THIRD-PARTY LITIGATION FUNDING AGREEMENTS: A COMPARATIVE STUDY

by

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SUMMARY

In third-party litigation funding agreements, funders agree to finance a litigant's litigation on condition that the funder will deduct a specified percentage from the capital awarded to the litigant in the event of success. In contingency fee agreements, such funding is provided by lawyers. Initially both these agreements were illegal in South Africa and England, but as civil courts became able to counter corruption and abuse – and with the recognition of the need to give more litigants access to justice – both were recognised as legal. Third-party litigation funding agreements by non-lawyers are unregulated in most jurisdictions. As the voluntary self-regulation in England is unsatisfactory, mandatory statutory regulation should be introduced in South Africa. The Contingency Fees Act 66 of 1997 caps the fee to 25% on the capital amount in South Africa. Since no such cap exists in Ontario (Canada), the cap of 25% in South Africa should be revised.

NKOMISO

Eka Mintwanano yo nyika nseketelo wa mali eka nandzu wa thedi phati, vanyiki va mali va pfumela ku hakela mali ya nandzu wa mumangali hi xipimelo xa leswaku munyiki wa mali u ta susa phesenteji leyi kombisiweke ku suka eka mali leyi nyikiweke mumangali loko a humelela. Eka mintwanano ya tihakelo ta vukorhokeri, nseketelo walowo wa mali wu nyikiwa hi maloyara. Ekusunguleni mintwanano leyi hinkwayo a yi nga ri enawini eAfrika Dzonga na le England, kambe tanihi leswi tikhoto ta mfumo ti koteke ku kokela etlhelo eka timhaka ta vukungundzwana na nxaniso- na ku anakanyiwa ka xilaveko xo nyika vamangali votala mfikelelo wa vululami- hinkwayo yi anakanyiwile tanihi leyi nga enawini. Mintwanano yo nyika nseketelo wa mali eka nandzu wa thedi phati hi vanhu lava nga riki maloyara a yi lawuriwi eka vuavanyisi byotala. Tanihileswi vutilawuri byo tinyiketa eEngland byi nga riki kahle, mafambiselo ya nawu lama lavekaka ya fanele ya tivisiwa eAfrika Dzonga. Nawu wa Tihakelo ta Vukorhokeri wa 66 wa 1997 wu veka mpimo wa hakelo eka 25% eka xiphemu xa tsengo wa mali eAfrika Dzonga. Ku sukela loko ku ri hava mpimo lowu nga kona eOntario (Canada), mpimo wa 25% eAfrika Dzonga wu fanele wu langutisiwa hi vuntshwa.

MANWELEDZO

Kha thendelano dza ndambedzo dza mbilo ine ya itelwa muthu, vhabadeli vho tenda u badela mbilo ya muthu o no khou itelwa mbilo tenda mubadeli a tshi ḓo ṱusa phesenthe yo tiwaho kha tshelede yo avhelwaho muthu ane a khou itelwa mbilo arali a kunda. Kha thendelano dza mbadelo dzine dza badelwa musi ramilayo o no kunda kha mulandu, mbadelo idzo dzi ṋetshedzwa nga vhoramilayo. Mathomoni thendelano idzi vhuvhili hadzo dzo vha dzi siho mulayoni Afurika Tshipembe na England, fhedzi musi khothe dza mbilo dzi tshi vho thoma u hanedzana na tshanḓanguvhoni na u tambudzwa - na u dzhiela nṱha ṱhoḓea ya u ṋea vhathu vhane vha khou itelwa mbilo u swikelela vhulamukanyi –vhuvhili hadzo dzo dzhiwa sa dzi re mulayoni. Thendelano dza ndambedzo dza mbilo ine muthu a itelwa nga vhathu vhane vha sa vhe vhoramilayo a i langulwi kha vhulamukanyi vhunzhi. Samusi u langulwa ha ndaulo nga iwe muṋe hu ha u tou funa ngei England a zwi ṱanganedzwi, ndaulo ya khombekhombe ya mulayo i fanela u ḓivhadzwa Afurika Tshipembe. Mulayo wa Mbadelo dzine dza badelwa Ramilayo musi o kunda wa nomboro 66 wa 1997 mutengo wawo u guma kha 25% mutengo wa tshelede Afurika Tshipembe. Samusi tshikalo itsho tshi sa wanali ngei Ontario (Canada), tshikalo itsho tsha 25% Afurika Tshipembe tshi fanela u sedzuluswa hafhu.

KEY WORDS

Access to justice

Champerty

Conditional fee agreements

Contingency fee agreements

Lawyers

Maintenance

Non-lawyers

Pactum de quota litis

Public policy

Third-party litigation funding agreements

DECLARATION

Name: Mpho Justice Khoza

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I, Mpho Justice Khoza, hereby declare:

- that **Third-party Litigation Funding Agreements: A Comparative Study** is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references;
- that in pursuit of scholarly work, I have published less than a quarter of this work under my credentials in the Potchefstroom Electronic Law Journal;
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2019/01/16

Signature

Date

Mpho Justice Khoza

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ABBREVIATIONS

ABA	American Bar Association
AD	Appellate Division
ADR	Alternative Dispute Resolution
ALF	Association of Litigation Funders
All ER	All England Reports
All SA	All South African Law Reports (LexisNexis)
ALR	Australian Law Reports
APPCAS	Law Reports Appeal Cases
APP L R	Arbitration Practice and Procedure Law Reports
BCCA	British Columbia Court of Appeal
BCLC	Butterworths Company Law Cases (UK)
BTE	Before-the-event insurance policies
Cal L Rev	*California Law Review*
Can Bar Rev	*Canadian Bar Review*
CBR	Canadian Bankruptcy Reports
CC	Constitutional Court
CCLT	*Canadian Cases on the Law of Torts*
CFA	Contingency Fee Agreements
CILSA	*Comparative and International Law Journal of South Africa*
CJC	Civil Justice Council
CLR	Commonwealth Law Reports
Comm L World Rev	Common Law World Review
Const LJ	*Construction Law Journal* (UK)
CPC	Carswell's Practice Cases
CPD	Cape of Good Hope Provincial Division
DBA	Damages Based Agreements

Depaul L Rev	*DePaul Law Review*
DLR	Dominion Law Reports
DSG	Dal-Sterling Group
EWCA	England & Wales Court of Appeal
EWCA Civ	England & Wales Court of Appeal Civil Division
EWHC QB	High Court of England and Wales Decisions (Queen's Bench Division)
FTC	Federal Trade Commission
GJ	Gauteng Local Division, Johannesburg
GNP	North Gauteng High Court, Pretoria
HCJ	High Court of Justiciary (Scotland)
HL	House of Lords
ICR	Industrial Cases Reports (UK)
ILR	Institute for Legal Reform
J	Judge
JOL	Judgments Online
KB	King's Bench
LASPO	Legal Aid, Sentencing and Punishment of Offenders Act 2012
LJKB	Law Journal (Old Series) King's Bench
Lloyd's Rep	Lloyd's Law Reports
LRAC	Law Reports Appeal Cases
LRCD	Law Reports Chancery Division
LSJ	Law Society Journal
L Q Rev	Law Quarterly Review
Moo Ind App	Moore's Indian Appeals
NLR	Natal Law Reports

N Ky L Rev	*Northern Kentucky Law Review*
NPD	Natal Provincial Division
NSWCA	New South Wales Court of Appeal
OAC	Ontario Appeal Cases
OFSPD	Orange Free State Provincial Division
OLR	Ontario Law Reports
Ont CA	Ontario Court of Appeal
Ont Ct (Gen Div)	Ontario Court (General Division)
Ont Div Ct	Ontario Divisional Court
Ont SCJ	Ontario Superior Court of Justice
OR	Ontario Reports (Canada)
Osgoode Hall L J	*Osgoode Hall Law Journal*
PELJ	*Potchefstroom Electronic Law Journal*
QB	Queen’s Bench
QBD	Queen's Bench Division, Law Reports
SAcLJ	*Singapore Academy of Law Journal*
SA Merc LJ	*SA Mercantile Law Journal*
SALJ	*South African Law Journal*
SALR	South African Law Reports
SALRC	South African Law Reform Commission
SCC	Supreme Court of Canada
SCR	Supreme Court Reports (Canada)
SCA	Supreme Court of Appeal
SDNY	Southern District of New York
Sing J Legal Stud	*Singapore Journal of Legal Studies*
Sing L Rev	*Singapore Law Review*
T	Transvaal Provincial Division

THRHR	*Tydskrif vir Hedendaagse Romeins-Hollandse Reg*
TLR	Times Law Reports
TPD	Transvaal Provincial Division
TS	Transvaal Supreme Court Reports
TSAR	*Tydskrif vir die Suid-Afrikaanse Reg*
UBCLR	*University of British Columbia Law Review*
UCQB	Upper Canada Queen's Bench Reports (1844-1881)
U Pa J Bus L	*University of Pennsylvania Journal of Business Law*
UKPC	United Kingdom Privy Council Decisions
UKHL	United Kingdom House of Lords
US	United States
VLR	Victorian Law Reports
W	Witwatersrand Local Division
WCC	Western Cape High Court, Cape Town
WLR	Weekly Law Reports
WWR	Western Weekly Reports
ZAECGHC	South Africa: Eastern Cape High Court, Grahamstown
ZAGPJHC	South Africa: South Gauteng High Court, Johannesburg

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CHAPTER 1: INTRODUCTION

1.1 Description or definition of agreements

In this study third-party litigation funding agreements are defined as those agreements in terms of which a person (funder) other than a lawyer provides a litigant with funds to prosecute an action in return for a share of the proceeds of the action if the litigation is successful.[1] In South Africa, the third-party litigation funding agreements concluded by lawyers are known as contingency fee agreements and governed by the Contingency Fees Act 66 of 1997 (hereinafter "the Contingency Fees Act"). Contingency fee agreements are defined as agreements whereby a lawyer and his or her client agree on the payment of the legal fees only upon the achievement of success in the legal proceedings.[2] A contingency fee agreement is thus a "no success, no fee" agreement.[3] In England contingency fee agreements are called conditional fee agreements.[4]

All third-party litigation funding agreements are prohibited by the doctrines of maintenance and champerty. Maintenance is defined as "the procurement or assignment, by direct or indirect financial assistance of another person to institute, carry on or defend civil proceedings without lawful justification".[5] Champerty is defined as "the support of litigation by a stranger in return for a share of the proceeds of the action".[6] The research background provides a brief outline of the position of third-party litigation funding agreements and the contingency fee agreements and gives reasons for choosing England and Canada for comparison with South Africa.

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1 *Price Waterhouse Coopers Inc. v National Potato Co-Operative Ltd* 2004 (6) SA 66 (SCA) 66 (Headnote).

2 *The South African Association of Personal Injury Lawyers v The Minister of Justice and Constitutional Development (The Road Accident Fund Intervening)* [2013] 2 All SA 96 (GNP) 98.

3 S 2(1)(a) of the Contingency Fees Act.

4 In terms of section 58 of the Courts and Legal Services Act 1990.

5 Law Commission of England, *Proposal for Reform of the Law Relating to Maintenance and Champerty* (London: Her Majesty's Stationery Office, 1966) para [9].

6 Middleton and Rowley *Civil Costs* 176.

1.2 Brief historical background to the validity of third-party litigation funding agreements

Third-party litigation funding agreements have been in existence for many years in South Africa. However, with a few exceptions the doctrines of maintenance and champerty prohibit these agreements on the grounds that they are against public policy. In South Africa, the enactment of the Contingency Fees Act resulted in the legal acceptance of some litigation funding agreements by legal practitioners. The problem with the Act is non-compliance by lawyers. Attorneys have been disregarding the 25% fee cap on the capital amount in the event of success of the litigation. This has led to many court decisions on the interpretation and calculation of the "success fee" or "uplift fee" which lawyers charge their clients on what they consider success or "partial success" in the contingency fee agreement. The Law Society of South Africa prescribes a format for lawyers when concluding contingency fee agreements with clients.

In South Africa, lawyers commonly violate two provisions of the Act, namely sections 2 and 4. Section 2 deals with the "uplift" or "success fee", and section 4 deals with settlements where the court plays a role in overseeing the fairness of the agreement and deciding whether adequate information has been provided by the lawyer to the client. Attorneys rarely adhere to the provisions of the Contingency Fees Act although they are prescriptive.

In South Africa there is no legislation governing third-party litigation funding agreements for non-lawyers. In *Price Waterhouse Coopers Inc. v National Potato Co-Operative Ltd*[7] the Supreme Court of Appeal watered down the prohibition of third-party litigation funding agreements. The *Price Waterhouse Coopers* case was encouraged by the legislature's regulation of contingency fee agreements through the Contingency Fees Act. There is relatively little literature on third-party litigation funding in South Africa, and as a result, the development of formal regulation has been staggered or even non-existent.. In most countries, it seems to be the commonly held argument that access to justice is reinforced if new forms of funding litigation are allowed to provide litigants with the possibility of pursuing their claims.[8] In South Africa,

7 2004 (6) SA 66 (SCA) 66 (hereinafter *Price Waterhouse Coopers*).
8 See e.g. Hurter 2011 *CILSA* 424.

the right to access to justice is enshrined in section 34 of the Constitution of the Republic of South Africa, 1996.

1.3 Choice of legal systems for comparative research

The reason for choosing English law as the appropriate legal system to compare with South Africa is that English law initially influenced the public policy of both third-party litigation funding agreements and contingency fee agreements in South Africa. The study investigates the English legal system in order to determine the feasibility of formal regulation of litigation funding agreements in South Africa. England is also the first common law country that permitted a self-regulated market for third-party litigation funding agreements.[9] This is why English legal literature contains a larger number of authoritative texts on the subject of third-party litigation agreements. Even the Contingency Fees Act is based on English law.[10]

However, English law will not be discussed for purposes of comparison with regard to contingency fee agreements, although the South African legislation in this field is partly based on English law. The discussion of English law will not contribute towards our understanding of the South African legislation, as there are few uncertain provisions in our legislation. The study will look at a country that applies contingency fee agreements differently to discuss alternative options in applying the Contingency Fees Act. The applicable contrasting country which is discussed on a comparative basis with regard to the application of the Contingency Fees Act and its shortcomings is Canada, more specifically the province of Ontario. The legislation in Ontario proposes a different approach to the conclusion of contingency fee agreements which will form the basis for a valuable comparative study with South African law.

The reason for choosing the Canadian province of Ontario is that both this province and South Africa share the same developmental path with regard to the prohibition of contingency fee agreements. However, in contrast to South Africa, there is no mandatory cap on contingency fee agreements in Ontario, since the courts play a more active role in overseeing the validity of contingency fee agreements and their fairness. The research problem and the purpose of the study is to look at the question

9 Jackson *Review of Civil Litigation Costs: Final Report*.
10 Section 58 of the Courts and Legal Services Act of 1990.

of regulating third-party litigation funding agreements and extending the scope of the Contingency Fees Act.

1.4 Research problem and purpose of study

This comparative research looks at developments in and the consequences of third-party litigation funding agreements as they affect litigants, lawyers and non-lawyers. The purpose of this study is threefold. Firstly, the study investigates the public policy doctrines of maintenance and champerty. The investigation covers the applicability of the doctrines with regard to third-party litigation funding agreements as it relates to the public policy principle of access to justice.

Secondly, the study compares and investigates the manner in which third-party litigation funding agreements have developed in English law. The approach followed was to look into the effectiveness of their private regulation and the way the regulation has improved in English law. The position in English law is then compared with the South African regulation of third-party litigation funding agreements in order to improve the manner in which these agreements operate in South African law. The study also looks at the growth of third-party litigation funding within South Africa and the need for formal regulation. Upon completion of this investigation, recommendations are made on how third-party litigation funding agreements should be regulated.

Thirdly, the study attempts to improve the regulation of contingency fee agreements in South Africa. This is done by investigating and comparing their regulation with that in the province of Ontario, Canada. The manner in which contingency fee agreements are regulated in Ontario, which is different from the manner in which they operate under South African law, will be outlined. The study thereafter incorporates these findings into recommendations on how the South African Contingency Fees Act governing contingency fee agreements could be improved. An outline of chapters is given below to make it easier to navigate through the dissertation.

1.5 Outline of chapters

The research consists of five chapters, the first chapter serving as an introduction. The second chapter deals with the English law perspective on third-party litigation funding agreements. The historical background of third-party litigation funding agreements is discussed. The discussion defines the two main doctrines that prohibit the

agreements, namely champerty and maintenance. The chapter also discusses recent case law which developed the mechanisms available to regulate third-party litigation funding agreements. This includes a discussion of the self-regulation of third-party litigation funding agreements by litigation funders and its shortcomings.

The third chapter is the Ontario perspective on contingency fee agreements. This chapter discusses the development of contingency fee agreements in Ontario, Canada. It also discusses and defines the policy restrictions of champerty and maintenance. This is because the doctrines apply *mutatis mutandis* to contingency fee agreements as they do in third-party litigation funding agreements for non-lawyers. However, the discussion of the historical background in English common law is brief, as this part of the study is thoroughly discussed in chapter 2. The emphasis on this chapter is on the manner in which contingency fee agreements are effectively regulated in Ontario, Canada.

The fourth chapter deals with the South African law perspective on third-party litigation funding agreements. This chapter discusses the development of both third-party litigation funding agreements and contingency fee agreements. The historical discussion includes briefly defining Roman and Roman-Dutch law's *pacta de quota litis.* This section is brief because a thorough English common law historical background to the concepts of maintenance and champerty is discussed in chapter 2. The chapter further compares South African law with both English law on third-party litigation funding agreements for non-lawyers and Ontario law on contingency fee agreements.

The fifth and last chapter includes recommendations and a conclusion. The chapter concludes on the findings from the English law perspective, the law perspective of Ontario, Canada, and the South African law perspective. This includes applicable reforms in South African litigation funding agreements for both non-lawyers and lawyers (contingency fee agreements).

In the study, all the chapters that discuss a comparative legal system will start by discussing the historical background to each legal system. This includes the reasons for the outright restrictions on either third-party litigation funding agreements or contingency fee agreements, the developments of these agreements, policy changes,

and reforms that are yet to take effect with regard to these agreements. The main arguments for and against these agreements are discussed in each chapter together with the advantages and disadvantages of allowing third-party funders to provide financial support to litigants.

CHAPTER 2: ENGLISH LAW PERSPECTIVE ON THIRD-PARTY LITIGATION FUNDING AGREEMENTS

2.1 Introduction

Third-party litigation funding agreements as discussed in this chapter are restricted to those agreements in terms of which a person (funder) other than a lawyer provides a litigant with funds to prosecute an action in return for a share of the proceeds of the action if the litigation is successful. In order to shed light on public policy on third-party litigation funding agreements, the chapter briefly discusses the historical background to litigation funding agreements in English law. The discussion includes the development of conditional funding generally,[11] because there is a degree of intersection of the history of conditional fee agreements or contingency fee agreements and third-party litigation funding agreements. The competing public policy principles of prevention of the abuse of the administration of justice, the right to access justice and freedom of contract are discussed in order to strike a balance between them.

The common law restrictions (champerty and maintenance) on third-party litigation funding agreements are briefly outlined, as they remain applicable in English law to some extent. This is followed by a discussion of the change in public policy regarding maintenance and champerty, which has been brought about mainly by judicial decisions. The advantages and disadvantages of these changes as discussed by commentators from different schools of thought are evaluated while investigating the current legal framework. The chapter further discusses appropriate reforms that would strengthen the current position of third-party litigation funding agreements in English law. This is followed by a conclusion.

2.2 Traditional policy on third-party litigation funding in England: Maintenance and champerty

In *Fischer v Kamala Naicher*[12] the court decided that champerty and maintenance go against public policy and justice, tend to promote unnecessary litigation and are, in the legal sense, immoral.[13] Since champerty and maintenance are contracts, it is prudent

11 Frinson *Civil Costs* 1382.
12 [1860] 8 Moo Ind App 170.
13 *Fischer v Kamala Naicher* [1860] 8 Moo Ind App 170 187.

to consider that a contract is illegal for being contrary to public policy only if its harmful tendency is clear, that is, if injury to the public is its probable and not merely its possible consequence.[14] Contracts tainted with maintenance and champerty are often held to be "void" or "unenforceable" by the courts unless they fall under one of the exceptions that will be discussed in this chapter.[15] These contracts are perceived to be against public policy because they tend to hinder the proper administration of justice.[16]

However, as Beale *et al* state, general public policy favours upholding contracts that have been freely entered into by contracting parties.[17] Peel states, however, that a contract is against public policy and consequently illegal if the mere making of it is a legal wrong (it contravenes either the common law or statute).[18] Maintenance and champerty were indeed previously crimes and torts for which damages were recoverable.[19] Middleton and Rowley state that in determining whether a contract made with the involvement of a third-party is unenforceable the courts must look at the facts of each case.[20]

These doctrines developed during England's feudal past in order to combat abuses of the legal process resulting from third-party intervention in litigation of others.[21] Lord Philimore explains the Champerty Act of 1275 and earlier statutes[22] in *Neville v London "Express" Newspaper Ltd*[23] by holding that:

> [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 or defences. And the statutes are directed against

14 *Fender v St John Midway* [1938] AC 1 13.
15 E.g *Hutley v Hutley* (1873) LR 8 QB 112; *Martell v Consett Iron Co Ltd* [1955] Ch 363; *Bennet v Bennet* [1952] 1 KB 123 136.
16 Peel *Contract* 940.
17 Beale et al *Contract* 940.
18 Peel *Contract* 474.
19 Frinson *Civil Costs* 469.
20 Middleton and Rowley *Civil Costs* 176.
21 Winfield 1919 *L Q Rev* 235; see also Thomas 1981 *Comm L World Rev* 45.
22 Winfield 1919 *L Q Rev* 70.
23 [1919] AC 368.

> maintenance, champerty and confederacy or conspiracy, while embracery or subornation of perjury were some of the means used to secure these unlawful ends.[24]

Rabin states in his discussion of maintenance and champerty that:

> [L] egal justice consists in the right determination by a judge of a controversy between two litigants. Even in criminal law there is regularly an accuser and an accused, whether the accuser is there in a representative capacity or as a party injured. In the early history of law, there was a strong feeling not only that these three parties, the judge and two litigants were necessary but that there must be no one else and that anyone who intruded himself between the judge and the parties could only mean mischief.[25]

It should be noted, however, that in mediaeval times the public policy against the doctrines of maintenance and champerty was initially not aimed specifically at the control of lawyers or the promotion of a code of legal ethics for them, as is the case in modern times.[26] Initially lawyers were exempted from the provisions of the statutes prohibiting maintenance and champerty. The justification was that lawyers were not maintainers or champertors but that those who employed their services were tainted with the crime.[27] The intended purpose of these statutes was to maintain the purity of the legal system, prevent speculation in litigation by third parties who were not directly involved in the litigation, and prevent abuse of the legal process.[28] Rabin points out that it was easier for lawyers to commit such offences than for persons outside the judicial system.[29] Under the next subheading, champerty will be discussed briefly as the first of the two doctrines prohibiting the abuse of the administration of justice that was prohibited by legislation and the courts.[30]

2.2.1 Champerty

The violation of the doctrine of champerty was regarded as more intolerable than maintenance.[31] It is evident that from its inception the doctrine of champerty was intended to counter corruption and abuse in the English judicial system during feudal

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24 *Neville v London "Express" Newspaper Ltd* [1919] AC 368, 427; confederacy or conspiracy means to conspire to forge and put in evidence at a trial; and embracery or subornation is defined as a favour by officers of the court: see Jackson 1882 *Wash L Rep* 369.

25 Rabin 1935 *Cal L Rev* 48.

26 Thomas 1981 *Comm L World Rev* 45.

27 Rabin 1935 *Cal L Rev* 65; see also Winfield 1919 *L Q Rev* 59.

28 For a discussion of these concerns and the history of champerty, see Rubin 2011 *Cal Rev* 48.

29 Rabin 1935 *Cal L Rev* 65.

30 Champerty Act of 1275; see also *Hutley v Hutley* (1873) LR 8 QB 112; *Bennet v Bennet* [1952] 1 KB 123 136; *Martell v Consett Iron Co Ltd* [1955] Ch 363; Winfield 1919 *L Q Rev* 57.

31 *Giles v Thompson* [1993] 3 All ER 321 HL 328.

times.[32] Impecunious plaintiffs were more likely to enter into champertous agreements with their lawyers, who were often the less successful solicitors.[33] Rabin mentioned that in rare situations it was possible that the crime of champerty might be committed on behalf of a defendant.[34]

The effect of champertous contracts was that such agreements were unenforceable between the parties.[35] However, the court in *James v Kerr*[36] held that sums actually advanced to the champertor under the agreement were recoverable. The defendant could not use the champertous support of the plaintiff as a defence to the action and such defence afforded no ground for a stay of the proceedings.[37] It is clear that the courts consistently disapproved of champertous agreements and were quick to strike down any agreement tainted by the crime of champerty.[38] For example, Lord Denning in *Re Trepca Mines Ltd (No.2)*[39] stated that:

> … [B]ut there is one species of maintenance for which the common law rarely admits of any just cause or excuse and that is champerty… the reason why the common law condemns champerty is because of the abuses to which it may give rise. The common law fears that the champertous maintainer might be tempted, for his personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses. These fears may be exaggerated; but, be that so or not, the law for centuries has declared champerty to be unlawful, and we cannot do otherwise than enforce the law.

Towards the end of the feudal period, after corruption had decreased and the struggle between the crown and its feudal lords had subsided, the courts' focus shifted from champerty to another concern.[40] This concern was with the doctrine of maintenance where individuals with no interest in a suit would encourage and/or assist others in a court action. Such instances might lead to an increase in litigation resulting in a more litigious society.[41] The doctrine of maintenance will be discussed below.

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32 The Statute of Westminster of 1275, which was the first statute to prohibit champerty in chapter 25 and maintenance in chapter 28, supports this view. Eight statutes further followed the Statute of Westminster of 1275; see Winfield 1919 *Law QR* 59. The statutes were said to be simply declaratory of the common law; see *Pechell v Watson* (1841) 8 M & W 691, 700; Winfield 1919 *L Q Rev* 56.

33 Rabin 1935 *Cal L Rev* 66.

34 66.

35 *Hutley v Hutley* (1873) LR 8 QB 112; see also Tolhurst *Contract* 191.

36 (1888) 40 Chd 449; See also *Carpenter v Boyce* (1896) 22 VLR 248 253.

37 *Martell v Consett Iron Co Ltd* [1955] Ch 363.

38 Balachandran 1999 *L Soc J* 73.

39 [1963] 1 Ch 199 219.

40 Winfield 1919 *L Q Rev* 59.

41 Winfield 1919 *L Q Rev* 59.

2.2.2 Maintenance

Maintenance is the involvement of a third-party in litigation where the party does not stand to gain from the litigation and where the maintenance agreement is against public policy. The public policy principle against maintenance was established to protect the administration of justice. The decision in *British Cash and Parcel Conveyors Ltd v Lamson Store Service Co Ltd*[42] elaborated as follows:

> [I]t is directed against wanton and officious intermeddling with the disputes of others in which the maintainer has no interest whatever, and where the assistance he renders to one or other party is without justification or excuse.

The involvement of a third-party without any interest in the litigation opened the door to the abuse of the legal process or the pursuit of justice.[43] The argument was that the third-party involvement encouraged speculative litigation in cases without merit.[44] This concern brought about distrust in cases financed by third parties.[45]

Winfield also states that apart from the above, there might also have been a concern that maintainers with an interest in the legal proceedings had an incentive to pervert the judicial process.[46] The doctrine of maintenance was developed during a time when litigation was increasingly encouraged by third parties. In support of this, Rabin states that this was one of the last manifestations of feudalism.[47]

Initially, maintenance was considered to be the unlawful support of litigation by word, writing, countenance or deed.[48] In the late eighteenth century, the law even went so far as to recognise that the volunteering of information in a lawsuit would suffice to constitute maintenance.[49] Frinson claims, however, that today maintenance generally focuses on financial aid, such as funding or the provision of legal aid.[50] The

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42 [1908] 1 KB 1006, 77 LJKB 649 CA 1014; see also *Wallis v Duke of Porland* (1797) 3 Ves 494; *Alabaster v Harness* [1895] 1 QB 339, CA 342; Law Commission *Maintenance and Champerty* para [9]; *Giles v Thompson* [1994] 1 AC 142 161; Tolhurst *Contract* 189.

43 For a discussion of these concerns and the history of the law of champerty see Rabin *Cal L Rev* 48; Winfield 1919 *L Q Rev*.

44 Hodges, Peysner and Nurse *Litigation Funding* 12.

45 See further Hodges, Peysner and Nurse *Litigation Funding* 12.

46 59.

47 Rabin 1935 *Cal L Rev* 65.

48 Winfield 1919 *L Q Rev* 54.

49 *Master v Miller* (1791) 4 Term Rep 320 340.

50 Frinson *Civil Costs* 469.

assignment of a "bare cause of action" is considered unlawful,[51] because it would allow a doubtful or fraudulent claim to be transferred to a person of influence or power, who (in a legal system that was still influenced by patronage) could then expect a sympathetic hearing in court proceedings.[52]

Most forms of maintenance have been allowed since 1895 if the third-party has a legitimate interest in the outcome of the claim or if he had a reasonable belief that he had such an interest.[53] The legitimate interest is not restricted to instances where the third-party maintains a claim for financial or commercial gain in the event of success in the litigation.[54] It also extends to other circumstances where social, family or other ties justify the maintainer in supporting the litigation.[55] The interest must, however, be distinct from any benefit, which arises under the contract since this is allegedly illegal as constituting maintenance.[56] In *Neville v London Express Newspaper Ltd*,[57] the court stated the following in respect of who could be considered to have a legitimate interest:

> [S]uch an interest is held to be possessed when in litigation a master assists his servant, or a servant his master, or help is given to an heir, or a near relative, or to a poor man out of charity, to maintain a right which he might otherwise lose.[58]

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51 The assignment of a bare cause of action is where the assignee has no real interest in the property that is the object of the assigned suit; all he or she wants from the lawsuit is to profit from the vindication of the assignor's right; Sebok 2011 *Vand L Rev* 89.

52 See *Giles v Thompson* [1993] 3 All ER 321 328; cited by Baroness Hale in *Massai Aviation Services v Attorney-General* [2007] UKPC 12 15.

53 See *Alabaster v Harness* [1895] 1 QB 339 CA; see also *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679 694; *Bourne v Colodense Ltd* [1985] ICR 291.

54 See also *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679 694; *Bourne v Colodense Ltd* [1985] ICR 291; *Buday v Location of Missing Heirs Inc* [1993] 16 O.R. (ed) 262; *Giles v Thompson* [1994] 1 AC 142; *Circuit Systems Ltd & Basten v Zucken Redac (UK) Ltd* (1995) 11 Const LJ 201 209; *Condliffe v Hislop* [1996] 1 WLR 753; *Abraham v Thompson* [1997] 4 All ER 362; *Thai Trading Co (a firm) v Taylor* [1998] 3 All ER 65; *Dal-Sterling Group Plc v WSP South & West Ltd* [2002] Technology and Construction Law Reports 20; *Dix v Towned* [2008] APP. L.R. 06/30.

55 *Thai Trading Co (a firm) v Taylor* [1998] 3 All ER 65 69; see also *Ellis v Torrington* [1920] 1 KB 399 406; Torlhurst *Contract* 192.

56 *Giles v Thompson* [1994] 1 AC 142 163.

57 [1919] AC 368.

58 389; Earlier before *Neville* in the case of *Bradlaugh v Newdegate* (1883) 11 QBD 11 Lord Coleridge CJ also spoke of 'the interest which consanguinity or affinity to the suitor give to the man who aids him, or the interest arising from the connection of the parties, e.g. as master and servant'; See also *Burke v Greene* (1814) 2 Ball & B 517; *Condliffe v Hislop* [1996] 1 WLR 753 where the court held that it was not unlawful for a mother to provide funds to finance her bankrupt son's action for defamation.

In other cases, litigation assistance was justified on the basis that the funder is financing the litigant as an act of charity,[59] on the basis of religious ties,[60] or when finance is provided by insurance companies defending claims,[61] which includes body corporates.[62] Financial institutions were also permitted to fund litigation where this is part of the service that they provide. A bank may thus offer a disbursement-funding loan, and a legal expenses insurer may fund the provision of legal services.[63] In addition to the above exceptions to maintenance, the other exception was provided by the court in *Circuit Systems Ltd & Basten v Zucken Redac (UK) Ltd*.[64]

The effect of maintenance is that such a contract is ordinarily held to be unenforceable between the contracting parties.[65] It is not a defence to the action either.[66] Before the amendment of sections 13 and 14(1) of the Criminal Law Act of 1967 which abolished the unlawfulness of both maintenance and champerty, the remedy of the other party to the litigation was an action in tort.[67] In instances where there is a claim for maintenance, the position is that the court will not stay proceedings which are being maintained, provided the proceedings do not constitute an abuse of the process of the court, that is, where an action has been commenced in bad faith with no genuine belief in its merits but commenced for an ulterior purpose.[68]

Tolhurst states that ever since the tort of maintenance was recognised by the courts, the successful party to the action could claim the costs from the maintainer if the other

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59 See *Harris v Brisco* (1886) 17 QBD 504; *Jennings v Johnson* (1873) LR 8 CP 425; *Ram Coomar Coondoo and Another v Chunder Canto Mookrjee* (1876) 2 APPCAS 186 210; *Holden v Thompson* [1907] BCLC 723 CA; Cole v Booker (1913) 29 TLR 295; *Hamilton v Fayed* [2001] EWHC QB 389; *Dix v Townend* [2008] APP. L.R. 06/30 para [29].

60 *Rothewel v Pewer* (1431) YB 9 Hen 6 64, pl 713.

61 *Hill v Archbold* [1968] 1 QB 686 694-695; See also *Bourne v Colodense Ltd* [1985] ICR 291.

62 See *Scott v National Society for the Prevention of Cruelty to Children* (1909) 25 TLR 789.

63 See, for example; *Martell v Consett Iron Co Ltd* [1955] Ch 363 416; *Trendtex Trading Corp v Credit Suisse* [1980] QB 629 668.

64 (1995) 11 Const LJ 201 209 (on appeal this point did not have to be decided: [1996] 3 All ER 748) held that despite the judgment of the court in *Prudential Assurance Co Ltd v Newman Industries Ltd* [1982] Ch 204 a majority shareholder in a company possesses sufficient interest so that an assignment to him of the company's cause of action is not against public policy (shareholder had standing to bring action where wrong to the company allegedly reduced the value of his shares).

65 *Cole v Booker* (1913) 29 TLR 295 297.

66 *Martell v Consett Iron Co Ltd* [1955] Ch 363.

67 Champerty Act of 1275; see also Beale et at *Contract* 966.

68 *Abraham v Thompson* [1997] 4 All ER 362; See also *Martell v Consett Iron Ltd* [1995] 1 Ch 363; *Cole v Booker* (1913) 29 TLR 295 297.

party to the action could not pay the costs.[69] However, it was necessary to provide evidence for loss or damage resulting from the maintenance.[70]

Maintenance and champerty can also affect solicitors although, a solicitor may conduct litigation despite having knowledge that his or her client has entered into a champertous agreement. The solicitor may not be able to recover costs if the solicitor actively participated in the agreement despite the fact that he or she is not a party to the agreement.[71]

Public policy on the prohibition of champerty and maintenance has been transformed over the years.[72] The transformation was necessitated by the fact that the prohibition of maintenance and champerty emerged in a society that was different from English society today, and reflected policy considerations that may no longer be relevant in today's society.[73] The section below will analyse the case law on public policy regarding access to justice and the protection of the administration of justice against abuse.

2.3 Analysis of English case law

There has been a gradual transformation of the public policy against maintenance and champerty and a more flexible approach has been introduced.[74] This was reaffirmed in *R (Factortame Limited and others) v Secretary of State for Transport, Local Government and the Regions (no.8)*[75] where the court held that "because the question of whether maintenance and champerty can be justified is one of public policy, the law must be kept under review as public policy changes".

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69 See *Martell v Consett Iron Co Ltd* [1955] Ch 363 375; *Hill v Archbold* [1968] 1 QB 686 694 and 697; *Trendtex Trading Corp v Credit Suisse* [1980] 1 QB 629 663; *Giles v Thompson* [1994] 1 AC 142 164; Tolhurst *Contract* 191.

70 Tolhurst *Contract* 191.

71 See e.g. *Re Trepca Mines Ltd (No 2)* [1963] 1 Ch 199; see also Yeo (2004) *SAcLJ* 86.

72 See e.g. *Hill v Archbold* [1968] 1 QB 686 694 and 697; *Trendtex Trading Corp v Credit Suisse* [1982] AC 679 702; see also the Law Commission, *Proposals for the Reform of the Law Relating to Maintenance and Champerty* (1966) 3-4; *Giles v Thompson* [1993] 3 All ER 321 330 CA.

73 Wenxiong (2014) *Sing. J. Legal Stud.* 383; see also Law Commission of England, *Proposal for Reform of the Law Relating to Maintenance and Champerty* (Her Majesty's Stationery Office 1966) (hereinafter Law Commission of England 1966) 5.

74 See for e.g. *British Cash and Parcel Conveyors Ltd v Lamson Store Services Co Ltd* [1908] 1 KB 1006 1013; see also *Hill v Archbold* [1968] 1 QB 686 697.

75 [2002] 3 WLR 1104 para [32].

In *Hill v Archbold*[76] the court also held that the trade union in the case had not been guilty of unlawful maintenance. The court further provided that maintenance is more readily accepted in the late modern period because most actions are now supported by third parties, including the state itself through legal aid with the proviso that if the action fails the third-party pays the costs of the other party.[77]

In *Giles v Thompson*[78] the court held that the doctrines of maintenance and champerty aim to protect the integrity of the justice system.[79] It further held that the public policy against maintenance and champerty is not based on grounds of morality but on a desire to protect the administration of civil justice.[80] Furthermore, the court held that it appears that the public policy change has influenced the court to take a liberal view of maintenance and champertous agreements, which were prohibited outright in the years preceding this judgment.[81]

The rules against the doctrines of maintenance and champerty have been progressively relaxed by the courts, taking into account the public policy principle of access to justice and the prohibitive costs of litigation.[82] In *Thai Trading Corp v Taylor*[83] the court held that:

> [T] he language and the policy which it describes are relevant of the ethos of an earlier age when litigation was regarded as an evil and recourse to law was discouraged. It rings oddly in our ears today when access to justice is regarded as a fundamental human right which ought to be readily available to all.[84]

This is a further indication that the public policy rules against maintenance and champerty have become more tolerant of intervention by a third-party over time.[85] This is because of the public policy consideration in favour of access to justice.[86] Current jurisprudence has progressively redefined and narrowed the scope of all the instances

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76 [1968] 1 QB 686.
77 *Hill v Archbold* [1968] 1 QB 694.
78 [1993] 3 All ER 321.
79 *Giles v Thompson* [1993] 3 All ER 321 328.
80 *Giles v Thompson* [1993] 3 All ER 321 332.
81 *Giles v Thompson* [1993] 3 All ER 321 332; Balachandran 1999 *L Soc J* 74.
82 Balachandran 1999 *L Soc J* 74.
83 [1998] 3 All ER 65.
84 *Thai Trading Corp v Taylor* [1998] 3 All ER 65 69.
85 See *Bergel and Edson v Wolf* (2000) 50 OR 3rd 777 para [22]; see also Frinson *Civil Costs* 471; Tolhurst *Contract* 190.
86 Frinson *Civil Costs* 471; see also Tolhurst *Contract* 190.

that prohibited access to justice by allowing additional litigation funding mechanisms to cope with the ever-changing public policy. The current position of third-party litigation funding agreements will be discussed below.

2.4 The current position of third-party litigation funding agreements in England

In 1966 third-party litigation funding was transformed through an amendment to the Criminal Law Act of 1967 (hereinafter the Criminal Law Act). Sections 13[87] and 14(1)[88] abolished criminal and civil liability for both maintenance and champerty. However, section 14(2)[89] retained the prohibition against maintenance and champerty where maintenance and champerty contracts were to be treated as being contrary to public policy or otherwise illegal. In interpreting section 14(2) of the Criminal Law Act the court in *Trendtex Trading Corporation v Credit Suisse*[90] held that:

> [S] ection 14(2) further provided that these prohibitions should not affect any rule of law as to the cases in which a contract was to be treated as contrary to public policy or otherwise illegal. It therefore seems plain that parliament intended to leave the law as to the effect of maintenance and champerty upon contracts unaffected by the abolition of them as crimes and torts.[91]

This was reinforced by the court in *London & Regional (St George's Court) Ltd v Ministry of Defence*,[92] where it was held that an agreement under which a third-party provided assistance to a party in litigation in return for a share of the proceeds was unenforceable on the basis of maintenance and champerty.[93]

However, Liang argues that litigation funding agreements are in direct violation of the classic doctrines of maintenance and champerty since it is the claimant who voluntarily seeks assistance from the funder to fund his litigation in the first place.[94] Liang also

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87 S 13(1): "The following offences are hereby abolished, that is to say- Any distinct offence under the common law in England and Wales of maintenance (including champerty)".

88 S 14(1): "No person shall, under the law of England and Wales be liable in tort for any conduct on account of its being maintenance or champerty as known to the common law, except in the case of a cause of action accruing before this section has effect".

89 S 14(2): "The abolition of criminal and civil liability under the law of England and Wales for maintenance and champerty shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal".

90 [1980] QB 629.

91 *Trendtex Trading Corporation v Credit Suisse* [1980] QB 629 670; see also Beale *et al Contract* 16-049.

92 [2008] EWHC 526 (TCC).

93 *London & Regional (St George's Court) Ltd v Ministry of Defence* [2008] EWHC 526 (TCC) para [103].

94 Liang 2014 *Sing L Rev* 184.

admits that third-party litigation funding agreements are less likely to be held unenforceable in English law unless there is some form of impropriety regarding them.[95] In the current jurisprudence merely agreeing to finance litigation in return for a share of the proceeds is clearly not enough to constitute champerty. There should be some evidence of improper motive, whether it be to conduct malicious or vexatious litigation, cause a delay, abuse the process, or commit some other form of impropriety.[96]

Liang fails to recognise that the laws regarding maintenance and champerty simply regulate the entrance of a third-party in litigation and are not concerned with whether the third-party was approached by the litigant or not. Further, Abrams and Chen state that third-party litigation funding provides financial support for litigation by an entity that is not a party to the litigation and has no direct interest in the outcome.[97] This is therefore a direct violation of the doctrine of maintenance.[98] However, it constitutes champerty as the third-party litigation funder will probably be entitled to a percentage of the claim should the litigant succeed.[99]

Regarding the viewpoint expressed by Abrams and Chen, they seem to disregard the fact that maintenance, like champerty, is excusable in many cases today although the evil of champerty is the one that lurks in the corners of litigation funding more often than maintenance. It is important to look briefly into the emergence of third-party litigation funding agreements to better understand the rationale of their acceptance today. Before third-party litigation funding agreements came to be prevalent in England, the justifiable assistance an indigent could receive took the form of public funding or legal aid, which would amount to maintenance.

The legal aid scheme in England was set up after the Second World War in terms of the welfare state.[100] The Legal Aid and Advice Act of 1949 introduced legal aid. It was, however, available only to those who met two criteria, namely the merit test and the

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95 Liang 2014 *Sing L Rev* 184; see also *Buday v Location of Missing Heirs Inc* [1993] 16 O.R. (ed) 262.
96 *Buday v Location of Missing Heirs Inc* [1993] 16 OR (ed) 262.
97 Abrams and Chen 2013 *U Pa J Bus L* 1083.
98 Abrams and Chen 2013 *U Pa J Bus L* 1083.
99 See *Giles v Thompson* [1993] 3 All ER 321 HL 328; Middleton and Rowley *Civil Costs* 176.
100 Moorhead, Sherr and Paterson 2003 *Law and Society Review* 772.

means test.[101] The 1949 Act was abolished by the Legal Aid Act of 1988, which introduced the Legal Aid Board. The Board was later abolished by the Access to Justice Act of 1999[102] and replaced by the Legal Services Commission.[103] Under the latter scheme, the general approach was that any civil legal matter would be eligible for legal aid if it was not one of the "excluded" matters listed in Schedule 2 to the 1999 Act. Individual applications for legal aid funding were assessed by reference to a "Funding Code" which set out general principles on eligibility for legal aid.[104]

In England, the Access to Justice Act of 1999 was enacted to further the scope conditional fee-based system.[105] Regarding the public policy principle of access to justice, Moorhead states that conditional fee agreements in England were introduced as an extension of access to justice for clients who fall outside the scope of the legal aid scheme but are unable or unwilling to afford normal hourly fee arrangements.[106] All the agreements, which fall under the scope of conditional fees, are accepted by the courts as they provide litigants with the means to pursue meritorious cases that they would otherwise not have pursued had it not been for the public policy principle of access to justice upon this basis.

In November 2008, Lord Jackson was tasked with conducting an independent review of costs and funding of civil litigation in England. His final report of December 2009 contained recommendations on a wide variety of issues. Most of these recommendations were adopted by the government and eventually implemented by the Legal Aid, Sentencing and Punishment of Offenders Act of 2012 (the LASPO Act), subordinate legislation and changes to the Civil Procedure Rules. The changes introduced through LASPO included the lifting of the ban on "damages based agreements" (hereinafter DBAs) which permit lawyers to claim a percentage of any eventual reward as payment for handling the case.[107] These are equivalent to the American style "contingency fees". LASPO introduced certain caps (25% in personal

101 Which is now the test used by litigation funders to fund claims, as will be discussed below.
102 Hodges, Peysner and Nurse *Litigation Funding* 15.
103 S 1 of the Access to Justice Act of 1999.
104 S 8 of the Access to Justice Act of 1999.
105 Chan Kok Yew 2004 *Comm. L. World Rev* 130.
106 Moohead 1999 *UBCLR* 482.
107 S 58AA (3) (a) of the Courts and Legal Services Act 1990 (amended by s 45 of LASPO); Damages-Based Agreements Regulations 2013 (SI 2013/609).

injury cases, 35% in employment cases and 50% in all other cases) and other regulations setting out the terms under which DBAs may be used. These rules operate in conjunction with the mandatory regulatory and ethical obligations applicable to practising lawyers.[108]

The Jackson Review of Civil Litigation Costs was published in 2012 and outlines the benefits of third-party funding. The majority of the contributors to the debate on the Costs Review found that third-party funding is beneficial and should be supported in principle. Lord Jackson's recommendations concerning litigation funding were as follows:[109]

> I do not consider that full regulation of third-party funding is presently required. I do, however, make the following recommendations:
>
> a) A satisfactory voluntary code, to which all litigation funders subscribe, should be drawn up. This code should contain effective capital adequacy requirements and should place appropriate restrictions upon funders' ability to withdraw support for ongoing litigation.
>
> b) The question whether there should be satisfactory regulation of third party funders by the Financial Services Authority (the "FSA") ought to be revisited if and when the third-party funding market expands.
>
> c) Third party funders should potentially be liable for the full amount of adverse costs, subject to the discretion of the judge.

These recommendations led to the creation of the Association of Litigation Funders and ultimately to the creation of the current voluntary Code of Conduct for Litigation Funders 2011 (as discussed in 2.6 below). Sir Rupert has commented that his concerns about litigation funding have been met by the terms of the adopted voluntary Code.[110]

From April 2013 LASPO reversed the general approach to legal aid of the Access to Justice Act 1999: civil and criminal legal matters are now excluded from the scope of legal aid unless they are among the matters listed in Schedule 1 to LASPO.

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108 Reg 1(2) of the Damages-Based Agreements Regulations 2013 (SI 2013/609).

109 Jackson *Review of Civil Litigation Costs: Final Report* 124; see also Hodges, Peysner and Nurse *Litigation Funding* 124-143.

110 See Jackson 2011 http://associationoflitigationfunders.com/wp-content/uploads/2014/02/Sixth-Lecture-by-Lord-Justice-Jackson-in-the-Civil-Litigation-Costs-Review-.pdf 4.

Section 38(1) of LASPO abolished the Legal Services Commission, which has now been replaced by the Legal Aid Agency.

Many areas of civil[111] and criminal[112] proceedings were removed from the scope of legal aid following the reduction in public spending.[113] LASPO is split into four parts. Part 1 replaced Part 1 of the Access to Justice Act 1999 as the statutory framework for legal aid in England and Wales, and implemented a series of substantial changes to the legal aid system. Sections 11 and 12 of LASPO provide guidelines on who qualifies for civil legal aid and sections 17 and 18 provide guidelines on who qualifies for criminal legal aid.

In the case of litigants and legal practitioners the Solicitors Act of 1974[114] initially prohibited an agreement whereby a solicitor stipulated for payment only if the case was successful. The practice of a solicitor's receiving payment only after the case succeeded would also have been considered champertous. This was significantly altered after conditional fee agreements in England and Wales were first introduced by section 58 of the Courts and Legal Services Act of 1990. This marked a significant step in the introduction of conditional funding agreements generally.[115] Section 58 of the Courts and Legal Services Act of 1990 was later amended by the Access to Justice Act of 1999.[116]

The Access to Justice Act of 1999 extended the availability of alternative methods of funding litigation by authorising conditional fee agreements in all money claims except family and criminal law cases.[117] Litigation funding by third parties (non-lawyers) is an unavoidable consequence of the above developments in funding litigation. The

111 S 8 of LASPO.
112 S 14 of LASPO.
113 See also Cairns 2013 *Probation Journal* 186-187.
114 S 59(2)(b); r 8 of the Solicitors' Practice Rules 1990.
115 Frinson *Civil Costs* 1383.
116 S 27 of the Access to Justice Act of 1999.
117 S 27 of the Access to Justice Act of 1999; see also Beatson, Burrows and Cartwright *Contract* 391-392.

developments aim to resolve the problem of securing access to justice for those unable to afford their own litigation costs.[118]

The most favoured funding method in England is before-the-event insurance policies (hereinafter BTE), followed by DBAs, conditional fee agreements (hereinafter CFAs) and commercial litigation funding (the latter being the subject of this study). The Jackson Costs Review, which the government has adopted, states that the policy should be that a "mixed economy" of different forms and sources of funding is required.[119] It also observes that alternative ways of reducing expenditure, which effectively provide access to justice, are appropriate for resolving disputes and that the courts should be a last resort.[120] The introduction of alternative modes of dispute resolution reverses the place of the courts from sole, or at least primary, arena for vindicating rights and delivering justice, to a long-stop role in the context of many claims being resolved in other forums, notably tribunals, public[121] and private sector ombudsmen and other Alternative Dispute Resolution (hereinafter ADR) forums.[122]

In 2002, the Court of Appeal clarified the law of champerty to permit private third parties other than solicitors to enter into agreements in which payment of their fees

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118 Hodges, Peysner and Nurse *Litigation Funding* 15; see also *Papera Traders Co Ltd v Hyundai Merchant Marine Co Ltd (No.2)* [2002] EWHC 2130; *Gulf Azov Shipping Co Ltd v Chief Humphrey Irikefe Idisi* [2004] EWCA Civ 292.

119 Hodges, Peysner and Nurse *Litigation Funding* 108.

120 Mediation is enshrined as both a normal preliminary step before instituting a court claim, and as an integral part of English civil procedure: CPR Practice Direction—Pre-Action Conduct. At EU level, see Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.

121 See a series of reports indicating an expansion of ombudsmen for citizen-state disputes in preference to litigation: *Common Sense, Common Safety* (The Young Review) October 2010; *Complaints & Litigation*: Health Select Committee proposals for Health Service Ombudsman reform, June 2011; Open Public Services, Cabinet Office White Paper July 2011; *Public Services Ombudsmen Project* Law Commission July 2011. See Buck, Kirkham and Thompson *The Ombudsman Enterprise and Administrative Justice* (Ashgate 2010).

122 See *Empowering and Protecting Consumers: Consultation on institutional changes for provision of consumer information, advice, education, advocacy and enforcement* (Department for Business Enterprise and Skills 2011). ADR in consumer disputes is set to take centre stage in replacing courts under recent EU proposals. Communication from the Commission: Consumer Solutions in the Single Market COM(2011) 791/2; Proposal for a Directive of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and the amendment of Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) COM(2011) 793/2; Proposal for a Regulation of the European Parliament and of the Council on online dispute resolution for consumer disputes (Regulation on consumer ODR) COM(2011) 794/2. See also Hodges, Benöhr and Creutzfeldt-Banda *Consumer ADR in Europe*.

was conditional upon success.[123] The court established that the mere fact that litigation services were provided in return for a share of the proceeds was not sufficient to justify a finding of unenforceability.[124]

In this case an impoverished Spanish trawler owner had obtained judgment against the British Government for damages for breach of their fishing rights. Regrettably, they could not afford to proceed with the assessment of damages. The accountants they had employed, Grant Thornton, agreed to provide litigation support in the form of handling documents and programming services, as well as undertaking to pay the fees of expert witnesses, in exchange for 8% of any amount recovered.

The Court of Appeal in addition to holding that the agreement was not champertous provided that:

> Where the law expressly restricts the circumstances in which agreements in support of litigation are lawful, this provides a powerful indication of the limits of public policy in analogous situations. Where this is not the case, then we believe one must today look at the facts of the particular case and consider whether those facts suggest that the agreement in question might tempt the allegedly champertous maintainer for his personal gain, to inflame the damages, to suppress evidence, to suborn witnesses or otherwise to undermine the ends of justice.[125]

Therefore in any individual case it is necessary to look at the agreement in question in order to determine whether it tends to conflict with existing public policy that is directed at protecting the due administration of justice with particular regard to the interests of the defendant, Factortame.[126] Furthermore, the court was of the view that Grant Thornton's interest, as a substantial creditor of the claimants, did not help Grant Thornton's case since that put Grant Thornton in a position to influence the outcome of the litigation.[127]

The court bore in mind the fact that the share of the damages received by Grant Thornton was only 8%. This was a firm of accountants and therefore members of a respectable and regulated profession. While they did play an important role in the preparation of the computer model on which the damages claims were based, this was

123 *Factortame Ltd and others v Secretary of State for the Environment, Transport and the Regions (No 2)* [2002] 4 All ER 97 123 (hereinafter *Factortame*).
124 *Factortame* 122.
125 *Factortame* 108.
126 *Factortame* 111.
127 *Factortame* 120.

subject to checking by the other side and was therefore transparent. In any event, highly experienced solicitors and counsel represented the claimants and it was proper for the solicitors to insist on remaining in control of the litigation process. In these circumstances, there was no realistic prospect that justice would be undermined in any way by the 8% share of the proceeds in the agreement. It was also clear to the court that there was no other realistic way in which the accountants could be paid for work they had already done, other than by supporting the litigation in the manner they had chosen to do.[128]

The court held that on the facts, litigation funding was necessary to allow access to justice, and therefore the funding agreement did not offend public policy. The court concluded that:

> They [the defendants] were faced with an extraordinarily complicated task in providing the damage that they had suffered and there was a real risk that lack of funds might result in their losing the fruits of their litigation. The 1998 agreements ensured that they continued to enjoy access to justice. They did this without putting justice in jeopardy. The 1998 agreements were not champertous. [my insertion][129]

This access to justice principle has also been applied in the context of insurance agreements. The case of *Veronica Pirie v Mrs Doreen Violet Ayling*[130] provides some guidance. In that case, the court held that an agreement for the insurance premium to be 20% of any damages awarded was not champertous. This is because the insurance company relied not on the spoils but on the fruits of the litigation as a source from which the insured could satisfy her liability for the premium in return for the provision of genuine insurance coverage. The point to note here is that courts must have regard to whether there are elements of exploitation in a funding agreement where a particular litigation funder's sole motive is to profit from it. The court held that:

> Whilst it is no doubt true that the greater the share of the spoils that the provider of legal services will receive the greater temptation to stray from the path of rectitude; in this case there is simply no opportunity for the insurer to act otherwise than as the risk bearer.[131]

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128 *Factortame* 121.
129 *Factortame* 123.
130 [2003] WL 21353355.
131 *Veronica Pirie v Mrs. Doreen Violet Ayling* [2003] WL 21353355 Para [10].

The reason for prohibiting champerty has always been to prevent the exploitation of the impecunious claimant, and the court must satisfy itself on the facts and circumstances of the case that such exploitation has not occurred, or otherwise declare such an agreement unlawful.[132] It is apt to remember Lord Denning's reasoning in *Re Trepca Mines Ltd (No 2)*[133] where he cautioned that the reason why the common law condemns champerty is because of the abuses it may give rise to. For instance, the litigation funder might be tempted for his own personal gain to "inflame the damages, suppress evidence or even suborn witnesses".

2.4.1 Arkin v Borchard Lines Ltd[134]

In 2005, the Court of Appeal confirmed the legality of litigation funding agreements, but this "was by way of what was not said rather than by way of an express ruling".[135] The landmark case of *Arkin*[136] furthered the gradual development of professional litigation funding. The case surveyed the many instances where funding agreements have been used and accepted over the years, and restated and established authoritative principles regarding the liability that funders may have for adverse costs in the event that the litigation they support fails.

The court found that the accountability of a third-party litigation funder should not exceed the amount of his investment. The way the issue was approached by the court implied that litigation funding was desirable in some ways, but more importantly, it implied that it was lawful.[137]

In *Arkin v Borchard Lines Ltd*,[138] a professional funding company entered into a funding agreement with the claimant. The funder MPC agreed to fund the employment of expert witnesses, the preparation of their evidence and the organisation of enormous quantities of documents, which it became necessary to investigate before the trial. When the claimant lost, the defendants applied for a costs order against MPC, the funder. The defendants emphasised the very substantial proportion of any

132 Liang (2014) *Sing L Rev* 189.
133 [1962] 3 WLR 955, 966.
134 [2005] EWCA Civ 655 (hereinafter *Arkin*).
135 Frinson *Civil Costs* 1384.
136 *Arkin* 655.
137 Frinson *Civil Costs* 1384.
138 [2005] EWCA Civ 655 (hereinafter Arkin).

recoverable damages or settlement payments (25% of the first €5 million and 23% of any excess) which MPC was to receive under its funding agreement in the event of success.

The amount of the claim including exemplary damages eventually reached €160 million. That would have meant a payment of some €40 million to the funders. The defendants also drew attention to the absence of any undertaking by MPC to pay the defendants' recoverable costs or to take out after-the-event (ATE) insurance cover in respect of such costs. They submitted that, in principle, professional funders, as distinct from pure funders (such as family or friends who back a case without expecting any reward), who are maintaining litigation for their profit, should be liable for the defendants' costs if their claim failed, which in this case it did.

MPC argued that funding agreements with professional funders which have the purpose of enabling impecunious claimants to pursue claims of real substance which, but for such funding, they could not have pursued, should not be visited with costs orders against the funders if the claim fails.

The High Court favoured MPC's public policy arguments and refused to make an order of costs against the Part 20 defendant. On appeal, the Court of Appeal held that a professional funder, who finances part of a claimant's litigation costs, should potentially be held liable for the costs of the opposing party to the extent of the funding provided.[139]

The court in this case managed to strike a compromise between the common law doctrine of champerty and the public benefit of increasing access to justice.[140] The Court held that it was unjust for a funder who purchased a stake in an action for a commercial motive to be protected from all liability for the costs of the opposing party if the funded party failed in the action.[141] This was a practical solution that neither denied a successful opponent all his costs nor deterred commercial funders from providing help to impecunious claimants seeking access to justice.

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139 *Arkin* para [41].
140 *Arkin* para [38].
141 *Arkin* para [38]; Liang 2014 *Sing L Rev* 193.

Philips MR explained the benefits of litigation funding as follows:[142]

a) professional funders would be likely to cap the funds that they provide in order to limit their exposure to a reasonable amount;

b) this would have a beneficial effect in keeping costs proportionate; and

c) professional funders would also have to consider with even greater care whether the prospects of the litigation were sufficiently good to justify the support that they were being asked to give.

If litigation funders bear the liability for the costs of a failed action, then it is arguable that there is less room for exploitation (and greater protection) for vulnerable claimants. Lord Phillips MR held as follows regarding the concern as to whether funders are liable for the costs of a failed action:

> We consider that a professional funder, who finances part of a claimant's costs of litigation, should be potentially liable for the costs of the opposing party to the extent of the funding provided. The effect of this will, of course, be that, if the funding is provided on a contingency basis of recovery, the funder will require, as the price of the funding, a greater share of the recovery should the claim succeed. In the individual case, the net recovery of a successful claimant will be diminished. While this is unfortunate, it seems to us that it is a cost that the impecunious claimant can reasonably be expected to bear. Overall justice will be better served that leaving the defendants in a position where they have no right to recover any costs from a professional funder whose intervention has permitted the continuation of a claim which has ultimately proved to be without merit.[143]

Therefore, a litigation funder is liable for the liabilities and costs involved in any failed litigation proceedings to the extent of the funding provided. Furthermore, he has an obligation to provide assistance designed to ensure that those who are involved in litigation have the benefit of proper legal representation, as the court held in *Gulf Azov Shipping Co Ltd v Chief Humphrey Irikefe Idisi*.[144]

Such a compromise has significant drawbacks, as was rightly pointed out in *Arkin*. Firstly, it would mean that the litigation funder would probably demand a greater share of the proceeds should the claim succeed, since he bears liability for the costs of funding the litigation. Secondly, litigation funders would be more careful in selecting

142 *Arkin* para [42].
143 *Arkin* para [41].
144 [2004] EWCA Civ 292 para [54].

whom to fund, and would probably only select those cases which they felt would succeed in court. This suggests that access to justice may not necessarily be increased, since it all boils down to the litigation funder's "cherry picking". In the light of this, can such a compromise really lead to an increased access to justice? Nevertheless, it may still be contended that litigation funders will only choose to fund meritorious cases, thus ensuring that the courts are not bogged down with unmeritorious claims.[145] It is surely in the public interest to ensure that people who have meritorious claims have their day in court.[146] The case of *Arkin* has been approved by cases in other jurisdictions, key of which is the South African High Court decision in *Price Waterhouse Coopers Inc v IMF Ltd*.[147] The following case demonstrates the steps taken by the courts in evaluating the legal implications of litigation funding.

2.4.2 London & Regional (St George's Court) Ltd v Ministry of Defence[148]

In this case, Coulson J summarised the views of the then applicable English law authorities as follows:[149]

a) the mere fact that litigation services have been provided in return for a promise of a share of the proceeds is not in itself sufficient to justify that promise being held to be unenforceable;[150]

b) in considering whether an agreement is unlawful on grounds of maintenance or champerty, the question is whether the agreement has a tendency to corrupt public justice, and as such the question requires close attention to the nature and surrounding circumstances of the particular agreement;[151]

c) the modern authorities demonstrate a flexible approach where courts have generally declined to hold that an agreement under which a party provided

145 Liang (2014) *Sing L Rev* 194.
146 Liang (2014) *Sing L Rev* 194.
147 2013 (6) SA 216 (GNP).
148 [2008] EWHC 526 (TCC) 121 ConLR 26 152 Sol Jo (no 14) 28.
149 *London and Regional (St George's Court) Ltd v Ministry of Defence* [2008] EWHC 526 (TCC) 121 ConLR 26 152 Sol Jo (no 14) 103.
150 *Factortame* 381.
151 See *Giles v Thompson* [1994] 1 AC 142 [1993] 3 All ER 321 HL.

assistance with litigation in return for a share of the proceeds was unenforceable;[152]

d) the rules against champerty, so far as they have survived, are primarily concerned with the protection of the integrity of the litigation process by the limitation of control of the conduct of the action by a third party.[153]

The cases referred to above deal with the current regime of third-party litigation funding and its evolving public policy concerns. The funding contract is incorporated in an instrument known as the litigation funding agreement, which will be dealt with below together with the Code of Conduct for Litigation Funders as measures that regulate the controversial third-party litigation funding arrangements.

2.5 The Code of Conduct for Litigation Funders and the Funding Agreement Principles

Currently, third-party litigation funding agreements in England (unlike conditional fee agreements) are not regulated by statute. There is, however, a voluntary Code of self-regulation as proposed by the Jackson report,[154] as well as the Code of Conduct,[155] which is implemented by the Association of Litigation Funders together with the Civil Justice Council (hereinafter CJC). Seven funders currently subscribe to this code at the time of writing of this dissertation.[156]

In November 2011, the Association of Litigation Funders,[157] a private company limited by guarantee and owned and directed by its member firms, was formed as a forum for funders and non-funders alike to discuss matters relating to funding and provide a contact point for those using funding.[158] It administers a self-regulating Code of Conduct. In 2015, the Association of Litigation Funders consisted of seven member

152 See *Papera Traders Co Ltd v Hyundai (Merchant) Marine Co Ltd (No.2)* [2002] Loyd's Rep 692 (hereinafter *Papera* 692).
153 See *Papera* 692.
154 Jackson *Review of Civil Litigation Costs: Final Report*.
155 Code of Conduct for Litigation Funders 2016 (hereinafter the Code of Conduct).
156 Jackson *Review of Civil Litigation Costs: Final Report* ch 9 para 1.2.
157 Association of Litigation Funders date unknown http://associationoflitigationfunders.com/.
158 Middleton and Rowley *Civil Costs* 180.

firms. This membership represents less than one-third of the 25 funders estimated by Lord Beecham to have been operating in England in 2013.[159]

In addition to administering the Code of Conduct, the Association of Litigation Funders acts as an advocacy organisation which "actively engages with government, legislators, regulators and other policy makers to shape the regulatory environment for litigation funding in England".[160] Members of the Association of Litigation Funders market their membership of the organisation, urging claimants and their lawyers "to work only with those funders who are approved members of Association of Litigation Funders".[161] The Association is responsible for future development of the Code of Conduct. The Code of Conduct sets out the standards of best practice and behaviour for litigation funders in England. It also provides transparency to claimants and their solicitors and requires litigation funders to provide satisfactory answers to certain key questions before entering into a written third-party litigation funding agreements.[162]

The Association of Litigation Funders' Code of Conduct does not impose any disclosure requirements on the court or opposing parties.[163] If a complaint against a member for violating the Code of Conduct is found to be meritorious under the Association's complaints procedure, the maximum fine is £500, payable to the Association.[164] A further potential penalty for noncompliance is termination of membership, at the discretion of the organisation's directors, who are representatives of the funder members. Termination of membership does not prohibit the funder from continuing to fund claims, and many active funders choose not to be members at all. Under the Code of Conduct, litigation funders are required to give assurances to claimants that, among other things, the litigation funder will not try to take control of

159 Justice not profit 2015 http://www.justicenotprofit.co.uk/wp-content/uploads/2015/09/Final-TPLF-Paper.pdf.
160 Justice not profit 2015 http://www.justicenotprofit.co.uk/wp-content/uploads/2015/09/Final-TPLF-Paper.pdf 7.
161 Justice not profit 2015 http://www.justicenotprofit.co.uk/wp-content/uploads/2015/09/Final-TPLF-Paper.pdf7.
162 Middleton and Rowley *Civil Costs* 180.
163 Hodges, Peysner and Nurse *Litigation Funding* 124.
164 Justice not profit 2015 http://www.justicenotprofit.co.uk/wp-content/uploads/2015/09/Final-TPLF-Paper.pdf 7.

the litigation, has the means to pay for the costs of the litigation and will not terminate the funding agreement unless there is a material adverse development.[165]

The Code of Conduct was initially recommended and ultimately approved by Lord Jackson and commended by Lord Neuberger.[166] The Code further states that a funder will take reasonable steps to ensure that the litigant has received independent advice on the terms of the litigation funding agreement.[167] It also provides that a funder will not seek to influence the litigant's solicitor or barrister to cede control of the dispute to the funder.[168] Frinson states that this provision is impractical;[169] however, fears that the involvement of funders may be seen as champertous have generally stopped funders from exercising any significant control over funded litigation.[170]

In a litigation funding agreement a funder covers all the costs of the litigation (or such costs as the funded party seeks to have covered by the funder) in return for a share of the proceeds of the action, including its own legal costs, experts' fees and court fees and any adverse costs.[171]

Contractual provisions of the litigation funding agreement are drafted only by funding specialists and here the following general points can be made:

a) The agreement ought to be drafted by a drafter who had sight of the draft contracts of retainer and the ATE policies.[172] The drafter should be asked to ensure that there are no conflicts. It is good practice to include a provision that stipulates which document will take precedence in the event of conflict.[173]

b) It is considered good practice to include a reporting provision which states in specific terms what reports the legal representative must provide to the funder.

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165 Clauses 9.3 and 11.2 of the Code of Conduct for Litigation Funders 2016.
166 Middleton and Rowley *Civil Costs* 181.
167 Clause 9.1 of the Code of Conduct for Litigation Funders 2016.
168 Clause 9.3.
169 Frinson *Civil Costs* 1392.
170 Jackson *Review of Civil Litigation Costs: Preliminary Report* 163.
171 Middleton and Rowley *Civil Costs* 179. Adverse costs are the costs ordered against the losing party in a civil claim.
172 After the Event Insurance policy which covers adverse costs of a claim.
173 Frinson *Civil Costs* 1392.

Such a provision should not require a level of reporting that might lead to allegations of "wanton and officious intermeddling" and champerty.[174]

c) The Code of Conduct also states that agreements should stipulate whether (and if so how) the funder may provide input into the litigant's decisions in relation to settlements.[175] It is also considered good practice to set out, in terms, what the funder cannot do (in other words, to limit the funder's influence so that he cannot be accused of controlling the litigation).[176]

d) With regard to termination of the contract, the Code of Conduct states that the agreement might be terminated where the Funder or Funder's Subsidiary or Associated Entity reasonably ceases to be satisfied with the prospects of the dispute, where the dispute is no longer commercially viable, or where there has been a material breach of the agreement by the litigant.[177]

e) It is considered necessary to include within an agreement or a schedule to such an agreement a record of priorities (often referred to as "the waterfall of priorities").[178] Where other stakeholders are involved such as ATE insurers, a priorities agreement would be appropriate. Paying attention to these issues will reduce the possibility of disputes.[179]

f) In the event of a dispute between the litigant and the funder regarding settlement or termination of the agreement, the Code provides that a binding opinion shall be obtained from a Queen's Counsel who shall be instructed jointly or nominated by the Chairman of the Bar Council.[180] Furthermore, it is considered good

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174 Frinson *Civil Costs* 1392.
175 Clauses 11.1 and 13.2 of the Code of Conduct for Litigation Funders 2016.
176 Frinson *Civil Costs* 1392.
177 See clause 11.2 of the Code of Conduct for Litigation Funders 2016; However, clause 13.1 of the Code of Conduct provides that if the funder, funder's subsidiary or associated entity terminates the agreement, the funder shall remain liable for all funding obligations accrued to the date of termination unless the termination is due to a material breach by the person funded under clause 11.2.3.
178 This is an agreement which will deal with who is to be paid and what happens if the sums recovered in the litigation are insufficient to satisfy all of the parties' contractual entitlements.
179 Frinson *Civil Costs* 1393.
180 See clause 13.2 of the Code of Conduct for Litigation Funders 2016.

practice to ensure that both the funder and the litigant are fully aware of this fact before the agreement is made.[181]

g) The Code of Conduct also states that agreements should state whether the funder will (i) meet any liability for adverse costs, (ii) pay any premium including insurance premium tax, to obtain costs insurance, (iii) provide security for costs, or (iv) meet any other financial liability. It is considered convenient to set these details out in a schedule to the agreement. Unless the entire risk is borne by the ATE insurer, there should also be a record of who pays what and in what circumstances (who is responsible for adverse costs orders, who pays for top-up insurance, etcetera).

There is no need for a CFA in a funding agreement; however, the availability of one is advisable where the solicitors are prepared to act on at least a partial conditional fee agreement as a demonstration of their faith in the merits of the case.[182] There is also no need for ATE insurance although it can be used to limit the funder's risk of an *Arkin* payment by spreading it to multiple stakeholders. The remuneration is typically 20%-50% of the amount recovered in either litigation or settlement.[183] The agreement ought to place a limitation on control by the funder for it not to be regarded as champertous.

The funding agreement should be structured in such a way that the litigant retains full control over the way in which it conducts its action (this includes the funder's not being permitted to set minimum settlement levels when signing up a case, or interfering in the everyday conduct of the matter).[184] Upon signature of the agreement the litigant is left to run his litigation in the usual way. The funding agreement sets out in clear terms the responsibilities and liabilities of the parties.[185] Despite the benefits of third-party litigation funding in furthering the policy on access to justice, this type of litigation funding has both advantages and disadvantages and they will be critically evaluated below.

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181 Frinson *Civil Costs* 1393.
182 Middleton and Rowley *Civil Costs* 179.
183 Middleton and Rowley *Civil Costs* 179.
184 Middleton and Rowley *Civil Costs* 179.
185 Middleton and Rowley *Civil Costs* 179.

2.6 Critical evaluation of third-party litigation funding in practice

2.6.1 Advantages of third-party litigation funding

Middleton and Rowley list the main advantages of third-party funding as follows:

a) Third-party funding facilitates access to justice by enabling the pursuit of meritorious claims that might not have been pursued by litigants.

b) Third-party funding also facilitates the involvement of law firms that were previously reluctant to take on cases on a “no win, no fee” basis.

c) Commercial funders screen cases carefully to prevent unmeritorious claims and a due diligence is usually conducted.

d) Funders are often actively involved in the litigation in an attempt to settle the proceedings. Here their legal and commercial experience can prove an advantage.

e) Third-party funding provides an additional way of funding litigation and for some parties it is the only means of litigation funding.

f) Although a successful claimant with third-party funding foregoes a percentage of his damages, it is better for him to recover a substantial part of his damages than to recover nothing at all.

g) The use of third-party funding (unlike the use of conditional fee agreements or contingency fee arrangements) does not impose additional financial burdens upon opposing parties.

h) Third-party funding tends to filter out unmeritorious cases, because funders will not take on the risk of such cases. This benefits opposing parties.

i) Finally, third-party funding is in the economic interest of the defendant as it ensures that adverse costs orders payable by the plaintiff are satisfied.

Funders are in favour of the litigation funding agreement in English law as a tool that plays an important role in encouraging advocate remuneration through conditional fee

agreements.[186] Third-party funding offers corporate clients the opportunity to move the financial risk and cost of litigation off their balance sheets.[187] Law firms are given the opportunity to take on big, complex cases using capital from third parties instead of having to bear the burden of ethical challenges inherent in funding litigation themselves.[188]

Lord Jackson comments as follows on the future of litigation funding:[189]

> There is likely to be a greater role for litigation funders, if CFA success fees cease to be recoverable… I express the hope that in the future litigation funders will be able to support a [wider] range of litigation than at present, including group actions and claims of lower value. [my comment]

These developments have resulted in discussions between litigation funders and bigger firms of solicitors aimed at providing facilities to fund group litigation and lower-value claims.[190] The relevance of the latter is that it should not be assumed that litigation funding is necessarily unethical and is relevant only to those who practise commercial litigation.[191] It is entirely credible that in the very near future it will be available in personal injury litigation as well.[192]

An example of a recent well-known case in which third-party funding appeared to operate satisfactorily is *Stone & Rolls Ltd (in Liquidation) v Moore Stephens*.[193] The claimant company brought a substantial claim for professional negligence against its former auditors, with the benefit of third-party funding. The Court of Appeal, reversing Langley J, held that on the alleged facts the auditors could raise the defence of *ex turpi causa non oritur actio* and accordingly struck out the claim.[194] The House of Lords dismissed the claimant's appeal. According to press reports, the funder, which had stood to receive some 40% of the proceeds if the action succeeded, duly accepted liability for the auditors' costs. Those costs were reported as being in the region of

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186 Financier Worldwide 2012 http://www.fulbrookmanagement.com/third-party-litigation-funding/.
187 Financier Worldwide 2012 http://www.fulbrookmanagement.com/third-party-litigation-funding/.
188 Financier Worldwide 2012 http://www.fulbrookmanagement.com/third-party-litigation-funding/.
189 Jackson 2011 http://associationoflitigationfunders.com/wp-content/uploads/2014/02/Sixth-Lecture-by-Lord-Justice-Jackson-in-the-Civil-Litigation-Costs-Review-.pdf 5.
190 Frinson *Civil Costs* 1412.
191 Frinson *Civil Costs* 1412.
192 Frinson *Civil Costs* 1412.
193 [2009] UKHL 39; [2009] 3 WLR 455.
194 From a bad cause, no action arises. This principle of public policy means that a claim cannot be based on the illegal actions or wrongful conduct of the claimant, nor can he benefit from his own wrongdoing.

£2.5 million. It was also reported that there was no after-the-event ("ATE") insurance. In an interview with the *Law Society Gazette* following the House of Lords decision, a legal director of the funder said that the funder currently had a portfolio of 10 to 12 ongoing cases with a success rate of 80%. These facts illustrate that third-party funders can operate satisfactorily in the absence of ATE insurance and that they can accept liability for any adverse costs orders. The risk assumed by the funder is reflected in the percentage of damages which the funder is entitled to receive in the event of success.

In their publication, Fullbrook Capital Management LLC (a litigation funder) states that investors see litigation as an innovative, untapped asset class with great potential.[195] Fullbrook argues that there is also greater transparency in the industry now, and that more industry data are being published and analysed, while new products and services are being offered by the industry.[196] However, this could also be a disadvantage because without regulation the products and services could be detrimental to the litigants.[197] This proves that the system that regulates third-party litigation funding agreements in England require improvements. The legislature and/or the Association of Litigation Funders as the administrator of the current Code of Conduct should look into the disadvantages of the current regulation. In doing so, the legislature should consider reforming the industry to meet current demands.

In conclusion, third-party litigation funding has evolved to increase the affordability of access to justice for some litigants. Litigation funding agreements provide access to justice for those unable to enter the courtroom due to financial constraints. The advantages highlighted above show that through these funding mechanisms the public policy principle of access to justice is of paramount importance and that other jurisdictions would do well to consider the route taken by England. The disadvantages associated with third-party litigation funding agreements are discussed below.

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195 Financier Worldwide 2012 http://www.fulbrookmanagement.com/third-party-litigation-funding/.
196 Financier Worldwide 2012 http://www.fulbrookmanagement.com/third-party-litigation-funding/.
197 See also *Hodges, Peysner and Nurse Litigation Funding* 143.

2.6.2 Disadvantages of third-party litigation funding

Firstly, it is one of the unfortunate truths that litigation funding by a third party is currently not available to everyone and is not available for every form of litigation in England. The minimum size of claims that litigation funders are prepared to fund ranges from £350,000 to £25,000,000.[198] Thus the damages suffered need to be sufficient to make the time and costs involved in considering and instituting the claim worthwhile. In addition to value, the minimum eligibility criteria for considering funding a claim are:[199]

a) a defendant who is able to pay the amount claimed;

b) good legal merits in relation to both liability and a demonstrable minimum claim value;

c) the costs of pursuing the matter are proportionate to the size of the claim; and

d) the lawyer employed to prosecute the claim for the client is experienced in the area to which the claim relates.

Third-party funding is not usually possible where non-monetary relief, such as an injunction or declaration, is the main remedy sought.[200] The funding arrangement is, however, widely available in commercial litigation.[201] In his initial report, Lord Jackson found that third-party litigation funding was commonly used to fund insolvency cases.[202] Litigation funding is becoming more prevalent in professional negligence[203] and group class actions.[204] With regard to personal injury cases, the Solicitors' Code of Conduct prohibits the use of third-party litigation funding.[205] Third-

198 Jackson *Review of Civil Litigation Costs: Preliminary Report* 161; see also Middleton and Rowley *Civil Costs* 180.
199 Middleton and Rowley *Civil Costs* 180.
200 Jackson *Review of Civil Litigation Costs: Final Report* 118.
201 Jackson *Review of Civil Litigation Costs: Final Report* 119.
202 Jackson *Review of Civil Litigation Costs: Preliminary Report* 162.
203 See, *Stone & Rolls Ltd (in liquidation) v Moore Stephens* [2009] UKHL 39. That claim was unsuccessful and the funder reportedly had to meet costs of £2.5 million.
204 Jackson *Review of Civil Litigation Costs: Preliminary Report* 162-163.
205 Rule 9.01(4) of the Solicitors' Code of Conduct 2007 prohibited a solicitor, in any personal injury claim, from acting in association with inter alia any person whose business was to support claims and who in the course of such business received contingency fees. This was replaced by 'outcomes-focused regulation' in the Solicitors Regulation Authority Code of Conduct 2011.

party litigation funding is not used in certain other types of litigation either for reasons that include the perceived low rate of return (such as in small business disputes), the technical and legal complexity (such as in intellectual property or construction disputes), or the unpredictability of the outcome (such as in defamation actions).[206]

Secondly, the litigation funding market includes a number of big funders, some of whom are members of the Association of Litigation Funders, as well as a number of smaller funders who have elected not to join the Association. Two of the biggest funders operating in England, Burford Capital and Juridica Investments, are public companies on AIM – the London Stock Exchange's international market "for smaller, growing companies" – and publish annual reports.[207] These companies have operations in the United States (hereinafter the US) as well. In its report the US Chamber of Commerce refers to the decision of *Excalibur Ventures LLC v Texas Keystone*,[208] in which the English Commercial Court dismissed what were described by Lord Justice Christopher Clarke as "a range of bad, artificial or misconceived claims" with a "grossly exaggerated" quantum of US $1.65 billion in September 2016.[209] Three funders, two of which were US companies, supported the litigation and the third was a company incorporated in the Cayman Islands. None of the companies was a member of the Association of Litigation Funders and there were doubts over whether one of them was even still in existence at the time the judgment was handed down.[210] In the report, the US Chamber of Commerce states that Argentum Capital had left the Association of Litigation Funders in 2014 amid concerns about the source of its capital.[211] The Channel Islands Securities Exchange also delisted Argentum Capital.[212] Its main investor was reported to be Centaur Litigation, which was reportedly under investigation by the Hong Kong authorities following allegations by Brendan Terrill, the owner of Buttonwood Legal Capital Limited, that some of its capital

206 Taylor 2013 http://www.gov.scot/Publications/2013/10/8023/27.
207 Justice not profit 2015 http://www.justicenotprofit.co.uk/wp-content/uploads/2015/09/Final-TPLF-Paper.pdf 9.
208 [2014] EWHC 4278 (Comm).
209 *Excalibur v Ventures LLC v Texas Keystone* [2014] EWHC 4278 (Comm)Paras [24] and [29].
210 Justice not profit 2015 http://www.justicenotprofit.co.uk/wp-content/uploads/2015/09/Final-TPLF-Paper.pdf 14.
211 Butler 2014 http://www.smh.com.au/business/ponzi-scheme-claims-against-litigation-funder-of-equine-class-action-20140221-337my.
212 Neil date unknown http://www.litigationfutures.com/news/stock-exchange-delists-third-party-litigation-funder.

originated from a Ponzi scheme.[213] These developments demonstrate that the existence of the Association of Litigation Funders does not necessarily prevent less reputable funders from entering the market, particularly as the market grows and more funders are competing for more cases that are speculative.[214]

In the third place, Beisner and Gary state that third-party litigation funding may lead to an increase in the filing of questionable claims.[215] They observe that funding companies are mere investors and they base their funding decisions on the present value of their expected return, of which the likelihood of success at the trial is only one component.[216] In addition, funding providers can mitigate their downside risk by spreading the risk of any particular case over their entire portfolio of cases and by spreading the risk among their investors.[217] Another consideration is that, as Rubin states, funding providers can be expected to have higher risk appetites than most contingency-fee attorneys and may be more willing to back claims of questionable merit.[218] This problem is not addressed in the Code of Conduct for Litigation Funders. The propensity to take portfolios of cases (including low and high risk cases), and the likelihood of such cases being packaged and securitised, also adds or will continue to add to the overall volume of more speculative cases being brought before the courts.[219] For defendants, this means an increase in the volume of litigation that must be defended, which has its own cost to the economy.[220] Even though cost shifting rules prevent overly speculative litigation, funders are protected under English costs

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213 Butler 2014 http://www.smh.com.au/business/ponzi-scheme-claims-against-litigation-funder-of-equine-class-action-20140221-337my.

214 Justice not profit 2015 http://www.justicenotprofit.co.uk/wp-content/uploads/2015/09/Final-TPLF-Paper.pdf 14.

215 Beisner and Rubin 2012 (October) *ILR* 4. The other four negative consequences of third-party litigation funding agreements are listed in Justice not profit 2015 http://www.justicenotprofit.co.uk/wp-content/uploads/2015/09/Final-TPLF-Paper.pdf 6.

216 Beisner and Rubin 2012 (October) *ILR* 4.

217 Beisner and Rubin 2012 (October) *ILR* 4.

218 Rubin (2011) *N Ky L Rev* 682L: The most notorious example of this problem was the investment by a fund associated with Burford Capital Limited in a lawsuit against Chevron filed in an Ecuadorian court alleging environmental contamination in Lago Agrio, Ecuador, where the court rejected the claim as frivolous.

219 Justice not profit 2015 http://www.justicenotprofit.co.uk/wp-content/uploads/2015/09/Final-TPLF-Paper.pdf14.

220 Justice not profit 2015 http://www.justicenotprofit.co.uk/wp-content/uploads/2015/09/Final-TPLF-Paper.pdf14.

rules.[221] They are only liable up to the amount they invested, regardless of the expense they have caused a defendant by bringing a meritless claim.[222]

Fourthly, Beisner and Gary argue that litigation funding changes the traditional dynamic as an investor is involved in the plaintiff's lawsuit. The funder company will probably want to protect its investment and there is usually an expectation that the investor may try to exert control over the plaintiff's strategic decisions.[223] The plaintiff's lawyer, as the person receiving payment from the investor and possibly even having been retained by the investor, may accede to those efforts.[224] Even when the funding provider's efforts to control a plaintiff's case are not overt, the existence of the funding provider naturally subordinates the plaintiff's own interests in the resolution of the litigation to the interests of the third party investor.[225] Raymond also argues that the lawsuit-investment industry makes no secret of its interest in protecting litigation investments by influencing cases. A principal of the investor Black Robe Capital Partners LLC was quoted as saying his firm would play a "pro-active role in lawsuits".[226] A former Burford chairperson said that his new investment company would not "control" litigation but would "do more than was done before".[227] Beisner and Gary further observe that third party funders prolong litigation by deterring settlement.[228] A plaintiff who has to pay a third party litigation investor out of the proceeds of any recovery can be expected to reject what may otherwise be a fair

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221 Justice not profit 2015 http://www.justicenotprofit.co.uk/wp-content/uploads/2015/09/Final-TPLF-Paper.pdf14.

222 Justice not profit 2015 http://www.justicenotprofit.co.uk/wp-content/uploads/2015/09/Final-TPLF-Paper.pdf14.

223 Beisner and Rubin 2012 (October) *ILR* 5.

224 Beisner and Rubin 2012 (October) *ILR* 4-5.

225 Beisner and Rubin 2012 (October) *ILR* 4-5. The commercial arbitration between a company called S&T Oil Equipment & Machinery Ltd and the Romanian government provides an example. S&T had sought financial assistance for its case from Juridica Investments Ltd, and, under their agreement, Juridica paid some legal fees for S&T in exchange for a percentage of arbitration proceeds. After Juridica withdrew funding, causing S&T's case to collapse, a sealed complaint filed by S&T against Juridica in Texas federal court alleged that S&T's own lawyers had begun seeking legal advice from Juridica after Juridica began paying their fees, and that Juridica required the lawyers to share with Juridica their legal strategy for the arbitration and any factual or legal development in the case; see also Roman and Cremades (2011) *TDM* 25-33.

226 See also Raymond (2011) *Am. Law.* 1.

227 Raymond (2011) *Am. Law* 1.

228 Beisner and Rubin (October 2012) *ILR* 5.

settlement offer, hoping for a larger sum of money.[229] The law or Code of Conduct for Litigation Funders does not address this matter of control adequately.

In the fifth place, Beisner and Gary indicate that third-party litigation funding investments compromise the lawyer-client relationship and diminish the professional independence of lawyers by inserting a new party into the litigation equation whose sole interest is making a profit on its investment.[230] In the light of this the US Chamber of Commerce states that despite litigation funders' financial success and the steep growth of the industry, the manner in which third-party litigation funding in England and around the world has developed appears to present some risks and the industry is not without its critics.[231] It further states that high-profile setbacks in certain cases[232] have demonstrated certain shortcomings, including the inadequacy of self-regulation in preventing some abuses.[233]

For this reason, funders may have an incentive to take a speculative case and press for a settlement, knowing that even if they lose, the defendants rarely recover the actual costs of the defence (as opposed to the court-awarded costs). In many cases,

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229 See further *Rancman v Interim Settlement Funding Corp* 789 N.E. 2d 217 220-21 (Ohio 2003) (noting that the amount the plaintiff-appellant owed to litigation financiers was an "absolute disincentive" to settle at a lesser amount); Frankel (2009) *Am. Law.* 1; *Altitude Nines LLC v. Deep Nines Inc* No. 603268-2008; Mullin 2009 http://thepriorart.typepad.com/the_prior_art/2009/11/altitude-capital-partners-altitude-nines-v-deep-nines.html; Funding Agreement Between Treca Financial Solutions and Claimants, *Chevron Corp. Donziger* Case No. 11-cv-0691 (S.D.N.Y.) Docket No. 356 Ex. B.

230 Beisner and Rubin 2012 (October) *ILR* 6. In recent litigation regarding injuries to 9/11 Ground Zero workers in the US, for example, one of the plaintiffs' firms representing the workers was financed by a third-party funding investment that provided for passing the interest on the investment on to the plaintiffs, to be paid out of any recovery by them. After settling with the defendants the firm sought to pass along $6.1 million in interest payments to the plaintiffs. The plaintiffs' lawyers argued strenuously in support of their position. The judge overseeing the settlement acknowledged that passing on the interest to the plaintiffs may be permissible, but disproved doing so in this case because it wasn't clear that the plaintiffs had understood or approved the charges. See *In Re World Trade Center Disaster Site Litig* No. 1:21-mc-00100 (S.D.N.Y. Aug. 27 2010); see also Hodges, Peysner and Nurse *Litigation Funding* 124-143.

231 Justice not profit 2015 http://www.justicenotprofit.co.uk/wp-content/uploads/2015/09/Final-TPLF-Paper.pdf 13.

232 Such as the Ecuadorean Lago Agrio litigation against Chevron financed by Burford Capital and later by Woodsford Capital, or the Harbour Litigation Funding's *Road Chef* litigation.

233 Justice not profit 2015 http://www.justicenotprofit.co.uk/wp-content/uploads/2015/09/Final-TPLF-Paper.pdf 13.

this can force defendants to settle while giving the funders the advantage of a capped risk.[234]

Finally, as more cases are taken on behalf of smaller and less sophisticated claimants (including consumers), there is a greater risk that funders may exercise control and potentially direct the litigation for their own benefit, as opposed to the benefit of the claimants, giving rise to conflicts of interest.[235] The concerns regarding third-party funding may be summarised as follows: increased litigation, encouragement of frivolous claims and the potential to corrupt the arbitral or judicial process by a person who is not connected with the merits of the dispute and has a profit motive. Some concerns relate to unfair contract terms, the need for disclosure and conflicts of interest. There is also a threat to corrupt the lawyer-client relationship through third-party funding. Some of the disadvantages make litigation funding in England less attractive to other jurisdictions that are willing to adopt the self-regulation of third-party litigation funding. Parallel to these disadvantages, some advantages are attractive to other jurisdictions. The options for reform regarding third-party litigation funding in England will be discussed below.

2.7 Options for reform in England

The voluntary Code of Conduct regulates most of the litigation funding investments in England and it seems to be an appropriate regulatory scheme considering the growth of the litigation market.[236] There are indications that England is likely to regulate third-party litigation funding by means of national legislation.[237] At present, if funding becomes available to consumers, these consumers may fall under the protection of the Consumer Credit Act 1974 and the Consumer Credit Act 2006.[238] Hodges, Peysner and Nurse go further and state that the basis of arguments that litigation funding should be regulated lies in concerns about the impact on consumers.[239] They are in agreement with the American literature regarding concerns about the

234 Justice not profit 2015 http://www.justicenotprofit.co.uk/wp-content/uploads/2015/09/Final-TPLF-Paper.pdf 14.
235 Justice not profit 2015 http://www.justicenotprofit.co.uk/wp-content/uploads/2015/09/Final-TPLF-Paper.pdf 14.
236 Code of Conduct for Litigation Funders 2016.
237 Frinson *Civil Costs* 1389.
238 Frinson *Civil Costs* 1389; Middleton and Rowley *Civil Costs* 181.
239 Hodges, Peysner and Nurse *Litigation Funding* 142.

development of a system that benefits lawyers and claims managers to the detriment of consumers and the judicial process.[240] Thus, they advocate for the expansion of the protection offered by the Consumer Credit Act 2006 as the current protection is not adequate.

In addition, court rules should be developed to ensure effective control over third-party funded litigation.[241] The European Union has adopted a non-binding Recommendation for Member States which includes several safeguards in respect of collective redress litigation funded by third parties.[242] This includes a recommendation that the claimant party in collective cases should be required to "declare to the court at the outset of the proceedings the origin of funds that it is going to use to support the legal action".[243]

A measure recommended by the Review of Expenses and Funding of Civil Litigation in Scotland and which the US Chamber also addresses is the disclosure of funding mechanisms. In the review Sheriff Principal James Taylor states as follows:

> I am of the view that disclosure of the means of funding should be required in every litigation. With respect to third-party funding, I note that defenders are in favour of a requirement to disclose, and for good reason. Disclosure has implications for how defenders proceed, for their willingness to settle, and for their willingness to settle early. Funders, who mainly fund claimants, likewise referred to the advantages of disclosure. In particular, they could look forward to earlier settlement, which had implications for the return on their investment.[244] It would appear, then, that disclosure expedites dispute resolution to the benefit of both parties and promotes efficiency in the legal system. If this is correct, I fail to see why disclosure of a litigation funding arrangement should not be desirable for all funded parties, whether they are pursuers or defenders. If, as I recommend, third party funders are liable for a proportion of the other side's expenses should the funded client be unsuccessful, then disclosure is also necessary.

He further states that:

> I therefore recommend that in all civil litigation in the Scottish courts, parties should be under an obligation to disclose to the court and intimate to all parties the means by which the litigation is being funded at the stage when proceedings are raised or notification given that a case is to be defended. Thus if an action is being funded by a trade union or a damages based agreement, for example, it should be disclosed in the same manner as a legally aided party is obliged to disclose that assistance has been obtained from the Legal Aid Fund. Disclosure should include both the type of funding and the identity and address of the funder. It should not include details of the financial

240 Hodges, Peysner and Nurse *Litigation Funding* 142; see also Beisner, Miller and Rubin *Third-party Litigation Funding* 9; Rubin 2011 *N Ky L Rev* 683; Schanzenbach and Dana *Third-party Financing* 24-25.

241 Council Access to Justice 12.

242 Strasbourg 2013 http://europa.eu/rapid/press-release_IP-13-524_en.htm1.

243 Strasbourg 2013 http://europa.eu/rapid/press-release_IP-13-524_en.htm1.

244 Hodges, Peysner and Nurse *Litigation Funding* 105.

> agreement made between the funder and the funder's client before the case has been decided as this may provide opponents with too deep an insight into the funder's view as to the strength of the funded case.[245]

When formulating a national regulatory scheme for litigation funding agreements, the English legislature should also consider requiring litigants to disclose the source of their funding so as to allow opponents to adequately defend their cases as discussed above. Hence, the English rules of court should require disclosure to all parties involved of the means by which the litigation is being funded on the onset of the proceedings as recommended by the Scottish review above.

The CJC is an advisory public body established under the Civil Procedure Act 1997 which is responsible for overseeing and co-ordinating the modernisation of the civil justice system. The CJC views litigation funding as an effective future means of providing access to justice in addition to contingency fee agreements.[246] The CJC noted that third-party funding in 2007 had already become established in England and Wales following the decision in *Arkin*, where the Court of Appeal examined the issue of third-party litigation funding in detail. The CJC published its report recommending the acceptance of litigation funding.[247] The CJC's second report in June 2007[248] concluded that properly regulated third-party funding should be recognised as an acceptable funding option for mainstream litigation.[249]

With regard to the regulation of commercial litigation, funders registered and based in England are regulated to some extent by the Financial Conduct Authority as investment firms but the litigation funding product is not regulated.[250] In 2009, Lord Justice Jackson also suggested that if a statutory regulation is implemented, it should be under the Financial Conduct Authority. Beisner and Rubin further argue that formal regulation raises threshold questions like whether such a regime should be targeted at third party investors, attorneys who represent clients receiving third-party funding

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245 Taylor 2013 http://www.gov.scot/Publications/2013/10/8023/27.

246 See Moorhead and Hurst *Access to Justice*.

247 Civil Justice Council "Improved Access to Justice – Funding Options and Proportionate Costs" The Future Funding of Litigation – Alternative Funding Structures June 2007 (Recommendations to Improve Access to Justice through the Development of Improved Funding Structures).

248 The conclusion was reached shortly after the Australian decision in *Campbell v Cash & Carry (Pty) Ltd v Fostif (Pty) Ltd Mobil Oil Australia (Pty) Ltd v Trendlen Pty Lt* [2005] NSWCA 83.

249 The Civil Justice Council, *The Future Funding of Litigation – Alternative Funding Structures* (June 2007).

250 Jackson *Review of Civil Litigation Costs: Final Report* 121.

investments or both.[251] They argue that the protection should focus on the third party funding investors whose activities are presently not subject to effective regulation.[252] They maintain that regulating attorneys alone will not address most of the risks posed by third-party litigation funding.[253] They state that adequate protection can only be achieved by direct regulation of the investors who provide the financing and therefore exert the most influence.[254] In any event, attorneys are already governed by existing rules of professional conduct.[255]

In their report entitled *Litigation Funding Status and Issues*, Hodges, Peysner and Nurse state that "it is currently possible to state the policy that applies in England on access to justice, and funding of litigation, as a result of the extensive analysis by Lord Jackson and the subsequent government reforms in a 2009 report".[256] The writers argue that provision of access to justice is an important constitutional and fundamental right. However, the principle is subject to qualifications.[257] Among such qualifications they agree that claims with good merit should be encouraged as this would promote access to justice but the same cannot be said for claims with poor merit.[258] There is limited tolerance for speculative litigation aimed at testing the boundaries of the law. However, test cases that clarify uncertainties in the law, and consequently have wide practical effect, should be permitted.[259] Still, parliament rather than the courts remains the major forum for addressing law reform.[260] The above authors also say that public funding for legal services for civil litigation is severely limited. Therefore, private funding is to be encouraged.[261] The European Union is of the opinion that the claimant should be prohibited from basing the funder's remuneration on the amount of the settlement reached or the compensation awarded.[262] An exception is when the funding

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251 Beisner and Rubin 2012 (October) *ILR* 7.
252 Beisner and Rubin 2012 (October) *ILR* 7.
253 Beisner and Rubin 2012 (October) *ILR* 7.
254 Beisner and Rubin 2012 (October) *ILR* 7; see also Hodges, Peysner and Nurse *Litigation Funding* 144 and 151; Napier (February) 2008 https://www.judiciary.gov.uk/related-offices-and-bodies/advisory-bodies/cjc/third-party-funding/ 2.
255 Beisner and Rubin 2012 (October) *ILR* 7.
256 Hodges, Peysner and Nurse *Litigation Funding* 107; Jackson *Review of Civil Litigation Costs: Final Report*.
257 Hodges, Peysner and Nurse *Litigation Funding* 107.
258 Hodges, Peysner and Nurse *Litigation Funding* 107.
259 Hodges, Peysner and Nurse *Litigation Funding* 107.
260 Hodges, Peysner and Nurse *Litigation Funding* 107-108.
261 Hodges, Peysner and Nurse *Litigation Funding* 108.
262 Strasbourg 2013 http://europa.eu/rapid/press-release_IP-13-524_en.htm 2.

arrangement is regulated by a public authority. In England this would be the Financial Services Authority (the regulatory functions of which have now been inherited by the Financial Conduct Authority).[263] The Commission further states that it has not ruled out third-party financing for European collective redress but proposes that certain conditions should apply, particularly transparency to prevent conflict of interests.[264]

In addition, Beisner and Gary agree that government oversight is essential as third-party litigation funding investors use litigated proceedings and compulsory court processes as their investment vehicles.[265] In other words, funding investors make money by using the coercive power of government to command defendants to appear in court or before arbitrators, turn over documents, and defend themselves. In these circumstances, regulating third-party litigation funding investors' actions is an entirely proper function of government.[266]

With regard to government oversight, the Institute for Legal Reform in the United States proposes a "three-pronged" approach:

a) The designation of a government agency to oversee third-party litigation funding investments.[267]

b) The enforcement of a regime of statutory safeguards against the abuses in third-party litigation funding investments by the federal agency.[268]

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263 Strasbourg 2013 http://europa.eu/rapid/press-release_IP-13-524_en.htm 2.

264 Strasbourg 2013 http://europa.eu/rapid/press-release_IP-13-524_en.htm 2; see also Hodges, Peysner and Nurse *Litigation Funding* 124-143.

265 Beisner and Rubin 2012 (October) *ILR* 7.

266 Beisner and Rubin 2012 (October) *ILR* 7.

267 Beisner and Rubin 2012 (October) *ILR* 10; they propose that the US. government should empower the Federal Trade Commission (the "FTC") to regulate the third-party litigation funding investment industry. The FTC was created in 1914 to prevent unfair methods of competition in commerce. This agency has a long, successful record of bringing enforcement actions against entities that engage in unfair or deceptive acts or practices. In the year 2011, for example, the agency has obtained over $9 million in civil penalties from companies that engaged in unfair or deceptive practices. During the same period, the FCT has obtained numerous cease-and-desist, disgorgements, and civil-contempt orders against companies that have violated the Federal Trade Commission Act. If it is designed as a federal agency to oversee third-party litigation funding investments, the FTC should be given three specific grants of authority: (1) to licence third-party litigation funding investors, (2) to make rules and regulations governing third-party litigation funding investments and (3) to enforce any laws, rules and regulations governing third-party litigation funding investments.

268 Beisner and Rubin 2012 (October) 11; The writers argue that government should, by legislation, implement specific safeguards that the FCT may enforce. These safeguards would be of two types:

c) The making of court rules requiring judge-controlled disclosures at the outset when third-party litigation funding is being used. The reason for this proposal is that a defendant facing a claim funded by a third-party litigation funding investor may not realise who is guiding litigation strategy and decisions on the other side, as such contracts are usually secret, making it unfairly difficult for defendants to mount an adequate defence. As such, disclosure requirements will correct this problem.[269]

The Association of Litigation Funders responded to the above approach in its parliamentary briefing. It argued that the litigation funding briefing for parliamentarians circulated by the US Chamber of Commerce demonstrates a surprising ignorance of the differences between the US and English litigation systems and unfairly maligns litigation funding and its protagonists.[270] It also stated that in recent years the litigation funding market in England and Wales has experienced reasonably strong demand not just from Small and Medium-sized Enterprises (SMEs) seeking access to justice, but also from large, solvent commercial entities who see litigation funding as an invaluable and otherwise unavailable risk management tool with which to hedge the uncertainties and costs risks of large-scale commercial litigation.[271]

The Association of Litigation Funders stresses that properly structured litigation funding can operate within the framework provided by common law principles of maintenance and champerty.[272] These public policy concepts remain relevant and set principles for proper conduct that are acknowledged and respected by member funders and are enshrined in the Code.[273] In support of its claim, the Association emphasises that there is no evidence supporting the view that in England and Wales funders seek to take control of the litigation or of settlement negotiations. Furthermore, funders leave the day-to-day conduct of the litigation to the litigant and its legal team,

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statutory provisions that would govern third-party litigation funding investors generally, and statutory provisions governing third-party litigation funding investors' conduct in particular disputes.

269 Beisner and Rubin 2012 (October) *ILR* 14.

270 Association of Litigation Funders of England & Wales date unknown http://www.calunius.com/media/2996/parliamentary%20briefing%20final%20270112.pdf 1.

271 Association of Litigation Funders of England & Wales date unknown http://www.calunius.com/media/2996/parliamentary%20briefing%20final%20270112.pdf1.

272 Association of Litigation Funders of England & Wales date unknown http://www.calunius.com/media/2996/parliamentary%20briefing%20final%20270112.pdf 1.

273 Association of Litigation Funders of England & Wales date unknown http://www.calunius.com/media/2996/parliamentary%20briefing%20final%20270112.pdf 1.

claiming the right simply to be kept informed of progress.[274] The Association elaborated by stating that concerns raised by the US Chamber are essentially a reflection of their experiences in the US, and such concerns are largely unfounded in England and Wales.[275] It added that the US Chamber alleges a risk of increasing numbers of spurious suits with the potential to harm the British economy. The Association stated that in commercial litigation in England and Wales the loser pays the winner's costs and claims that this is a highly potent disincentive to spurious law suits.[276] Furthermore, the US Chamber's claim about the proliferation of spurious class actions illustrates a lack of familiarity with the practical limits of class actions in England and the inbuilt limitations on damages awards due to the absence of juries empowered to award punitive damages in civil cases.[277]

The Scottish review of third-party litigation funding supports the Institute's argument on the "three pronged" approach and states as follows:

> [R]ecent evidence suggests that the market is not only expanding in England and Wales but that funders are planning to extend into new markets, such as multi-party actions and divorce. This extension into cases involving ordinary citizens may mean that the case for transparency and regulation is stronger now than in 2009 when Jackson LJ was writing.[278]

It found that in 2012 there was a rising demand for third-party litigation funding in England and that the high returns from investing in commercial disputes with good prospects for success and high levels of reward were not enough for funders.[279] It suggested that some funders are starting to diversify their portfolios and are investing in a broader range of claims, including personal injury group actions.[280]

Hodges, Peysner and Nurse argue that a voluntary scheme does not address the requirements of a developing market and the "potential harm caused by the

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274 Association of Litigation Funders of England & Wales date unknown http://www.calunius.com/media/2996/parliamentary%20briefing%20final%20270112.pdf 1.
275 Association of Litigation Funders of England & Wales date unknown http://www.calunius.com/media/2996/parliamentary%20briefing%20final%20270112.pdf 2.
276 Association of Litigation Funders of England & Wales date unknown http://www.calunius.com/media/2996/parliamentary%20briefing%20final%20270112.pdf 2.
277 Association of Litigation Funders of England & Wales date unknown http://www.calunius.com/media/2996/parliamentary%20briefing%20final%20270112.pdf 1-2.
278 Taylor 2013 http://www.gov.scot/Publications/2013/10/8023/27.
279 Financier Worldwide 2012 http://www.fulbrookmanagement.com/third-party-litigation-funding/.
280 Financier Worldwide 2012 http://www.fulbrookmanagement.com/third-party-litigation-funding/.

emergence of new funders who may develop new litigation funding products and alternative business models that fall outside the scope of the code".[281] The writers state that third-party funding in England has already expanded to the point where regulation by the Ministry of Justice, the Legal Services Ombudsman or a financial regulator should be considered.[282] They doubt whether a voluntary code would provide adequate sanctions for dealing with rogue funders and bad practice.[283]

They argue that the cost-shifting regime should apply to court litigation as a general principle subject to three caveats;

a) The regime should contain elements that deter the bringing of frivolous claims and incentivise claimants to accept reasonable offers of settlement.[284]

b) In order to give effect to the social policy that certain types of claimants should be protected against the risk of adverse costs,[285] there should be a qualified one-way cost rule for them, instead of the normal two-way rule. The qualified approach makes it possible to target the protection at those who need it and gives them a stake in the outcome so as to exert some control over costs. A similar approach operated successfully under the legal aid regime.[286] The protection should apply to cases where there is an unequal relationship between the parties, for example personal injury cases and defamation cases, and there should be further consultation on applications in respect of housing disrepair, actions against the police, claimants seeking judicial review, and individuals claiming defamation or breach of privacy.

c) The economic realities of litigation costs necessitate a change from the traditional position which is that successful claimants should receive damages in full to one

281 Hodges, Peysner and Nurse *Litigation Funding* 143, 148 and 151.
282 Taylor 2013 http://www.gov.scot/Publications/2013/10/8023/27.
283 Hodges, Peysner and Nurse *Litigation Funding* 149.
284 Jackson *Review of Civil Litigation Costs: Final Report* 123.
285 And in the light of data that suggest that most personal injury claims are valid.
286 Still enshrined in the Access to Justice Act 1999, s 11(1): 'Costs ordered against an individual ... shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances including – (a) the financial resources of all parties to the proceedings and (b) their conduct in connection with the dispute…'.

where claimants can be expected to pay some costs out of their damages.[287] However, the amount of success fees that lawyers may deduct is capped at 25 per cent.[288]

As some of these issues are more closely concerned with ADR and the courts, they fall outside the scope of this study and will not be investigated. The recognition of other methods of funding litigation was a significant step in developing third-party litigation funding agreements and thus makes them less unfavourable under the laws of maintenance and champerty. A number of key cases that expanded the scope of third-party litigation funding agreements and limited the common law doctrines of maintenance and champerty also significantly influenced these developments.

It is clear from the above account that the controversy surrounding third-party litigation funding agreements will continue in England, and as this industry also affects interstate commerce, other jurisdictions are also affected thereby. This is evidenced by the US Chamber of Commerce's comments on the English position and its recommendation for a fully regulated system by government as opposed to the current self-regulating system in England despite the Association of Litigation Funder's opposing view that there is merit in a self-regulating system. The above proposed options for reform in the English legal system will certainly change the litigation funding industry if enacted by the legislature. The conclusion provided below recaps the development of third-party litigation funding, changes in policy and options for reform in England.

2.8 Conclusion

As discussed in this chapter, the public policy against the doctrines of champerty and maintenance has changed in England over the years. This public policy consideration dates back from the time when third parties were a threat to the integrity of the judicial system and some of the reasons for opposition to these doctrines are still relevant in England. However, drastic changes have taken place and some situations require the courts to promote access to justice over the archaic rules of maintenance and

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287 Protection of personal injury claimants by a one-off rise in the level of general damages for pain and suffering and loss of amenity would be increased by 10 per cent.

288 Hodges, Peysner and Nurse *Litigation Funding* 109.

champerty. These changes are evidenced by a number of English court decisions[289] dating from 1919. These changes, including the origin and change in the perception of the application of maintenance and champerty, were chronicled by Winfield.[290]

The change in public policy came to the forefront with the inclusion of the two doctrines in the Solicitors Act which prohibited legal practitioners from entering into conditional fee agreements in violation of the doctrines of maintenance and champerty.[291] The aim of the inclusion was to deter ethical misconduct but it also made other forms of litigation funding impossible. The change began in 1967 when legislation was passed to abolish the two doctrines as crimes and tort and there was a further change during the 1990s when the legislature promulgated the Access to Justice Act of 1999 to regulate conditional fee agreements.

This gradually led to the courts openly allowing third parties to fund litigation actions in order to promote access to justice. This resulted in the emergence of commercial litigation funders and the measures to hold such funders liable for adverse cost orders.[292] It further led to debates about the regulation of third-party litigation funding and now the market for third-party litigation finance is regulated by the Association of Litigation Funders, albeit on a voluntary basis. Non-members are still regulated by common law principles and most of them are not easily detected as they provide funding privately since disclosure of funding arrangements is not considered a priority in the English courts. The criticisms levelled against the litigation funding arrangement in England are aimed at the effectiveness of a self-regulation system.

In this chapter it was argued that self-regulation of third-party litigation funding fails to address the problems associated with this kind of funding. Furthermore, it was argued that the public has an interest in the funding mechanism and as such a public institution should be tasked with overseeing the conduct of litigation funders. Litigation funders must answer to a government-regulated body that will not only enforce the provisions of the Code of Conduct but also be independent and objective. The chapter has

289 Cases such as *British Cash and Parcel Conveyors Ltd v Lamson Store Service Co Ltd* [1908] 1 KB 1006, 77 LJKB 649 CA; *Neville v London Express Ltd* [1919] AC 368*; Re Trepca Mines Ltd (No 2)* [1963] Ch 199; *Hill v Archbold* [1968] 1 QB 686; *Trendtex Trading Corporation v Credit Suisse* [1980] QB 629; Giles v Thompson [1994] 1 AC 142.

290 Winfield (1919) *L Q Rev* 35-50.

291 S 59(2)(b); r8 of the Solicitors' Practice Rules 1990.

292 *Arkin v Borchard Lines Ltd* [2005] EWCA Civ 655.

established that the Association of Litigation Funders in England is hardly a government body that is capable of impartiality. This is evidenced by the fact that the self-regulating code does not reach further than the members of the Association.

The study has indicated that one of the criticism of the US Chamber of Commerce on funding regulation in England is that the Association does not represent the majority of litigation funders within the industry. The notable criticism is that those who are not members cannot be penalised for disregarding the provisions of the voluntary Code of Conduct or be banned from the Association. It was argued that the seven litigation funders that are members of the Association of Litigation Funders represent the larger litigation funding providers in England and therefore may not represent the interests of the smaller litigation funders who are non-members. As such, the impartiality of the Association's policies can be questioned as it may promote the interests of the member funders over the interests of non-member funders.

The chapter argues that the ideal way to address these deficiencies is to follow the proposal of the US Chamber of Commerce for a government-funded external body such as the Financial Services Authority (the "FSA"). In England, the Code of Conduct should be embodied in national legislation so that it will regulate all instances of third-party litigation funding.[293] It is argued that a regulated system of third-party litigation funding would properly guide the growing number of litigation funding agreements in England and that such a system would also encourage the funding of low-value claims.[294] This will provide transparency in respect of such agreements which will better enable the courts to foresee possible abuses of the system including abuses by funders that are not members of the Association of Litigation Funders. The regulated system would be akin to the conditional fee agreements. A discussion of an aspect of third-party funding in Ontario, Canada, is provided below. It highlights the impact of contingency fee agreements in the province of Ontario and the changes that developed.

293 Jackson *Review of Civil Litigation Costs: Final Report* 121.
294 Beisner and Rubin 2012 (October) *ILR* 7.

CHAPTER 3: ONTARIO: CANADIAN LAW PERSPECTIVE ON CONTINGENCY FEE AGREEMENTS

3.1 Introduction

The current chapter focuses on the Canadian perspective on contingency fee agreements concluded by lawyers. It outlines the historical development of contingency fee agreements and their prohibition by the doctrines of maintenance and champerty. The study also looks at the legal system of the province of Ontario as it is the last province to have permitted contingency fee agreements. Currently, Ontario is also one of the Canadian provinces that does not allow the conclusion of contingency fee agreements in certain family law cases.

In Canada, there have been restrictions through legislation and case law on the scope of champerty and maintenance, both based on" Canadian contract law has English common law as its foundation in all its provinces with the exception of Quebec, as discussed above.[295] References to some of the English authorities on the doctrines of maintenance and champerty insofar as they have contributed to the development of public policy in Ontario, Canada, will therefore be included. The contingency fee arrangements in Canada will be discussed, including the development and acceptance of such agreements in certain family law cases as well as the role the Ontario courts play in overseeing the fairness of these agreements especially in settlement proceedings.

3.2 Traditional policy on contingency fee agreements

As a result of the inheritance of the English common law by Canada with the exception of Quebec, champertous agreements were void and considered to be against public policy.[296] However, the crimes and torts of maintenance and champerty were abolished in the 1960s in England upon the recommendation of the Law Commission, which concluded that an action for damages no longer served any useful purpose.[297] Conversely, the common law doctrine invalidating champertous contracts is still

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295 Refer to chapter 2 of the English perspective; see also Waddams *Contract* 414.

296 See generally Winfield (1919) 35 *Law Q. Rev.* 50.

297 Law Commission *Maintenance and Champerty* para [7]; see also Puri 1998 *Osgoode Hall L. J.* 534.

applicable in limited cases in Canada.[298] As a consequence in the late nineteenth century, Ontario enacted An Act Respecting Champerty[299] which reads:

> 1. Champertors be they that move pleas and suits, or cause to be moved, either by their own procurement, or by others, and sue them at their proper costs, for to have part of the land in variance, or part of the gains.
>
> 2. All champertous agreements are forbidden, and invalid. [300]

In addition to this Act, maintenance and champerty were torts at common law, making the third party or lawyer liable to the defendant for special damages suffered as a result of the third party or lawyer's financial assistance, including the costs of defending the lawsuit.[301] The defendant in the action could not move to stay the action on the basis of the third party or lawyer's maintenance since the maintainer is not a party to the action before the courts, and maintenance is not considered a defence against the merits of an action.[302] Furthermore, maintenance and champerty were common law criminal offences in Ontario, Canada, until they were abolished in 1953 by section 9 of the Criminal Code.[303] The Criminal Code Revision Committee recommended their abolition on the basis that these crimes were "obsolete and archaic".[304]

With the above in mind, the following discussion will summarise the Canadian decisions on public policy against maintenance and champerty. The discussion will outline the meaning of the doctrines as defined by the courts in Ontario, the

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298 *See McIntyre Estate v Ontario (Attorney General)* 2002 45046 (ON CA), (2002) 61 OR (3d) 257 (CA) para [25]; *Hill v Archbold* [1968] 1 QB 686 (CA).

299 RSO 1897 c. 327 ss 1-2.

300 The leading Canadian case is *Fredrickson v Insurance Corp. of British Columbia* (1986), 28 DLR (4th) 414 [1986] 4 WWR 504 (BCCA) *Fredrickson* concerned the assignability of a cause of action in tort and in contract. See also *Continental Bank of Canada v Arthur Anderson & Co.* (1987) 59 OR (2d) 774 39 DLR (4th) 261 (HCJ); *Plastyle Inc. v CKF Inc.* (1992) 16 CCLT (2d) 55 8 BLR (2d) 210 (Ont Ct (Gen Div)); *433616 Ontario Inc*. (Re) (1992), 7 OR (3d) 670 (Gen Div); *Caisse Populaire Vanier Ltée v Bales* (1991) 2 OR (3d) 456 3 CBR (3d) 264 (Gen Div).

301 *See Alabaster v Harness* [1895] 1 QB 339 (CA) cited with approval in *Newswander v Giegerich* (1907) 39 SCR 354 in which the Supreme Court of Canada stated at 359: "That costs of defending a suit which has been improperly maintained may be recovered in an action of maintenance is true."

302 See *Kroeker v Harkema Express Lines Ltd.* (1973) 2 OR (2d) 210 (HC); and *Davey v Tallon* [1928] 3 WWR 215 (Man KB).

303 R.S.C. 1985 c. C-46 s 9 amending S.C. 1953-54 c. 51, s 8.

304 MacLeod and Martin (1955) *Can. Bar Rev.* 23-24. For case law on the criminal offence of champerty, see *Goodman v The King,* [1939] S.C.R. 446; *R v Bordoff* (1938) 70 CCC 35 (CSP); and *Colville v Small* (1910), 22 OLR 33 (HCJ).

requirements for establishing maintenance and champerty, the policy justifications for the rationale against maintenance and champerty, the exceptions to the general rule, and the application of the policy on contingency fee agreements.

3.2.1 What are champerty and maintenance in Canada?

Champerty is considered to be an egregious form of maintenance in which there is the added element that the maintainer shares in the profits of the litigation. Importantly, without maintenance there can be no champerty.[305] Maintenance is committed by those who, for an improper motive, are guilty of wanton or officious intermeddling in the disputes of others in which they have no interest and where the assistance they render to one or the other party is without justification or excuse.[306] The subheadings below will deal with the elements required to establish either maintenance or champerty and also identify instances where the maintainer has a legitimate interest and the assistance rendered to the litigant is not without justification or legitimate excuse.

3.2.2 The requirements for maintenance and champerty

In determining whether an agreement falls within the definition of maintenance and champerty, an improper motive must be established.[307] The fact that one is financing a lawsuit is in itself insufficient to constitute maintenance.[308] Similarly, the fact that there is an agreement to finance a lawsuit in exchange for a share in the proceeds is in itself insufficient to constitute champerty.[309]

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305 See *Findon v Parker* (1843), 11 M. & W. 675 (Eng Ex Div) 682 (1843) 152 ER 976 (Eng Ex Div) 979; *Fischer v Kamala Naicher* (1860) 8 Moo Ind App 170 (England PC) 187; *Newswander v Giegerich* (1907) 39 SCR 354 (SCC) 359 362-63; *Colville v Small* (1910) 22 OLR 33 (Ont HC) 34; *Neville v London Express Newspaper Ltd.* (1918) [1919] AC 368 (UK HL) 378-79 382-83; *R v Goodman* [1939] SCR 446 (SCC) 449 453-54; *Monteith v Calladine* (1964) 47 DLR (2d) 332 (BCCA) 342; *S. (J.E.) v K. (P.)* (1986) 55 OR (2d) 111 (Ont Dist Ct) 118 121; and *Smythers v Armstrong* (1989), 67 OR (2d) 753 (Ont HC) 756-57. See also *Giles v Thompson* [1993] 3 All ER 321 (Eng CA) 357.

306 See *Monteith v Calladine* (1964) 47 DLR (2d) 332 342 (BCCA), quoted with approval in *Buday v Locator of Missing Heirs Inc* (1993) 16 OR (3D) 257 267-268 (CA), Griffiths JA.

307 *Monteith v Calladine* (1964) 47 DLR (2d) 332 (BCCA) 342; see also Puri 1998 *Osgoode Hall L J* 527.

308 *Monteith v Calladine* (1964) 47 DLR (2d) 332 (BCCA) 342.

309 *Monteith v Calladine* (1964) 47 DLR (2d) 332 (BCCA) 342.

In the case of *Monteith v Calladine*[310] the court held that:

> It would appear, therefore, that champerty is maintenance plus an agreement to share in the proceeds, and that while there can be maintenance without champerty, there can be no champerty without maintenance. There must be present in champerty as in maintenance an officious intermeddling, a stirring up of strife, or other improper motive.[311]

In *S (JE) v K (P),*[312] the court also emphasised that an improper motive must be present:

> I must conclude that the motive of the party who interests himself in the suit of another is most relevant to determine whether maintenance is made out. If the motive is genuine and arises out of concern for the litigant's rights, it is not maintenance. Similarly if that interest of such party arises genuinely from an interest in the outcome, it is not maintenance and this is not restricted to blood relationships…

As discussed in chapter 2, the English courts also reiterate that champerty and maintenance require the element of an improper motive.[313] An improper motive is relevant and has been relied upon by the courts in considering the common law doctrine of champerty, particularly in creating exceptions to its application.[314] The court in *Fischer v Kamala Naicher*[315] held that champerty and maintenance must be something that goes against good policy and justice, tends to promote unnecessary litigation and that in a legal sense is immoral and implies the existence of a bad motive.[316]

Thus, both maintenance and champerty require proof of an improper motive in providing the financial assistance, whether it is malicious or constitutes officious intermeddling, a stirring up of strife (for vexation or delay), or some other impropriety.[317] In addition, both deal with the involvement of an uninterested third party

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310 1964 Carswell BC 150, 47 DLR (2d) 332; see also *Buday v Locator of Missing Heirs Inc.* (1993) 16 OR (3d) 257 (Ont CA) 267-68.

311 *Monteith v Calladine* (1964) 47 DLR (2d) 332 (BCCA) 342.

312 1986 Carswell Ont 379, 10 C.P.C. (2d) 252, 55 OR (2d) 111 117.

313 See *Neville v London Express* (1918), [1919] AC 368; (UKHL) 378-79, 382-83, 411-12, 414-15; *Trepca Mines Ltd. (No. 2) Re* (1962), [1963] 1 Ch. 199 (Eng. CA) 219-20; *Giles v Thompson* [1993] 3 All ER 321 (Eng. CA) 328-29, 332 and 360; and *Thai Trading Co. v Taylor* [1998] QB 781 (Eng. CA) 786-90.

314 *S v K* (1986), 55 OR (2d) 111 (Dist. Ct) 116.

315 *Fischer v Kamala Naicher* (1860) 8 Moo Ind App 170 187 (PC).

316 *Fischer v Kamala Naicher* (1860) 8 Moo Ind App 170 187 (PC); see also *Newswander v Giegerich* (1907) 39 SCR 354 (SCC) 360.

317 *Buday v Locator of Missing Heirs Inc* (1993), 16 OR (3d) 257 (Ont. CA) 267-8.

in the litigation of others.[318] It also appears that the third party, in addition to providing the financial assistance, must cause the action to be commenced, aggravated or enlarged in some way.[319] Proof that the plaintiff has already consulted with a lawyer would indicate that the plaintiff was inclined to pursue a legal claim and that the third party was not intermeddling.[320] The justifications or exceptions to maintenance and champerty are discussed below.

3.2.3 Policy justifications

The policy rationale against maintenance and champerty as inherited from the English common law was an attempt to minimise abusive interference in litigation by wealthy and powerful members of society.[321] The Ontario Law Reform Commission's *Report on Class Actions* describes the historical roots of the doctrines against maintenance and champerty as follows:

> Rules against maintenance and champerty were introduced over 700 years ago in response to abusive interference in the legal system by powerful royal officials and nobles. Although the particular abuses against which the prohibitions were directed had been cured by the time of the Tudors, the rules continued to survive. In modern decisions concerning maintenance, courts do not refer to the medieval origins of the doctrine, but justify its continued existence on the basis of public policy considerations. The antipathy of the courts to champertous agreements similarly is supported by policy concerns.[322]

Justification for the doctrines focuses on the perceived abuses of the administration of justice. Puri argues that while this passage is a plain statement of the abuses that will result if champertous agreements are recognised at law, judicial decisions do not appear to critically analyse the extent of these perceived abuses. He further argues that these concerns appear to be overstated.[323] Below are the exceptions to the general rule that invalidates agreements that are found to have been based on either maintenance or champerty.

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318 See *American Home Assurance Co. v Brett Pontiac Buick GMC Ltd. (No. 2)* (1992), 116 NSR (2d) 319 (CA), rev'g (4 March 1992), Doe. SH 77076 (TD).

319 Puri 1998 *Osgoode Hall L J* 527.

320 See *Buday v Locator of Missing Heirs Inc* (1993) 16 OR (3d) 257 (Ont. CA) 267; and *R v Goodman* [1939] SCR 446 (SCC) 449.

321 Puri 1998 *Osgoode Hall L J* 527.

322 Ontario Law Reform Commission, *Report on Class Actions* vol. 3 (Ministry of the Attorney General 1982) 717.

323 Puri 1998 *Osgoode Hall L. J.* 528.

3.2.4 Exceptions to the general rule

The courts have recognised competing and overriding public policies and provided exceptions to the general rules against maintenance and champerty.[324] The courts will not find a lawyer or a third party's financial assistance to be maintenance or champerty where the third party or lawyer's motive can be characterised as proper or legitimate.[325] A proper and legitimate motive would be associated with charity and compassion,[326] legitimate common interest,[327] commercial interest,[328] or legislative exceptions.[329]

3.2.5 Public policy on lawyer's contingency fees

Contingency fee agreements for lawyers are prohibited by the common law definitions of champerty as discussed above, statutory definitions of champerty, and legislation governing lawyers.[330] Prior to 1992, all Canadian provinces except Ontario had enacted legislation that permitted contingency fee arrangements between solicitors and clients in order to increase access to justice.[331] Manitoba, for example, has authorised such fees since 1890, while most of the other provinces have permitted them for at least 25 years.[332]

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324 Puri 1998 *Osgoode Hall L. J.* 528.

325 Puri 1998 *Osgoode Hall L. J.* 528.

326 See *Newswander v Giegerich* (1907) 39 SCR 354 (SCC) 362 and *Carlson v Chambers* [1947] 1 WWR 353 (Sask K.B.). See also *Young v Young* [1993] 4 SCR. 3 in which the Supreme Court of Canada held that a religious society financially supporting litigation of a member's divorce proceedings, involving freedom of religion and expression issues, did not constitute maintenance. It would be difficult, if not impossible, to argue charity in relation to a champertous agreement since the third party had negotiated a right to share in the proceeds of the litigation.

327 See *Bradlaugh v Newdegate* (1883) 11 QBD I 11 (CA). Assistance in paying for litigation costs is probably extremely common given that an individual will often turn to a family member to pay for the costs of the litigation. The authors Bogart and Vidmar *Access to Civil Justice* 33 examined problems and experience with the Ontario civil justice system and found that in 37 per cent of cases legal fees were paid for by the concerned litigant or another member of their household. Members of one's household are likely to be members of one's immediate family. Thus, despite the rules against maintenance and champerty in the context of relatives, financial assistance by relatives is very frequent and this makes monitoring and enforcement of the common law rules very difficult. Since it appears that the issue of relatives maintaining lawsuits has not been applied in recent times and has not arisen before the courts in the last 100 years, the courts simply accept this arrangement as a reality of litigation.

328 Such as pre-existing commercial interest and legitimate business arrangement.

329 Ontario's An Act to Make Debts and Choses in Action Assignable at Law RSO 1877 c. 116 ss. 6-12, amending 1872, 35 Vic c. 12 to recognise assignments of choses-in-action.

330 Solicitor's Act RSO. 1990 c. S-15, s 28.

331 Canadian Bar Association, Code of Professional Conduct*,* 1987 c. XI para [10].

332 *McIntyre Estate v Ontario (Attorney General)* 2002 45046 (ON CA), (2002) 61 OR (3d) 257 (CA) para [56].

Campbell chronicled the acceptance of contingency fee agreements by the other provinces in Canada as follows:

> [W]hile some Canadian jurisdictions have introduced one form of contingency fee or other within the last decade or so (British Columbia – 1979; Saskatchewan -1975; New Foundland – 1986; Northwest Territories – 1979; and Yukon – 1980), others have permitted formal contingency fees for twenty years or more (Alberta – 1969; Quebec 1968; New Brunswick – 1973; and Nova Scotia – 1972). Indeed Monitoba endorsed the use of contingency fees in 1890.[333]

The regulatory schemes of contingency fee agreements in Canada are very similar but for some minor differences.[334] An example of a self-regulated province with regard to contingency fees is Nova Scotia which is governed by the Civil Procedure Rules of the province.[335] In most provinces there is a sliding scale of contingency fees, starting with lower fees if the case is resolved by a specific time and increasing if the case goes to trial.[336] British Columbia, for example, imposes a ceiling on the percentage of the recovery that a lawyer may receive in certain types of proceedings. Most jurisdictions impose no such restrictions.[337] All of the provinces require contingency fee agreements to be in writing and many jurisdictions require such agreements to be filed in court.[338] In addition, each Canadian jurisdiction provides a mechanism by which a client may seek a review of the lawyer's fee.[339]

In Ontario, contingency fees were legalised in 1992 in relation to class actions only when the Class Proceedings Act was enacted.[340] The courts in Canada and England have repeatedly held that lawyers' contingency fee agreements were champertous and, as a result, unenforceable. In *Solicitor Re*,[341] the court held that:

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333 Campbell *International Product Liability* 145.
334 Antonow 2010 (December) *TLFJ* 1.
335 Antonow 2010 (December) *TLFJ* 1.
336 Antonow 2010 (December) *TLFJ* 1.
337 See Legal Profession Act SBC 1998 c 9 s 65-67; British Columbia, Law Society Rules; Ontario's Rules of Professional Conduct (n 5) Rule 2.08; and Ontario's Solicitors Act RSO 1990, c s-15, as amended by SO 2002, c 24, Sch A..
338 See s 28.1 (4) of the Solicitors Act RSO 1990; Busath 1979 *Utah L. Rev* 555; Wennihan 1995 *SMUL Rev* 1662.
339 See Solicitors Act RSO 1990, c. s.15.
340 The Class Proceedings Act 1992 c 6. s 33(1) reads: Despite the Solicitors Act and An Act respecting Champerty, being chapter 327 of Revised Statutes of Ontario 1897 a solicitor and a representative party may enter into a written agreement providing for payment of fees and disbursements only in the event of success in a class proceeding.
341 (1907) 14 OLR. 464 (Ont HC) 465; see also *Wallersteiner v Moir (No. 2)* [1975] 1 QB 373 (Eng CA) 393-94.

> [T]he confidential relation between lawyer and client forbids any bargain being made by which the practitioner shall draw a larger return out of litigation than is sanctioned by the tariff and the practice of the Courts. Especially does the law forbid any agreement for the lawyer to share in the proceeds of a litigated claim as compensation for his services. Such a transaction is in contravention of the statute relating to champerty, and it is also a violation of the solemn engagement entered into by the barrister upon his call to the Bar.

The reasons for the courts barring contingency fee agreements include the concern that the relationship of trust between lawyer and client may be tainted and that this may lead to the lawyer acting unethically to secure a win and avoid the fiduciary duty imposed by the profession.[342] The argument in favour of contingency fee agreements indicates that lawyers have been acting in what was considered to be meritorious cases for impecunious clients on the understanding that, if they lost no fees would be paid.[343]

These reasons have contributed to a change in the public policy on contingency fee agreements. The changes happened gradually in many jurisdictions and stem mainly from the experience of American, English, New Zealand, Australian and other Canadian jurisdictions. Ontario accepted contingency fee agreements after most common law countries had abolished the "archaic" restrictions. The public policy changes in Ontario regarding contingency fee agreements will be discussed below.

3.3 The current position of contingency fee agreements in Ontario, Canada

In 1954, the Canadian parliament abolished all common law crimes, including champerty and maintenance. However, champerty and maintenance continued to be actionable in tort in Ontario upon proof of special damages.[344] In addition, the Champerty Act provided that champertous agreements are forbidden and invalid.

The English Court in *Giles v Thompson*,[345] in a judgment which influenced Canadian public policy on maintenance and champerty, described the change in public policy as follows:

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342 *McIntyre Estate v Ontario (Attorney General)* (2002) 61 OR (3d) 257 (CA) para [52].

343 See *Bergel & Edson v Wolf* (2000) 50 OR (3d) 777 (Ont SCJ) 795; and *Finlayson v Roberts* (2000) 136 OAC 271 (Ont C.A.) para [24].

344 See *Frind v Sheppard* [1940] 4 DLR 455 (Ont. CA), rev'd [1941] 4 DLR 497 (SCC); and *Davidson Tisdale Ltd. v Pendrick* (1997) 18 CPC (4th) 131 (Ont. Div. Ct.) (leave to appeal); (1998) 31 CPC (4th) 164 (Ont. Div. Ct.).

345 [1993] 3 All ER 321 (Eng. CA) 360.

> [T]he law of maintenance and champerty has not stood still, but has accommodated itself to changing times: as indeed it must if it is to retain any useful purpose…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.

It is only when a person has an improper motive, which includes, but is not limited to, officious intermeddling or stirring up strife, that a person will be found to be a maintainer.[346] In support of contingency fee agreements and access to justice the Supreme Court of Canada in *Coronation Insurance Co v Florence*[347] also held that:

> The concept of contingency fees is well established in the United States although it is a recent arrival in Canada. Its aim is to make court proceedings available to people who could not otherwise afford to have their legal rights determined. This is indeed a commendable goal that should be encouraged…Truly litigation can only be undertaken by the very rich or the legally aided. Legal rights are illusory and no more than a source of frustration if they cannot be recognised and enforced. This suggests that a flexible approach should be taken to problems arising from contingency fee arrangements, if only to facilitate access to the courts for more Canadians. Anything less would be to preserve the courts facilities in civil matters for the wealthy and powerful.

This was echoed by the Law Society of Upper Canada which has supported the regulation of contingency fees since 1988 and has restated their support in 1992 and 2000.[348] Furthermore, in 1997 the Ontario Legal Aid Review recommended that the Ontario government introduce legislation that would allow contingency fee arrangements for lawyers in Ontario.[349] The report noted that legal aid certificate coverage had been removed for most civil litigation matters and that permitting contingency fee agreements would be an important step in addressing the resulting difficulty of accessing the courts.[350] In 2000, the Attorney General's Joint Committee on Contingency Fees- also recommended permitting contingency fees, except in criminal and quasi-criminal cases, and in family law proceedings. The Joint Committee Report stated that:

> One way to make justice more accessible is to provide a flexible approach to the payment of legal services by permitting contingency fees. Contingency fees are advantageous for middle class litigants because they shift most of the risk of litigation

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346 *British Cash and Parcel Conveyors Ltd v Lamson Store Service Co Ltd* [1908] 1 KB 1006, 77 LJKB 649 CA 1014; see also *Wallis v Duke of Porland* (1797) 3 Ves 494; *Alabaster v Harness* [1895] 1 QB 339, CA 342; Law Commission *Maintenance and Champerty* para [9]; *Giles v Thompson* 1994] 1 AC 142 161; *Tolhurst Contract* 189.

347 [1994] S.C.J. No. 116 (S.C.C.); see also *McIntyre Estate v Ontario (Attorney General)* (2002) 61 OR (3d) 257 (CA) para [14] and [55].

348 *McIntyre Estate v Ontario (Attorney General)* (2002) 61 OR (3d) 257 (CA) para [63].

349 Ontario Legal Aid Review *A Blueprint for Publicly Funded Legal Services*; *McIntyre Estate v Ontario (Attorney General)* (2002) 61 OR (3d) 257 (CA) para [63].

350 See Ontario Legal Aid Review *A Blueprint for Publicly Funded Legal Services* 218-225.

> from a client to a lawyer. Under a contingency fee agreement, the lawyer finances the litigation for the client while a case is pending. As a result, middle class clients, who are generally risk averse, do not have to commit to pay an unpredictable amount for their lawyer's services and are then able to turn to the justice system to seek redress for their injuries…
>
> A variety of controls and safeguards can be imposed to regulate contingency fees to protect consumers, avoid abuse and prevent over-charging by lawyers, including: restrictions on the area of practice to which contingency fees can be applied, restrictions on clients, regulation of the lawyer's remuneration, review of the contingency fee contract, filing the contract with the court and regulating the form and content of the contract.[351]

Although the development of the common law is usually an evolutionary and incremental process rather than the result of a single defining judgment, the Ontario Court of Appeal in *McIntyre Estate v Ontario (Attorney General)*[352] changed the rhetoric for other cases to follow. The Court of Appeal held that there is no apparent reason why a policy that favours contingency fee agreements for class actions would not apply equally to litigation brought by individuals.[353]

In *McIntyre Estate*[354] the facts were as follows: Mr McIntyre was addicted to cigarettes and died of lung cancer. For his alleged wrongful death, his widow, as executrix of his estate, sued Imperial Tobacco and Venturi Incorporated, a manufacturer of a plastic device used to reduce tar and nicotine. The action was commenced in Ontario, but Mrs McIntyre could not afford the suit. However, Rochon, a Genova law firm, was prepared to take on her case provided the court approved the use of a contingency fee agreement. The proposed agreement was that if the litigation failed then the estate would be charged neither a fee nor for the disbursements, but if the litigation succeeded then the estate would pay 33% of the compensatory damages recovered, 100% of costs recovered, 100% of disbursements not otherwise recovered from the defendants, and 40% of the punitive, aggravated or exemplary damages. After commencing her suit for damages, Mrs McIntyre, in separate proceedings against the Ontario Attorney-General, applied for a declaration that the proposed fee agreement with her lawyers did not offend the Champerty Act. In the alternative, she sought a

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351 *McIntyre Estate v Ontario (Attorney General)* (2002) 61 OR (3d) 257 (CA) para [63].

352 2002 45046 (ON CA), (2002) 61 OR (3d) 257 (CA).

353 Para [61].

354 *McIntyre Estate v Ontario (Attorney General)* (2002) 61 OR (3d) 257 (CA) paras 2-14. In a ruling found at [2001] OJ No. 3206 (QL) (CA), Imperial Tobacco was denied standing as an intervenor. The Advocates' Society and the Ontario Trial Lawyers' Association were granted leave to intervene as friends of the court.

declaration that the Champerty Act was unconstitutional and void or, in the further alternative, that the estate's action should be permitted as a constitutional exemption. Wilson J in the Ontario Superior Court of Justice granted the application in part. She declared that the proposed fee agreement did not offend the Champerty Act but, in her view, it was premature to approve the contingency fee arrangement. She did not rule on the constitutional law issues.[355] The Attorney-General appealed to the Ontario Court of Appeal and, although technically speaking, his appeal was granted, practically speaking the appeal was a failure.

In the Court of Appeal, the Attorney-General's arguments in favour of preventing contingency fee agreements in civil lawsuits for other than class actions (where such fees are authorised by statute[356]) failed. The Attorney-General's unsuccessful argument was that the Champerty Act outlawed contingency fee agreements.

The court further held that although sharing in another's lawsuit is an indicium of champerty, an agreement to share in the profits of another's suit is not champertous unless there is also an improper motive.[357] It went further in holding that participating, supporting and even taking a share in another's lawsuit may be proper and justifiable, in which case there is no maintenance and no champerty.[358] The court stated that motive was the determinative factor and indicated that it is only when a person has an improper motive which motive may include, but is not limited to, "officious intermeddling" or "stirring up strife", that a person will be found to be a maintainer.[359] Further, the court stated that examining the motive of the person charged with champerty better promoted the purpose of the legislation, which was to protect the administration of justice from genuine abuses, both new and old.[360]

The court furthermore held that, historically, courts in Ontario and in other jurisdictions were antagonistic toward contingency fee agreements. This was because of concerns that such agreements would tempt lawyers to act unethically and harm the administration of justice and that such agreements could give rise to conflicts of

355 *McIntyre Estate v Ontario (Attorney General)* (2001) 53 OR (3d) 137 (Ont SCJ).
356 See .
357 *McIntyre Estate v Ontario (Attorney General)* (2002) 61 OR (3d) 257 (CA) para [72].
358 *McIntyre Estate v Ontario (Attorney General)* (2002) 61 OR (3d) 257 (CA) para [27].
359 Para [27].
360 Para 47].

interest between the lawyer and his or her client in the carriage and settlement of the litigation.[361] However, the court was also of the view that there was little evidence to justify the concerns, and the experience of jurisdictions that permitted contingency fee agreements showed that the concerns were unsubstantiated.[362] Although the court in *McIntyre Estate* encouraged the legislature to assume responsibility, it considered that the court would be able to change the Ontario law on contingency fee agreements as a matter of developing the common law and held that the court need not wait for legislative action.[363] The court rejected the Attorney-General's argument that changes in Ontario law regarding the legality of these agreements should be made only by the legislature.

The *McIntyre Estate* decision narrowed the scope of An Act Respecting Champerty of 1897. The court further held that the effect of the legislation was simply to apply the common law doctrine of champerty to such agreements and, furthermore, the court held that the common law treatment of lawyer's contingency fee agreements should be considered to have evolved over time.

In Ontario, contingency fee agreements would no longer be champertous *per se* unless tainted by an improper motive and contrary to the law.[364] In reaching this conclusion, the court drew support from the policy considerations relating to access to justice that favour the use of contingency fee arrangements and the reforms introduced in other jurisdictions.[365]

Nevertheless, the court granted the Attorney-General's appeal because it could not be determined on the record whether the particular fee agreement before the court was champertous.[366] Accordingly, the enforceability of the contingency fee arrangement in a particular case must often be determined in the light of the ultimate result and the extent of compensation afforded to the lawyer in question.[367] Even after such an

361 *McIntyre Estate v Ontario (Attorney General)* (2002) 61 OR (3d) 257 (CA) para [52] – 53
362 Paras [51]-[61].
363 Paras [67]-[74] and [85].
364 Para [75].
365 Paras [56] – [60].
366 *McIntyre Estate v Ontario (Attorney General)* (2002) 61 OR (3d) 257 (CA) para [15].
367 McCamus *Contract* 469-470.

acceptance of contingency fee agreements, in Canada contracts that promote maintenance or champerty, even if not invalid on the ground that they are agreements to commit criminal or tortious acts, should be susceptible to attack on the ground that they interfere with the proper administration of justice.[368]

The Superior Court of Justice in *Raphael Partners v Chester Lam*[369] also upheld a contingency fee agreement as fair and reasonable under the tests imposed by the Solicitors Act.[370] The court had set guidelines for the enforcement of a contingency fee agreement. The court in *Raphael* further held that the contingency fee was "fair and reasonable" where the contingency fee agreement was for 15% of the first $1 million and 10% of each subsequent $1 million in damages, plus recovered costs, totalling $431,313 plus GST on a $2.5million settlement.

Due to the influence of both the *McIntyre Estate* and *Raphael* judgments, the Law Society of Upper Canada amended its Rules of Professional Conduct to permit contingency fees for some types of litigation.[371] Immediately afterwards, a private member's bill to regulate contingency fee agreements was enacted in the Ontario legislature to legalise and regulate contingency fee agreements.[372] Contingency fee agreements were allowed in Ontario in 2002 when amendments were made by inserting section 28.1 into the Solicitors Act[373] which provides that:

a) The solicitor and his/her client may enter into a contingency fee agreement in accordance with this section.[374]

b) The agreement will provide for the payment of fees upon the success of the case.[375]

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368 *McIntyre Estate* 2002 45046 (ON CA), (2002) 61 OR (3d) 257 (CA); see also Fridman *Contract* 365-366.
369 (2002) 55 OR (3d) 289 (SCJ).
370 See fn .
371 See s 28.1(3)(a) and (b) of the Solicitors Act RSO 1990, c S 15.
372 Justice Statute Law Amendment Act 2002 SO 2002, c 24.
373 RSO 1990, c S 15.
374 S 28.1(1).
375 S 28.1(2).

c) The section excludes proceedings under the Criminal Code (Canada) or any other criminal or quasi-criminal proceedings, or a family law matter.[376]

d) The section also states that the agreement must be in writing for it to be binding.[377] The subsection goes on to state that the amount of the contingency fee to be paid to the solicitor must not be more than the maximum percentage, if any, prescribed by regulation of the amount or of the value of the property recovered in the action or proceeding, however the amount or property is recovered.[378]

e) The section further provides that a greater maximum amount may be permitted upon approval by the Superior Court (taking into account the nature and complexity of the action or proceeding and the expense or risk involved in it and may consider such other factor as the court may deem relevant).[379] Furthermore, it states that the agreement shall not include costs except with leave of the court.[380]

f) Pursuant to section 28.1(12) of the Solicitors Act, the Lieutenant-Governor-in-Council is empowered to make regulations concerning contingency fee agreements related to a number of matters. No maximum percentage or remuneration has been established in Ontario by any regulation. However, section 5 of Regulation 195/04 states that court approval is required for any contingency fee agreement entered into by a litigation guardian acting for a person under disability.

Section 5 of Regulation 195/04 reads as follows:

> 5(1) A solicitor for a person under disability represented by a litigation guardian with whom the solicitor is entering into a contingency fee agreement shall,
>
> (a) apply to a judge for approval of the agreement before the agreement is finalised; or

376 S 28.1(3)(a) and (b).
377 S 28.1(4).
378 S 28.1(5).
379 S 28.1(6) and (7).
380 S28.1(8) and (9).

(b) include the agreement as part of the motion or application for approval of a settlement or a consent judgment under rule 7.08 of the Rules of Civil Procedure.

The commentary under rule 2.08(3) of the Rules of Professional Conduct lists the factors which should be considered when determining the appropriate percentage for the contingency fee and reads as follows:

> In determining the appropriate percentage or other basis of the contingency fee, the lawyer and the client should consider a number of factors, including the likelihood of success, the nature and complexity of the claim, the expense and risk of pursuing it, the amount of the expected recovery and who is to receive an award of costs. The lawyer and client may agree that in addition to the fee payable under the agreement, any amount arising as a result of an award of costs or costs obtained as part of a settlement is to be paid to the lawyer, which agreement under the Solicitors Act must receive judicial approval. In such circumstances, a smaller percentage of the award than would otherwise be agreed upon for the contingency fee, after considering all relevant factors, will generally be appropriate. The test is whether the fee in all of the circumstances is fair and reasonable.

In *Re Cogan*,[381] the court held that in addition to the Rule 2.08 (3) factors identified by the Law Society, it would also consider "the valid social objective of ensuring that access to justice is maintained for injured plaintiffs, including children and parties under disability". The court held as follows:[382]

> Therefore, when a contingency fee agreement is being presented for approval by the court, the following factors must be considered: a) the financial risk assumed by the lawyer, which is included under likelihood of success, the nature and complexity of the claim, and the expense and risk of pursuing it; b) the results achieved and the amount recovered; c) the expectations of the party; d) who is to receive an award of costs, and e) achievement of the social objective of providing access to justice for injured parties, including injured children and parties under disability. I find that these factors must be accorded much greater weight than the time spent by the lawyer.

The additional considerations of the achievement of the ideal of access to justice for people in need is instrumental in providing adequate representation to the vulnerable groups in society. These factors are considered by the court to determine the fairness of such vulnerable groups' fees before approving the exorbitant fees of the lawyers. The position in Ontario has evidently changed and improved since 2002 with regard to contingency fee agreements. As noted above, the landmark cases have shaped the perspective with regard to contingency fees and the legislature together with the Law Society have also made significant strides in ensuring that access to justice is realised. The measures advanced by the legislature, the courts and the Law Society

381 (2007) 88 OR (3d) 38 para [42].
382 Para [42].

acknowledge the risk that lawyers take but also protect litigants from overreaching by lawyers. The section below will discuss the advantages and disadvantages in Ontario with regard to contingency fee agreements.

3.4 Critical evaluation of contingency fee agreements in Canada

3.4.1 Advantages of contingency fee agreements

3.4.1.1 Access to justice

The main advantage of contingency fee agreements is that they increase access to justice and improve the administration of justice.[383] Contingency fee agreements also solve the problem of expensive litigation that denies access to justice to people with modest means.[384] Contingency fee agreements are advantageous for middle class and indigent litigants and those who do not want to assume the risk of litigation because these agreements shift most of the risk from client to lawyer. In terms of a contingency fee agreement, the lawyer finances the litigation for the client while a case is pending. As a result, middle class clients, who are generally risk averse, do not have to commit to pay an unpredictable amount for their lawyer's services but are still provided with access to the justice system in order to seek redress for their injuries.[385]

3.4.1.2 Criteria for contingency fees

The judiciary has developed a mechanism in Ontario to assist the assessment officer in determining what would be the appropriate fee. Below is a list of factors that help to ensure that there is minimal abuse with regard to the enforcement of contingency fee agreements. The factors that must be considered in establishing a fair and reasonable fee were set out by the Ontario Court of Appeal in the case of *Cohen v Kealey & Blaney*[386] and similar factors were set out in the commentary under rule 2.08(2) of the Law Society's Rules of Professional Conduct. The factors listed in rule 2.08(2) are as follows:

a) the time and effort required and spent;

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383 *Tri Level Claims Consultants v Koliniotis* (2005) 259 DLR (4th) 297 (Ont CA) para [12]; see also Corboy 1975 *Litig* 39; Rickman 1994 *Oxford Review of Economic Policy* 39-41.

384 *Coronation Insurance Co. v Florence*, [1994] SCJ No. 116 (QL) para [14].

385 See Rickman 1994 *Oxford Review of Economic Policy* 31.

386 (1985) 26 CPC (2nd) 211 (Ont CA).

b) the difficulty and importance of the matter;

c) whether special skills or services have been required and provided;

d) the amount involved or the value of the subject-matter;

e) the result obtained;

f) fees authorised by statute or regulation; and

g) special circumstances, such as the loss of other retainers, postponement of payment, uncertainty of reward, or urgency.

The Court of Appeal's decision in *Cohen* was handed down before contingency fees were allowed in Ontario and it deals with the traditional factors which affect the fairness and reasonableness of a solicitor's fee without considering the effect of a contingency fee agreement. Rule 2.08(2) of the Law Society's Rules of Professional Conduct largely sets out the same factors that were considered in *Cohen*, and does not deal with a situation involving a contingency fee agreement. In addition, the Law Society enacted a new rule 2.08(3) which sets out the factors to consider when determining the appropriate percentage for a contingency fee. The courts find that the factors in rule 2.08(3) should be given more weight than the traditional factors, which do not deal specifically with a contingency fee agreement.

3.4.3.3 Freedom to contract

The contingency fee agreement represents the essence of freedom to contract.[387] The client in a contingency fee agreement contracts away part of his legal claim.[388] The contingency fee agreement also links the interests of the lawyer and the client.[389]Contingency fee agreements also empowers litigants to litigate where they are financially unable to do so.[390]

The Ontario legislature intended to promote access to justice and to ensure that the cost of their legal system did not act as a barrier to justice when it amended the

387 See Wennihan 1995 *SMUL Rev* 1648.
388 See Note 1962 *Iowa L Rev.* 940.
389 See Schwartz and Mitchell 1969 *Stan L Rev* 1120.
390 See Corboy 1975 *Litig* 29.

Solicitors Act to allow contingency fees. Contingency fees are considered to be particularly important for very complex cases that involve lengthy and costly preparation.[391] Despite the above advantages of contingency fee agreements, there are disadvantages to such agreements and they are analysed below.

3.4.2 Disadvantages of contingency fee agreements

3.4.2.1 Conflict of interest

Contingency fees also pose serious risks to the due administration of justice.[392] In the case of *Tri Level Claims Consultants v Koliniotis*,[393] the Ontario court held that a lawyer or paralegal with a financial interest in the outcome of a case may be tempted to engage in sharp or even dishonest practice. Furthermore, a contingency fee agreement may also put a lawyer or paralegal in a conflict of interest position with his own client.[394] For example, an offer to settle made early in the proceedings before a lawyer or paralegal has done much work may appear attractive to a lawyer or paralegal who is being paid a percentage of the settlement amount regardless of the work done. Such an offer may not do justice to the client's claim but could create a direct incentive for the lawyer to settle the case for an amount that covers a substantial portion of his fees.[395]

3.4.2.2 Control of litigation

Unlike an attorney working for a flat rate, the contingency fee lawyer has a substantial financial interest in the claim as he only recovers his fee if the outcome favours his client.[396] Control of litigation assumes greater significance in a contingency fee situation. The client might be willing to go to trial but since the lawyer has invested in the claim and assumed the financial risk, it is only plausible that the lawyer will exercise greater control.[397] This also raises ethical concerns because the lawyer has assumed

391 *Re Cogan* (2007) 88 OR (3d) para [37].
392 *Tri Level Claims Consultants v Koliniotis* (2005) 259 DLR (4th) 297 (Ont CA) para [12].
393 (2005) 259 DLR (4th) 297 (Ont CA) para [12]; see also Rickman 1994 *Oxford Review of Economic Policy* 42-45.
394 *Tri Level Claims Consultants v Koliniotis* (2005) 259 DLR (4th) 297 (Ont CA) para [12].
395 See Rickman 1994 *Oxford Review of Economic Policy* 42-45.
396 MacKinnon *Contingent Fees* 196.
397 See Brickman 1996 *Fordham L Rev* 285.

the role of both lawyer and principal while the client is merely informed of the progression of the case and is not asked to provide instructions.[398]

3.4.3.3 Prohibition of contingency fee agreements in family law, criminal and quasi-criminal proceedings

The other disadvantage of contingency fee agreements is that they are prohibited in family law cases. As Perell explains:

> The exclusion of contingency fees for matrimonial matters may be explained by the fact that the contingency of success is not apt for most such proceedings, where divorces are available on a no-fault basis and where the major issue will often be dividing the assets, which is also a matter of some high predictability under matrimonial property regimes. In matrimonial disputes, the exposure to risk of failure is thus different than in other litigation. Further, there is the concern that contingency fees likely will be higher than regular fees, thus diverting assets that might be used, for example, to better support the children of the marriage.[399]

This prohibition can result in a litigant in a family law matter being inadequately represented because of lack of financial assistance. Another disadvantage of contingency fee agreements is that they cannot be used in criminal and quasi-criminal proceedings as the outcomes of criminal proceedings do not produce any property that can be shared, which means that contingency fees would probably have utility for wealthy but not for poor or middle class clients.[400] Thus, the chief value of contingency fees of facilitating access to justice is not advanced in the criminal context.[401]

Despite these plausible advantages and disadvantages of the system governing contingency fee agreements, the system is not immune to reform and the next section will highlight some of the applicable reforms that may help to keep the current regulation in line with the societal needs of litigants.

3.5 Reform of contingency fee agreements in Ontario, Canada

In all the Canadian provinces except Ontario, no-win-no-fee arrangements are legal in some family law cases.[402] The reason why the conclusion of contingency fee agreements in certain family law matters was considered necessary is that there is a

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398 See Morgan TD 1976 *Harv L Rev* 732.
399 Perell (2003) *Can Bus LJ* 484-485.
400 Perell (2003) *Can. Bus. LJ* 484-485.
401 Perell (2003) *Can. Bus. LJ* 484-485.
402 Carville 2015 http://www.thestar.com/news/canada/2015/05/31/lawyers-fight-archaic-ban-on- no-win-no-fee-arrangements-in-family-court.html.

need to allow such contingency fee agreements. This appears from the letter of a group of family lawyers to the provincial government of Ontario.[403] The position in other provinces like British Columbia is different where the court must approve a contingency fee agreement before it becomes valid and enforceable. Section 67(3)-(5) of British Columbia's Legal Profession Act[404] provides that:

> (3) A contingent fee agreement for services relating to a child guardianship or custody matter, or a matter respecting parenting time of, contact with or access to a child, is void. (4) A contingent fee agreement for services relating to a matrimonial dispute is void unless approved by the court.
>
> (5) A lawyer may apply to the court for approval of a contingent fee agreement for services relating to a matrimonial dispute and section 66(7)-(9) applies.

The rationale is that there are a number of married women who do not work outside their homes and who represent themselves in the family law court.[405] Lawyers argue that this stacks the legal odds in favour of men, who are typically in control of family finances.[406] They conclude that with the court's approval certain family law matters ought to be allowed by the legislator, as in provinces like British Columbia, Saskatchewan, New Brunswick and Yukon.[407]

This clearly proves that there is a cogent argument for retaining the stance that family law matters should remain excluded from the application of contingency fee agreements unless approved by a court of law. These issues cannot be the sole rationale for change as litigants' access to justice is not dependent upon the conclusion of such agreements.

3.6 Conclusion

The amended section 28.1 of the Solicitors Act of Ontario province has brought about significant changes in the development of contingency fee agreements in the province. The most noteworthy development investigated is the oversight function of the court

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403 Carville 2015 http://www.thestar.com/news/canada/2015/05/31/lawyers-fight-archaic-ban-on- no-win-no-fee-arrangements-in-family-court.html.

404 SBC 1998.

405 Carville 2015 http://www.thestar.com/news/canada/2015/05/31/lawyers-fight-archaic-ban-on- no-win-no-fee-arrangements-in-family-court.html.

406 Carville 2015 http://www.thestar.com/news/canada/2015/05/31/lawyers-fight-archaic-ban-on- no-win-no-fee-arrangements-in-family-court.html.

407 Carville 2015 http://www.thestar.com/news/canada/2015/05/31/lawyers-fight-archaic-ban-on- no-win-no-fee-arrangements-in-family-court.html.

in settlement proceedings where there is a minor or disabled person involved. The court plays a pivotal role in approving any contingency fee agreement entered into on behalf or for the benefit of a disabled person or minor. The only development that the courts in Ontario have not sanctioned is the acceptance of such agreements in family law matters. The acceptance of contingency fee agreements in some family law matters will serve as a means of providing access to justice to those litigants who may be hampered by not being able to litigate because of absence of contingency fee agreements, if the court approves the agreement.

CHAPTER 4: SOUTH AFRICAN LAW PERSPECTIVE ON THIRD-PARTY LITIGATION FUNDING AGREEMENTS

4.1 Introduction

This chapter highlights the significant developments regarding both lawyer and non-lawyer funders of litigation where the funder is not a party to the proceedings. The South African legal system is compared with developments in England regarding non-lawyer funders (which were discussed in chapter 2 above) and those in Ontario, Canada, regarding lawyer funders (as discussed in chapter 3 above).

The outline of the chapter is as follows: Firstly, a brief historical overview of the South African development of third-party litigation funding agreements will be given. Secondly, a discussion of both lawyer and non-lawyer third-party litigation funding agreements is provided. Finally, the current position regarding contingency fee agreements is discussed. The legal positions in England, South Africa and Ontario are compared and the reforms that are necessary for the regulation of both agreements as informed by legal developments in England and Ontario are discussed.

4.2 Brief historical overview of third-party litigation funding agreements[408]

South Africa has a mixed legal system with its origins in Roman law, Roman-Dutch law and English law, which has greatly influenced the development of third-party litigation funding agreements. In Roman and Roman-Dutch law third-party litigation funding agreements were known as *pacta de quota litis*. A p*actum de quota litis* is an agreement in terms of which the funder undertakes to provide funds for litigation by the litigant in exchange for a share of the proceeds should the case be successful.[409] Third-party litigation funding agreements were regarded with distaste as they were considered to encourage speculative litigation and thus amounted to an abuse of the legal process.[410] This adverse view was held irrespective of whether the funding was by lawyers or non-lawyers.

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408 This paragraph has been previously published by me:: Khoza 2018 *PELJ* 4-6.
409 Hutchison and Pretorius *Contract* 189.
410 *Price Waterhouse Coopers Inc. v National Potato Co-Operative Ltd* 2004 (6) SA 66 (SCA) 74.

The earliest court case in South Africa that applied the legal writings of the Roman-Dutch authorities is *Hollard v Zietsman*,[411] where the advocate for the defendant argued that English law on champerty and maintenance is stronger than Roman law.[412] This may explain the tendency of the courts to apply English law in third-party litigation funding arrangements. The advocate for the plaintiff added that the purpose of the Roman-Dutch law rule was to deter attorneys and advocates from speculating in litigation.[413] After both advocates canvassed the Roman and Roman-Dutch law authorities on litigation funding, the court concluded that it is not illegal to agree with another to bear part of that other's costs of litigation but agreements to purchase the subject matter of a suit (*de quota litis*) are illegal.[414]

As was discussed in detail in chapter 2, under the English common law maintenance and champerty are the names given to agreements which may contravene the public policy as encouraging speculative litigation.[415] Maintenance is the improper assistance by one person in litigation conducted by another, in which the former has no legitimate interest (in other words without just cause or excuse).[416] In *Giles v Thompson*,[417] Steyn LJ described champerty as an aggravated form of maintenance. Champerty occurs when the person maintaining another's lawsuit stipulates in an agreement for a share of the proceeds of the action or suit should the action succeed.[418] Both contracts were contrary to public policy.[419]

The English common law condemned champerty to protect the integrity of the judicial system because the fear existed that champertous agreements could give rise to abuses such as the inflation of damages, suppression of evidence, and suborning of witnesses.[420] In 1995, the English court in *Aratra Potato Co v Taylor Johnson*

411 (1885) 6 NLR 93.
412 *Hollard v Zietsman* (1885) 6 NLR 94.
413 *Hollard v Zietsman* (1885) 6 NLR 96.
414 *Hollard v Zietsman* (1885) 6 NLR 97.
415 Beatson, Burrows and Cartwright *Contract* 390.
416 *Hill v Archbold* [1919] 1 QB 686 694; *Price Waterhouse Coopers Inc. v National Potato Co Operative Ltd* 2004 (6) SA 66 (SCA) 74.
417 [1993] 3 All ER 321 328.
418 *Price Waterhouse Coopers Inc. v National Potato Co-Operative Ltd* 2004 (6) SA 66 (SCA) 74.
419 74.
420 *Re Trepca Mines Ltd* [1962] 3 All ER 357 355.

Garrett,[421] found that it was champertous to agree on a differential fee arrangement that depended on the outcome of the case.

This view was also expressed in *Campbell v Welverdiend Diamonds Ltd*,[422] where the court stated that:

> It is clear from the authorities that while a transaction of this kind may be properly entered into, and may be supported whether it is a genuine case of assisting a litigant for a fair recompense, it cannot be supported in other cases; a court is not to give effect to arrangements which are made by persons who traffic in litigation.

In South Africa, however, it has long been accepted that an agreement to assist a litigant in exchange for a percentage of the proceeds (a *pactum de quota litis*) is lawful, if it was entered into in good faith[423] and with the object of assisting the litigant in the exercise of his or her rights.[424]

The partial acceptance of third-party litigation funding was foreshadowed in a paradoxical *dictum* delivered in a judgment by Innes CJ in *Patz v Salzburg*:[425]

> [O]f course it is against public policy to traffic or gamble in lawsuits, or to maintain them for speculative or wrongful purposes. That is both English and Roman-Dutch law. But it is not unlawful bona fide and properly to assist a litigant to defend or establish his rights, even though the person so assisting may derive some benefit from the subject-matter of the action.

The court emphasised the disapproval of third-party litigation funding agreements when applying the English common law rule of champerty and at the same time seemed to be willing to relax the rule by allowing such agreements where a *bona fide* third party who has no stake in the litigation finances the proceedings (maintenance), and also share the proceeds (champerty). The *dictum* foreshadows a later development in South African law where the legality of agreements in which non-lawyers fund litigation is recognised.

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421 [1995] 4 All ER 695.

422 1930 TPD 287.

423 See *Mayne v James & The High Sheriff* (1893) 10 CLJ 61; *Hugo & Miller v The Transvaal Loan & Finance & Mortgage Co* (1894) 1 OR 336 340; *Green v De Villiers; Dr Leyds NO & The Rand Exploring Syndicate Ltd* (1895) 2 OR 289 294; *Schweizer's Claimholders' Rights Syndicate Ltd v The Rand Exploring Syndicate Ltd* (1896) 3 OR 140 144; *Patz v Salzburg* 1907 TS 526 527; *Walker v Matterson* 1936 NPD 495 504.

424 Scott 2004 *SA Merc LJ* 478.

425 1907 TS 527 527 (followed in *Walker v Matterson* 1936 NPD 495 504).

After the Contingency Fees Act legitimised contingency fee agreements between a litigant and a legal practitioner, the High Court in *De la Guerre v Ronald Bobroff & Partners Inc* [426] held that the Act is exhaustive on the subject and that any contingency fee agreement not in compliance with the Act is invalid.[427] There has evidently been a steady development with regard to litigation funding arrangements in South Africa, following the English authorities on this subject. The following section will discuss the impact of third-party litigation funding agreements on non-lawyers as applicable in South Africa.

4.3 Third-party litigation funding agreements with non-lawyers[428]

It is trite by now that champerty and maintenance contracts are injurious to the administration of justice, and as a result, they are against public policy. This is also argued by the author Bradfield who state that the civil courts are designed primarily for the settlement of *bona fide* disputes between litigants with or without the assistance of entirely disinterested members of the legal profession and those that do not have the right of appearance in court.[429] They further state that any contract that does not fit this pattern of litigation may contain the seeds of injustice and must therefore be scrutinised closely.[430]

The Supreme Court of Appeal in *Price Waterhouse Coopers Inc v National Potato Co-Operative Ltd*[431] commented that third-party litigation funding agreements are recognised in South Africa, because the civil justice system has developed its own inner strength.[432] The court examined and endorsed some champertous agreements by holding that:[433]

> 1 an agreement in terms of which a person provides a litigant with funds to prosecute an action in return for a share of the proceeds of the action is not contrary to public policy or void;

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426 (GNP) (unreported case no 22645/2011, 13-2-2013).
427 *De la Guerre v Ronald Bobroff & Partners Inc* (GNP) (unreported case no 22645/2011, 13-2-2013) para 14; See also Van Niekerk 2013 (April) *De Rebus* 50.
428 Published: Khoza M.J. "Formal Regulation of Third-party Litigation Funding Agreements? A South African Perspective" (2018) 21(1) *PELJ* 6-10.
429 Bradfield *Contract* 411.
430 Bradfield *Contract* 411.
431 2004 (6) SA 66 (SCA).
432 76.
433 81-82.

2 the illegality of such contracts would not be a defence in an action;

3 litigation pursuant to such a contract may constitute an abuse of the process which in appropriate circumstances a court may prevent notwithstanding a litigant's right of access to the courts enshrined in section 34 of the Constitution.

This was the *status quo* for almost nine years until the Gauteng North High Court in *Price Waterhouse Coopers Inc v IMF Ltd*[434] held that the litigation funder could be joined as a co-litigant in the litigation of another in order to be able to give a cost order against such funder. The court regarded this to be a logical progression from the recognition that champertous agreements are lawful.[435] The court added that the ability to hold the funder liable for costs is one of the measures that the courts could adopt to counter any possible abuses arising from the recognition of the validity of champertous agreements.[436]

Subsequent to the decision in *Price Waterhouse Coopers Inc v IMF Ltd*[437] to join a funder in the proceedings of another, the Western Cape High Court in *EP Property Projects (Pty) Ltd v Registrar of Deeds, Cape Town*[438] granted a costs order against a litigation funder who had been joined in the litigation. The court looked at the position in English law and other common law jurisdictions, observing that costs orders would generally not be granted against what it referred to as "pure funders", that is funders who do not seek to control the course of the litigation and lack any personal interest in the litigation.[439] However, where the funder controls the proceedings and has a personal interest in their success, the funder is not so much facilitating access to justice as gaining access for his purposes, and becoming the "real" litigant.[440] In this instance the court concluded that it is then considered that the funder should be held liable for any adverse costs order.

Another important decision was that in *Scholtz v Merryweather*.[441] In this case the Western Cape High Court applied the distinction laid down in *EP Property Projects*[442]

434 2013 (6) SA 216 (GNP).
435 *Price Waterhouse Coopers Inc v IMF Ltd* 2013 (6) SA 216 (GNP) 222.
436 *Price Waterhouse Coopers Inc v IMF Ltd* 2013 (6) SA 216 (GNP) 222.
437 2013 (6) SA 216 (GNP).
438 2014 (1) SA 141 (WCC) (hereinafter *EP Property Projects*).
439 *EP Property Projects* 162.
440 *EP Property Projects* 164.
441 2014 (6) SA 90 (WCC) (hereinafter *Scholtz*).

between the "pure funders" who are immune to adverse costs orders and controlling litigation funders who have a personal interest and seek to control the litigation. The court in *Scholtz*[443] held that the funder was jointly and severally liable with the litigant for the costs of the application because the funder had not only funded the litigation but had also substantially controlled the proceedings by hindering service of summons, consulting lawyers and initiating the rescission application.[444] He also stood to benefit in that, if the judgment could be rescinded, he would be relieved of his common law obligation to support the litigant who is his son.[445]

The Gauteng Local Division in *Gold Fields Ltd v Motley Rice LLC*[446] also approved and applied the distinction advanced in the *EP Property Projects* case[447] between pure funders and other funders.[448] The court in *Gold Fields* held that the funder was a "pure funder" because the funder did not stand to gain financially if the litigation was successful nor did he exercise substantial control over the litigation.[449] The funder was merely facilitating access to justice and not "gaining access to justice for his own purposes".[450]

With regard to these developments, it is prudent to look back at Wallis's remarks that funding provided by litigation investors can clearly be a viable solution to providing some litigants with access to the courts, although restrictions on the type of cases can be expected due to the potential ethical implications.[451] These restrictive developments have the potential to affect litigation funding companies.

There seems to be a proliferation of litigation funding companies in South Africa. In 2013 the first litigation funding company, called the South African Litigation Funding Company (SALFCO), was established.[452] Other litigation funding companies include

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443 2014 (6) SA 90 (WCC).
444 *Scholtz* 114.
445 *Scholtz* 113.
446 2015 (4) SA 299 (GJ) (hereinafter *Gold Fields*).
447 2014 (1) SA 141 (WCC) 164.
448 *Gold Fields* 319-322.
449 *Gold Fields* 324.
450 *Gold Fields* 324.
451 Wallis 2011 (August) *Advocate* 35.
452 Cokayne 2013 http://www.salfco.com/docs/SALF%20launch%20%20Press%20Release%20Pretoria%20News%203%20June%2013.pdf; Burger 2014 http://www.werksmans.com/legal-briefs-view/let-litigation-funder-beware/.

Astrea, Christopher Consulting and Litigation FundingSA. A few other companies have shown interest in investing in South African cases. Some examples are IMF Australia, which has been engaged as a funder in the high-profile case of *Price Waterhouse Coopers Inc v IMF Ltd,*[453] and the London-based funder Calunius Capital.[454]

The emergence of these funding companies and individuals has been accompanied by many problems.[455] These problems relate to issues of transparency, fairness to clients, the impact of the funder in the case, and the influence that the funder has on overall decisions regarding the case.[456] The problems that third-party litigation funding agreements pose are similar in England and.[457] Beisner and Gary[458] have outlined some of the problems with regard to third-party litigation funding agreements in the United States of America. Firstly, they argue that the proliferation of funders will increase the volume of uncertain litigation as these funders regard disputes as investments. Secondly, funders may try to exert control over strategic decisions relating to the case. Thirdly, funders tend to prolong litigation by preventing the settlement of the case. Lastly, lawyers tend to pay less attention to the interests of the litigant as the aim is to retain future business with the funder.[459] The funders are not restricted to the percentage they generally charge clients and in some cases their charges may exceed what is considered reasonable.[460]

The issue of concluding third-party litigation funding agreements in South Africa has not yet been addressed, except as regards the aftermath of such agreements, when the matter is before the courts.[461] The current state of third-party litigation funding in South Africa is problematic in that it affords the funder more protection than the litigant as a client of the litigation funder.[462] The litigant is not protected in terms of the National

453 2013 (6) SA 216 (GNP) 222.
454 Vickovich 2012 https://www.africanlawbusiness.com/news/african-litigation-funding-market-a-hot-potato.
455 Khoza 2018 *Potchefstroom Electronic Law Journal* 9.
456 Khoza 2018 *Potchefstroom Electronic Law Journal* 9.
457 This will be discussed below in 4.5 Comparison; see also Khoza 2018 *Potchefstroom Electronic Law Journal* 9.
458 Beisner and Rubin 2012 (October) *ILR* 4-5.
459 Beisner and Rubin 2012 (October) *ILR* 4-5.
460 Khoza 2018 *Potchefstroom Electronic Law Journal* 9.
461 Khoza 2018 *Potchefstroom Electronic Law Journal* 9.
462 Khoza 2018 *Potchefstroom Electronic Law Journal* 9.

Credit Act[463] (hereinafter the National Credit Act) or the Consumer Protection Act[464] (hereinafter the Consumer Protection Act) as these agreements provide a wide scope of freedom of contract to the funder as the *qui contractus initiat*.[465] In a case where the litigation is about land, for example, the litigant may end up losing half of the land as a result of the contract the litigant entered into with the funder.[466] In terms of section 1 of the National Credit Act, the agreement does not amount to a credit agreement.[467] The reason why the agreement cannot amount to a credit agreement is that the funder becomes entitled to payment only after achieving success in the litigation.[468] This means that the funder will get professional disbursements and remuneration without interest in the ordinary sense but with an agreed-upon percentage of the capital award only when the case is successful, which is akin to a success fee.[469]

It is clear therefore that there is an imbalance in this form of agreement, where the funder can charge an exorbitantly high fee on the grounds of the risk undertaken, even though the case appears *prima facie* to be meritorious.[470] Although the Contingency Fees Act protects the litigants with regard to lawyers, third-party litigation funding can result in unfair and abusive contract terms for litigants.[471] This is so because the Contingency Fees Act, which regulates funding provided by lawyers to litigants, does not apply. There is no limit to the amount a funder can draw after the finalisation of a matter he funded[472] and there are no mechanisms regulating how the fee agreement should be worded or the exact clauses that should feature in the agreement to avoid invalidity.[473] There are also no legal consequences for a failure to adhere to established standards.[474] Although some practitioners seem to be confused about the application of the Contingency Fees Act, the Act contains clear guidelines regarding its application.

In the light of the above discussion of the academic literature and case law, it is apparent that third-party litigation funding has recently become more acceptable in

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463 34 of 2005.
464 68 of 2008.
465 Khoza 2018 *Potchefstroom Electronic Law Journal* 9.
466 Khoza 2018 *Potchefstroom Electronic Law Journal* 9.
467 Khoza 2018 *Potchefstroom Electronic Law Journal* 9.
468 Khoza 2018 *Potchefstroom Electronic Law Journal* 9.
469 Khoza 2018 *Potchefstroom Electronic Law Journal* 9-10.
470 Khoza 2018 *Potchefstroom Electronic Law Journal* 10.
471 Khoza 2018 *Potchefstroom Electronic Law Journal* 10.
472 As provided in s 2 (1) and (2) of the Contingency Fees Act 66 of 1997.
473 As provided by s 3 of the Contingency Fees *Act* 66 of 1997.
474 As in s 5 of the Contingency Fees *Act* 66 of 1997; see also *Price Waterhouse Coopers*) 78.

South African law and elsewhere. As a result, there is a need for a more robust regulatory scheme in South Africa. The discussion also indicates that the challenges that South Africa is currently facing in respect of third-party litigation agreements are similar to those in other jurisdictions. Lawyers' litigation funding agreements with their clients (contingency fee agreements) and their effects on litigants are discussed below.

4.4 Third-party litigation funding agreements with lawyers

In addition to third-party litigation funding agreements concluded with non-lawyers, there is a recognised phenomenon in South Africa, as in other common law countries, known as contingency fee agreements.[475] Contingency fee agreements are the counterpart of non-lawyer third-party litigation funding agreements, since they allow lawyers to conclude champertous or maintenance agreements with their clients. In South Africa, the Contingency Fees Act regulates contingency fee agreements, and will be discussed below.

The South African legislation on such agreements is based on English legislation.[476] It is now evident that the enactment of the Contingency Fees Act is consistent with legislative developments regarding contingency fee agreements in jurisdictions where English common law operates. In all these countries, the object pursued by way of legislative changes was to promote the public policy principle of access to justice.

Bradfield observe that:[477]

> South African law consistently treated such contracts as contrary to public policy and void, until opinion finally came round to the view that a contract between a client and a legal practitioner for a contingency fee, within strictly controlled limits, should be permitted in order to give clients access to justice that they would otherwise not be able to afford. This thinking is embodied in the Contingency Fees Act 66 of 1997, which permits an advocate or attorney to enter into a contingency fees agreement with a client for payment of a fee only in the event of success.

475 Eg England, Australia and Canada.
476 Access to Justice Act of 1999; see also Druker *Contingency Fees* 81.
477 Bradfield *Contract* 411-412.

This initiative was taken because of the number of middle class litigants who were unable to enforce their rights because of the cost of litigation and because they did not qualify for legal aid as provided for by the Legal Aid Act.[478]

The Contingency Fees Act which came into operation on 23 April 1999 consists of seven sections. The Act was enacted to strengthen the right to access to the courts as provided for in section 34 of the Constitution of the Republic of South Africa, 1996.[479]

The Contingency Fees Act provides that a legal practitioner may conclude a written agreement with a client in any legal proceeding (except criminal proceedings and family law matters)[480] after being satisfied that there are reasonable prospects of success.[481] In addition, the Act also provides a framework of what would be "fair remuneration" in a contingency fee arrangement.[482] There are two kinds of agreements that a legal practitioner may enter into with his client in terms of section 2 of the Act. The first is a "no success no fee" agreement,[483] and the second is an agreement whereby the legal practitioner may charge fees higher than the normal fee if the client is successful.[484] The higher fee is also referred to as the success fee.[485] Only the second type of agreement is subject to the statutory caps.[486]

The much-needed clarity of the second type of agreement that may be entered into by the legal practitioner and his or her client regarding the 100% cap of normal fees was provided by the North Gauteng High Court in *Masango v Road Accident Fund*,[487] (hereinafter the *Masango* case) as follows:

> The legal practitioner is authorised in terms of s 2(1)*(b)* read with s 2(2) of the CFA, as an incentive, to charge a success fee which is higher than his or her normal fee, subject

478 1969 as repealed by the Legal Aid South Africa Act 39 of 2014; South African Law Commission (Project 93), Report on "*Speculative and Contingency Fees*" (November 1996) 30.
479 S34 provides: Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.
480 S 1.
481 S 2(1).
482 Reinecke 2014 (July) *Without Prejudice* 47.
483 S 2(1)(a).
484 S 2(1)(b).
485 *Masango v Road Accident Fund* 2016 (6) SA 508 (GJ) 513.
486 *Mofokeng and 3 Others v Road Accident Fund* (2009/22649, 2011/19509, 2010/24932, 2011/20268) [2012] ZAGPJHC 150 (22 August 2012) para [35].
487 2016 (6) SA 508 (GJ). (hereinafter the *Masango* case)

> to the two caps. The normal fees of the attorney are taken as a base and the attorney is authorised to increase the normal or base fee by up to 100%. The attorney may thus increase the normal fee by say 10%, 20%, 30%, 45% etc, but the percentage increase may not exceed 100%. This is the first cap on success fees. What is important is that there is a base (the normal fee) from which a percentage increase is permissible. This is the ordinary and only basis on which the practitioner may increase fees. The legal practitioner first determines his normal fee, which he would have been entitled to charge without a contingency fees agreement, and then increases it in terms of the contingency fees agreement. The success fee is a fee which has been increased from the normal fee. It is thus necessary that we understand the meaning of 'fees', 'normal fees' and then 'success fees' as contemplated in the section.[488]

Mojapelo DJP in *Masango* defined the terms "fee", "normal fees" and "success fees" as used in the Act.[489] After interpreting the ordinary meanings of the words, he defined a "fee" as a payment due to a professional person or body for services rendered or advice given.[490] He then defined "normal fees" of an attorney for litigious work as fees or charges that would ordinarily be allowed on taxation.[491] He further elaborated that normal fees are attorney's fees for services actually rendered or for advice actually given or, simply put, fees that are included as attorney and client costs outside of any special arrangements.[492] He finally defined "success fees" as normal fees which have been increased by a pre-agreed percentage.

The clarity regarding the charging of more than 100% of success fees by practitioners will hopefully eliminate the pervasive overreaching by lawyers. In the *Masango* case for example, normal fees were not used as a base for charging the success fees, which is contrary to the Contingency Fees Act. The concluded contingency fee agreement simply charged 25% of the capital award and in addition charged 14% tax including disbursements. This was clearly a case of sharing in the proceeds and amounted to champerty, which the court vehemently disapproved of.

The second cap introduced as a proviso to section 2(2) is the 25% cap on the capital award which only applies to claims sounding in money. The court in *Masango* provided that the cap does not apply to other claims litigated through a contingency agreement.[493] The section states that in claims sounding in money the success fee

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488 *Masango* 514.
489 *Masango* 514. These terms are not defined in s 1 of the Contingency Fees Act.
490 *Masango* 515.
491 *Masango* 515.
492 *Masango* 516.
493 *Masango* 517.

shall not exceed 25% of the total amount awarded or obtained by the client (excluding costs).[494]

The court in *Masango* emphasised that there is no basis in the Contingency Fees Act or anywhere else for the legal practitioner to charge a fee of 25% (or a smaller amount) of the capital award by the court to the client.[495] The court further held that the 25% of the client's capital award is introduced only as a cap and therefore the 25% cap is not a fee.[496] The court furthermore held that the charge of 25% of the capital award is neither a percentage commission nor a share in the injuries or damages suffered by the client.[497] Any agreement that makes a legal practitioner a partner in the injuries suffered by his client is *contra bones mores* and is therefore unlawful and illegal at common law (as it constitutes champerty) and under the Contingency Fees Act.[498]

The practice of unlawfully sharing 25% of the client's capital award by legal practitioners has come before the courts since the enactment of the Contingency Fees Act. The following cases are examples where a legal practitioner simply charged 25% of the client's capital award: *Mofokeng and 3 Others v Road Accident Fund*,[499] *De la Guerre v Ronald Bobroff*,[500] *Motswai v Road Accident Fund*,[501] *Mfengwana v Road Accident Fund*,[502] *Masango v Road Accident Fund*.[503] These cases are ordinarily settled and the legal practitioner whose normal fees even if doubled may not even amount to 25% of the client's capital ends up receiving more for the services he actually rendered than he would have charged on a normal fee basis.

Settlements are regulated by section 4 of the Contingency Fees Act which provides for transparency by requiring the filing of affidavits with the court if the matter is before the court or professional controlling body if the matter is not before the court by the legal practitioner accompanied by the client's affidavit. The full terms of the settlement

494 S 2(2).
495 *Masango* 517.
496 *Masango* 517.
497 *Masango* 517.
498 *Masango* 517.
499 (2009/22649, 2011/19509, 2010/24932, 2011/20268) [2012] ZAGPJHC 150 (22 August 2012).
500 [2013] JOL 30002 (GNP).
501 2014 (6) SA 360 (SCA).
502 (1753/2015) [2016] ZAECGHC 159 (15 December 2016).
503 2016 (6) SA 508 (GJ).

must be included in the affidavits[504] as well as an estimate of the amount that may be obtained should the matter go to trial.[505] The section also provides that there should be an estimate of chances of success at trial.[506] It adds that there should be an outline of fees if the matter is settled as compared to the case going on trial.[507] The Act, furthermore, provides that the reasons for recommending settlement should be stated in the affidavit.[508] There should be a statement that all of the above have been explained to the client and what steps have been taken to ensure that the client understand the explanation.[509] Lastly there must be a statement that the settlement has been explained to the client and that the client accepts the terms.[510]

The client must also provide an affidavit in which he declares that he was notified of in writing of the terms of the settlement, that the terms were explained to him and that he understands and agrees to them and his attitude to the settlement.[511]

Finally, section 4(3) provides that any settlement made where a contingency fees agreement has been entered into shall be made an order of court, if the matter has served before court. The Act thus makes provision for the early settlement of litigation but fails to guard against the two inherent risks accompanying settlements. It is prudent to mention that the Act does not prevent a defendant from entering into a contingency fee agreement; on the contrary, in practice it is the plaintiffs who often enter into such agreements.[512]

Section 5 provides that clients may review the contingency fee agreement or the fees through the professional controlling body if the provisions of the agreement or the fee is unreasonable or unjust. No rules have been implemented as envisaged in terms of section 6. Section 7 provides that the Minister may make regulations prescribing

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504 S 4(1)(a).
505 S 4(1)(b).
506 S 4(1)(c).
507 S 4(1)(d).
508 S 4(1)(e).
509 S 4(1)(f).
510 S 4(1) (g).
511 S 4(2).
512 *Mofokeng and 3 Others v Road Accident Fund* (2009/22649, 2011/19509, 2010/24932, 2011/20268) [2012] ZAGPJHC 150 (22 August 2012) para [13].

further steps to be taken for the purposes of implementing and monitoring the Act. Two regulations have been promulgated since the passing of the Act.[513] .

The first inherent risk is the inclination to settle rather than go to court. The section was adopted from the Law Reform Commission's consultation paper,[514] in which it was stated that:

> [A]nother argument against contingency fees is that the financial interest of lawyers in the outcome of litigation may adversely affect their ability to give dispassionate, objective and disinterested advice at all stages of the proceedings. For example lawyers might be inclined to avoid trial by advising their clients to accept settlement offers, even though an offer is lower than the judgment likely to be gained at the trial, in order to secure their fees and avoid the additional expense of the trial which depending on the nature of the agreement entered into, have to meet should the case becomes unsuccessful.[515]

The court in *South African Association of Personal Injury Lawyers v The Minister of Justice and Constitutional Development*[516] also observed that it is important to bear in mind that by the time the case goes to court the attorney has spent thousands of Rands[517] and has worked for a long period without debiting fees from the client. Naturally, by the time the trial is conducted, the attorney is eager to recover his fees and close the book to maximise his cash flow. [518]

It is therefore unsurprising that litigation is regularly settled. This creates a risk that the lawyer will settle for a lower amount than that which could be claimed if the matter had

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513 S 1(vi)(b) and 5: Determination of Professional Controlling Body and designation of a body published in Government Notice No. R. 546 of 23 April 1999 (Government Gazette No. 20009) and amended by Government Notice No. R. 1110 of 3 November 2000 (Government Gazette No. 21719) which lists the controlling bodies applicable to advocates; and S 3(1)(a): Contingency Fees Agreement in terms of the Contingency Fees Act, 1997 (Act No. 66 of 1997) published in GN R547 of 23 April 1999 (*GG* 20009) which gives form and content of the agreement; see also Austin *Contingency Fees* 62.

514 South African Law Commission (Project 93), Report on "*Speculative and Contingency Fees*" (November 1996) 29.

515 *South African Association of Personal Injury Lawyers v The Minister of Justice and Constitutional Development* [2013] 2 All SA 96 (GNP) 115.

516 [2013] 2 All SA 96 (GNP).

517 In *De la Guerre v Ronald Bobroff* [2013] JOL 30002 (GNP) it amounted to an amount of R120 000, which the attorney of record had carried for a period of two years.

518 *South African Association of Personal Injury Lawyers v The Minister of Justice and Constitutional Development* [2013] 2 All SA 96 (GNP) 117.

gone to court. The second risk is that the parties may agree to fees that overcompensate the lawyer where the matter is settled. The danger in both cases could be addressed by allowing flexibility regarding the fee cap so that overreaching can easily be detected, looking at factors such as fairness and reasonableness. This is not presently the case in South Africa as the Act only provides that the success fee must not exceed 100% of the normal fees.

It is furthermore clear that the risk of not recouping fees from a client if the matter is settled is much lower than the risk of going to court. It would therefore be logical even to reduce the safeguard of 100% uplift fee above normal fees and the 25% cap on the ultimate award in the event of a settlement.

A recent instance of overreaching by a lawyer was illustrated in *Mfengwana v Road Accident Fund* (hereinafter *Mfengwana*[519] which was tried in the Grahamstown High Court. In this case, the plaintiff's attorney failed to comply with the Contingency Fees Act, specifically sections 2(1)(a), 2(2) and 4. There were apparent problems regarding the contingency fee contract itself and no affidavits from the attorney or the client were filed with the court. The judge commented that "strict compliance with the Act is necessary to prevent abuses on the part of the unscrupulous legal practitioners willing to take advantage of their clients – a phenomenon that is, in my experience, unfortunately all too common".[520]

The judge arranged for the *Mfengwana* judgment to be sent to the Cape Law Society so that it "as custodian of the ethical standards of the profession in the public interest, may consider ways and means of stopping the rot".[521] In *Mfengwana*, Rubushe (the plaintiff's attorney) charged 25% of R900 000 damages awarded or, to be precise, R226 222.30.[522] However, the particulars of claim were just four pages long, with one page taken up by the contract details.[523] The plea itself was also just four pages, and again the fourth page consisted of just the formal details of the parties.[524]

519 2017 (5) SA 445 (ECG).
520 *Mfengwana v Road Accident Fund* 2017 (5) SA 445 (ECG) 450.
521 *Mfengwana v Road Accident Fund* 2017 (5) SA 445 (ECG) 454.
522 *Mfengwana v Road Accident Fund* 2017 (5) SA 445 (ECG) 451.
523 *Mfengwana v Road Accident Fund* 2017 (5) SA 445 (ECG) 450.
524 *Mfengwana v Road Accident Fund* 2017 (5) SA 445 (ECG) 450.

The court held that it is evident from the quality of work performed, as illustrated by the odd and inadequate particulars of claim, that the fee charged was grossly disproportionate and amounted to overreaching.[525] The attorney charged more than double the normal fee in violation of sections 2(1)(a) and 2(2) of the Act. Based on the quality of work the attorney would have been entitled to far less than 25% of the award.

This case is akin to the case of *Motswai v Road Accident Fund*[526] where the court *a quo* condemned the conduct of "predatory" administrators, attorneys, advocates and medico-legal experts, all of whom the court accused of being "enriched" to the detriment of accident victims and taxpayers.[527] This contention remains true even though the Supreme Court of Appeal overturned the judgment by Satchwell J.

The problems picked up by the courts include overreaching, the inadequacy of the court in overseeing some of these abuses, and the percentage cap requirements of the Act call for a more robust reform of contingency fee agreements. These reforms will be discussed below after a broad comparison of both contingency fee agreements and third-party litigation funding agreements.

4.5 Comparison

4.5.1 South Africa and England (third-party litigation funding agreements by non-lawyers)[528]

It is not surprising that South Africa is strongly influenced by English law and that there are many similarities between the two jurisdictions in the way in which third-party litigation funding agreements are dealt with. Public policy regarding third-party funding agreements in South Africa (invalid unless it was concluded in good faith) in similar to that in England (invalid if the agreement was concluded with an improper motive.

However, in both these countries the courts have been progressive, although the progress has been gradual, in developing mechanisms to solve third-party litigation funding agreement problems as they come to the courts. Research has established

525 *Mfengwana v Road Accident Fund* 2017 (5) SA 445 (ECG) 451.
526 2014 (6) SA 360 (SCA).
527 366.
528 This paragraph has been previously published by me: Khoza 2018 *Potchefstroom Electronic Law Journal* 10-13.

that reliance on the court's discretion is not enough to regulate the third-party funding environment.

The courts in both South Africa and England have consistently been antagonistically opposed to third-party litigation funding agreements and have considered them to be against public policy.[529] In the event, the legislature decided to legitimise these agreements indirectly by introducing what in England is the conditional fee agreement and in South Africa is a duplicate by the name of the contingency fee agreement. These were attempts to further implement the principle of access to justice and they led to the acceptance of third-party litigation funding agreements.

In both England and South Africa, a litigation funder other than a "pure funder" in certain circumstances can be joined as a co-litigant in the litigation in order to be able to make a costs order against such funder. This is a development that minimises the risk of abuse of the justice system in both countries. In South Africa this this has been effected in recent case such as *Price Waterhouse Coopers Inc v IMF Ltd*,[530] *EP Property Projects (Pty) Ltd v Registrar of Deeds, Cape Town*,[531] *Scholtz v Merryweather*,[532] and *Gold Fields Ltd v Motley Rice LLC*.[533]

The English law position can be established through a consideration of the findings of the research conducted by Lord Jackson in his review of civil litigation costs.[534] In concluding his research Lord Jackson noted that the regulation of third-party funding agreements was insufficient and that there were few players in the funding industry.[535] This led to the creation of a self-regulated organisation called the Association of

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529 See *Hollard v Zietsman* (1885) 6 NLR 93; *Mayne v James & The High Sheriff* 1893 10 CLJ 6; *Hugo & Miller v The Transvaal Loan & Finance & Mortgage Co* 1894 1 OR 336 340; *Green v De Villiers; Dr Leyds & The Rand Exploring Syndicate Ltd* 1895 2 OR 289 294; *Schweizer's Claimholders' Rights Syndicate Ltd v The Rand Exploring Syndicate Ltd* 1896 3 OR 140 144; *Patz v Salzburg* 1907 TS 526 527; *Walker v Matterson* 1936 NPD 495 504; *Price Waterhouse Coopers*; *Master v Miller* (1791) 4 Term Rep 320 340; *Wallis v Duke of Porland* (1797) 3 Ves 494; *Alabaster v Harness* [1895] 1 QB 339; *British Cash and Parcel Conveyors Ltd v Lamson Store Service Co Ltd* [1908] 1 KB 1006; Winfield 1919 *LQ Rev* 54; Law Commission of England *Proposal for Reform* para [9]; *Giles v Thompson* 1994] 1 AC 142 161; *Aratra Potato Co v Taylor Johnson Garrett* [1995] 4 All ER 695; Tolhurst *Contractual Rights* 189.

530 2013 (6) SA 216 (GNP).

531 2014 (1) SA 141 (WCC).

532 2014 (6) SA 90 (WCC).

533 2015 (4) SA 299 (GJ).

534 Jackson *Review of Civil Litigation Costs.*

535 Jackson *Review of Civil Litigation Costs* 119.

Litigation Funders. This organisation provides guidelines on how to finance litigation through its Code of Conduct,[536] which is not legislation *per se* but provides clarity on agreements of this kind.

In English law, however, third-party litigation funding agreements by non-lawyers are not entirely unregulated. The Courts and Legal Services Act[537] allows third-party litigation agreements and includes the definition of a funder. The Act also provides conditions applicable to the funding agreements and requires the approval of the Secretary of State or a prescribed person for funders. Key among these conditions is that the funding agreement must be in writing.[538] Section 58B of the Courts and Legal Services Act empowers the Secretary of State to make regulations after consulting with judges, the General Council of the Bar, the Law Society, and other appropriate bodies. The regulations have not been implemented yet. Thus, there is still a vacuum in the proper regulation of third-party litigation funding in English law. In English law the litigation-funding environment is still largely self-regulated by the Code of Conduct of the Association of Litigation Funders, 2016.

The perception in both these countries is that third-party litigation funding is "nascent" and as such it does not need to be legislated. This opinion is shared largely by litigation funders themselves. They argue that parties who use third-party litigation funding are generally commercial or similar enterprises with access to full legal advice.[539] This argument does not highlight the historical context under which litigation funders have been operating. Third-party litigation funding has been an issue since the time of Rabin[540] and Winfield.[541] However, it is being treated as a new phenomenon by the courts and other proponents of a free-regulation industry that operates outside the equity of the law.

The large number of cases discussed in both South Africa and England that deal with third-party litigation funding agreements is an indication of the view that these agreements are not new and that they create problems when they are not regulated.

536 Code of Conduct for Litigation Funders, 2011; Code of Conduct for Litigation Funders, 2016.
537 1990 s 58B.
538 S 58B(2)(b) of the Courts and Legal Services Act, 1990.
539 Jackson *Review of Civil Litigation Costs* 119.
540 Rabin 1935 *Cal L Rev*.48.
541 Winfield 1919 *L Q Rev* 235.

The recommendations that will be discussed in the chapter below will provide clarity on regulating third-party litigation funding agreements. What follows is a discussion of a subspecies of third-party litigation funding agreements operating in South Africa and Canada with regard to lawyers.

4.5.2 South Africa and Canada (contingency fee agreements)

In the province of Ontario, Canada, the evolution of contingency fee agreements is similar to that in South Africa. The English common law was a major influence in the prohibition of contingency fee agreements. The acceptance of contingency fee agreements in both countries came after England introduced the conditional fee agreement.

In South Africa the Contingency Fees Act is based on section 58 of the English Courts and Legal Services Act.[542] In this regard Druker remarks:[543]

> The conditional fee bears a strong resemblance to the South African contingency fee. In a sense they are more or less the same even insofar as the 100% uplift ("success fee") is concerned and the 25% limit. It would seem that those who drafted the Contingency Fees Act bent over backwards to distance themselves from anything too close to the American model and thus our contingency fees in South Africa are, for all practical purposes, the equivalent of the conditional fee in England.

This section has been superseded by the Access to Justice Act 1999. The South African Act (like the English Access to Justice Act 1999) provides that contingency fee arrangements are lawful in all cases except criminal work, matrimonial disputes and cases involving disputes over children.[544] This is not very different from the position in the Canadian province of Ontario.

Ontario introduced contingency fee agreements through section 28.1 of the Solicitors Act.[545] This act does not allow the agreements to be concluded in family law matters and criminal law proceedings.

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542 Hurter 2001 *CILSA* 84.
543 Druker *Contingency Fees* 81.
544 Moorhead 1999 *UBCLR* 475-476.
545 RSO 1990, c.

However, in most Canadian provinces except Ontario certain family law disputes are allowed provided that the court approves.[546] In Canada, attorneys in the provinces have a sliding scale of contingency fees, starting with lower fees if the case is resolved by a specific time and increasing if the case goes to trial, thus providing wider protection against abuse.[547]

The two countries further mandate that the agreement must be in writing for it to be enforceable.

In South Africa the Act provides for a maximum percentage that a lawyer is permitted to charge a client based on the fee agreement. In contrast Ontario does not have such a restriction. In Ontario a larger amount is permissible where the action is complex or expensive, or there is a greater risk in the case. [548] The agreement in Ontario does not include costs except with the court's leave, whereas in South Africa the agreement may include costs.

In Ontario, section 5 of Regulation 195/04 protects persons under disability who are represented by a "litigation guardian" by requiring that the legal practitioner and the guardian apply to court for approval of the contingency fee agreement before it is finalised. In this case the court plays a bigger role than in any other contingency fee agreement as approval is required before the case serves before the court.

Most of the advantages of contingency fee agreements discussed under the section on Ontario apply *mutalis mutandis* to those in South Africa.[549] The difference is that Ontario provides for flexibility when it comes to the percentage a lawyer may charge for a case under contingency fee agreement. There is no prescribed limit for lawyers regarding the percentage fees which they can charge their clients The only limitation is that the fee must be fair and reasonable in the circumstances. However, as indicated above, the South African Act took over the wording of the English statute verbatim

546 Carville 2015 http://www.thestar.com/news/canada/2015/05/31/lawyers-fight-archaic-ban-on-no-win-no-fee-arrangements-in-family-court.html.
547 Carville 2015 http://www.thestar.com/news/canada/2015/05/31/lawyers-fight-archaic-ban-on-no-win-no-fee-arrangements-in-family-court.html.
548 S 28.1(6) and (7).
549 See 3.4.1 Advantages of contingency fee agreements".

even to the point where the limitations on the percentage that a lawyer can charge are the same.

The similarities and differences between South Africa and the Canadian province of Ontario as highlighted above make it clear that there is room for reform regarding contingency fee agreements. The recommendations provided below could help to bring about developments in contingency fee agreements and third-party litigation funding agreements.

CHAPTER 5: RECOMMENDATIONS AND CONCLUSION

5.1 Reform of non-lawyer litigation funding agreements[550]

In view of the problems facing litigation funding agreements it is imperative to consider statutory regulation instead of relying on self-regulation as in England. The industry has outgrown self-regulation as this form of regulation is only binding on members of the association of funders and non-members have no obligation to abide by the self-regulation. Third-party litigation funding has already reached the critical point referenced in the Jackson Report of 2009:[551] a point where regulation is necessary. If left ungoverned, South African third-party litigation funding, like its counterpart in England, will constitute a risk to the market and to litigation.[552]

To provide access to justice and minimise injustice to litigants, the legislator must find a means to regulate third-party litigation funding properly. This is also in line with the principle of Ubuntu in the light of transformative constitutionalism in South Africa. A further aim is to meet the need for general fairness and to accord with the "restorative" spirit of the South African Bill of Rights. There is no doubt that third-party litigation agreements have to be strictly regulated as a matter of fairness to avoid the disproportionate charging of litigants. Although this dissertation does not intend to provide a blueprint to be followed in drafting a solution, it shows the need to regulate third-party litigation funding agreements.

The recommendations that apply in South Africa are as follows:[553]

a) The South African jurisdiction can utilise the Consumer Protection Act[554] or the National Credit Act[555] in addressing issues with regard to third-party litigation funding agreements, or introduce separate legislation. A schedule to the National Credit Act could be added in order to regulate third-party litigation funding agreements. The rationale behind this recommendation is that third-party litigation funding agreements are *sui generis*, but have some characteristics of agreements regulated by the National Credit Act. This is so because third-party

550 This paragraph has been previously published by me: Khoza 2018 *PELJ* 14-16.
551 Jackson *Review of Civil Litigation Costs.*
552 Justice Not Profit "*Third-party Litigation Funding*" (2015).
553 Beisner and Rubin 2012 (October) *ILR* 7.
554 Consumer Protection Act 68 of 2008.
555 34 of 2005.

litigation funding agreements are concluded on the basis that should a litigant become successful in the litigation, the third-party litigation funder will be entitled to his disbursements and a risk fee or interest calculated as a percentage. This form of credit advanced to a litigant should be within the control of the National Credit Act, because the agreement has the potential to contain abusive and/or unfair provisions which are unjustifiably harsh on the litigant to the extent that a successful litigant might end up with much less money than in the event of failure. A national regulatory scheme for litigation funding agreements should also require that litigants disclose the source of their funding so as to allow opponents to defend their cases adequately. The purpose of this is to grant the defendant an opportunity to know who is guiding the litigation strategy and taking the decisions on the other side (as it is naïve to assume that funders will not take control of litigation where they have invested funds). Contracts of this nature are usually secret, making it unfairly difficult to mount an adequate defence. Disclosure requirements would solve this problem.[556] The court rules should require disclosure to all parties involved in the litigation of the means by which the litigation is being funded at the outset of the litigation proceedings, as recommended by the Institute for Legal Reform and the Scotland review.[557]

b) The provisions regulating third-party litigation funding should protect litigants who have inadequate income, are illiterate, and have little bargaining power, as well as small businesses, as they are susceptible to abuse by third-party funders. The criteria for equity,[558] fairness and reasonableness (the principles of Ubuntu) for both the litigant and the funder should be addressed by the regulatory scheme in the National Credit Act. The schedule should take into account the socio-economic circumstances of South African litigants as consumers.

c) The regulations should also address concerns about new entrants to the market developing business practices which bring the industry into disrepute or increase the potential for harm or loss to be caused to claimants. Compelling funders to

556 Beisner and Rubin 2012 *ILR* 14.

557 Beisner and Rubin 2012 *ILR* 14; Taylor 2013 http://www.gov.scot/Publications/2013/10/8023/27.

558 This is contemplated by s 3(d) of the National Credit Act, where it provides that the purpose of the Act is to provide equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers.

register at a selected government agency such as the National Credit Regulator could achieve this. The agency would then oversee their operations and review some of the unethical behaviours associated with third-party funding and non-compliant funders. This would strengthen accountability for the funders and provide litigants with a less expensive and more efficient way of addressing issues regarding the ethics of funders.

d) The regulation of third-party funding should be comprehensive and should cover not just the relationship between the lawyer-funder and the client, but also the integrity of funding agreements.[559]

e) The regulation should oblige lawyers to advise clients who cannot fund their litigation to apply for third-party funding in addition to other funding options. The lawyer should also advise litigants on the implications of sourcing a litigation funder. The kinds of litigation that are eligible for funding should be clearly outlined.

f) The legislation should be structured along the lines of the English Code of Conduct for Litigation Funders[88] but it should be pertinent to the South African context. The preamble should emphasise the importance of the right to access justice and should also indicate the necessity of prosecuting meritorious claims by funders.

g) The legislature should incentivise funders to provide funding to a wide variety of claims and not only commercial claims. This expansion of the possibility of litigation by litigation funders is also contemplated by Lord Justice Rupert Jackson in his report, when he states that "if the use of third-party funding expands, then full statutory regulation may well be required, as envisaged by the Law Society".[560] Funders should also be encouraged to fund personal injury cases, so that in addition to contingency fee agreements, litigants can have the option of having their litigation funded by litigation funders. The funders should be restricted in the amount of success fees[561] they may be entitled to, depending

559 Hodges, Peysner and Nurse *Litigation Funding Status* 151.
560 Jackson *Review of Civil Litigation Costs* 119.
561 "The higher fee is also referred to as the success fee" - *Masango v Road Accident Fund* 2016 6 SA 508 (GJ) 513.

on the type of cases undertaken. There should be guidelines on the complexity and risk taken by funders in a case, as these will affect the success fee.

h) In addition, the legislature should state clearly that the funder will be liable to pay adverse costs should the litigation fail. Although this requirement is contemplated by the courts in South Africa to afford more protection to the litigant, it should be one of the consequences that the litigant cannot waive.

In view of the overwhelming criticism of the English Code of Conduct for Litigation Funders,[562] it would be prudent for South Africa to regulate third-party litigation funding agreements to avoid abuse – especially by new funders emerging with own practices that may result in the exploitation of litigants. The above recommendations could contribute to the provision of guiding legislation that will enable both litigants and funders to operate fairly in dealings with each other. The regulation of third-party agreements would not only provide the courts with oversight as in the case of contingency fee agreements, but would also foster transparency and prevent the overcharging of clients.[563] The above recommendations can help to provide guiding legislation that will enable both litigants and funders to operate fairly in their dealings with each other. The recommendations discussed below apply to contingency fee agreements in South Africa.

5.2 Reform of lawyer contingency fee agreements

Firstly, in determining the appropriate percentage, the courts in South Africa should remove the problematic threshold of 25% and replace it with considerations considered by Smith J in *Re Cogan*[564] such as:

> a) financial risk assumed by the lawyer, included under likelihood of success, the nature and complexity of the claim, and the expense and risk of pursuing it: b) the result achieved and the amount recovered; c) the expectations of the party; d) who is to receive an award for costs, and e) achievement of the social objective of providing access to justice for injured parties, including injured children and parties under disability…

562 Code of Conduct for Litigation Funders, 2016.
563 Justice not Profit 2015 http://www.justicenotprofit.co.uk/wp-content/uploads/2015/09/Final-TPLF-Paper.pdf.
564 (2007) 88 O.R. (3d) 38.

This method is available to clients and lawyers in Ontario under the commentary in the Law Society's Rules of Professional Conduct, rule 2.08(3). The ultimate test for the court would be whether the fee is fair and reasonable in the circumstances.

Secondly, both Ontario and South Africa should revisit the ban on family law matters by looking into developments in British Columbia, one of the oldest provinces in Canada to have allowed contingency fee agreements. This will provide access to justice to those litigants who in the absence of contingency fee agreements would otherwise not be able to bring a case with merits before the courts. The court can play a role by approving these agreements from the inception when it comes to matrimonial matters. The cap on fees in family law matters will have to be low in order to avoid exhausting family savings, to lessen spousal strife and to lay to rest other fears associated with allowing contingency fee agreements.[565]

The main cap introduced by the Contingency Fees Act is far too inflexible because it sets a single threshold for the maximum contingency fee, which applies to all types of cases.[566] The fairness and reasonableness of the fee structure should be a matter within the discretion of the court.

The practice of predetermining the success fee always gives rise to unfair results: the attorney may underestimate the case and perhaps uplift his normal fees by 40% where the quality of work done afterwards and the risk assumed might well deserve a 100% uplift. Conversely, a pre-agreed percentage increase of 100% may be unfair to the client where the quality of work done by the legal practitioner is poor. This could be remedied by allowing a legal practitioner and his client to agree on the fee increment or a fee adjustment after the case. However, the predetermined percentage would still be considered. This would also reinforce the provision that requires a reduction of the fee increment in the event of partial success. These developments may strengthen access to justice as the most important public policy principle applicable to contingency fee agreements. The discussion of both lawyers and non-lawyers' agreements when it comes to third-party litigation funding agreements will be wound up with the following conclusion.

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565 Carville 2015 http://www.thestar.com/news/canada/2015/05/31/lawyers-fight-archaic-ban-on-no-win-no-fee-arrangements-in-family-court.html.

566 *SAAPIL* case 118.

5.3 Conclusion

It is now evident that the history of both third-party litigation funding agreements and contingency fee agreements is interrelated. Both of these kinds of agreements were prohibited in countries that were influenced by the English common law. It is also evident that in the number of litigation funding agreements by non-lawyers is increasing and the study has shown that the growing number of third-party litigation funders poses problems for the courts. Having considered the earlier and more recent research conducted on the subject, this study has shown in the recommendations section that it would be beneficial to regulate third-party litigation funding The study has also highlighted the fact that new mechanisms fostering access to justice have proved to be useful. However, they should be looked at with particular care as they also pose potential risks if not properly regulated. Considering the rise in the number of reported cases, it is clear that funding for meritorious cases is in demand, and this situation may give rise to abuse.

The research shows that relevant legislation should provide guidelines on how to deal with cases where the identity of funders is not disclosed, and how to ensure fairness in the levying of funders' fees. The element of the control of litigation by the funder should be regulated. This regulation should benefit both the funder and the litigant with regard to the control of the litigation. Disclosing the involvement of a third-party funder to the other party to the litigation would change the dynamics of the litigation and in most cases balance the scales with regard to access to justice. There should be an incentive for funders to fund the meritorious claims of individuals who are unable to access justice due to monetary constraints, and the funding of litigation should therefore not be limited to commercial cases.

This study indicates the need for the courts and the legislature to find solutions beyond those recommended to properly limit the effects of third-party litigation funding agreements. As indicated, a good starting point would be to look at third-party litigation funding agreements in English law. England is the only country that currently has a mechanism to regulate third-party litigation funding agreements, although the system is not without flaws. It is also concluded that third-party litigation funding should be fully regulated by legislation to protect the interests of litigants and defendants. The proposed legislation could resemble the Code of Conduct of the Association of

Litigation Funders in England. The legislation should provide measures that include but are not limited to transparency in litigation funding agreements. Third-party litigation funding and its subspecies, contingency fee agreements, have developed and are strengthening the right of many litigants to have their disputes adjudicated by the courts. It is suggested that there should be further research by the Reform Commission on the area of third-party litigation funding. This could be done by drawing comparisons with countries that are contemplating legislating third-party litigation funding in order to implement better measures and further the public policy on access to justice.

In this study, when looking at the developments of both non-lawyer litigation funders and lawyers' contingency fee agreements, it was found that they both provide litigants with the means to pursue meritorious cases that would have been impossible to pursue if the prohibitions against these agreements were still in place. This study has further determined that both mechanisms fostering access to justice have proved to be useful but they should be carefully scrutinised as they also pose hardships if not properly regulated. It appears from the rise in litigation reflected in the reports that these mechanisms for funding meritorious cases are in demand and as such they are open to abuse.

The study has shown that the courts and the legislators must find means above those that are recommended in this study to properly limit the effects of both these kinds of agreements. As indicated in this study, a good starting point when embarking on the reform of third-party litigation funding agreements is to look at the developments in England. This is corroborated by the fact that England is the only country as of late that has a mechanism for regulating third-party litigation funding agreements, although it has its shortfalls. The study further indicates that South Africa could also adopt working practices from Ontario as indicated above regarding contingency fee agreements. This would allow the courts to oversee some detrimental agreements concluded on behalf of vulnerable members of society. The other development would be to allow the funding of some matrimonial cases by contingency fee agreements provided that the court first approve such funding. Third-party litigation funding and its subspecies, contingency fee agreements, have developed and are strengthening the right of many litigants to have their disputes adjudicated by the courts. The doors for access to justice have been opened and lack of funding is no longer a barrier to engaging in litigation.

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