Court maintained its earlier position. In this case, the jury awarded the plaintiffs $1 million in compensatory damages and $145 million in punitive damages and the Supreme Court overturned the award of punitive damages on appeal. In coming to this decision, the court declined "to impose a bright-line ratio which a punitive damages award cannot exceed". However, it felt that American jurisprudence and principles demonstrate that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process … Single digit multipliers are more

150 In contrast with the position in the United States, Singapore's law on punitive damages currently follows the English position, which takes a restrictive approach towards the award of such damages.[278] Under the principles enunciated in the House of Lords decision of *Rookes v Barnard*,[279] punitive damages are only available under three circumstances:

(a) when they are sanctioned by statute;

(b) when the injury is a result of oppressive, arbitrary or unconstitutional conduct by government servants; or

(c) where the plaintiff's injury was caused by a defendant who had calculated that his conduct would lead to a profit that might exceed the compensation payable to the plaintiff.

These categories are considered closed and the English courts have recently restricted the interpretation of *Rookes* further by stating that the House of Lords intended, in that case, to limit rather than expand the availability of punitive damages.[280] As such, a plaintiff cannot claim punitive damages by merely showing that one of the *Rookes* exceptions is applicable. Instead, he has to go one step further to show that punitive damages were awarded in such claims prior to the *Rookes* decision.[281] All

likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in the range of 500 to 1 … or, in this case, of 145 to 1". Although this decision is progressive in providing guidance to lower courts and reducing the expectations of litigants and contingency fee lawyers, it is unfortunate that the court was unwilling to significantly overhaul the law on punitive damages by affirmatively placing a cap on the ratio between punitive and compensatory damages. The court was no doubt swayed by the argument that larger ratios might be necessary in cases where egregious acts resulted in only a small amount of economic loss. Under such circumstances, a larger ratio would be necessary to punish the offender sufficiently so as to deter him from continuing with the egregious acts.

It should be noted that despite the more tampered approach that has been adopted by the United States Supreme Court, punitive damages awarded in the United States will remain significantly larger than those awarded in Singapore, where the ratio has thus far been significantly below 1 to 1, not to mention a single-digit ratio: see *infra*, n 278.

278 Soh Kee Bun, "Exemplary or Punitive Damages" (1998) Sing JLS 63 at 72.

279 [1964] 1 All ER 367.

280 *AB Waterworks v South West Water Services* [1993] QB 507. While this case has not been judicially acknowledged in Singapore, the Singapore courts will probably move in the same direction, despite the academic objections to the rule: see Soh, *supra*, n 278 at 67.

281 Harvey McGregor, *McGregor On Damages* (16th Ed, 1997) at pp 291–292.

these factors mean that punitive damages would only be available in an extremely small minority of cases.

151 Furthermore, as Singapore does not operate a jury system, damages are assessed by judges, who are more adept at exercising restraint in the awards of both punitive[282] and general damages.[283] These factors indicate that even if percentage contingency fees are introduced in Singapore, lawyers cannot expect large windfalls in terms of punitive damages and as a result, will not stir up fruitless litigation.[284] Similarly, there is little incentive for Singaporean lawyers to engage in unscrupulous conduct since the relatively low level of damages awarded by the courts are such that any increases in income brought about by such conduct would not be commensurate to the risks of disbarment and criminal prosecution. As stated in the Green Paper on contingency fees:

> Wanting success cannot be wrong in itself, provided that unfair means are not used in achieving it. Any tendency on the part of a lawyer to 'improve' his client's case ought to be capable of control through professional codes of conduct, and the judges already possess the power to penalize solicitors personally in costs for any improper act or omission in the conduct of litigation. Both sides of the profession are, in England and Wales, subject to stringent codes of practice which, if broken, may lay the lawyer open to disciplinary proceedings before his professional body which can result in his losing his right to practise. To assume that the financial interest introduced by a contingency fee will override the standards of an individual in relation to his client is to assume an unreasonably low standard of conduct for the profession

[282] While there have not been many cases in Singapore involving punitive damages, two cases referred to in Soh, *supra*, n 278 at 73–75, 88–91 are illustrative of the restraint exercised by the courts. In the case of *Abdul Mutaif bin Sultan v Surya Abbas Syauta* [1993] SGHC 182, the court added 10% of the compensatory damages against each of the two defendants as punitive damages, leading to an overall award for punitive damages of 20% of the compensation. The sum ($18,000) was quite small, considering the egregious nature of the defendants' conduct. Similarly, in *Lotus Development Corporation v Ong Seow Pheng* [1997] 1 SLR 484, the Registrar and High Court awarded punitive damages equivalent to 11 and 12% of the compensation respectively. Although the Court of Appeal effectively raised this percentage to about 58%, this was brought about by it significantly lowering the level of compensatory damages.

[283] The same view is taken of the level of damages awarded in the United Kingdom.: see Lord Chancellor's Department, *Contingency Fees*, *supra*, n 13 at p 9; Graffy, *supra*, n 102 at 72.

[284] This was also the view taken by the Lord Chancellor's Department in its 1989 Green Paper on contingency fees: Lord Chancellor's Department, *Contingency Fees*, *supra*, n 13 at p 7.

> as a whole. There appears to be no evidence to justify this assumption.[285]

The same can be said of Singapore.

152 Another significant difference between the Singapore and American legal systems is the presence of the fee-shifting rule in Singapore. In Singapore, even if a plaintiff can transfer his risk of having to pay his solicitor-and-client costs to his lawyer in the event that he loses, he would still remain personally liable for his opponent's legal costs if he loses. As such, while he would be less risk averse to litigation than if he was relying on the hourly fee, a plaintiff would still have to carefully consider his chances of losing before embarking on litigation. If this rule is maintained, any increase in the litigiousness of Singaporean litigants would be considerably less marked than that in the United States.[286]

153 As the above arguments demonstrate, the adoption of percentage contingency fees in Singapore will probably not lead to a significant increase in litigiousness and unscrupulous behaviour by lawyers. On the other hand, a large segment of the population will enjoy increased access to justice. The only major concern that remains is whether the adoption of this fee structure would create conflicts in the solicitor-client relationship that will cause lawyers to inevitably subject their client's interest to their own economic interests. Theoretical aspects of this issue have been dealt with in Section II and I would simply highlight at this juncture that the Singapore bar has always vigilantly enforced ethical rules and disciplined wayward lawyers. Nevertheless, there are still reported cases of lawyers breaching their fiduciary duties. For example, several lawyers have in the past two years

285 *Ibid* at 5.

286 Of course, this reduces access to justice and as such, the English Law Society has developed a cheap insurance policy called Accident Line Protect ("ALP") that insures conditional fee plaintiffs from having to pay party-and-party costs in the event that they fail in their action. This is not necessarily a positive development since adverse selection problems abound from the use of such a mechanism. First, only plaintiffs with higher risks of losing their cases will take up this insurance, thus leading to higher premiums. Based on a recent study, this has indeed occurred: see Abel, *supra*, n 3 at 298. Second, the fee-shifting rule is useful for contingency fee lawyers who may be uncertain if their clients have revealed all the facts to them, including facts that are not so favourable to their case. With ALP, the more sophisticated client will rationalize that like the American plaintiff relying on contingency fees, he has nothing to lose in litigating and is better off not disclosing material but unfavourable information to his lawyer so that the latter will accept his case. On the other hand, if he knows that he will be liable for his opponent's costs if he loses, he will be as forthright as possible in order to get his lawyer's assessment of the probability of success of his case.

misappropriated more than a million dollars which they were holding in trust for their clients.[287] This highlights the temptations that arise when large sums of money are left with lawyers. Nevertheless, such mechanisms are necessary to facilitate commercial transactions and as such, there has been no suggestion that lawyers should not be allowed to hold such funds. If lawyers are entrusted with so much money in the face of such temptation, why can they not be entrusted with their clients' interests when it comes to advising their clients and acting ethically when operating under a contingency fee system? Instead of merely complaining about possible conflicts that will arise through the use of contingency fees, a rigorous system should be designed to minimise such conflicts and ensure that the reliance on such a fee structure would be monitored and unethical lawyers sanctioned.[288] It is no answer to say that contingency fees create incentives for lawyers to act illegally. Such temptations already exist under the hourly fee system.

D. Setting up the system

154 In the above section, I argued that adopting an American-style percentage contingency fee system in Singapore would not lead to drastic consequences. However, that does not mean that the percentage contingency fee is the best solution to the access to justice problem in Singapore. Other forms of contingency fees, such as the speculative fee and the conditional fee, provide similar access to justice and as explained in Section II, do not at the same time create conflicts of interest that are as serious as those brought about by percentage contingency fees. Moreover, apart from the options I considered in Section III(B) above, variants of the percentage contingency fee have also been suggested and adopted in other jurisdictions. An exhaustive study of these mechanisms and reforms is beyond the scope of this paper. However, I will highlight some of these mechanisms and the criticisms that have been levelled against them before suggesting what I believe is the best approach for Singapore.

155 An interesting suggestion by the British organisation, Justice, is for a Contingency Legal Aid Fund ("CLAF") to be set up.[289] This proposal involves the setting up of a public organisation, funded by an initial grant to constitute its working capital, which effectively finances litigation by individuals who do not qualify for legal aid but who

287 "Missing Lawyers: Police to Probe Complaints", *The Straits Times* (8 March 2003); "Law Society Gives Record Compensation", *The Straits Times* (15 October 2003); "Lawyers Agree to Tough Accounting Rules", *The Straits Times* (5 February 2004).

288 O'Dair, *supra*, n 17 at 434.

289 *Justice, Lawyers and the Legal System: A Critique of Legal Services in England and Wales* (1977) at pp 48–49; Justice, *The Trial of Motor Accident Cases* (1966).

nevertheless lack the resources to engage in litigation. Though non-profit in nature, the fund would be self-funding as the administrators of the fund would, after making an assessment of the prospects of the case, negotiate with the applicant for a percentage of any award that is recovered to be paid over to the fund. Under the Justice proposal, the applicant would then be free to choose his attorneys, who would be paid by the CLAF based on a standard hourly fee.

156 There are several advantages to the CLAF proposal since the benefits of the percentage contingency fee system are harnessed though its weaknesses and flaws are avoided. First, since the risks are borne by a non-profit fund and the lawyer representing the plaintiff is paid by the hour, the conflicts of interests associated with percentage contingency fees will not be triggered. Second, there will be no incentive for lawyers to engage in unscrupulous conduct and stir up unnecessary litigation. Third, a new objective gatekeeper, the administrators of the CLAF, will emerge to ensure that frivolous cases are not litigated. And finally, if the administrators of the CLAF are charged to break even or turn in a profit that will be distributed amongst the applicants, they will carefully monitor the lawyers to ensure that they do not overcharge or act against the interest of the applicants. In effect, the CLAF can be a mechanism that can effectively galvanise OSs to become RPs in their negotiations with, and monitoring of, attorneys. The CLAF can therefore be an extremely useful tool and it is unfortunate that although this proposal had the support of some English academics and lawyers,[290] it was given little consideration by the English government.[291]

157 As pointed out in Section I, there are many variants to the percentage contingency fee, such as percentages that vary based on the recovered sum or stage at which the case is settled or won. Such variants have been viewed as being more acceptable than the standard percentage contingency fee and as such, many reformers have proposed that lawyers be required to adjust their percentages on a sliding scale that decreases as the amount recovered increases.[292] Some American

290 A committee appointed by the English Bar Council and Law Society opined, in 1986, that although a CLAF would be "inequitable" in that "meritorious litigants whose claims succeed would effectively be subsidizing less deserving plaintiffs whose actions failed", this was "preferable to the state of affairs in which deserving plaintiffs outside the legal aid limits lack the confidence to sue at all": Abel, *supra*, n 3 at 257 (quoting from Committee on the Future of the Legal Profession, *A Time For Change* (1988) at paras 10.22–10.33).

291 Graffy, *supra*, n 102 at 88–89. The English Bar Council expressed surprise and disappointment that the 1989 Green Paper failed to consider the CLAF, which it felt was an "important possibility": Abel, *supra*, n 3 at 263.

292 Jay, *supra*, n 1 at 831.

states have adopted such suggestions by placing caps on percentages that can be charged, either based on a sliding scale or a single maximum percentage.[293] Critics of such reforms argue that percentage caps based on sliding scales do not ensure that reasonable fees are charged since lawyers charging the maximum percentages may still be billing excessively in cases involving little risk.[294] On the other hand, as with all caps, market forces are disturbed and meritorious cases that involve larger risks may be deterred.[295] Moreover, even if lawyers do take on such cases, there is a likelihood that they will put in less work than optimal and this would have an impact on the amount recoverable.[296]

158 Finally, there is the proposal by Brickman and the Manhattan Institute for the percentage contingency fee system to be modified *vis-à-vis* tort actions. The principal features of the proposal are:

> (a) Contingency fees may not be charged against settlement offers made prior to plaintiffs' retention of counsel.
>
> (b) All defendants are given an opportunity to make settlement offers covered by the proposal, but no later than 60 days from the receipt of a demand for settlement from plaintiffs' counsel. If the offer is accepted by the plaintiff, counsel fees are limited to hourly rate charges and are capped at 10% of the first $100,000 of the offer and 5% of any greater amounts.
>
> (c) Demands for settlement submitted by plaintiffs' counsel are required to include basic, routinely discoverable information designed to assist defendants in evaluating plaintiff claims. In turn, to assist plaintiffs in evaluating defendants' offers, discoverable material "in the … [defendant's] possession concerning the alleged injury upon which [the defendant] relied

293 *Ibid*; Brickman, *Rethinking Contingency Fees*, *supra*, n 1 at p 17; Graffy, *supra*, n 102 at 71. The state of California, for example, mandates that for medical malpractice cases, a lawyer may take only 40% of the first $50,000 of a client's damages, 33 1/3% of the next $50,000, 25% of the next $500,000, and 15% of sums exceeding $600,000: Schneyer, *supra*, n 115 at 390.

294 Brickman, *Rethinking Contingency Fees*, *supra*, n 1 at p 19.

295 Clermont & Currivan, *supra*, n 173 at 580–581; Jay, *supra*, n 1 at 831–835; Schneyer, *supra*, n 115 at 391, 410; *Hearings*, *supra*, n 1 (Statement by Richard Vuernick); Kritzer, "The Wages of Risk", *supra*, n 21 at 309. Kritzer also argues that as his study of Wisconsin lawyers has shown, if the market is allowed to operate freely, many lawyers will enter into agreements whereby they would charge lower percentages for cases resolved early in the litigation process: *ibid* at 307.

296 Clermont & Currivan, *ibid*; Jay, *supra*, n 1 at 831–834; Schneyer, *supra*, n 115 at 391; Schwartz & Mitchell, *supra*, n 142 at 1145.

in making his offer of settlement" must be made available to plaintiffs for a settlement offer to be effective.

(d) When plaintiffs reject defendants' early offers, contingency fees may only be charged against net recoveries in excess of such offers.

(e) If no offer is made within the 60-day period, contingency fee contracts are unaffected by the proposal.[297]

159 This proposal has received some support, partly because it prevents lawyers from making windfalls through settlement and eliminates the conflicts of interest that may arise when an offer for settlement is made. At the same time, it compels defendants to make reasonable offers since low ball offers for settlement will not be recommended by percentage contingency fee lawyers who would only be paid by the hour if the settlement is accepted.

160 The Brickman proposal has much to commend itself of and if percentage contingency fees are adopted, it may be a useful mechanism to rein in the excesses that may emerge. However, it is not free from criticism[298] and my view is that, like percentage caps and other suggestions built upon the framework of the percentage contingency fee, the proposal is flawed in that it does not completely address the fact that lawyers are not compensated based on the amount of work that is done or the skill involved. The proposal merely mitigates some of the problems of the percentage contingency fee, whilst leaving other fundamental flaws uncorrected. As such, it may not be wise to adopt this fee structure or any of its variants.

297 Brickman, *Rethinking Contingency Fees*, *supra*, n 1 at 27–28 (citations omitted). See also O'Connell, *supra*, n 169.

298 Galanter, for example, disapproves of this proposal and its progeny as he feels that they "may impair [the contingency fee lawyers'] ability to contend with the defendants. Reducing the incentives for plaintiffs' lawyers may reduce investments in lawyering for plaintiffs and thus increase the disparities in lawyering and further skew the distributive outcomes. This is compounded by the proposal for one-way offers of settlement, which provide asymmetrical opportunities for defendants to affect the amount and timing of lawyering for the claimants": Galanter, "Anyone Can Fall Down a Manhole", *supra*, n 115 at 468–69. Similarly, Kritzer argues that the proposal "reflects a lack of understanding of what representation of injured parties entails" and implicitly suggests that the proposal will lead to a great decrease in supply of lawyers willing to work on a contingency fee basis as they will, in most cases, be compensated more poorly than if they worked on an hourly fee basis: Kritzer, "Seven Dogged Myths", *supra*, n 71 at 777. See also Schneyer, *supra*, n 115 at 408–410.

161 Having ruled out the percentage contingency fee, it is submitted that the best way of achieving optimal access to justice for Singaporeans is a combination of various contingency fee structures. First, the least objectionable type of contingency fees, the speculative fee, should be permitted. While lawyers providing their services *pro bono* are no doubt the most noble of our profession, as pointed out by Ostler J in *Sievwright v Ward*, taking up a case on a speculative basis is also honourable and allowing lawyers to do so is consistent with public policy.[299] There is little danger in opening the legal profession to this fee structure, which has been relied upon in many Commonwealth jurisdictions for decades.[300]

162 Second, to supplement the speculative fee, which would probably only be relied upon in the few cases where success is almost certain,[301] a CLAF should be set up. Though the CLAF scheme is premised on the percentage contingency fee and therefore envisages apportioning part of the plaintiff's recovery to the fund, Justice has suggested that any profits made at the end of a period be distributed to applicants.[302] As such, applicants are assured that they are "paying" the lowest possible "premium" for the insurance function provided by the fund.

163 Finally, it is submitted that conditional fees with an uplift capped at 100% should be introduced to ensure that the public has the widest possible choice of funding since there will be scenarios where it would be to a plaintiff's benefit to retain a lawyer under a conditional fee agreement instead of turning to the CLAF. While the use of conditional fees is not exempt from conflicts of interest and other problems, the propensity for such occurrences is less than if percentage contingency fees were resorted to and with proper regulation, these negative effects can be minimised.

164 The benefit of relying on this three-pronged approach to providing increased access to justice is that these mechanisms will serve to generate competition within the legal profession and ensure that lawyers do not charge excessively. It should also be noted that this proposal would not put Singapore in a unique position, since at least

299 *Supra*, nn 78 and 80.

300 See *supra*, Section IC. This was also the opinion stated in the 1989 Green Paper. See Lord Chancellor's Department, *Contingency Fees*, *supra*, n 13 at p 10.

301 The Scottish experience is that only 1% of cases are taken up on this basis: *ibid*.

302 Justice, *supra*, n 289 at 48–49.

one Australian state, South Australia, currently has all three mechanisms in place.[303]

165 Before concluding, I would like to emphasise the importance of a carefully designed regulatory framework in the implementation of the above proposal, especially for the introduction of conditional fees. Otherwise, as the English have experienced with their experiment, problems may emerge. The day after Lord Mackay signed the statutory instruments which allowed conditional fees to be used in England and Wales, he stated that "[t]he important thing is that the uplift reflects the risk." The problem is that Lord Mackay placed too much faith in the market. He believed that market forces would influence the negotiation of uplifts, which he felt would also be reined in by the taxation process. As such, he took the position that the conditional fee system should not be subject to unnecessary regulation[304] and the regulations passed pursuant to the introduction of the fee structure "governed conditional fees with a light touch"[305] and did not go a long way to protecting clients from potential abuses.

166 This initial position may account for the mixed data found in the PSI report and a subsequent study, which led commentators to conclude that despite some encouraging signs that conditional fees were successfully opening up access to justice and that many lawyers were behaving ethically, "the initial regime for regulating success fees was ineffective."[306] A detailed analysis of the weaknesses of the early English regulatory framework is outside the scope of this paper but essentially, there was evidence that many English lawyers did not analyse the probability of success in percentage terms though the calculation of conditional fees relied on this practice.[307] And, even when they did, the data suggested that there was the possibility that "some solicitors might be deliberately overestimating risk to justify charging clients a higher

303 Although not employed together at the same time as a coherent strategy to ensure access to justice, these mechanisms have been available in South Australia since 1993. As stated above in Section IC, speculative fees have been allowed in Australia for decades. In 1992, South Australia introduced the Litigation Assistance Fund, which protected a client from having to pay his own fees, but required him to pay 15% of the amount recovered if he was successful in the litigation. In 1993, the state allowed lawyers to charge up to double the scale fees that would normally be charged (100% uplift), if plaintiffs were successful in their actions: Access To Justice Advisory Committee, *supra*, n 4 at pp 179–180.

304 Lord Mackay, *supra*, n 99 at 10. See also Yarrow & Abrams, *supra*, n 3 at 196.

305 Yarrow & Abrams, *ibid*.

306 *Ibid* at 201.

307 *Ibid* at 199.

uplift"[308] since there was nothing to prevent the conditional fee lawyer from charging excessively by estimating a higher risk than necessary.[309] On top of this, some lawyers began to charge percentage contingency fees because the existing statutory regulation did not prevent them from slipping in under the guise of conditional fees.[310] With regard to clients, research showed that they seldom compared conditional fees offered by different lawyers and rarely tried to negotiate a lower fee, being totally reliant on their lawyers for the assessment of risks involved in litigation.[311] These, and other troubling trends called for a change in regulatory approach. Fortunately, the new Lord Chancellor, Lord Irvine, believes in greater regulation of lawyers' fees[312] and passed the Conditional Fee Agreements Regulations 2000, which attempted to resolve some of the perceived problems of the earlier regulations.

167 In order to ensure that conditional fees are effectively regulated, two critical objectives must be secured. First, regulations must ensure that clients are provided the information that they need in order to make a choice about which fee structure would best meet their needs.[313] To this end, lawyers must be compelled, *inter alia*, to inform their clients accurately of the risks involved, explain the various types of fee structures available and to provide objective advice on which structure is best for them.[314] Furthermore, they should be required to offer their clients the option of representation on an hourly basis[315] and inform them of circumstances when they may seek assessment of the fees and expenses and the procedure for doing so. The second critical regulatory objective is that conditional fee lawyers have to be regulated such that

308 Yarrow, *supra*, n 108 at pp xii–xiii.

309 Graffy, *supra*, n 102 at 85.

310 Yarrow & Abrams, *supra*, n 3 at 199.

311 *Ibid* at 201.

312 Lord Chancellor's Department, *Modernising Justice*, *supra*, n 107 at p 22.

313 See Access To Justice Advisory Committee, *supra*, n 4 at pp 178, 188–189.

314 Schwartz, *supra*, n 1 at 399. Brickman argues that as a fiduciary, a lawyer owes a duty to his client to provide all information that will impact on the client's ability to consent to a contingency fee agreement. If he does not provide this information, he does not deal fairly with his client and is in violation of his fiduciary obligations: Brickman, "Contingent Fees Without Contingencies", *supra*, n 1 at 52–53. It should be noted that a lawyer is currently already obligated to provide his client with information on the basis of his fees and reasonably foreseeable payments. Furthermore, he has to furnish estimates of the fees and other payments payable, which cannot vary substantially from the final amount charged, unless the client is informed in writing of any changes in circumstances: Professional Conduct Rules, *supra*, n 56, r 35.

315 At least two states in the United States, New Jersey and Wisconsin, require this: Jay, *supra*, n 1 at 823.

they do not charge excessively and their fees do not consume an excessive part of the award or settlement received by the plaintiff. In connection with this, it is recommended that any fee charged should be statutorily capped at 25% of the total amount recovered by the plaintiff.[316] However, the regulations must clearly prevent conditional fees from evolving into percentage contingency fees with their potential for larger profits for less work.[317] Finally, conditional fee lawyers should be required to specify, in the conditional fee agreement, the reasons for setting a particular uplift percentage and how much, if any, of this percentage relates to other elements of risk apart from the risk of failing in the action.[318]

168 The above suggestions are but some of the many important regulatory details that have to be ironed out and some have been implemented in the English Conditional Fee Agreements Regulation 2000.[319] No doubt, a comprehensive study of the current English, Scottish and Australian regulations and codes of ethics should be done in order to construct the best possible regulatory framework for a system which allows for a CLAF as well as speculative and conditional fees.[320]

169 Apart from the need to devise proper regulations to govern the use of contingency fees, an important consideration is how the contingency fee system will fit into Singapore's legal framework and whether this framework will have to be overhauled in order to accommodate the fee structure. In particular, two important questions are whether and how the fundamental rules of law to the effect that a lawyer's primary duty is to the court will be affected by the use of contingency fees since lawyers relying on such fees will have a direct interest in the outcome of litigation. Further questions that arise from these pertain to the type of cases where contingency fees should be allowed or disallowed and whether the rules of procedure premised on

316 Although there is no such cap in England, this is the de facto position since most conditional fee lawyers have used the model agreement produced by the Law Society, which limits conditional fees to 25% of the sum recovered: see Yarrow, *supra*, n 108 at p xv. Nevertheless, it would be prudent to cap this figure statutorily or at least set up a mechanism whereby conditional fee agreements which provide for a higher cap are reviewed by the courts to ensure fairness to the client.

317 Graffy, *supra*, n 102 at 74.

318 Access To Justice Advisory Committee, *supra*, n 4 at p 190.

319 See especially rr 3 and 4.

320 An American perspective might also be useful. For detailed articles on the regulatory and ethical dimensions surrounding contingency fee reforms suggested for the United States, see Brickman, "Contingent Fees Without Contingencies", *supra*, n 1; Jay, *supra*, n 1; Schneyer, *supra*, n 115; Schwartz, *supra*, n 1.

the presumption that a lawyer is independent have to be altered to give cognisance to the fact that this independence is no longer unquestionable.

170 These questions are complex and should be dealt with in greater detail in a further study on the implementation of the contingency fee system. However, I believe that they do not pose an insurmountable obstacle to the introduction of the fee structure. The fact is that the independence of lawyers has never been absolute. Yet this has not deterred jurisdictions such as Australia and the United Kingdom from introducing the contingency fee into their legal systems. There is no reason why Singapore cannot similarly graft the fee structure into our system successfully.

171 No doubt the principle that a lawyer's primary duty is to the court should not be changed. Lawyers should remain duty-bound not to "deceive or mislead the Court, any other advocate and solicitor, witness, Court officer, or other person or body involved in or associated with Court proceedings"[321] and should not act in a manner that would conflict with "the interests of justice, public interest and professional ethics".[322] Furthermore, if contingency fees are introduced into Singapore, judges should be made aware of their use in cases before them so that they will be able to exercise greater vigilance to the possibility of unethical behaviour. However, as already advocated above, the fear of such behaviour should not deprive Singapore's population from greater access to justice. Safeguards can, and should, be introduced to identify and punish errant lawyers who intentionally ignore their duty to the court.

Conclusion

172 The contingency fee debate can be located within the framework of the broader debate of whether legal practice is a business or a profession.[323] Few legal systems, if any, force the legal profession into either extreme and the question is where Singapore wants to be situated "along the continuum between the strictly business/economics and the strictly professional."[324] Traditionally, we have always preferred the professional but in recent years, Singapore has demonstrated its

321 Professional Conduct Rules, *supra*, n 56, r 56.

322 Professional Conduct Rules, *ibid*, r 54.

323 See generally, Detlev F Vagts, "Professional Responsibility in Transborder Practice: Conflict and Resolution" (2000) 13 Geo J Legal Ethics 677 at 679–687; Abrams *et al*, *supra*, n 139 at 76–78; Graffy, *supra*, n 102 at 76–79.

324 Vagts, *supra*, n 323 at 679.

preference for the business/economics as we have allowed for the incorporation of law corporations and more freedom in advertising by lawyers. In doing so, we have become part of a global movement that recognises the reality of the modern legal practice. Despite a lawyer's duty to the court, he effectively runs a business and needs to make ends meet and be incentivised to reach the best possible outcome for his client.

173 The contingency fee is simply one element of the business-orientated approach, where lawyers' compensation centres on a freely negotiated contract between attorney and client.[325] It is true that clients are often at a disadvantage in terms of bargaining power and as such need protection. However, the liberalisation of lawyers' compensation will, as with the liberalisation of other service industries, also lead to more consumer choice and greater flexibility in creating products that will suit the client. What contingency fees provide to the client is the prospect of having legal services which are more costly if he succeeds, but cheaper should he lose.

174 It is, no doubt, true that regulating the legal profession as a business will not be easy and this shift may lead to negative consequences. But we must not ignore the fact that the business-profession divide is a continuum and not a dichotomy. Perils lie at either extremes and there is no perfect point of repose that is ideal for every jurisdiction. The need to maintain ethical standards and balance conflicts of interest is not always opposed to the ideal of equal access to justice. However, when they clash, a compromise is far more acceptable than arguments that we should choose the former simply on the basis that "for hundreds of years the profession has been wisely advised to keep it that way"[326]. Nor should we ignore the fact that ethics are a part of the contingency fee debate. It is very much at the centre of the debate since the adoption of contingency fees poses a challenge to the legal profession. In order to live up to our calling as a body that brings justice to all people, whether rich or poor, we will have to ensure that when we rely on contingency fees, we will always place our interests behind that of our clients'. This change may not be easy but it is important to heed the sentiments of Justice Lucas Thompson about contingency fees:

> [Such contracts] are in fact based on [the client's] ability to pay. Abrogate the right to so contract, and … you virtually close the doors of justice upon the party aggrieved in the cases. The genius of this practical and utilitarian age [renders old rules] as inapposite and

325 *Ibid* at 683.

326 Graffy, *supra*, n 102 at 87.

> inappropriate, in reference to the affairs of mankind in this age, as would be the code of chivalry promulgated by the Knight of La Mancha to the common every-day concerns of life.[327]

175 With the unemployment rate soaring and economic growth just recovering from Singapore's deepest recession since its independence, Singapore has to grapple with many issues. However, one of the issues that cannot be ignored is how to provide Singaporeans with meaningful access to justice. In 1989, MP Mr Davinder Singh SC pointed to the Green Paper that had just been presented to the English Parliament and asked if the Singapore government had considered the application of contingency fees in Singapore. In response, Minister of Law Professor Jayakumar stated that before the government considered adopting the fee structure, it wanted to see the eventual solutions arrived at in the United Kingdom and also have the issue debated amongst the lawyers in the Law Society of Singapore.[328] Fifteen years have passed and conditional fees have been permitted in England and Wales for almost eight years. Thus far, the Law Society of Singapore has been silent on this issue. It is time that the Singapore bar rises to the occasion and debates this issue since it lies at the foundations of our profession. It may be that the proposals suggested in this paper are too sweeping and better solutions may exist. However, it is our duty to ensure that this issue is not ignored or swept under the rhetoric of the *argumentum ad Americanum*.

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[327] Karsten, *supra*, n 32 at 242 (quoting *Major's Ex' v Gilson* (1855) 1 Pat & H 48 at 83).

[328] *Singapore Parliamentary Debates, Official Report* (27 March 1989) cols 852, 857.