CONTINGENCY FEES: A CASE STUDY FOR MALAYSIA*

O.W. Holmes in the opening sentence of *The Common Law*[1] said "The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellowmen have had a good deal more to do than the syllogism in determining the rules by which men should be governed." The application of this philosophy to Malaysia provides the basis of several questions. For example, whose times, moral and political theories, and institutions of public policy, as embodied in the law have been received from England via the common law and statute of reception?[2] If the laws reflect the values of groups, societies, at certain times and places can it be sagelu assumed that the transportation of these values can be effectively adopted and implemented by a new and alien community. In this paper the idea of received values is tested. In England and Wales the law governing maintenance and chanperty and the solicitors ' practice rules make the legal and ethical introduction of contingency fees an impossibility. This paper attempts to show the historical reasons for the emergence of maintenance and champerty and the antipathy towards the American style of fee payment. It spells out the consequences, as laid out in English case law, of efforts to evade the common law rules by lawyers, and indicates the importance of these rules and cases in Malaysia. The paper highlights the divorce between the theory and practice of law in this country by focusing on personal injuries: running down and vehicle accident cases. Although it attempts to tackle this issue constructively by offering a series of proposals to alleviate the present difficulties the paper can be read inductively. Received values are not necessarily supportive of national policy or community needs. They require analysis for function and utility.

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[1] Little, Brown (1964).

[2] Civil Law Act 1956 (Revised 1972), s. 3.

CONTINGENT FEE

Mention the words 'contingent fee' to many common lawyers and they produce the same reaction and for the same reasons as those of 'Farmer Jones' to the animals of Orwell's Animal Farm: 'four legs good, two legs bad'.[3] The ignorance of the historical reasons why such a system of fee payment should be outlawed in England coupled with an unawareness of how the system operates in the United States of America, and a number of other countries, often produce a predictable but untutored reaction to the suggestion of examining this method with a view to transporting it into other legal systems. The purpose of this section is to detail how the contingency fee operates in the U.S.A. and consider its strengths and weaknesses.

The financing of professional services is a major factor in determining in the long run its quality and the extent of its availability to all members of the public. The historical roots of the common law are entrenched in real property and the legal profession has developed over the centuries steeped in the values and traditions of property and those who own, sell, buy, lease, and bequeath it. Consequently, the major aspects of law and legal services have been geared towards servicing the interests of the relatively wealthy members of the community. Given that the lawyer's fees and disbursements make up a significant item of the total costs of a client's bill this element has a bearing on the effective access to law for a large section of the community: the poor. However, the determination of an attractive system of fee settlement to this large group simultaneously introduces a number of parallel issues. For example, it is thought that fees should be settled with a view to considering their impact upon the profession's ethical standards. Thus, it is improper both in England and Wales and in Malaysia to undercut certain fees which are standardised by the supervisory bodies. Similarly, although economic considerations are not stated by the legal profession to be of paramount importance it would be foolish to pretend that they are immaterial. Whatever the realistic value placed upon the economics of law practice they are bound to affect the lawyer-client relationship.

A contingent fee can be defined as a fee received for services performed on behalf of a client who is asserting a claim, payable to the lawyer if, and only if, some recovery is achieved through the lawyer's efforts. Its distinguishing characteristic is negative: if no recovery is obtained for the client, then the lawyer is not entitled to a fee. In America the lawyer's financial return is based upon the success of the action and unlike England does not recognise the entitlement to a fee by virtue of contributing his skills within the adversary system towards the provision of a legal solution

[3] *Animal Farm* Gill and Macmillan (1974).

to the issue in hand. The contingent fee is the usual and normal method of compensation for the American lawyer representing a plaintiff in a personal injury action as well as numerous other civil causes although the more familiar and traditional methods of retaining a lawyer are normal in different types of cases. Despite its wide spread use it continues to raise considerable debate about its usefulness and properiety.

In 1853 the United States Supreme Court accepted that claims against the United States could be brought on the basis of the contingent fee.[4] Currently, the only two States not to adopt it are Maine and Massachusetts and even in Massachusetts it is still commonly employed.[5] By 1908 the American Bar Association had recognised the ethical acceptability of the contingent fee by its original adoption of Canon 13. In 1933, Canon 13 was amended to read:

> A contract for a contingent fee, where sanctioned by law, should be reasonable under all the circumstances of the case, including the risk and uncertainty of the compensation, but should always be subject to the supervision of the court as to its reasonableness.

The contingent fee is used in various branches of law practice. This is important to bear in mind because of the temptation to associate it solely with the practice of personal injury cases. Such a linkage is incorrect though understandable since personal injury litigation is the major type of litigation in the civil courts and this operates almost exclusively via the contingent fee. However, this system is also used in the process of debt collection. It has become a highly organised business with specialist firms involved in this practice. Lawyers have established the Commercial Law League of America which has recommended a schedule of minimum fees for debt collecting. The recommended commissions are 18% on the first $500, 15% on the next $500, and 10% on all over $1,000.[6]

It also operates in workmen's compensation practice. Normally, the statutes or the commissions set a maximum percentage figure for the fee, allow fees based only on that amount of the award which is attributable to the lawyer's involvement, and prohibit payment of or collection of fees in excess of those officially sanctioned. Corporate business practice embraces this method of payment. In particular this is found in the minority stockholder suit. If the minority action is unsuccessful the lawyer usually receives nothing.[7] It is frequently employed in tax practice where the fee is based

[4] *Wylie* v. *Coxe* 20 U.S. 580 (1953); *Taylor* v. *Bemiss* 110 U.S. (1883).

[5] K.B. Hughes "Contingent Fee Contracts in Massachusetts" (1963) 43 Boston L.R. 1.

[6] F.B. Mackinnon, *Contingent Fees for Legal Services* (Aldine, 1964) 25.

[7] Note, *Stockholders' Suits: Award of Attorney's Fees to Successful Plaintiff Where Corporation Receives a Substantial Benefit"* (1960).

on the amount of the savings to the taxpayer and also in contract cases where damages are sought. Issues of compensation arising out of compulsory purchase are financed in this way by basing the fee on the increase in the offer of settlement above the original figure tendered by the compulsory purchaser. In will contests a claimant under the will or even a person seeking to challenge the will may retain a lawyer on a contingent basis with the fee dependant upon the amount recovered through the lawyer's efforts. Finally, bankruptcy proceedings may be financed in this fashion.

The contingent fee does not operate in every case where theoretically the award could be calculated on a cash basis. There is both judicial and legislative concern to protect those parties who for whatever reason suffer from some form of incapacity. For example, a New York statute provides that the courts shall review the contingent fee arrangement between the lawyer and the guardian of an infant, and allow only a reasonable fee.[8] This recognises the inherent danger of overcharging within this system. For similar reasons Indian tribes are not allowed to enter into such an arrangement for certain claims.[9] In divorce practice the operation of the contingent fee is considered void, as a nearly uniform rule.[10] The reasons for this disapproval are based upon the very success of this fee arrangement. Public policy has traditionally supported reconciliation and the preservation of marriage and as the lawyer is paid upon the completion of the divorce and settlement he is encouraged to pursue the action to this conclusion rather than advise in favour of reconciliation.

> The reason why such contracts, wherein any or all of the fee is made contingent upon the securing of a divorce, are held to be contrary to public policy is because of their tendency to deter or prevent a reconciliation between husband and wife. It is the policy of the law, as we said in *Hillman* v. *Hillman* to encourage husband and wife to compromise and settle between themselves their domestic troubles, and to discourage actions for divorce.[11]

Such a policy does not deny the lawyer the opportunity to act in divorce proceedings but it anticipates that such conduct will be financed by fees paid on a win or lose basis. How long this prohibitive doctrine will remain is open to speculation given the increasingly 'fluid' status of marriage in the United States and also in England and Wales.

[8] New York Judiciary Law, 474.

[9] For statutes requiring approval contracts between Indians and attorneys see 25 U.S.C., 81 *et seq.*

[10] 15 Alabama L.R. 208–213, Corbin, *Contracts* 1424, Restatement, *Contracts* 542(2) (1932).

[11] *In re* Smith 42 Wash. 2d. 188, 254 P. 2d. 464, 469 (1953).

A second area where the contingent fee is prohibited is that of advocacy before the legislature, executive department or administrative agency.[12] Much of this work is of a quasi-judicial nature particularly in administrative practice. If there is an aspect which requires the exercise of a wide discretionary power within an executive department or if a client, often a corporate body, seeks some legislative action it is considered against public policy to allow the contingent fee to operate. The danger is that improper means of persuasion might be employed, for example, bribery, to influence public officials. This matter is made more sensitive as such operations are beyond the scrutiny and restraints of open court proceedings.

The third and final area in which the contingent fee is considered improper is that of criminal practice. It has been said that it is against public policy because it had tended to bring about conviction regardless of the lawyer's primary duty to see that justice is to be done.[13] However, given the nature of the average criminal who prizes the services before the case rather than after and the common feature of poverty it is usual for the trial lawyer to fix a fee and to be paid all or part in advance of the hearing. The following practice has been recommended in California.

> In criminal practice, it is unethical to have a fee contingent upon a specific result: acquittal, probation, fine, or minimum term of punishment. Fee setting in a criminal case should be on the basis of the time necessary to render proper service. Most bar associations have minimum fee schedules that serve as guides. A fee based on the amount of service to be rendered, with the amount contingent upon that state of proceedings where the case is terminated – for example, without trial, during trial, after trial, after appeal – is proper.[14]

The arguments which are advanced for and against the contingency fee are forceful.[15] Yet we cannot locate the dominant groups who support

[12] Maggio, "Lobbying – Multistate Statutory Survey – Requirements and Procedures for Lobbying Activities" (1962) 38 Notre Dame Law 79, McDowell, "The Legality of 'Lobbying Contracts' " (1961) 41 B.U.L. Rev. 34.

[13] Corbin, *Contracts*, 1424, Restatement, *Contracts*, 542 (1932).

[14] Basic California Practice Handbook (1959) 388.

[15] More extended treatment of the contingency fee in the U.S.A. may be found in the following articles: K.B. Hughes "Contingency Fee contract in Massachusetts" (1963) 43 Boston L.R. 1: "Contingency Fee contracts: validity, controls and enforceability" (1962) 47 Iowa L.R. 942: Franklin, Chanin and Mark, "Accidents, money and the law: a study of the economics of personal injury litigation" (1961) Col. L.R. 1: "Appeal courts power to establish contingency fee schedule upheld" (1960) 60 Col. L.R. 242: "Are contingency fees ethical where client is able to pay a retainer?" (1959) Ohio St. L.J. 329: Radin, "Contingency Fees in California" (1940) 28 Cal. L.R. 587; *Sunday Times* 25 November 1977.

and oppose the scheme on the basis of current, legitimate practice, i.e. those who favour, found in the U.S.A., and those against, based in England. It is perhaps more helpful to consider that road accident victims are viewed as the bottom end of the legal market which attracts a type of practitioner who is often more willing to step outside the ethics of the profession in order to attract and sustain a viable share of the potential clientele.[16] Thus, as a matter of expediency contingency fees are accepted in the U.S.A. although senior members of the profession, uninvolved in this type of practice, are aware of the problems that it is reputed to breed, while in England the existence of legal aid has avoided the legal profession being obliged to chose between contingency fees and representation or no contingency fees and no representation, as was the effective choice in the U.S.A.

Those opposing this fee arrangement consider that the contingency fee stimulates litigation by its attractive costing. Secondly, the lawyer is more likely to identify with the client as a partner rather than as counsel thus being less able to render impartial advice. The temptation is to reach for success at all costs for the judgment and its attractive financial outcome becomes a personal goal. The personal involvement with the client in the outcome of the litigation is likely to place the lawyer in direct conflict with his duty to the court. Thirdly, the manner in which the fee is scaled is such that the lawyer may be encouraged to seek an early settlement. This is because a court action, although rewarded by a higher percentage return, is in terms of costs analysis, less well paid than an early and simple settlement out of court despite the fact that it produces a lower gross amount for the lawyer. The examination of an isolated case is misleading for it should be seen in the light of the total practice where a number of early, simple settlements produce a greater overall return than fewer court actions some of which may prove to be unsuccessful. Here, the economies of scale benefit the lawyer but not client.[17] Fourthly, the contingency fee is supposed to equate successful outcome of litigation with successful practice of law. Fifthly, this method of payment may lead to over-reaching in fee setting for at the commencement of the contract the fee arrangement may not appear to be a significant feature in comparison with the over-powering nature of the legal problem about to be litigated. Sixthly, the profession would have to subsidise the client in respect of the

[16] K.W. Reichstein, "Ambulance Chasing: A Case Study of Deviation and Control" (1965) Social Problems 3. "As a general rule it is – if it might be phrased – the lower class of lawyers, rather than the acknowledged leaders of the Bar, whose practice is mainly on a contingency fee basis". A.D. Youngwood, "The Contingency Fee" (1965) Mod.L.R. 330, 333: R.C.A.White, "Contingent Fees: A Supplement to Legal Aid" 41 (1978) Mod.L.R. 286.

[17] D.E. Rosenthal, *Lawyer and Clients: Whose in charge?* (Russell Sage 1974).

total expense of conducting litigation. This might require substantial increases in the capital necessary to maintain a lawyer's practice. Finally, in the U.S.A. juries are said to recognise that a substantial part of any award must be paid to the lawyer and compensate by increasing the amount of their award. The level of damages payable there has become astronomic, with dire consequences for professions and traders, of which the medical profession is a particular example. Moreover, the vast increase in the cost of insurance has become penal, with consequent inflationary increases in costs generally. Although assessments are made by the judge in Malaysia, who might resist such a temptation, it is possible that the tendency might develop".[18]

Impressive though these features are the supporting arguments are also persuasive. Principally, the contingency fee system allows people with meritorious claims to receive legal assistance whereas otherwise they would be denied such support. Secondly, the system encourages accident victims to seek early advice. This early retention of a lawyer is likely to increase the success of a case as it reduces delay between the event and the commencement of the investigation. Thirdly, win or lose, the plaintiff would know that he had no personal liability for his lawyer's charges. Finally, proponents believe that lawyers are businessmen with skills for sale and that consequently, payment by commission is legitimate.

In essence the arguments surrounding contingency fees should not be seen in isolation but in the light of existing and realistic alternatives. Thus, for example, this has not been seen as an issue of major significance in England until recently because of the ability of legal aid to provide a basic but satisfactory service to the community. However, with the escalating cost of litigation which demands greater financial commitment on the part of the State in order to maintain the service there is growing interest in the contingency fee programme. In the U.S.A. where there is no comprehensive legal aid scheme contingency fees are deemed necessary. Given that it should be evaluated within the local economic and social structure it is inappropriate to dismiss this form of payment simply because it has been considered inappropriate in England. Instead, the prevailing pattern of legal services produced by the private practitioner and the Legal Aid Bureau in Malaysia should be examined in order to discover whether the community is being effectively served as a result of the blanket adoption of the English common law of maintenance and champerty and the legal profession's rules of ethics. Only after an analysis of *local* needs and

[18] For example in England, there is experience of judges seeking to ensure payments to parties in disregard of prior statutory claims of Legal Aid Fund. See, generally, Law Society evidence to the Royal Commission on Legal Services, Memorandum No. 3, part 2, 154, (1977).

services can an accurate decision be made about the suitability and acceptability of the contingency fee scheme.

ENGLISH PRACTICE

An understanding of the current arguments which surround maintenance and champerty requires an appreciation of their historical development. Like so much of the common law the original reasons for their introduction have lost their validity. Nevertheless, as will be seen, the doctrines were adapted in changing times and parallel institutions such as civil legal aid were created which reinforced juridical opinion that any interference in the litigation of other persons should be denounced as vexatious and promoting undue strife. Such action was denounced on the basis of maintenance.

The action of maintenance was treated to judicial consideration in *Bradlaugh* v. *Newdgate*[19] where Lord Coleridge, C.J., defined the event as follows:

> "There are many definitions of maintenance, all seeming to express the same idea. Blackstone calls it 'an officious intermeddling in a suit which no way belongs to one by maintaining or assisting either party with money or otherwise to prosecute or defend it': Bl. Com. Book iv.c. 10, s. 12. "Maintenance', says Lord Coke, 'signifieth in law a taking in hand, bearing up, or upholding of a quarrel, or side, to the disturbance or hindrance, of common right': Co. Litt. 368b. These definitions are repeated in substance in Bacon's Abridgement, in Viner, and in Comyns, under the head of maintenance. To the same effect, though somewhat differing in words, is the language of Lord Coke in the 2nd Institute in his commentary on the Statute of Westminister the First, c. xxviii. There is, perhaps, the fullest and completest of all to be found in Termes de la Ley, "Maintenance is when any man gives or delivers to another that is plaintiff or defendant in any action any sum of money or other thing to maintain his public, or takes great pains for him when he hath nothing therewith to do; then the party grieved shall have a writ against him called a writ of maintenance'. Chancellor Kent, adopting Blackstone's definition, which definition itself is founded on a passage in Hawkins, says that it is 'a principle common to the laws of all well governed countries that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce': part vi. lect. 67. I quote from the excellent edition of Kent's Commentaries, published by Mr. O.W. Holmes at Boston in 1873. To the same effect is another

[19](1883) 11 Q.B.D. 1.

American authority, Mr. Story. 'Maintenance is the officious assistance by money or otherwise, proferred by a third person to either party to a suit, in which he himself has no legal interest, to enable them to prosecute or defend it': Story on Contract, ch. vii, s. 578. Jacob's Law Dictionary is to the same effect as the other authorities I have quoted".[20]

A similarly lengthy and erudite treatment of the history and rationale of the law of maintenance was given in *Neville* v. *London "Express" Newspaper, Ltd.*,[21] Lord Phillimore in this case declared:

"The law of maintenance is stated in the textbooks to be in itself part of the common law though affirmed or declared and supported of various ancient statutes. These, as I gather, at any rate those which were brought to your Lordship' notice, are the following:—

3 Edw. I.cc. 25, 28.
20 Edw. I. Ordinance concerning conspirators.
28 Edw. I.c. 11.
1 Edw. III.st. 2, c.14.
4 Edw. III.c. 11.
1 Rich II.c. 4.
7 Rich, II.c. 15.
32 Hen. VIII.c. 9.

which have been analysed by my noble and learned friend, Lord Shaw, and to which I would add 3 Hen. Vii.c. 1.

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 priviliged position. Sometimes the King's officers were induced by a bribe or by the offer of a share of the spoil to favour his adversary. Sometimes great men gave countenance to his adversary, sometimes confederacies were formed to support unjust claims of defences. And the statutes are directed against maintenance, champerty and confederacy or conspiracy, while embracery or subornation of perjury were some of the means used to secure these unlawful ends".[22]

"There remain the institutional writers of the eighteenth century, Hawkins and Blackstone, whose language has been quoted by Lord Shaw.

In their view the evil of maintenance lay in the stirring up of strife.

[20] *Ibid.*, pp. 5, 6.

[21] [1919] A.C. 368 (H.L.), *per* Lord Finlay at pp. 378, 382.

[22] *Ibid.*, p. 426.

My Lords, I think this was bad archaelogy. Maintenance is on a par with champerty, conspiracy and embracery. The doctrine was established to prevent injustice".[23]

The bedfellow of maintenance is the doctrine of champerty. It has been described variously as:

"a form of maintenance, and occurs when the person maintaining another takes as his reward a portion of the property in dispute".[24];

"Champerty is maintenance in which the motive of the maintainer is an agreement that if the proceeding in which the maintenance takes place succeeds, the subject matter of the suit shall be divided between the plaintiff and the maintainor".[25];

"Champerty implies a bargain of some sort between the plaintiff or the defendant in a cause and another person who has no interest in the subject in dispute to divide the property sued for between them if they prevail, in consideration of that other person carrying on the suit at his own expense".[26]

The historical origins of these related doctrines are to be found in the power struggle of the English Kings and the semi-autonomous feudal barons.[27] The growing centralised strength of the crown challenged the regional authority of the feudal lords and provided both causes and opportunities to pervert and exploit the administrative and judicial machinery.

Lords, barons and others of consequence found that the courts were often as effective and less morally reprehensible than armed conflict in relieving others of property. Suits involving land titles, being the basis for the common law, were frequent and often involved a bargain by which a litigant agreed to transfer a share of the property to the one who helped him should the outcome be satisfactory.[28] In the thirteenth and four-

[23] *Ibid.*, p. 433.

[24] *Neville* v. *London "Express" Newspaper Ltd.*, *loc. cit.*, *per* Lord Finlay L.C. p. 382.

[25] Steph. Cr. (9th ed.), 149; Co. Litt. 3686; Termes de la Ley; Cowel, *Champarty*; *Guy* v. *Churchill* 40 Ch.D. 481; *James* v. *Kerr* 40 Ch.D. 449.

[26] *Hayes* v. *Levinson* (1890) 16 V.L.R. (Australia) 305 *per* Hood, J., p. 307.

[27] See generally, Holdsworth, *A History of English Law* (3rd ed., 1922) Vol. III, 395–399; Radin, "Contingent Fees in California" (1940) 28 Cal. L.R. 587 (for a discussion of the Law in Greece, Rome and of the Middle Ages); in particular note, Winfield, "The History of Maintenance and Champerty" (1919) 35 L.Q.R. 50; Winfield, "Assignment of Choses in Action in Relation to Maintenance and Champerty" (1919) 35 L.Q.R. 143.

[28] "It is true that maintenance and champerty were well known at an early state of our law, but if our historical analysis of them be correct, they were known almost exclusively as modes of corruption and oppression in the hands of the King's officers

teenth centuries the king, anxious to stamp royal authority throughout his country, attempted to prevent the abuse of the courts by a series of countermeasures, such as laws against forgery, perjury, conspiracy, deceit, embracery, barratry, maintenance and champerty. The effectiveness of those measures is questionable owing to the corruption of those entrusted with their enforcement. Nevertheless, examination of the statutes[29] shows that the original prohibition was directed at a select group such as clerks of the justices, sheriffs and other royal officials.[30] It is important to note that these doctrines were not aimed at the specific control of lawyers, nor the promotion of a code of legal ethics. Indeed, the early statutes did not mention lawyers as a group although they were covered once the statutes provided for a general prohibition against champerty.[31] By the time of the Tudor dynasty, in particular Henry VIII, the judiciary had been strengthened and the power of the baronage, enfeebled by the Wars of the Roses, was curtailed. The control of administrative abuse and the establishment of royal power were largely achieved. This resulted in the reduction of actions for maintenance and champerty and the growing obsolesence of these doctrines.

Champerty provides yet another example of the ability of common law judges to transform outmoded doctrines into creations of contemporary value which although having their foundation in the past have little or no similarity to the original purposes. The changing attitude of the judiciary is illustrated in many cases[32] but it would be incorrect to assume from these dicta that officious meddling in litigation was considered less objectional than in earlier times.[33] The initial focus of the struggle between the crown and its feudal lords was replaced by the concern that external support for

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and other great men". Winfield, "Assignment of Choses in Action in Relation to Maintenance and Champerty" *loc. cit.*

[29] *Supra*, Lord Phillimore in *Neville* v. *London "Express" Newspaper Ltd.*

[30] E.g., Statute of Westminister I, 3 Edw. I, Ch. 25. "No officer of the King by themselves, nor by others, shall maintain pleas, suits, or matters hanging in the King's courts, for lands, tenements, or other things, for to have part or profit thereof by covenant made between them; and he that doth, shall be punished at the King's pleasure". Winfield, "The History of Maintenance and Champerty" p. 39.

[31] Articuli super cartas of 1300, 28 Ed. I, St. 3, Ch. 11.

[32] Buller J., in *Master* v. *Miller* (1791) 4 T.R. 340; Lord Abinger C.B., in *Findon* v. *Parker* (1843) 11 M. & W. at 679; Lord Coleridge C.J., in *Bradlaugh* v. *Newdegate* (1883) 11 Q.B.D. at 7; Cozens-Hardy M.R., in *British Cash and Co., Ltd.* v. *Lamson and Co. Ltd.* [1908] 1 K.B. at 1012.

[33] Tindall C.J., in *Stanley* v. *Jones* (1831) 7 Bing. at 378; Lord Esher M.R. in *Alabaster* v. *Harness* [1895] 1 Q.B. at 790; Lord Summer in *Oram* v. *Hutt* [1914] 1 Ch. at 106.

a court action, particularly in exchange for a consideration based upon the outcome, would produce a litigious community forever willing to run to the courts for settlement of grievances which would be better left to the attention of other methods of dispute settlement. Thus, in *Reynell* v. *Sprye*[34] there is an illustration of the way in which champerty was altered and justified in new terms. "Such an understanding, such an agreement . . . may or may not have amounted strictly in point of law to champerty or maintenance so as to constitute a punishable offence, but must . . . be considered clearly against the policy of the law, clearly mischievous, clearly such as a Court of Equity ought to discourage and relieve against". This example places the issue within a new framework, that of public policy and equitable remedies. Ultimately, it was "the unruly horse"[35] of public policy which was used to justify and accommodate the changing perimeters of judicial concern for champerty. Lord Esher in *Alabaster* v. *Harness*[36] stated:

> "The doctrine of maintenance ... does not appear to me to be founded so much on general principles of right and wrong or of natural justice as on consideration of public policy. I do not know that, apart from any specific law on the subject, there would necessarily be anything wrong in assisting another man in his litigation. But it seems to have been thought that litigation might be increased in a way that would be mischievous to the public interest if it could be encouraged and assisted by persons who would not be responsible for the consequences of it, when unsuccessful".

Although the rigidity of the laws of maintenance and champerty were relaxed it remained an offence for a person to support litigation in which he had "no legitimate concern" or did so without "just cause or excuse". Nevertheless, "legitimate concern" is more broadly interpreted and "just cause or excuse" more readily found. As stated by Lord Denning in *Hill* v. *Archbold*[37]:

> "This new approach means that we must look afresh at the previous cases. In particular at two cases on which Mr. Hill relies. The first is Oram v. Hutt. In that case a man had slandered the general secretary

[34] Knight Bruce L.J., (1952) 1 De G.M. & G. 660, 677; 42 E.R. 710, 717.

[35] *Janson* v. *Driefontein Consolidated Mines Ltd.* [1902] A.C. 484, per Lord Davey p. 507.
"The law relating to public policy cannot remain immutable. It must change with the passage of time. The wind of change blows upon it". *Nagle* v. *Feilden* [1966] 2 Q.B. 633, per Dankwerts L.J., p. 65.

[36] [1895] 1 Q.B. 339, 342 (C.A.)

[37] [1967] 3 All E.R. 110, 112.

of a trade union, accusing him of misconduct in the affairs of the union. The executive committee of the trade union authorised the general secretary to sue for slander and agreed to indemnify him against the costs. The general secretary won. He got judgements for £1,000 and costs; but the defendant could not pay anything. So the trade union paid the costs incurred by the general secretary. One of the members of the union then sued the trustees of the union claiming that the payments were illegal. It was held by this court, consisting of Lord Parker of Waddington, Lord Sumner and Warrington J., that the payment was obnoxious to the law of maintenance. They ordered the general secretary to repay the money . . .. It is now over fifty years since Oram v. Hutt was decided. I prefer to say plainly that Oram v. Hutt is no longer good law. Much maintenance is considered justifiable today which would in 1914 have been considered obnoxious. Most of the actions in our courts are supported by some association or other, or by the State itself. Very few litigants bring suits, or defend them at their own expense. Most claims by workmen against their employers are paid for by a trade union. Most defences of motorists are paid for by insurance companies. This is perfectly justifiable and is accepted by everyone as lawful, provided always that the one who supports the litigation, if it fails, pays the costs of the other side . . .. In the light of this experience, I am satisfied that if Oram v. Hutt were to come before us today, we should hold that the union had a legitimate interest in the suit and were quite justified in maintaining it: remembering that if the suit had failed, the union would have paid the costs".

Previously Lord Denning had considered the issue of maintenance and champerty in *Re Trepca Mines Ltd.*[38]:

"Maintenance may, I think, nowadays be defined as improperly stirring litigation and strife by giving aid to one party or to defend a claim without just cause or excuse. At one time, the limits of 'just cause or excuse' were very narrowly defined. But the law has broadened them very much of late: see Martell v. Consett Iron Co. Ltd. And I hope they will never again be placed in a strait-waistcoat. There is, however, one species of maintenance for which the common law rarely admits of any just cause or excuse, and that is champerty. Champerty is derived from campi partitio (division of the field). It occurs when the person maintaining another stipulates for a share of the proceeds: see the definitions collected by

[38] [1962] 3 All E.R. 351, 355 (C.A.)

> Scrutton, L.J., in Haseldine v. Hosken. 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 own 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; and I may observe that it has received statutory support, in the case of solicitors in s. 65(1) (a) and (b) of the Solicitors Act 1957."

The changing view of maintenance recognised that the support of other people's litigation is no longer regarded as a mischief: trade unions, trade protection societies, insurance companies[39] and even the State by legal aid do it regularly, openly, frequently and legally. Currently a considerable body of litigation is maintained by persons who are not party to it. The most recent case to deal with and reappraise the issues raised by contingency fees is that of *Wallersteiner* v. *Moir (no. 2).*[40] The substance of the action revolved around the limited power a minority shareholder can exercise in protection of his rights.[41] Two interrelated issues were raised, one being the minority shareholder's action as a representative action on behalf of the company and secondly, the present state of the law concerning contingency fees was discussed. The court held that the plaintiff in such an action was not entitled to legal aid for, by virtue of the Legal Aid Act 1974, s. 25, the "person" entitled to legal aid did not include a body corporate and, if the plaintiff were given legal aid, it would mean that the company on behalf of whom he sued would receive legal aid indirectly. The issue of contingency fees arose directly from the inability of the plaintiff to receive legal aid and his request to be financed for the litigation by an alternative technique.

The court was urged by counsel to allow a contingency fee to operate in this particular case. The argument stated that as legal aid was not available, there being a company involved, it should not be considered contrary to public policy to countenance the support of such litigation as it opened the doors of justice to litigants too poor to risk defeat in expensive litigation. Buckley, L.J., was unable to accept the proposition that this was a special case for once a category of special cases is accepted

[39] The first policy for legal expenses insurance in England was offered in 1974 by Strover and company, underwritten by Lloyd's of London. This form of insurance cover on the continent is common place.

[40] [1975] 1 All E.R. 849 (C.A.)..

[41] See generally, by way of illustration, Gower, *Modern Company Law* (1969) 587.

others invariably follow. At the same time it was felt that the implications of such a departure were widespread and that it would be inappropriate to make a finding in this case without the previous consultation, consideration and approval of other affected parties. Nevertheless, total and final condemnation of contingency fees was not forthcoming.

> "Before such a system were introduced to our legal regime careful consideration would have to be given to its public policy aspect. Notwithstanding the help we have received from counsel, this does not appear to me to be a suitable occasion for attempting to investigate that aspect in depth and for arriving at a final conclusion on it."[42]

Scarman L.J. followed this opinion. An exception to the public policy ruling was not accepted but the door was left open for the debate to continue.

> "Counsel has made the Law Society's position abundantly clear: they believe that the implications of creating the exception proposed by Lord Denning M.R. calls for further study. I agree. The exception, if it is to come, could have repurcussions in this, or indeed any litigation, the courts cannot fully probe, analyse, or assess. It is legislative, not forensic work."[43]

However, Lord Denning M.R. stated that while public policy remains against contingency fees in general he recognised that it was a proper question to ask whether a derivative action should be an exception. His conclusion was that while legal aid normally allowed the poor access to court, a statement questioned by the writer, this particular case illustrated the possibility of a minority shareholder being forced to court if he wished to prevent improper conduct on the part of majority shareholders. Despite the only course of action being litigation the financial risks are such that they effectively preclude such action. Consequently, Lord Denning in a minority judgement indicated that he would allow the plaintiff to operate on a contingency basis with his lawyers subject to the permission first of the Council of the Law Society and next of the courts.[44]

Though the court was not willing to countenance a fee arrangement based on the system operating in the United States the *obiter dictum* is such as to suggest that the matter is far from closed. The development of the common law which has produced a more liberal and enquiring approach to this issue is matched by statute law. Maintenance and champerty were illegal for almost seven hundred years but with the decline of suits for such arrangements it was finally decriminalised in the Criminal Law Act 1967,

[42] *Loc. cit.*, p. 867.

[43] *Ibid.*, p. 872.

[44] *Ibid.*, p. 862.

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

This statute did not affect the conduct of the plaintiff in *Wallersteiner v. Moir* (No. 2) for, as we will see, it did not take it outside the scope of the Solicitors Act 1974, s. 59(2)(b) and the Solicitors Practice Rules 1936–1972, Rule 4. Nevertheless, it drastically reduced the potential impact of the earlier common and statute law and focused clearly upon the legal profession. Such a change since the previous case on this subject, *Trepca Mines Ltd.*,[45] strengthened Lord Denning's minority judgement regarding the need to reassess the malleable legal concept of public policy. Similarly, the report of the Law Commission in 1966[46] upon which the Criminal Law Act 1967 was based described the issue of allowing contingency fees in litigation as a big question "upon which the professional bodies as well as the public must have further time for reflection before any solutions can or should be formulated".[47] The Commission continued by recommending "further study" of this matter.[48]

This section had laid out the historical development of maintenance and champerty. It has been shown that the initial reasons for its prohibition were unrelated to lawyers and any notion of ethical standards. Indeed, professionalism and ethics, which developed considerably later, built upon these features by being located centrally within the legal code of practice governing the lawyer and client relationships.[49] Nevertheless, despite the unequivocal prohibition of champerty by the legal profession it has been suggested that arrangements are made which bear a striking resemblance to this prohibited practice. For example, T.G. Ison has stated that in accident claims work the solicitor will frequently say: "I will

[45] [1962] 3 All E.R. 351. [1963] Ch. 199.

[46] *Proposals for Reform of the Law Relating to Maintenance and Champerty* Law Commission No. 7, 1966.

[47] *Ibid.*, para 19.

[48] *Ibid.*, para 30.

[49] See, *Law Society and Champerty*, rules of practice laid out in that section.

negotiate the claim on your behalf, and if a satisfactory settlement is obtained, I will rely on the insurer for costs. If no settlement is completed, there will be no charge to you except for disbursement. If you then want to start proceedings we will have to come to some arrangement regarding my fees".[50] Within the area of non-contentious work the Law Society has approved a system of costing which may bear little relation to the skills, effort and time involved in completing the undertaking. Conveyancing, the most significant income producer for the English solicitor,[51] was formerly costed on a fixed scale which was related to the value of the property[52] and whether it was in a registered land area.[53] Yet it did not follow that a cheap house was less difficult to convey than an expensive property. Since the abolition of the fixed scale the Solicitors Remuneration Order, 1972[54] has eight headings which are to be considered. One states, "where money or property is involved, its *amount or value*" is to be considered, while other circumstances to be borne in mind are "the skill, labour, specialised knowledge and *responsibility* involved on the part of the solicitor".[55] In *Property & Revisionary Investment Corp. Ltd.* v. *Sec. of State for the Environment*[56] Donaldson J., in fixing remuneration at £5,500 for the vendor's solicitors in relation to the sale of property for the sum of £2,500,000 gave guidance as the mode of assessing remuneration in commercial conveyancing transactions by indicating that by far the most important factor, in such cases, is the value of the property involved. Responsibility has taken on a financial measurement: the greater the value of the property, or the higher the court, or the larger the sum of money in debt collecting, the greater is "the responsibility". Such an interpretation,

[50] *The Forensic Lottery* (Staples, 1968) 118–119.

[51] See, National Board for Prices and Incomes, Report No. 54, "Remuneration of Solicitors" Cmnd. 3529 (1968).

[52] "Scale fees were introduced in 1883 and have since been maintained on the basis of being geared to the monetary value [of property]".
"Conveyancing Remuneration" Memorandum of the Council of the Law Society, Law Society Gazette (May 3, 1972), 386, para 12.

[53] The introduction of the Land Registry in 1925 introduced the registered and unregistered property.

[54] Statutory Instrument 1139.

[55] Emphasis added.

[56] [1975] 2 All E.R. 436; [1975] 1 W.L.R. 1504. See generally, "Solicitors' Remuneration" [1977] 40 Modern Law Review *639*. See also, *Treasury Solicitor* v. *Regester and Another The Times* 23 December 1977.

[57] *Ibid.*,

though understandable, measures responsibility on a finite, financial scale and in conveyancing matters places it as the "most important factor"[57] whereas clients might prefer to see responsibility defined in absolute terms unaffected by financial considerations.[58] For example, the purchaser of an inexpensive house would be justifiably perturbed on being told that his lawyer was less responsible than if his house is expensive yet such a conclusion follows if responsibility is scaled to value and the client's account is computed principally upon a responsibility equals value formula.

In England today the issue of contingency fees has been reopened by the Royal Commission on Legal Services which is expected to report late/ in 1979. One of its substantive headings for investigation is the matter of contingency fees. The reasons for this are the escalating costs of litigation and the decreasing willingness of the state to finance legal services via legal aid. Legal aid was designed to cover 80 per cent of the population. In 1959 it was available to 64 per cent of average families, in 1964 to 42 per cent and by 1975 it had dropped to 24.6 per cent.[59] The situation today is that the courts are open to the very rich and the very poor and the vast majority are unable to benefit from legal aid. The changing financial climate has necessitated a re-examination of feasibility of contingency fees as a supplementary institution to legal aid. Although the Law Society in its evidence to the Royal Commission was "strongly opposed, in the interests of the public, and of the profession to contingency fees"[60] the incoming president, in his presidential address to the society in Harrogate in October 1977 presented a changed view[61] when he talked of a long term solution based upon this form of fee arrangement. He considered that the Legal Aid Committees should assume the task of authorising such litigation and

[58] In interviews with lawyers in Kuala Lumpur I was told that although they denied practising contingency fees they would vary the final account to a client, for example, in debt collecting according to the amount regained. This variation depended principally upon the amount and not upon the time, effort and skill involved.

Although it is improper for any English solicitor to arrange, on taking instructions from a client to agree to vary the fees charged according to success or failure he is allowed when preparing his bill to consider the following matters which can vary the final amount in accordance with the outcome of the action. The bill takes into account the amount involved in accordance with the provisions of R.S.C. Order 62 App. 2 Part X and Order 47 Rule 16 of the County Court Rules, 1936 and also charges may be reduced when a client loses a case because of the adverse financial impact upon him.

[59] New Law Journal (1977) 13 October, 802.

[60] Law Society Memorandum No. 3, Part 2, (1977) 156.

[61] *Law Society Gazette*, October (1977), 821.

fixing the fee to be charged in relation to the nature of the case and its prospect of success. He endorsed the proposals of *Justice* in their paper, *Lawyers and the Legal System*[62] which recommended the establishment of a public contingency legal aid fund which after an initial government grant would become self-financing after its first year. The Labour Party in its evidence to the Royal Commission[63] also proposed a non-profit making independant organisation which would ensure that the lawyer was paid, win or lose, but that the client would pay a fee, which would be a percentage of the award of settlement, only after a successful claim. The Senate of the Inns of Court recommended the establishment of a suitors' Fund.[64] These systems have the advantage of retaining the independence of the client in selecting the lawyer but offer no additional gain to those who might indulge in ambulance chasing. The proposing bodies believe that they amalgamate the best features of contingency fees with the maintenance of the independence of the legal profession as it currently operates. Although several bodies have opposed the introduction of the American style system[65] these hybrid institutions have received considerable support. The debate which features contingency fees illustrates that there is a serious level of dissatisfaction with the way in which legal services are currently offered and financed.

THE LAW SOCIETY AND CHAMPERTY

It is a feature of the legal profession that it is allowed by statute to exercise a high degree of autonomy. Indeed, self-regulation has been recognised by scholars as being a characteristic of an advanced and established profession.[66] These powers are currently exercised by the Law Society which received its first Royal Charter in 1831. This body echoed the scholarly descriptions of a profession by its self-portrait to the Monopolies Commission:

[62] *Justice* (Stevens) 1977. See their previous paper, Justice, *Trial of Motor Accidents* (1966) para 9.

[63] *The Citizen and the Law* (Labour Party 1977) para. 91–98.

[64] The Senate, Submission No. 13.

[65] Organisations which oppose contingency fees, in the American format are the British Legal Association; Young Lawyers' Group (Cheshire and North Wales); West Country Young Solicitors Group; The Consultative Committee of Accountancy Bodies, Northern Ireland; The Association of Consulting Engineers; the Council of Her Majesty's Circuit Judges.

[66] "The purpose and policy of that legislation (Solicitors Act) was undoubtedly to make solicitors as far as possible masters in their own house". *Re A Solicitor* [1945] 1 All E.R. 445, Scott L.J., at 448. Millerson, *The Qualifying Associations* (1964); Johnson, *Professions and Power* (1972).

> A body of men and women (a) identifiable by reference to some register or record (b) recognised as having a special skill and learning in some field of activity in which the public needs protection against incompetence, the standards of skill and learning being prescribed by the profession itself (c) holding themselves out as being willing to serve the public (d) voluntarily submitting themselves to standards of ethical conduct beyond those required of the ordinary citizen by law and (e) undertaking to accept personal responsibility to those whom they serve for their actions and to their profession for maintaining public confidence.[67]

There is a range of ethical practices which solicitors are obliged to observe. The forbidden procedures are often commonly associated with champerty not because they are inextricably mixed but rather because they all involve deviant practices which have a symbiotic relationship. Though fascinating the topics of touting[68] advertising, poaching and undercutting[69] must fall outside the scope of this particular paper for lack of time and space.[67] space.[70]

The purpose of this section is to focus upon the English rules which govern the financial relationship between the solicitor and his client in the area of contentious business. This is of particular importance because of the doctrine of common-law reception which applies in Malaysia.[71] Despite the decriminalisation of maintenance and champerty by the Criminal Law Act 1967,[72] the Solicitors Act 1974, the Solicitors' Practice Rules and the doctrine of public policy still hold that champertous arrangements between a solicitor and his client are improper. As a result of this prohibition certain consequences follow should such an arrangement be exposed. Before detailing the results of such improper arrangements I identify the relevant statute law and rules of ethical conduct which control these relationships.

[67] Monopolies Commission Report, 1968, Cmnd. 4436–1, App. 5. See also, the Monopolies and Mergers Commission Report on Legal Services, 1976, Ch.4, where the Law Society again follows this form of self description.

[68] See, *Re A Solicitor* [1945] 1 All E.R. 445.

[69] Solicitors Practice Rules 1936–1972, Rule 1. See, *Hughes* v. *Architects Registration Council* [1957] 2 Q.B. 550, Devlin J., at 561.

[70] However, the author and Miss Chin Nyuk Yin are preparing a separate paper on the practice of touting and advertising amongst solicitors and advocates in West Malaysia, with special reference to Kuala Lumpur.

[71] See, *Theory and Practice in Malaysia* where knowledge of the English common law has a direct bearing on the practice of law in Malaysia.

[72] Criminal Law Act 1967, s. 14(2).

The relevant legislation is the Solicitors Act 1974 which consolidates the legislation governing the profession 'for the first time since the Solicitors Act 1957. The guiding principle of the Solicitors Act has been described as "consumer (or rather client) protection".[73] Following this principle is s. 59(2)(b) which is concerned with contentious business agreements for an ascertainable sum for fees.

> 59(2) Nothing in this section or in sections 60 to 63 shall give validity to . . . .
>
> (b) any agreement by which a solicitor retained or employed to prosecute any action, suit or other contentious proceedings, stipulates for payment on by in the event of success in that action, suit or proceeding.

Coupled with this, for the purpose of this paper, is s. 31 which states:

> (1) Without prejudice to any other provision of this part the Council may, if they think fit, make rules, with the concurrence of the Master of the Rolls, for regulating in respect of any matter the professional practice, conduct and discipline of solicitors.
>
> (2) If any solicitor fails to comply with rules made under this section, any person may make a complaint in respect of that failure to the Tribunal.

The Council of the Law Society has promulgated a series of rules entitled The Solicitors' Practice Rules (1936–75) which have been approved by the Master of the Rolls. They have effect under, or were made under, the Solicitors Act 1974, s. 31.[74] The Rule which covers contingency fees is the fourth:

> (4) (2) A solicitor shall not act either in association with a claims assessor[75] or in respect of any accident claim for any client introduced (whether directly or indirectly) by a claims assessor acting as such for that client and it shall be the duty of a solicitor before accepting instructions in respect of an accident claim, to make reasonable enquiry to find out whether acceptance would contravene the provisions of this paragraph.

[73] Adamson, *The Solicitors Act 1974* (Butterworths).

[74] They consist of the following set of rules; The Solicitors Practice Rules 1936 S.R. & O. 1936 No. 1005, as amended (R. 1 dated 2 April 1971, r. 2 dated 6 Oct., 1972, rr. 3 and 4 dated 28 July, 1972, rr. 5–7 dated 22 July, 1936); The Solicitors Practice Rules 1967, not published in the S.I. series (rr. 1–3 dated 24 Jan., 1967) and The Solicitors Practice Rules 1975, not published in the S.I. series (rr. 1–5 dated 9 May, 1975).

[75] Rule 4(1) "Claim assessor" means any organisation or person (not being a solicitor) whose business or any part of whose business is to make, support or agent or otherwise accident claims in such circumstances that such organisation or person solicits or receives any payment, gift or benefit in respect of such claims".

(3) A solicitor who is retained or employed to prosecute any action suit or other contentious proceeding shall not enter into agreement or arrangement to receive a contingency fee[76] in respect of that action, suit or other contentious proceeding.

Rule 4 para. 3 reflects s. 65(1)(b) of the Solicitors Act 1957 which states that nothing in the Act shall give validity to either:

(a) any purchase by a solicitor of the interest or any part of the interest of his clients in any action, suit or other contentious
(b) any agreement by which a solicitor retained or employed to prosecute any action, suit or other contentious proceeding, stipulates for payment only in the event of success in that action, suit or proceeding.

When making the new rule the Council of the Law Society accepted that it was important to make it clear that charging on a contingency fee basis is inconsistent with English law and practice and that this should be clearly expressed in the Rule.[77]

Having established that contingency fees are improper for solicitors I move onto the consequences of having entered into such a fee arrangement. The profession has its own form of disciplinary proceedings operated by the Solicitors Disciplinary Tribunal.[78] Section 47 provides the Tribunal with the following powers:

(a) the striking off the roll of the name of the solicitor to whom the application or complaint relates;
(b) the suspension of that solicitor from practice;
(c) the payment by that solicitor of a penalty not exceeding £750, which shall be forfeited to Her Majesty . . . .

Apart from the internal sanctions imposed by the Law Society on its members the contract between the solicitor and client is subject to the rules of common law. A contract for legal services of a contentious nature based upon a contingency fee was illegal and therefore unenforceable. "I cannot doubt, however, that an agreement which if entered into by an

[76] Rule 4(1) "Contingency fee" means any sum (whether fixed, or calculated either as a percentage of the proceeds or otherwise howsoever) payable only in the event of success in the prosecution of any action, suit or other contentious proceeding".

[77] See, *A Guide to the Professional Conduct of Solicitors*, Law Society (1974) 113. Note, that under Rule 5 of the Solicitors Practice Rules the Council of the Law Society has the power to waive compliance with any of the rules in any particular case or cases. Scarman L.J., in *Wallersteiner* v. *Moir* (No. 2) op. cit., did not think that the council was empowered to waive Rule 4 even if it was so minded in regards to a contingency fee arising out of a derivative action.

[78] Solicitors Act 1974, ss. 46, 54.

individual would be void as an agreement to commit an illegal act. . ."[79]. The court may also go behind a written contract if the totality of the agreement attempts to support a champertous arrangement.[80]

A number of cases have indicated what consequences flow from such an illegal contract. In *Haseldine* v. *Hosken*[81] the plaintiff entered into an agreement with his client whereby he would make no claims if the action was unsuccessful and would receive 20 per cent of any damages paid. The action was unsuccessful and finally the defendant sued the solicitor, Haseldine, for his costs, having discovered that the plaintiff was unable to meet the judgment. Haseldine settled with the defendant and then attempted to claim the settlement from an insurance policy which covered him against loss arising by reason of any neglect, omission or error while acting in his professional capacity. The court held that as the original agreement was champertous it was illegal *ab initio* and contrary to public policy. A claim in respect of loss due to having contracted in such a fashion was untenable. Thus, the professional negligence insurance policy, an essential feature of the modern lawyer's practice, is inoperative for such a contract.

Not only does the solicitor have no valid action against his client for his fee, if contingent, but he is also liable to fail on his costs as laid down in *Wild* v. *Simpson.*[82] The plaintiff, a solicitor, was retained by the defendant. During the original litigation the defendant was adjudged bankrupt and Wild experienced difficulty in obtaining money to continue the action. A second agreement was made whereby the plaintiff provided out of pocket expenses and legal fees; and in the event of a successful judgment he was to receive a percentage. The plaintiff was not entitled to costs should the action fail. The action was successful and the solicitor claimed only his costs, not the percentage, which was clearly champertous. The court held that the original agreement was varied by the subsequent and illegal agreement so the totality became tainted and unenforceable. Consequently, the plaintiff failed in his bill of costs against his former client. It follows that if costs are irrecoverable from a contingency fee arrangement made subsequent to the original and proper fee contract then

[79] *Oram* v. *Hutt* [1914] 1 Ch. 98, Lord Parker of Waddington at 103. Any bargain which "savours of champerty" is void. *James* v. *Kerr* (1899) 40 Ch.D. 456; *Hutley* v. *Hutley* (1873) L.R. 8Q.B. 112.

[80] *Rees* v. *De Bernady* [1896] 2 Ch. 437.

[81] [1919] 2 K.B. 822; applied in *Askey* v. *Golden Wine Co. Ltd.* [1948] 2 All E.R. 35.

[82] [1919] 2 K.B. 545; *Hilton* v. *Woods* (1867) L.R. 4 Eq. 432, 439; but see *Knight* v. *Bowyer* (1858) 2 De G. + J. 421, 445.

a fee arrangement based exclusively on an illegal agreement will also render the lawyer incapable of claiming his costs from the client.[83]

Should the solicitor have received settlement on his bill, which was based on a champertous agreement, then he is liable to repay the improper commission. In *Pince* v. *Beattie*[84] a written agreement between the solicitor and his client stated that the former should have 5 per cent commission on the gross amount of property recovered by him for the latter, in addition to his costs. The court held that as the stipulation was contrary to public policy the commission must be refunded even though it was included in a settled account. In this case the plaintiff did not mention the issue of costs in his statement of claim. However, it does provide authority for a client asking the court to order the solicitor to disgorge any champertous sums which have already vested with the solicitor. This would seem to fall foul of the time-honoured principles articulated by Lord Manfield in *Holman* v. *Johnson*:

> The objection that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this: ex dolo malo non ritur actio. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of acting appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it".[85]

The doctrine laid down in *Holman* v. *Johnson* complies with the general legal principle, founded on public law, that any transaction that is tainted by illegality in which both parties are equally involved is beyond the pale of the law. No person can claim any right or remedy whatsoever under an illegal contract in which he has participated.[86] However, an important

[83] *Re Masters* (1835) 1 Har. + W. 348.

[84] (1863) 32 L.J. Ch. 734; L.T. 315.

[85] *Holman* v. *Johnson* (1775) 1 Cowp. 341, per Mansfield L. at 343.

[86] *Gardon* v. *Metropolitan Commr.* [1910] 2 K.B. 1080, Buckley L.J. at 1098.

exception has been made by the Court of Appeal for the relationship of solicitor and client which runs contrary to the statement of Lord Mansfield. *Re Thomas, Jaquess* v. *Thomas*[87] concerned money subscribed by strangers for the maintenance of litigation for the recovery of property, to be repaid out of the property recovered. The money was entrusted to Jaquess who retained Thomas as a solicitor. Money was paid to Thomas but the action failed. Jaquess took out a summons against the solicitor for delivery and taxation of his bill of costs and an account of the money paid to him. The defence was, *inter alia*, that the work Thomas was employed to do was illegal on the grounds of champerty and that no assistance ought therefore to be given by the court to either as against the other. Lindley L.J., giving the judgment of the court, was extremely critical of such a suggestion and rejected the defence.

> "Is every rascally solicitor to invoke his own rascality as a ground for immunity from the jurisdiction of the court? Or is the court to listen to a solicitor who, after acting for and advising his client and taking his money, is mean enough to denounce him and set up the illegality of the client's conduct as a reason why the court should not call its own officer to account? Or is the court judicially to hold that, although it may strike such a solicitor off the rolls, it cannot legally compel him to do that which every man with a spark of honour would do without hesitation — viz., account to the client who employed him? We emphatically protest against any such notion. The court expects and exacts a high standard of honour on the part of solicitors to their clients, and ought not to listen, and will not listen, to such a scandalous defence as that set by Thomas in this case . . . The doctrine laid down by Lord Mansfield in *Holman* v. *Johnson* and recently acted upon by this court in *Scott* v. *Brown* has never been applied, and, in our opinion, ought not to be applied, to the exercise of the jurisdiction of the court over its own officers".[88]

In *Danzey* v. *Metropolitan Bank of England and Wales*[89] a solicitor agreed to act for a client in an action on the terms of receiving a percentage of any sum recovered, such percentage to cover his costs and expenses

[87] [1894] 1 Q.B. 747.

[88] *Ibid.*, pp. 749, 750. Modern support for the view expressed by Lindley L.J. is provided by Denning M.R. in *Re Trepca Mines* [1962] 3 All E.R. 351: "When a solicitor makes a champertous agreement with his client, I should have thought that the parties were not in *pari delicto*. The solicitor is more guilty, for he ought to know better than to stipulate for a percentage for himself. If he recovers a fund which belongs to his client, he ought to hand it all over to his client, and not be allowed to deduct anything for his costs".

[89] (1912) 2 T.L.R. 327, see also *Grassmore Colliery Co.* v. *Workmen's Friendly Society and Connell* (1912) I.L.J. C.C. 82.

and no charge was to be made in the event of failure. Shortly after the issue of the writ the solicitor discovered that there was no substance in the action. The court found that the agreement was champertous and that as the judgment was given for the defendants in the action with costs the solicitor became personally liable to pay them.

Although the contract of champerty is illegal it does not necessarily prevent an action from being pursued. In *Hilton* v. *Woods*[90] the plaintiff had an original and good title to property. He entered into an improper agreement with his solicitor as to the mode of remuneration for professional services. It was held that the plaintiff was not disqualified from suing since his title was vested in him *before* he entered into the illegal contract. Mallins V.C. stated that if the solicitor had been the plaintiff suing by virtue of a title derived under the agreement with his client the bill would have been dismissed as having its source in an illegal agreement.[91] The contract is not champertous if the parties have a common interest, and a moral interest, as that of parent and child.[92] Similarly, it is lawful for persons to combine together to prosecute a guilty person or one against whom there are reasonable grounds for suspicion.[93]

It has never been doubted that a solicitor might lay out his own monies as disbursements on his client's account[94] and a solicitor can conduct a case gratuitously out of charity or friendship towards a client.[95] But Hawkins J. in *Alabaster* v. *Harness*[96] stated; "To carry on a suit for another upon the mere speculation of obtaining costs from the defendant in the event of success, seems to fall directly within the mischief against which the law of maintenance is directed".

However, there is nothing improper about a solicitor undertaking litigation in the knowledge that he will not be paid unless the action is successful. Lord Russel of Killowen in *Ladd* v. *London RoadCar Co.*[97] stated:

> "In reference to the subject of speculative actions generally, I think it right to say on the part of the profession and the class of persons who were litigants in such cases, that it is perfectly consistent with

[90](1867) L.R. 4 Eq. 432; 36 L.J. Ch. 492; 16 L.T. 736.

[91]See generally on the issue of illegality; Cheshire and Fifoot, *Law of Contract* (1976) 321–363.

[92]*Burke* v. *Green* (1820) 2 B. + B. 517.

[93]*R. v. Best* (1705) 1 Salk. 174.

[94]Coke's *Second Institute*, 564; Viner's *Abridgement*, Maintenance (M), 2.

[95]Viner's *Abridgement*, Maintenance (M), 13.

[96][1894] 2 Q.B. 897, 900; not discussed on appeal, [1895] 1 Q.B. 339.

[97](1906) 12 B.C.R. 272; 39 S.C.R. 355.

> the highest honour to take up a speculative action in this sense, viz., that if a solicitor heard of an injury to a client and honestly took pains to inform himself whether there was a bona fide cause of action, it was consistent with the honour of the profession that the solicitor should take up the action. It would be an evil thing if there were no solicitors to take up such cases, because there was in this country no machinery by which the wrongs of the humbler classes could be vindicated. Law was an expensive luxury, and justice would very often not be done if there were no professional men to take up their cases and take the chances of ultimate payment; but this was on the supposition that the solicitor had honestly satisfied himself by careful inquiry that an honest case existed."

Likewise a solicitor, or any person, may provide funds to allow a litigant to defray the costs of an action provided that there is no malice, officious inter-meddling or desire to stir up strife. This is illustrated by the case of *Newswander* v. *Giegerich*[98] where Davies J., stated:

> "It would indeed at the present day be a startling proposition to put forward that every one was guilty of the crime of maintenance who assisted another in bringing or maintaining an action, irrespective of the results of merits of such action and whether the courts sustained it or not. Many grasping, rich men, and soulless corporations would greedily welcome such a determination of the law, because it would enable them successfully to ignore and refuse the claims of every poor man who had not sufficient means himself to prosecute his case in the courts, conscious that if any third person except from charity gave the necessary financial assistance to have justice enforced, as soon as it was enforced the denier of justice could turn round and compel the good Samaritan to pay him all the costs he had incurred in attempting to defeat justice. Such a condition of things is repugnant to our common sense and the courts have from time to time found it necessary to engraft exceptions upon the law of maintenance making such things and relations as kindred affection of charity, with or without reasonable ground, a lawful excuse for maintaining an action and confining the law to cases where a man improperly and for the purpose of stirring up litigation and strife encourages others to bring actions or to make defences which they had no right to bring or make."

Finally, I consider the consequences of a champertous agreement between the client and a third party of which the solicitor is aware. The case of *Re Trepca Mines Ltd.*,[99] held that when a solicitor is retained to

[98] (1900) 110 L.T.J. 80.

[99] [1962] 3 All E.R. 351; [1963] Ch. 199, C.A.

conduct litigation on the ordinary and accustomed terms, he is not debarred from acting in that litigation simply because he knows, or gets to know, that his client had made a champertous agreement to share the proceeds with another, and he is entitled to conduct the litigation to the end and recover his proper costs for so doing, unless he had himself in some way or other participated in the champertous agreement.[100] However, the court followed *Wild* v. *Simpson* by stating that if he is a party to the champertous agreement or participates by voluntarily doing a positive act to assist to implement the unlawful agreement, then he can recover neither costs, profit, nor disbursement for by his participation he aids and abets and is himself guilty of the offence.

THEORY AND PRACTICE IN MALAYSIA

A contingency fee between a lawyer and client in Malaysia is illegal and concurrently subjects the lawyer to the possibility of disciplinary proceedings. Indeed, a contract of this nature involving non-lawyers is also illegal for the received common law of maintenance and champerty remains operative whereas it was repealed in England and Wales by the Criminal Law Act 1967. The basis for this illegality is found in the Civil Law Act 1956, s. 3 which states:

> 3(1) Save so far as other provision has been made or may be made by any written law in force in Malaysia, the Court shall;
>
> (a) in West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7th day of April, 1956;
>
> (b) in Sabah, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on the 1st day of December 1951;
>
> (c) in Sarawak, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on the 12th day of December, 1949 . . ..

Thus, throughout Malaysia the common law doctrine of maintenance and champerty apply unless qualified because of the necessity of local circumstances.

As stated earlier[101] the common law judges currently oppose a contingency fee contract between lawyer and client on the basis of public policy. It is suggested that the Contracts Act, 1950 s. 24(e)[102] supports such judicial thinking.

[100] *Per* Lord Denning M.R., p. 356.

[101] Supra, *English Practice*.

[102] Laws of Malaysia, Act 136.

> The consideration or object of an agreement is lawful, unless . . .
> (e) the court regards it as immoral, or opposed to public policy. In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

Consequently, a contract between a lawyer and client for legal services which is based upon payment by a contingency fee is void.

Thirdly, the Legal Profession Act, 1976[103] also prohibits such a contract between those subject to the control and discipline of the Bar Council and clients. Specifically, section 93(1) states:

> Advocates and solicitors shall be subject to the control of the Bar Council and shall be liable on due cause shown to be removed from the Roll or suspended from practice in manner hereinafter provided, or censured . . . (2)(i) has done some other act which, if being a barrister or solicitor in England, would render him liable to be disbarred or removed from the Roll or suspended from practice or censured.

Following a number of individualised offences this adopts the role of a 'catch all' safety net by subjecting *all* Malaysian lawyers to the rules of the Bar Council and the Law Society in England and Wales.[104] This blanket reception of the rules of practice of English barristers results in the prohibition of contingency fees as such a fee relationship is unethical in England for both barristers and solicitors.[105] Section 112 of the Legal

[103] Laws of Malaysia, Act 166.

[104] It was suggested to me by a senior member of the Malaysian Bar Council that s. 93(2)(i) was meant to apply only to those Malaysian practitioners who qualified in England as either solicitors or barristers. I consider this interpretation to be incorrect. This is because such a meaning would thereby render s. 93(2)(1) redundant as it would repeat s. 93(2)(i); it would involve a dual standard of ethics and discipline for Malaysian lawyers, i.e. Malaysian practitioners qualified outside England would be subject only to the Legal Profession Act 1976 while those who qualified in England would be subject to both the Legal Profession Act and the appropriate rules in England; it can be read as a 'catch all' subsection as it refers to "some other act", which follows on from the specifically detailed offences of 93(2) (a) (b) (c) (d) (e) (f) (g) (h); and, finally, the words used are "if being a barrister or solicitor in England would render . . ." which, it is suggested, create a hypothetical case for reception rather than restricting it to those Malaysian members who are barristers or solicitors in England.

[105] See, *The Law Society and Champerty*; Solicitors Act 1974, s. 59(2) (b) and Solicitors Practice Rules (1936–75) rule 4; Boulton, *Conduct and Etiquette at the Bar* (6th ed., 1975); For each case on which he appears counsel must have a separate brief marked with a fee (Annual Statement of the General Counsel of the Bar 1894–5, p. 16).

Profession Act also touches upon contingency fees by stating 112(1) "Except as expressly provided in any written law, or by rules made under this Act, no advocate and solicitor shall (b) enter into any agreement by which he is retained or employed to prosecute any suit or action or other contentious proceeding which stipulates for or contemplates payment only in the event of success in such suit, action or proceeding". One of the fundamental features of the contingency fee contract is that the client only pays the lawyer if the action is successful. The 'no win, no pay' relationship is prohibited by section 112.

The individual and combined effect of the Civil Law Act, Contracts Act and Legal Profession Act is to establish that a contingency fee contract between a lawyer and client is illegal on the grounds of champerty which is currently based upon public policy and also that the practice is unethical for the lawyer which exposes that person to the possibility of professional disciplinary action. Further, under the reception policy of common law cases,[106] as found in the Civil Law Act 1956, s. 3, certain consequences flow should such a contract between a lawyer and client be made. Although no case law is to be found on this topic in Malaysia, nor indeed have any disciplinary proceedings been instigated for contingency fee arrangements, as will be seen, so common has the practice of contingency fees become in contentious civil business that it seems likely that at some point the issue will arise.

Turning now to the practice of law we are faced with a sharp and clear divergence between the theory and practice. Contentious personal injury work comprises a significant element of the courts' workload. The Lord President of the Federal Court, Tun Suffian, estimated that in Kuala Lumpur in 1974, 40% of the civil suits were running down cases.[108] In 1973 the Perak Bar Committee appointed a sub-committee to consider the backlog of cases in the Ipoh High Court and Special Sessions Court. The report of the sub-committee stated that 60% of the cases causing a backlog were running down suits.[109] The increasing number of 'runner'[110]

[106] These have been stated at some length because they do have a local application, in the section, *The Law Society and Champerty.*

[107] Suffian, "Some Problems Facing the Administration of Justice" (1976) 1 M.L.J. xiv; R.R. Chelliah, "Some Problems Facing the Administration of Justice" (1976) 1 M.L.J. iii.

[108] In England and Wales it has been estimated that personal injury work represents 80% of the litigation in the High Court, P.S. Atiyah, *Accidents, Compensation and the Law* (Weidenfeld and Nicolson) 575.

[109] See Chow Min Yee, "Civil Procedure and Delay in Litigation" Faculty of Law, University of Malaya, unpublished project paper, (1976) 113.

[110] 'Runners' is the shorthand used by the legal profession in Malaysia to signify running down cases.

reflects the growing volume of motor vehicles, and concomitantly, road accidents in the country, as illustrated by the following table.

General Data: Number of Motor Vehicles in Relation to Population and number of Accidents in Peninsular Malaysia.[111]

Table I

Date	Population	Number of Vehicles	Number of persons per vehicle	Accidents
1970	9,000,399	669,294	13:1	12,704
1971	9,133,506	730,035	13:1	16,847
1972	9,873,633	802,831	12:1	22,151
1973	10,130,672	939,951	11:1	29,286
1974	10,434,592	1,090,279	10:1	24,581

The owner of a vehicle is obliged to have a minimum of third party insurance[112] which normally ensures that a victim of a road accident will have a defendant in funds against whom to proceed.[113] The average injured party is "illiterate and not aware of legal rights in accident cases."[114] Thus, there are usually considerable economic and social differences which distinguish the insured motorist and the injured party. One High Court judge described to me the typical plaintiffs in running down cases: "Plaintiffs are by and large ignorant people". Since the only formal, civil, public method of conflict resolution is currently via the courts, it places the potential plaintiff in a disadvantaged position. The Malaysian constitution recognises this imbalance of access to and use of the judicial system and Article 8 states: "All persons are equal before the law and entitled to the equal protection of the law". In 1960 a step towards providing legal representation for indigents in civil matters was taken when a letter written by an orthopaedic almoner at Kuala Lumpur

[111] Royal Malaysian Police Statistical Report on Road Accidents in Peninsular Malaysia, 1974.

[112] Road Traffic Ordinance 1958, s. 74 (F.M. 49 of 1958).

[113] In West Malaysia a Motor Insurers' Bureau was established on 15th January 1968. It gives pecuniary relief to accident victims where there is not in force a policy of insurance as required by the Road Traffic Ordinance 1958. See, [1968] 1 M.L.J. xix.

[114] *The Malay Mail* 3 February 1977.

General Hospital pointed out that free legal advice should be given to patients suffering from serious disabilities for which compensation could be obtained had the patient been legally represented.[115] In the same year the Attorney-General lent his support to the idea of establishing a Legal Aid Bureau. Subsequently, the Ministry of Justice and the Bar Council were involved. In 1970 a pilot scheme was created and authorised to expend not more than $100,000. The headquarters are located in Kuala Lumpur and all eleven states in Peninsular Malaysia are covered. In July 1976 the legally qualified people in the Bureau were the Director of Legal Aid, a Deputy Director, eleven assistant directors and six second legal assistants. The total establishment at that time stood at 86. At the same time the Bureau is supported by a panel of private lawyers who act on payment of a small fee.

The establishment and operation of a Legal Aid Bureau would appear to place Malaysia on a par with England and Wales and provide an explanation why laws and rules against contingency fees have some justification. However, closer examination indicates that we are not comparing like with like. For example, the number of lawyers available to serve the eligible community is small and they are inexperienced. With the exception of the senior members the staff tend to be young and liable to be transfered out of the Bureau. The result is that it is difficult to build up a cadre of experienced personnel committed to the principles of legal aid within a well defined career structure. Secondly, although the private practitioner has expressed support the financial returns are such as to make the work relatively unattractive to the more successful.[116] Thirdly, eligibility for legal aid, which is determined by a means test, is based at a low threshold. As a rough guideline a person whose income is less than $134 per month and whose property does not exceed $500 is entitled to free legal aid. Thereafter there is a sliding scale up to $330 per month with the capital ceiling of $3,500. Poor people are often unable to identify an issue as having a legal content and legal remedies are often limited. Because of the ethical rules of touting and advertising which constrain a lawyer in the way in which he can approach a potential client and generally become involved in developing community awareness of legal services the initial identification of a legal problem invariably rests with the citizen. Lawyers, governed by a code of practice based upon the English system, are essentially reactive and can only operate proactively if they step beyond the accepted methods of conduct. The requirement that aggrieved parties come to lawyers, and in this instance the Legal Aid Bureau, places the

[115] *Legal Aid Services in Malaysia*, Legal Aid Bureau, Kuala Lumpur, 1976.

[116] There are 62 lawyers on the Panel in the State of Selangor where over 500 practice and 121 in the remainder of Peninsular Malaysia.

awareness and responsibility upon the individual. Research done by students at the Faculty of Law, University of Malaya, indicates an extremely narrow perception of what constitutes a legal problem.[117] This narrow interpretation thereby excludes the Legal Aid Bureau which has to be 'triggered' into action by the complainant. The student project paper illustrates that poor, and in particular rural communities, operate in ignorance of the legal services, especially civil dispute settlement, which are offered by the state. This unawareness is reflected in the number of cases handled by the Bureau. In 1971 in the Federal Territory 11 running down cases were handled. In subsequent years the numbers respectively were 12, 10, 2, 19 and in 1976 it dropped to 3.[118] The share of the Bureau of this work is minimal as is illustrated by the figure that in 1976 in the High Court Register at Kuala Lumpur 564 cases were listed.[119]

The nature and availability of legal manpower is one obvious constraint on the legal aid service as is the inability of the public to recognise issues as

[117]Refer to unpublished project papers of third year law students on legal aid and legal needs (Law Library, University of Malaya, Kuala Lumpur).

Contrast the view of J.L.C. Yew, "Ambulance Chasing and Contingency Fees in the Honourable Legal Profession: A Plea" [1972] 1. M.L.J. ix, "The public knows of the existence of lawyers not only through the newspapers but also through the efforts of the Legal Aid Bureau which has been spreading the gospel for several years".

In a recent survey in London people were asked about their knowledge of legal aid and their views about the law and the legal system. "Over two-thirds of the Centre's (North Kensington) clients demanded to know something about the Legal Aid and Advice Scheme, but when asked to explain it, only about a third of them were able to give anything like a comprehensible explanation, and most had only a very rough idea of how the scheme worked. A few went so far as to suggest that legal aid was a place to go, or that it was synonymous with the Law Centre. Amongst non-users even fewer knew much about it, only 10 per cent giving a reasonably coherent explanation and, as with clients, as many as a third having no knowledge at all. Nor did previous contact with a solicitor in private practice appear to make any difference for either group: of the 54 per cent of non-users who had consulted a solicitor, 13 per cent had actually received legal aid, and in the client group 9 per cent mentioned receiving it.

Although at the time of the interviews a national publicity campaign was launched by the government to publicize 'New Legal Aid' and the introduction of the £25 scheme, using newspapers and television, very few indeed of either group could give the barest details of what the scheme involved". A Byles and P. Morris, *Unmet Need* (Routledge and Kegan Paul, London 1977), 48–49.

[118]The power to act in such cases is derived from the Legal Aid Act 1971, Third Schedule, section 12, Rights and Liabilities in respect of civil action for damages arising out of accidents involving motor vehicles within the meaning of the Road Traffic Ordinance 1950.

[119]These figures are taken from a paper by Umi Kalthum bt. Abdul Majid, "Motor Accident Claims and the Law", Faculty of Law, University of Malaya, 1977.

having a legal content. If these were the only matters to consider they would not satisfactorily explain the large number of 'runners' heard given that they are not conducted by litigants in person. The reason why the Bureau commands an insignificant share of this particular market is because the private practitioner dominates it. This dominant role is assisted by the relatively small input the Bureau is currently capable of making but there are other factors less apparent which create and sustain this position. As stated above the Bureau is essentially a reactive service and this places severe constraints on its method of operation and impact within the community. However, the practitioner although formally controlled by rules of proper conduct, and in particular those concerning touting and advertising, is in a position to avoid them with greater ease and ultimately for large personal profit.

For the purposes of this paper a distinction is made between the issues surrounding touting, which is the improper acquisition of clients, and contingency fees, being the way in which the client might finance the action.[120] Although it is usual to associate these matters they are not of necessity inextricably linked. Nevertheless, as they are both improper practices the tendency to see them running together is stronger in Malaysia than for example in the U.S.A. where only the former is unethical. It is helpful to separate the two matters for opinion and emotion opposing touting is stronger than that concerning contingency fees and consequently, it should not overlap and taint the debate on this separable matter.

As stated above, features such as the financially secure defendant, the high rate of road accidents, the constraints placed upon the Legal Aid Bureau and the often relative simplicity of these actions make 'runners' a work area of considerable attraction to the private practitioner. The major problems are firstly the ignorance of potential clients which is largely surmounted by the widespread use of touts and the second is that they are usually indigents. Legal advice, representation and court litigation is costly and this is overcome by the lawyer himself financing the client through the processes on a 'no win, no pay' basis. Indeed, the contingency fee is the only way in which the private practitioner can afford to offer his skills and it is currently the only practical way in which the injured party can seek compensation. One Kuala Lumpur practitioner indicated that with "poor clients the firm is out of pocket if we lose but on a swings and roundabouts principle sometimes we win and sometimes we lose". Field work in

[120] The technique of "ambulance chasing" and its practice in Kuala Lumpur has been documented by the author and Miss Chin Nyuk Yin. A paper on this topic and its relation to touting, advertising and the code of professional ethics is currently being prepared for publication by the co-researchers.

the capital city[121] indicates that the contingency fee is the normal way of handling a runner. "Almost 100 per cent of 'runners' use contingency fees": "Contingency fees are a current practice in Malaysia". Injuries are not the prerogative solely of the poor and as one lawyer stated even those who could afford to pay in the normal fashion are attracted to this scheme: "Even rich people have elected for contingency fees". The work appears to be concentrated in the hands of a few firms. "There are six to eight regular firms involved in 'runners'"; "Certain firms specialise in contingency fees". Specialism within a practice is a common feature in all jurisdictions and in this instance it might be a mixture of having the services of the most active touts or being able to offer a known skilled service. For example, one judge stated that those who specialise in this work "know exactly what to do. They are specialists who know the job. Counsel from smaller firms who are inexperienced introduce unnecessary evidence and drag out the proceedings". Another judge said "These lawyers know the court and the judge. They can 'interpret' for the client". One practitioner stated "We advise clients, on our experience, of the chances of winning. We give the benefit of our experience". A practitioner involved in this work emphasised that many of his clients arrived because of recommendations from other clients and through the general reputation of his firm for success in this type of case: "Quite a number of clients come on their own based on the firm's reputation". However, those who observe but do not practise this method of fee arrangement considered that this work demanded little legal knowledge and skill. "It doesn't need a lot of legal acumen to handle 'runners'. Most 'runners' are based on facts and common sense'": "There is not much law involved in these cases". This analysis when coupled with the social class of the client, and the methods by which they are acquired and financed offers an explanation of why this type of work is considered to be at the bottom end of the practitioners' market and attacks the supposed homogenity of the legal profession. It also provides some basis for distinguishing between the type of touting which occurs for this business and that which goes on for 'upmarket' work such as conveyancing, property development and commercial matters.

The lawyer's responsibility to the client is often more extensive than that of his American counterpart. This is because the levels of poverty are so different that the Malaysian practitioner has not only to maintain the action but also act in the capacity of a social service while the case awaits an outcome. "Those firms also subsidise their clients. For example, by a

[121] In September and October I was a visitor at the Faculty of Law, University of Malaya. During that period I interviewed a number of lawyers, judges, police and government lawyers in Kuala Lumpur. I draw heavily upon their statements regarding the practice of 'runners'. Quotations are taken from the interviews. However, as agreed, the identity of the interviewees is not disclosed.

transport allowance and pocket money." Alternatively, the tout, operating as agent for the firm, may act "like a big brother. He consoles, and does small favours. He spends money and the lawyer covers his expenses. It is a relatively small amount".: "Legal aid cannot afford to be at the bedside. The tout is a form of social service". Thus, maintenance is of broader social significance and may include the financial support of the client during the period of recuperation and prior to the settlement or award. Despite the fact that there may be a significant investment in the client and the case the agreement concerning the way in which the lawyer is to be paid is oral. Only the authority to act is reduced to writing: "The agreement is verbal". The percentage for a successful action is open to negotiation but seems to float around 20 per cent. "20 per cent is the scale on runners irrespective of the award".: "In a simple case we may reduce the charge, for example, in a 'sitter' (passenger)" '20 per cent is the figure charged". Again major differences emerge between the legal practice in America and the illegal practice in Malaysia. There is no public, fixed, sliding scale of charges and the contract remains verbal. The reason is the concern to minimise the possibility of the client complaining successfully about the financial arrangement and the inevitable legal and disciplinary consequences it would have for his lawyer.[122] However, the likelihood of such an event is slim given the nature of the lawyer/client relationship: "The client is ignorant of the unethical nature of the contract".[123] "There is a fear of lawyers among the illiterates. Therefore they will not complain. Also, they have received 80% of the award". Protective though this device may be for the lawyer, as will be stated and illustrated, it leaves the client in a vulnerable position whereby he may be exploited by the unscrupulous lawyer and left without adequate protection from the Bar Council or the courts.

As is expected the views regarding the propriety of the contingency fees in 'runners' vary considerably. Those involved in the practice offer an explanation and justification based upon the very argument which is used to deny its formal acceptance: public policy. By providing this 'no win, no pay' opportunity to clients the provision of legal services is extended to a group which perhaps might otherwise be denied access to legal redress by virtue of ignorance, fear and cost: "Services being offered to the poor man are increased". The promotion of the private profession as a social service as illustrated by this development was projected by one lawyer as likely to be endorsed by the practice at large. "I think that Malaysian lawyers

[122] See, *English Practice*, for the consequences of such contracts between lawyers and clients for contentious work.

[123] The Secretary to the Bar Council is reported as saying there have been very few complaints. *The Malay Mail* 5 February 1977.

would vote for it". One member of the Bar Council indicated that he believed that the Council "basically supports it but there are many points to be worked out". At the same time he pointed out that the Council is "dead against ambulance chasers". However, there is no unanimity regarding this view as is clear from the statement of J.L.C. Yew: "If contingency fees are legalised in accident cases one might well ask, what next? Is there any guarantee that the corruption will not spread?"[124]

The dangers associated with the private, clandestine arrangements over payment are considerable. It is not possible to entertain the suggestion that the percentage fee is negotiable. The lawyer can and does dictate the terms of the agreement. The client can accept them or do without. The typical client will be grateful for the opportunity of legal representation without appreciating or considering the bargain that he strikes. This inequality of power opens the door to gross exploitation: "There is overcharging of illiterate clients by unscrupulous lawyers".: "The touts offer the sky". The percentage fixed by the lawyer is often as high as 50 whilst one case reported by a doctor of a Malay patient whose lawyer and tout had left him with nothing after a settlement had been made "because the lawyer's fees purportedly came up to 100 per cent of the settlement". The patient had wept and said "Nasib tidak baik, apa boleh buat? (What can be done if you are unlucky?)". The illegality of this contract requires that the tax authorities remain uninformed of this 'black' money which further increases the net amount to the firm. Similarly, party to party costs are retained as may be the interest on general and special damages; "Lawyers are very keen on the issue of costs": "Party to party costs are kept by us".

The Bar Council is aware of the existence of this practice. In 1972 a sub-committee was established to report on the issues of touting and contingency fees.[125] Unfortunately, no action has occurred despite the widespread knowledge that lawyers are consistently operating in breach of the law and the profession's code of ethics. It has been stated that "the function of the Council is like that of an auditor which is to be a watchdog and not a bloodhound".[126] Experience has shown that clients do not complain and if the Council adopts the reactive and not protective role it justifiably lays itself open to the explanation offered to me by one lawyer

[124] *Op. cit.* See also, *The Malay Mail* 3 February 1977. An article entitled "The Hospital Vultures"which deals with touting in hospitals is highly critical of this practice and of contingency fees.

[125] *Straits Times* 2 October 1972.

[126] Cordery's *Law Relating to Solicitors* (1961) 440.

that "dog does not eat dog". The argument is that the social and working relationships of lawyers which extend over a period of time and operate in a number of spheres override the 'once off', personal injury client whose possible exploitation can be ignored and avoided by statements such as "It is impossible to take a hard line although sometimes 40 to 50 per cent is an abuse": "There has been no disciplinary action on contingency fees as there was no power under the old act".

The Bar Council is presented with a choice of three strategies. It can maintain the status quo, remain inactive, and allow the law and its ethical code to continue to be breached. The result of this can only be the continuing exploitation of personal injury clients for which it must shoulder some responsibility for its failure to regulate and discipline its members according to the law and its own code of practice. Secondly, the existing laws and practice could be enforced.[127] However, such is the state of alternative, public services that the action would effectively remove the private practitioner from this area of practice. Not only would personal injury litigation be affected but so would other areas: "It (contingency fees) also operates in contentious debt collecting": "I think it operates in some tax cases". At the same time it would allow insurance companies the advantage of negotiating with an unrepresented party. This in itself can produce inequitable results as the following case illustrates. An administrator of an estate received a sum of $4,750 (including costs) in final settlement of his claim on behalf of the estate. He was earlier urged by a representative from the insurance company involved to accept a sum of $400 and upon his refusal was offered $800 which he again refused.[128] The widespread use and acceptance by default by the profession and its governing body of the contingency fee practice leads to the conclusion that the existing rules controlling the fee arrangements between the lawyer and his client should be revised in order to recognise and supervise this practice. For example, the Bar Council could prepare a scale fee from which the lawyer would not be allowed to deviate and this fee would be written into the document authorising the lawyer to act and lodged with the court. By bringing the matter to the public attention of the legal profession and interested parties the opportunities for improper practices would be reduced. The Public Trustee might become the depository of all settlements and court awards on behalf of the client. This would ensure that the client received the full amount less the agreed legal costs and fees.[129] Thirdly, the Bar Council might take the more adventurous step

[127] As laid out in *The English Practice* section.

[128] Umi Kalthum bt. Abdul Majid, *loc. cit.*, 58.

[129] This could be based on the role of the Public Trustee in Singapore. Singapore Motor Vehicles (Third Party Risks and Compensation) Act 1960 (1 of 1960).

by examining the proposals offered by *Justice*, the Labour Party and the Senate of the Inns of Court in England to establish an independent, non-profit making body which would draw upon the private practitioner. This would retain the fee system for the practitioner, irrespective of results, but charge a fee to the client only if successful which would be fixed by a panel on a percentage basis.

In conclusion, this paper has shown that a public and painful divorce between the theory and the practice of law is a dangerous state of being. Simply, role performance, what actually happens, and role expectation, what is supposed to happen, should be harmonious. Fuller, in "The Morality of Law"[130] said that one of the ways in which a purported system of law fails to achieve legality is a failure of congruence between the rules as announced and their actual administration. The issue of contingency fees has been dominated by the values of England with the result that they are both illegal and unethical in Malaysia despite the fact that a strong and different case could be advanced for the introduction of a new form of fee payment for the private practitioner. Although I have attempted to point out new ways in which this dichotomy could be resolved it is also my intention to provide an illustration of the inherent dangers of blanket reception of ideas and values as embodied in the laws of a foreign community.

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[130] (Yale University Press, 1964) 39.

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LESEN TUMPANGAN SEMENTARA: SUATU PERSOALAN

"Tiada rotan, akar pun jadilah"
Pepatah Melayu.

A. MUKADDIMAH

Malaysia ialah sebuah negara pertanian. Masyarakatnya adalah masyarakat tani – masyarakat yang berbudi kepada bumi. Masyarakat bumi hijau adalah bergantung kepada tanah. Kestabilan ekonomi pula adalah bergantung kepada hasil bumi, dan banyak sedikitnya hasil bumi adalah bergantung kepada tanah.

Di zaman dahulu, zaman sebelum adanya undang-undang tanah, adat ialah undang-undang, di mana "sesiapa yang menebang-menebas, maka dialah yang menjadi pemilik tanah itu". Tetapi setelah undang-undang bertulis diperkenal dan dikuatkuasakan, maka adat sudah menjadi lapuk – sudah tidak lagi terpakai. Jika seseorang berkehendakkan tanah untuk menjalankan kegiatan ekonomi, maka ia terpaksalah memohonnya, dan kemungkinan untuk mendapatnya amatlah besar sekali, sehinggakan sebuah syarikat Inggeris, Duff Development Company Limited,[1] telah dikurniakan tanah seluas kira-kira 2,000,000 ekar iaitu suatu kawasan yang lebih dari dua-pertiga dari seluruh negeri Kelantan secara pajakan dengan bayaran yang paling minima sekali. Lama kelamaan, tanah telah berkurangan dan oleh kerana kekurangan tanah, maka bukan sahaja kemungkinan untuk mendapat tanah itu menjadi tipis, tetapi proses membuat permohonan untuk mendapatkan tanah itu mula menjadi payah, mahal dan memakan masa yang lama.

Banyak persoalan telah timbul mengenai permohonan untuk mendapatkan tanah, samada untuk selama-lamanya, ataupun pajakan untuk beberapa waktu yang tidak melebihi 99 tahun, ataupun untuk mendapatkan kebenaran buat sementara waktu sahaja. Pemberian milik untuk selama-lamanya atau pemberian pajakan negeri untuk suatu tempoh, perezapan tanah, pengeluaran lesen tumpangan sementara atau permit untuk mengambil bahan batuan adalah di antara empat cara di mana Pihak Berkuasa Negeri telah diberi kuasa oleh Kanun Tanah Negara untuk melupuskan tanah.[2]

Makin banyak persoalan timbul mengenai tanah, semakin ketatlah pula

[1] Lihat *Duff Development* v. *Kelantan Government*, [1924] A.C. 797.

[2] Walaupun Kanun tidak menyebut mengenai keluasan tanah, namun kuasa untuk melupuskan seluas mana tanah adalah di atas budibicara Pihak Berkuasa Negeri.