The Contingency Tea Party

A close look at the introduction of contingency fees in Australia, by Mr Justice J.B. Thomas of the Queensland Supreme Court.

The question is whether the lawyer should be able to take a slice of his client's cake (usually a third) for helping to bake it. The slice is called a contingency fee. This has recently been floated as an attractive idea by certain solicitors in Australia. A friendly reception has been extended to the idea in certain solicitors' magazines (e.g. Proctor (April 1990)). However, a wider view is necessary.

The contingency fee system is the American method of financing litigation, and it still applies in some American States to non-litigious business (such as administration of estates). Generally speaking profit-sharing arrangements with clients are more tolerantly viewed in the U.S. than they are in Australia. The current debate concerns litigation. The idea is to legalise arrangements for lawyers to share the proceeds if the client wins and to make no charge if the client loses. Commonly the agreement is for one third. It may be more, it may be less.

Such a system gives the lawyer a direct financial interest in his client's case. It gives the strongest possible incentive to win. Whilst that sounds desirable, the in-built problem is human weakness. The temptation to win at any cost is too often irresistible. When the inducement to bend the truth, suppress embarrassing documents, mislead the opponent, assist the adverse witness to disappear, or hoodwink the court becomes too strong, the system disintegrates. It is at present held together by a very frail ethical fabric.

Consider a lawyer retained with a 30 per cent interest in a $1,000,000 claim. He stands to gain $300,000 if his client wins against the carrying of his own costs if he loses. It is difficult to envisage all such attorneys insisting upon the strict observance of their duty to the court in relation to adjournments, citation of authority, discovery of documents, or indeed at all. Once the honest practitioner sees his opponent bending the rules, little incentive remains to disadvantage his client and himself by obeying them. Thus the system breaks down.

One of the good things about litigation in Australia is the trust that exists between the court and the practising profession. One can come into court with relative confidence that the solicitors have not suborned witnesses, encouraged production of spurious documents, or, in a word, played dirty tricks. Even under our present system one sometimes discerns a certain amount of coaching of witnesses but this is of controllable proportions, and generally speaking the ethical rules are respected. It could not remain so under the financial pressures and incentives of the contingency system.

I notice with interest the attempt in the Proctor article to demolish in advance any unfavourable comparisons that might be drawn with the "litigation syndrome" which has plainly overtaken United States society. It is true, as the article notes, that in many U.S. jurisdictions damages are not reduced for contributory negligence, future economic loss is calculated without discount, and there is a propensity to award punitive damages . While this may help explain some of the strange decisions and enormous awards given in that country, it hardly explains the U.S. disease of suing anyone for anything, or the flood of litigation in that country. This is not explained either by the fact that in the U.S. there is less social security and compulsory third party cover than we have here. The truth is that at the heart of the litigious society that has developed in the United States lies the contingency fee system.

People will sue others for practically anything, with no holds barred. There are now about three quarters of a million practising lawyers in the States, and about 30,000 graduate lawyers joining their ranks each year. Why not? The spoils make it a growth profession, even if it is a non-productive industry. Most of them make a very good living. It is the world's most litigious society.[1]

Let me describe the stage it has reached by mentioning a few recent examples. Some of them are a little hard to believe.

A New York man, tired of living, decided to end it all by leaping into the path of a subway train. The train driver was exceptionally alert and managed to stop without killing the gentleman, although it was impossible to avoid hitting and injuring him. The attempted suicide then sued the railway company. What do you think happened? A British journalist[2] upon hearing of this law suit assumed it must be based on some fancy cause of action such as frustration of the plaintiff's democratic right to make away with himself. He was quite surprised to discover that the claim was actually for damages for personal injury, and even more astounded to hear that the plaintiff won the case and was awarded $600,000.

Another man gave a party on his birthday in the course of which he became drunk. He climbed into the swimming pool enclosure of the block of flats where he lived declaring that he could walk under water from one end of the pool to the other. Neither his wife nor any of the 15 guests tried to stop him from carrying out this ambitious plan. They watched him enter the water. He did not complete the course. In fact he drowned. The grieving widow thereby lost the benefit of his support. She sued the owners of the flats. Did she win? Of course she did.

A New York gentleman (Mr Febesh) was stung by a wasp when sitting outdoors at his country club. He suffered a serious reaction from anaphylactic shock, sued the club for negligently allowing unaccompanied wasps into the grounds, and collected $1.5 million in damages.

An American gymnast injured himself whilst practising on his exercise mat. He sued the manufacturers of the mat and collected $14 million. What would most solicitors be prepared to do to ensure that the contingency fee in that case was won?

Partygivers kind enough to supply their guests with alcohol have been sued by the same guests who chose to drive home and who collided with another vehicle on the way. The party hosts have been sued not only by the guest but by the other driver. Private hosts are not the only ones at risk. The owners of a cafe in Michigan had to pay $1 million because one of their patrons drove away and injured himself.

A man has been ordered to pay damages to the lady who purchased his house. He had failed to disclose to her that 12 years previously someone had been murdered in the house.[3]

A message starts to emerge as the cases unfold. A passenger on an aeroplane took a rise out of his fellow passengers by declaring that the aircraft was going to crash. One of the passengers thereby suffered severe emotional distress. She successfully sued *the airline* for damages and obtained an award more than sufficient to settle any jagged nerves.

The terrible risks now taken by doctors, or anyone who is foolish enough to try to render aid to injured persons in public, are well-known and the prospect of their being sued by patients if anything happens to go wrong is equally unsettling. The

enormous insurance premiums to cover such claims are prohibitive. Some doctors now have notices in their surgery stating "I have no insurance". If sued they simply go bankrupt. Such posters are merely a symptom of the voracity of the American legal system.[4] Some public reaction is now starting to simmer.

Why would anyone want such a system in Australia? To some the potential financial reward (the "hip pocket argument") presents the obvious attraction. But some are promoting the idea professing the highest ideals. It is of course a common ploy to promote self-interest under an idealistic label. All you have to do is find a problem in the present system and offer a new scheme to solve the terrible problems of the old. In the haste to eliminate the old problem, the greater problems inherent in the so-called "reform" are readily overlooked. They are never so visible as the present ones that we wish to remove.

The advocates of the contingency fee system disclaim profit as their motive. They only want to remedy the problem of the high price of litigation, by making it accessible to all. They say that their case is purely altruistic and that the contingency fee system will enable little people to take on the giants or, for that matter, anybody. They aver that the risk of failing to win will discourage solicitors from taking on flimsy cases. No doubt they also have in mind that even if the case is not very good, there is a reasonable chance that a defendant will settle out of court just to get the lawyer off its back. Such settlements in, say, only 20 percent of flimsy claims can make the overall exercise quite worthwhile for the lawyer, especially when it is recognised that neither the client nor the lawyer is under any jeopardy of having to pay the other party's costs.

" The temptation to win at any cost is too often irresistible. "

It is sometimes overlooked that the traditional English system of "losing party pays" is the best known disincentive to flimsy litigation. When the risk is properly explained by the solicitor any party must think twice before taking a case to court. The jeopardy in relation to the other side's costs is commonly the catalyst that produces settlements. Without the strong disincentives provided by the present "losing party pays" system the volume of litigation would be quite unmanageable. Courts could not cope with it. Human beings will always be willing to air their grievances in a public forum such as a court, especially if they have little to lose by doing so.

In the United States this lesson has been learned too late. It has recently been observed that "contingent fees have fostered an atmosphere of a no-cost lottery for clients." [5]

Under our system there is a general prohibition upon arrangements which give the lawyer a pecuniary interest in the result of his client's litigation. With a few well-recognised exceptions, it is simply unlawful. The law would have to be changed by Parliament before a contingency system could be adopted. It is to be hoped that the government would not give its approval to a measure that would be against the best interests of the administration of justice and, in the end, of the community.

The origin of the common law rule, like so many of our rules, is in the need to avoid conflict between interest and duty. A good solicitor needs to advise his client with a clear eye and unbiased judgment. He is an officer of the court who is bound to present the case with fairness and integrity. A legal advisor who acquires a personal financial interest in the outcome of the litigation may find himself in a situation in which that interest conflicts with those obligations. The last three sentences are not my own. They are a paraphrase of words written by Buckley L.J. in 1975.[6]

There is of course a well-recognised exception in relation to speculative actions which solicitors commonly undertake for clients. If the solicitor does not promote the litigation himself, and is satisfied that his client has a good cause of action, he may agree not to charge in the event of losing, and to charge a proper fee in the event of winning. The term "proper fee" is perhaps in danger of erosion or, more accurately, accretion. There is a case for saying that if a solicitor takes the risk of receiving nothing at all, he ought to be compensated by receiving something more than the normal fee in the event of success. That is another way of saying that because the whole practice is a bit of a gamble, it is fair to provide some odds for the winning cases; otherwise the practice of taking speculative actions might be unprofitable on the whole and fail from want of sufficient incentive. It is difficult to evaluate the argument because questions of degree are involved each time a solicitor decides whether to take on a "spec". However, it is an argument that deserves fair consideration. If there is to be any provision for an increment above the normal proper fee in such cases, it would need to be very carefully specified and closely supervised. It should not be the toe in the doorway that leads to the room where the spoils are shared.

We should be careful in following practices that come from the American legal system. In the U.S. litigation is a commodity, and presumably the more one can promote and sell it the better. I am by no means sure that the encouragement of litigation and the promotion of a litigious society is in the best interest of Australians.

If we are stimulated by the vision of creation of disputes where none formerly existed, ambulance chasing, sharing of the spoils, the promotion of litigation as an industry, witness tampering and the other unethical practices that have inevitably crept into the over-competitive American system, by all means let us follow their example. If we are interested in preserving our more modest system which depends heavily on trust between bench and legal practitioner as well as between solicitor and client, then we should be very careful before relaxing our traditional suspicion of contingency fees. The rules are not relics of a bygone age. They are fundamental to the preservation of a trusted profession. ❑

1 Figures cited by George Gordon - New York correspondent, *Courier Mail* 13th June 1988.

2 Bernard Levin - *The Times* 16th May 1988

3 Some of the above examples are referred to in *U.S. News and World Report*, "The National Lottery" 27th January 1986, "Why Lawyers are in the Doghouse" 11th May 1981, and "The Urge to Sue: Getting out of Hand?" 5th July 1976; and in Mr Levin's article (above).

4 Michael Becket, U.S. correspondent, *Courier Mail*, 22nd June 1988

5 U.S.N. & W. Report 27th January 1986

6 *Wallersteiner v. Moir* [1974] 1 W.L.R. 991; [1974] 3 All E.R. 217.

(Reprinted with kind permission of Victorian Bar News)