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AN AMERICAN HAMBURGER STAND IN ST. PAUL'S CATHEDRAL: REPLACING LEGAL AID WITH CONDITIONAL FEES IN ENGLISH PERSONAL INJURY LITIGATION

Richard L. Abel*

INTRODUCTION

Until very recently, contingent fees were unthinkable in England. Indeed, plaintiffs' lawyers were not even allowed to forgo or reduce their fees after the fact in unsuccessful cases, although "speculative actions" had long been permitted in Scotland and several commentators declared them widespread in England.¹ The Law Society opposed contingent fees in 1912 not only because they encouraged "blackmailing actions" on behalf of the poor, but also because they were a "cloak for advertising or touting for cases by speculative firms of solicitors."²

Touts . . . obtained cases by "haunting the side doors of our large metropolitan hospitals and buttonholing the distressed relatives . . . or by a ghoulish alertness in studying the newspapers for announcements of accidents in factories and streets, and in sending circulars to injured persons or their friends, and in following up the circulars with a personal call upon them."³

Legitimate solicitors resented losing work to such "ambulance chasing agencies."⁴ The first Government report on legal aid, in 1928, urged

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1. See BRIAN ABEL-SMITH & ROBERT STEVENS, *LAWYERS AND THE COURTS: A SOCIOLOGICAL STUDY OF THE ENGLISH LEGAL SYSTEM 1750-1965* 315 (1967); MICHAEL ZANDER, *LAWYERS AND THE PUBLIC INTEREST: A STUDY IN RESTRICTIVE PRACTICES* 115 (1968) [hereinafter *LAWYERS AND THE PUBLIC INTEREST*]; ROYAL COMMISSION ON LEGAL SERVICES IN SCOTLAND, I REPORT ¶ 8.86 (1980) (Cmnd 7846); HAZEL GENN, *HARD BARGAINING: OUT OF COURT SETTLEMENT IN PERSONAL INJURY ACTIONS* 109-10 (1987); Herbert M. Kritzer, *The English Experience with the English Rule: How "Loser Pays" Works, What Difference It Makes, and What Might Happen Here*, 78 A.B.A. J. 54 (1992); MICHAEL ZANDER, *LEGAL SERVICES FOR THE COMMUNITY* (1978).

2. ABEL-SMITH & STEVENS, *supra* note 1, at 139 (quoting *TIMES* (London), Dec. 27, 1912).

3. ABEL-SMITH & STEVENS, *supra* note 1, at 139 n.4 (quoting *TIMES* (London), Dec. 27, 1912).

4. *Id.* at 139 n.1. See 47 L. J. 49 (Jan. 27, 1912) (quoted in ABEL-SMITH & STEVENS, *supra* note 1, at 139 n.1); John Collie, *Legal Aid Societies*, *TIMES* (London), Dec. 27, 1912, at 8 (quoted in

local law societies to establish Poor Man's Lawyers to provide free services to drive such operations out of business.⁵ A 1943 article claimed that England had the most stringent rules against maintenance and champerty. Even in 1967, when the criminal laws were repealed, rules of professional conduct continued to prohibit such conduct.⁶

Yet rising concern about the cost of litigation sometimes provoked questions about the ban on contingent fees. In 1931, the *Solicitors Journal* analogized the requirement of a "fixed fee, win or lose" to "a good trade union rule to safeguard the proper remuneration of the Bar."⁷ A confidential 1964 Law Society memorandum to the Bar Council, exposed by the press the following year, condemned the rule that the full brief fee was due for settled cases, even if counsel had done no work. In 1967, the two professional associations agreed that where a "case is settled after delivery of the brief and in advance of the day of hearing counsel *is entitled* to accept no fee or less than the agreed fee."⁸ But this had to remain the rare exception "if the door was not to be opened to what were really speculative or contingent fees."⁹ In 1966, the organization Justice urged the creation of a non-profit entity to provide legal representation in automobile accident cases; successful cases whose costs would be paid by defendants would contribute to a fund to pay the costs of unsuccessful plaintiffs.¹⁰

In 1949, England created the first, and still the most ambitious, national legal aid scheme ever enacted, which naturally included per-

ABEL-SMITH & STEVENS, *supra* note 1, at 139 n.3-4); Fred J. Maw, *Legal Aid Societies*, *TIMES* (London), Dec. 30, 1912, at 2; (quoted in ABEL-SMITH & STEVENS, *supra* note 1, at 139 n.5).

5. LEGAL AID FOR THE POOR COMMISSION, FINAL REPORT 6 (1928) (Cmnd 3016).

6. See ZANDER, *LAWYERS AND THE PUBLIC INTEREST*, *supra* note 1, at 116-117; E. J. Cohn, *Legal Aid for the Poor: A Study in Comparative Law and Legal Reform*, 59 *L. Q. REV.* 250, 266 (1943).

7. 75 *SOLIC. J.* 433, 433 (1931).

8. ZANDER, *LAWYERS AND THE PUBLIC INTEREST*, *supra* note 1, at 97 (quoting JOINT COMMITTEE OF THE BAR COUNCIL AND THE COUNCIL OF THE LAW SOCIETY, *COUNSEL'S FEES AND RELATED SUBJECTS* ¶ 9 (1967)) (emphasis in Zander). According to Zander,

[t]he existence of the Memorandum and of its contents was made public for the first time by the *Guardian* on 21 May 1965. The *Sunday Times* also carried details of the Memorandum on 23 May 1965 and there was widespread press comment in the weeks that followed. Neither the Law Society nor the Bar Council knew of, or approved the, [sic] publication, which came as a surprise as much to them as to the rest of the legal profession.

Id. at 89 n.8. See *The Law Society's Secret Report*, *SUNDAY TIMES* (London), May 23, 1965, at 11.

9. ZANDER, *LAWYERS AND THE PUBLIC INTEREST*, *supra* note 1, at 97-98 (quoting JOINT COMMITTEE OF THE BAR COUNCIL AND THE COUNCIL OF THE LAW SOCIETY, *COUNSEL'S FEES AND RELATED SUBJECTS* ¶ 9 (1967)).

10. ZANDER, *LAWYERS AND THE PUBLIC INTEREST*, *supra* note 1 at 119-20 (citing JUSTICE, *THE TRIAL OF MOTOR ACCIDENT CASES* ¶ 9 (1966)).

sonal injury cases. The American Bar Association (ABA) president promptly condemned this as creeping socialism.¹¹ Another American commentator claimed that the English Bar's ban on contingent fees had "propelled" it "into becoming a handmaiden of the Welfare State."¹² Fearing legal aid would deprive private practitioners of poor people's claims, American schemes have always categorically excluded personal injury plaintiffs.

The pathbreaking critiques of the English legal profession published in 1967 highlighted the anti-competitive effects of the ban on contingent fees. Brian Abel-Smith and Robert Stevens acknowledged that "speculative solicitors were meeting a real social need."¹³ Criticizing the rule that barristers were entitled to their full fees in cases that settled, Michael Zander declared that barristers should be "paid for the work they do—no more and no less."¹⁴ Contingent fees may "provide the only way to get one's legal rights."¹⁵ Both Stevens and Zander took these positions after graduate legal study in the United States. Nevertheless, the Law Society reiterated its adamant opposition to contingent fees in 1970 and criticized non-lawyers who settled accident claims on a contingent basis.¹⁶

The Royal Commission on Legal Services, appointed in 1976, recommended against contingency fees in 1979. Although "a few witnesses" advocated them, "the overwhelming weight of the evidence that we have received is opposed." Such arrangements encouraged lawyers "to concentrate only on strong cases and on cases which, while without real merits, have a high nuisance value." The lawyer's

personal interest in the outcome may lead to undesirable practices including the construction of evidence, the improper coaching of witnesses, and the use of professional partisan expert witnesses . . . improper examination and cross-examination, groundless legal arguments designed to lead the courts into error and competitive touting.

Successful clients had to pay lawyers "a proportion often substantial of any damages." Lawyers were

exposed to strong temptation to settle . . . although it may not be in the client's interest to do so. Alternatively, the client, having noth-

11. Robert G. Storey, *The Legal Profession Versus Regimentation: A Program to Counter Socialization*, 37 A.B.A. J. 100 (1951).

12. Kenneth B. Hughes, *The Contingent Fee Contract in Massachusetts*, 43 B.U. L. REV. 1, 8 (1963).

13. ABEL-SMITH & STEVENS, *supra* note 1, at 139.

14. ZANDER, *LAWYERS AND THE PUBLIC INTEREST*, *supra* note 1, at 98.

15. ZANDER, *LAWYERS AND THE PUBLIC INTEREST*, *supra* note 1, at 119.

16. See LAW SOCIETY, *MEMORANDUM ON MAINTENANCE AND CHAMPERTY: CLAIMS ASSESSORS AND CONTINGENCY FEES* (1970).

ing to lose, may insist that a hopeless or irresponsible claim be pursued to litigation in the hope that some profit will result.

The Commission concluded that the contingent fee “would not work well in this country and would give rise to serious dissatisfaction. It would benefit only a limited class of litigants and would reward some lawyers disproportionately.”¹⁷

The Commission also rejected Justice’s renewed proposal for a Contingency Legal Aid Fund (CLAF). It worried about adverse selection: “[P]laintiffs with good prospects of success would decline to use the scheme but those with a poor or doubtful case would seek to do so,” especially because the fund “would be under constant pressure to give assistance in cases where the plaintiff attracted strong sympathy but where the prospects of success were not great.” In any case, it would “be wrong to expect successful clients to subsidise those who were unsuccessful.”¹⁸ The Scottish Royal Commission expressed similar views a year later. It stated that there would be no “need for a contingency legal aid fund if our proposals for the further development of the civil legal aid scheme are accepted.”¹⁹ The Government endorsed the (English) Royal Commission’s recommendations in 1983.²⁰

In February 1985, Lord Hailsham, the Lord Chancellor, established a Civil Justice Review consisting of lawyers, judges, legal academics, business leaders, and consumer advocates. Its June 1988 report rehearsed the objections that contingency fees would create conflicts of interest and encourage lawyers to focus on “strong cases or those with nuisance value.” But it also acknowledged they would increase access to law by stating, “[T]here have been major advances in regulation policy and it is arguable that the risks arising out of a contingency fee system should be controlled by specific regulations rather than a general ban.” In addition, it stated, “[O]n grounds of competition policy it may be desirable to devise more limited schemes under which lawyers may have a stake in the outcome of a case as a form of incentive.” Because it had “not been able to make a full study of this matter,” it recommended that “the prohibition on contingency fees and other forms of incentive scheme should be open to re-examination.”²¹ Two

17. ROYAL COMMISSION ON LEGAL SERVICES, I FINAL REPORT ¶¶ 16.2-6 (1979) (Cmnd 7648).

18. *Id.* at ¶¶ 16.7-12.

19. ROYAL COMMISSION ON LEGAL SERVICES IN SCOTLAND, *supra* 1, at ¶¶ 8.83-85.

20. LORD CHANCELLOR’S DEPARTMENT, THE GOVERNMENT RESPONSE TO THE REPORT OF THE ROYAL COMMISSION ON LEGAL SERVICES ¶¶ R16.1-3 (1983) (Cmnd. 9077).

21. CIVIL JUSTICE REVIEW, REPORT OF THE REVIEW BODY ON CIVIL JUSTICE ¶¶ 384-89 and R.58 (1988) (Cmd 394).

years later the Law Society published a report expressing interest in a contingency legal aid fund.²²

In April 1986, the Bar Council and Law Society appointed a committee containing equal numbers of barristers, solicitors, and laypersons, with a lay chairperson, Lady Marre, to resolve some of the questions left unsettled by the Royal Commission. Its July 1988 report canvassed the arguments about contingency fees. The report stated:

[Opponents] say that they are a threat to the ethical standards of the profession. Lawyers with a financial stake in the outcome of an action would tend to follow their own interests rather than the best interests of their client in planning the course of the action. Lawyers would be unwilling to take actions with less than very good chances of success. Further, they might be tempted to settle a case too easily at an early stage For barristers to have a financial interest in the outcome of a trial might also erode the traditional detachment which contributes to the relative speed and efficiency of British justice [A defendant may have] to defend a weak case brought against him where the plaintiff is able to pursue the case relentlessly without fear of loss whatever the outcome Thus inflated claims with little merit are encouraged in the hope of settlement.

But the committee also noted,

Reputable American lawyers say that contingency fees enable individuals to bring actions that they otherwise could not bring and that the lawyer is given an incentive to settle rather than undertake protracted litigation. There is also a view that, in a consumer-led society, individuals should be given the freedom to decide.

The Committee was more enthusiastic about a CLAF. Although it was "inequitable" that "meritorious litigants whose claims succeed would effectively be subsidising less deserving plaintiffs whose actions failed," this was "preferable to the state of affairs in which deserving plaintiffs outside the legal aid limits lack the confidence to sue at all." In both instances, it cautiously recommended "further research and discussion."²³

II. LORD MACKAY'S GREEN PAPER AND THE COURTS AND LEGAL SERVICES ACT

In October 1988, the new Lord Chancellor, Lord Mackay, promised three Green Papers in the new year examining "the fundamental issues of what activities require the services of lawyers and on what basis such services ought ideally to be provided." Although he did not

22. LAW SOCIETY, *IMPROVING ACCESS TO CIVIL JUSTICE: THE REPORT OF THE LAW SOCIETY'S WORKING PARTY ON THE FUNDING OF LITIGATION* (1987).

23. COMMITTEE ON THE FUTURE OF THE LEGAL PROFESSION (THE MARRE COMMITTEE), *A TIME FOR CHANGE* ¶¶ 10.22-33 (1988).

favor "change for change's sake," he acknowledged public complaints "about delays and other aspects" of the legal system.²⁴ The press unanimously welcomed reform and reviled the profession as a bastion of protectionism.²⁵ But the conservative *Daily Telegraph* feared "the spectre of a Britain as rampantly litigious as America, where every doctor is now obliged to take a course in law before picking up a scalpel."²⁶

Publishing the Green Papers on January 25, 1989, the Lord Chancellor declared that their "overall objective" was "to see that the public has the best possible access to legal services and that those services are of the right quality . . . by ensuring that . . . a market providing legal services operates freely and efficiently."²⁷ The Paper on "Contingency Fees" repeated the criticisms. It discussed how a lawyer might be "tempted to encourage the client to settle early to avoid the effort involved in fighting the case," concentrate "on cases with a high nuisance value where the defendant is more likely to be forced into making an offer to settle," and "try to enhance his client's chances of success, perhaps by coaching witnesses or withholding inconvenient evidence." The Paper further declared that American contingency fees "(i) encourage juries to award excessively high damages; and (ii) encourage litigants to proceed with cases with very little merit, leading to an explosion of litigation." They have "certainly imposed significant costs on business in the USA."

But the Green Paper doubted these fears had "any real basis." It stated, "Clients probably already expect their lawyers to be fully committed to the case Any tendency on the part of a lawyer to 'improve' his client's case ought to be capable of control through professional codes of conduct." The value of the subject matter already could influence fees. Because judges award damages in England (which has civil juries only in defamation suits), "it seems unlikely that current practices . . . would change in the event of the introduction of contingency fees." The English rule that costs follow the event made it

24. LORD CHANCELLOR'S DEPARTMENT, PRESS NOTICE, Oct. 24, 1988. See *Shake-up for the Legal Closed Shop*, EVENING STANDARD, Oct. 24, 1988; *Mackay Signals Big Shake-up for the Legal Profession*, INDEPENDENT, Oct. 25, 1988; *Radical Reforms Ahead for Law's "Closed Shop"*, DAILY TELEGRAPH, Oct. 25, 1988, at 1.

25. See *Mackay Plans "Shake up" for Legal System*, TIMES (London), Oct. 25, 1988 at 1; Alastair Brett, *Dragging Reform into the Courts not Before Time*, SUNDAY TIMES (London), Oct. 30, 1988, at B9; *A Cold Wind Blows Through the Law*, GUARDIAN, Oct. 26, 1988, at 22.

26. DAILY TELEGRAPH, Oct. 26, 1988, at 18. See *The Ultimate Closed Shop*, EVENING STANDARD, Oct. 25, 1988; *A Sceptical Eye on Legal Interests*, INDEPENDENT, Oct. 26, 1988, at 20; *One Law for the Rich*, OBSERVER, Oct. 30, 1988.

27. LORD CHANCELLOR'S DEPARTMENT, THE WORK AND ORGANISATION OF THE LEGAL PROFESSION ¶ 1.1 (1989) (Cm 570).

“unlikely that the introduction of contingency fees . . . would have any real impact on the propensity to litigate.” The Green Paper blamed the fact that “United States society is litigious on a scale not known in England and Wales” on “bounty-hunting” by American lawyers encouraged by the facts that treble damages are awarded in anti-trust cases, “punitive damages are very much more widely used,” and class actions are possible. In England, it was “unrealistic to suppose that lawyers, as professional people running businesses, would willingly take on cases where there was very little prospect of success.”

“Current Government policy” was “in favour of deregulation[,] . . . the removal of restrictions[,] and the consequent widening of choice[,] . . . the onus should be on those who want to maintain a restriction to justify it.” It further stated “Rules which were developed to prevent interference with the administration of justice in feudal times may no longer be appropriate.” Contingency fees

would give individuals and organisations who do not qualify for legal aid, but who cannot support expensive litigation, the opportunity of bringing their claims to court[,] . . . encourage a greater level of commitment on the part of the lawyer; and . . . encourage competition between lawyers as clients would be able to shop around, [which] will place pressure on the solicitor to operate efficiently . . . Contingency fee arrangements would also spread the risk of litigation for ‘small’ litigants.”

Another advantage, based on American experience, is that it would “shift the present balance of advantage between the litigants in product liability cases,” which “would make producers more conscious of their duty to supply safe products.”²⁸

Nevertheless, safeguards were necessary. Because solicitors would “have greater knowledge of the likely costs” and, therefore, “be in a stronger position than the client,” there should be some restriction of “the terms of agreement that the solicitor might otherwise be able to impose on the client.” Indeed, “the tide of opinion in the United States of America is turning against the unrestricted use of contingency fee agreements.”²⁹

There was no “substantial argument against the introduction of [Scottish-style] speculative actions.” But these were only 1% of the caseload of Scottish advocates and, hence, unlikely to make much difference in England. The Lord Chancellor’s Department (LCD), therefore, proposed an uplift, calculated as a fixed proportion of taxed costs

28. LORD CHANCELLOR’S DEPARTMENT, *CONTINGENCY FEES* ¶¶ 1.2, 1.4-5, 3.3-4, 3.8-18, 5.1 (1989) (Cm 571).

29. *Id.* at ¶¶ 3.19-20.

(rather than damages) and deducted from the plaintiff's recovery (rather than paid by the defendant).³⁰ It also proposed consideration of a contingency fee with fixed percentages of damages, subject to taxation where "the level of the fee was not a fair reflection of the amount of work." Unregulated contingency fees were not "in the public interest."³¹

The LCD raised several questions about coordination with legal aid. Because it paid at a lower "standard basis," some lawyers who refused it might be willing to act on a contingency fee calculated at the higher "indemnity basis." But legal aid collected contributions at the end of the case, not at the beginning, and offered litigants some protection against the costs of successful opponents.³²

Although the press displayed even greater enthusiasm than they had at the original announcement, the *Daily Telegraph* again warned that the contingency fee "raises the spectre of a rash of vexatious litigation of the kind seen in the United States."³³ William Rees-Mogg (a Conservative life peer and former editor of the *Times*) predicted a legal system "like the one that exists in New York. It is hard to describe how much harm [that] does, and how little good."³⁴ It "is regarded by some American economists as one of the reasons why American industry has ceased to be competitive with the Japanese."³⁵

Just three weeks after publication of the Green Paper, the Bar Council issued its first response. Contingent fees were "a third-rate substitute" for legal aid. Both the Royal Commission and the Government response had rejected them. The Green Paper was "an inadequate study of the problems."³⁶ This provoked new abuse from the press (mostly directed at the Bar's resistance to expanded rights of audience for solicitors). The *Financial Times* suggested the public "might take the cynical view that: 'If that lot are against him, Mackay

30. *Id.* at ¶¶ 4.2-5.

31. *Id.* at ¶¶ 4.6-9.

32. *Id.* at ¶¶ 5.10-12.

33. See SUNDAY TELEGRAPH, Oct. 29, 1989; *Legal Milestone*, DAILY TELEGRAPH, Jan. 26, 1989, at 16.

34. See William Rees-Mogg, *Why a Legal Big Bang Could Turn Out to be a Political Time Bomb*, INDEPENDENT, Jan. 31, 1989; William Rees-Mogg, *On the Seventh Day God Rested but Thatcher Knows No Sabbath*, INDEPENDENT, Feb. 21, 1989.

35. See DAILY MAIL, Jan. 26, 1989, at 1; EVENING STANDARD, Jan. 26, 1989, at 1; Raymond Hughes, *Contingency Fees: Rewards for Lawyers Who Win Their Cases*, FIN. TIMES, Jan. 26, 1989, at 6; Clare Dyer, *All Become Equal Before the Law*, GUARDIAN, Jan. 26, 1989, at 4; INDEPENDENT, Jan. 26, 1989, at 3; OBSERVER, Jan. 29, 1989, at 15; SUNDAY TIMES (London), Jan. 29, 1989.

36. GENERAL MANAGEMENT COMMITTEE, BAR COUNCIL, JUSTICE IN DANGER: THE BAR'S CAMPAIGN FOR JUSTICE FOR ALL 3-4 (1989).

must have got it about right.’”³⁷ The *Guardian* predicted that the Bar’s “cry ‘The End Is Nigh’ will cause cheers not consternation among the consumers who have been so badly served by the profession for so long.”³⁸ The *Daily Mail* called lawyers “a laughing stock.”³⁹ The *Daily Telegraph*, the Bar’s only defender, perversely urged Lord Mackay to provoke equal “rending of raiment among the members of the Law Society” by authorizing contingent fees.⁴⁰ Professor Michael Zander reiterated the endorsement of contingency fees that he had expressed twenty years earlier. He stated that although they should be available to litigants eligible for legal aid, “it would obviously be crucial to provide that the existence of a contingent fee arrangement could not be ground for the withdrawal of legal aid.”⁴¹ The judges, however, escalated their denunciations of the Green Papers. Lord Benson, the accountant who had chaired the 1976-79 Royal Commission, warned that as the contingency fee “cancer” spreads “the lawyer and the plaintiff combine together as a team to scavenge what they can out of insurance companies.”⁴²

A self-described “American attorney of British origins, with 35 years’ experience of law practice in Florida” called American law practice “simply a business venture,” in which some lawyers (but presumably not he) “have become multi-millionaires overnight.”⁴³ He stated that “[e]thical prohibitions against lawyer advertising, solicitation, referral fees and cost advancement have been cast aside.”⁴⁴ Expressing the uncritical nostalgia typical of expatriates, he pronounced, “Britain should not now be introducing an American hamburger stand into the middle of St Paul’s Cathedral.”⁴⁵ The presidents of the Association of Trial Lawyers of America (ATLA) and the ABA naturally defended the contingent fee, while the president of the defense-funded American Tort Reform Association attacked it. David McIntosh, senior partner of the City of London insurance defense firm Davies Arnold Cooper, warned that the “United States-style system . . . would enrich the English legal profession . . . at the expense of the

37. *Mackay Gives the Profession a Taste for Blood*, FIN. TIMES, Feb. 20, 1989, at 23.

38. *The Law is Being a Silly Ass*, GUARDIAN, Feb. 20, 1989, at 18.

39. George Gale, *Bar and Humbug*, DAILY MAIL, Feb. 24, 1989.

40. *Reform of the Bar*, DAILY TELEGRAPH, Mar. 14, 1989, at 20.

41. MICHAEL ZANDER, *THE GREEN PAPERS: A RESPONSE* ¶ 133 (1989).

42. Lord Benson, *A Sacrifice to Competition*, FIN. TIMES, Mar. 1, 1989, at 23.

43. TIMES (LONDON), Mar. 6, 1989.

44. *Id.*

45. *Id.* The following year, after two years of “study” by the Florida Bar, its state Supreme Court prohibited written solicitations of personal injury victims within thirty days of an accident. The U.S. Supreme Court upheld the rules. *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995).

consumer."⁴⁶ And a barrister repeated the apocryphal story that product liability claims had shut down American small plane manufacturers.⁴⁷

In the Lords debate, Lord Irvine of Lairg QC, the shadow Lord Chancellor, called contingent fees abhorrent, "another gimmick to avoid state responsibility and to secure justice on the cheap."⁴⁸ Although that may have been partisan politics, many on the left were equally critical. The Social and Liberal Democratic Lawyers Association also saw the proposals as an excuse to cut legal aid. The Legal Action Group presciently characterized contingency fees as "the thin end of the legal aid cuts wedge."⁴⁹

The Bar's 275-page response incorporated the report of a working party chaired by Francis Ferris QC, which recommended Scottish speculative actions for three reasons: "freedom of trade"; lawyers would not take such cases unless the chances of success were "reasonably high"; and conflicts of interest would not be "serious." Nevertheless, the Bar Council rejected such actions, stating, "A lawyer should not, in any circumstances, be permitted to have a direct financial stake in the outcome of his client's case." It found that conflicts of interest were "inevitable" and could not be solved by rules of professional conduct and that "[s]uch arrangements would tend to lower the ethical standards of the profession." In addition, such actions "would have little impact, if any, on the availability of legal services to persons of modest means."⁵⁰

The Bar Council also opposed "an additional 10% or 20% on top of the 'solicitor and own client' costs." Lawyers would offer such arrangements only when confident of success, permitting "solicitors to increase their income at the expense of plaintiffs with strong cases."

46. *Learning from American Experience*, TIMES (London), Mar. 16, 1989, at 16.

47. *Can British Clients Win with a US-style System?*, L. SOC'Y GAZETTE, Mar. 22, 1989, at 6. For the comments at an earlier conference see *US Lawyer Says Fears Justified*, DAILY TELEGRAPH, Mar. 8, 1989, at 9; *Scots System "Could Work in England,"* INDEPENDENT, Mar. 8, 1989, at 4; *US No Win, No Fee System Deters "Nuisance Claims,"* INDEPENDENT, Mar. 8, 1989, at 4.

48. See *Top Lawyers in Scathing Attack on Proposals: Hailsham Onslaught on Timetable*, TIMES (London), Apr. 7, 1989, at 28-29; Michael Zander, *The Thatcher Government's Onslaught on the Lawyers: Who Won?*, 24 INT'L L. 753, 769 (1990). See also *Peers Put Mackay Through the Hoop*, GUARDIAN, Apr. 7, 1989, at 24; *Fierce Opposition May Prompt Government to Rethink*, L. SOC'Y GAZETTE, Apr. 12, 1989, at 2.

49. *Chance of a Common Front*, LEGAL ACTION, July 1989, at 7. See INDEPENDENT, May 3, 1989, at 3; *Legal Changes "Will Help Only Wealthy Clients,"* INDEPENDENT, May 4, 1989, at 3; *Irrelevant say SLD Lawyers*, L. SOC'Y GAZETTE, May 10, 1989, at 5; ZANDER LAWYERS AND THE PUBLIC INTEREST, *supra* note 1, at 773; Cyril Glasser, *Legal Services and the Green Papers*, L. SOC'Y GAZETTE, Apr. 5, 1989, at 9.

50. GENERAL COUNCIL OF THE BAR, *QUALITY OF JUSTICE: THE BAR'S RESPONSE* ¶¶ 24.3-4 (1989).

The Council was even more critical of making fees a percent of damages, which would allow a lawyer to get a “much larger remuneration that [sic] he would under a conventional fee arrangement.” Risk would be even more important. Lawyers would prefer such arrangements, while clients would prefer conventional ones, “but the client who would be likely to be poor, or suffering from physical or mental distress, and easily imposed upon, would be looking to the lawyer to advise the client in the client’s best interests.” “For centuries” such bargains were “presumed to have been made by undue influence.” Another “acute” conflict would arise because “the lawyer’s interests would be best served by spending no more money and accepting any compromise offer.” In addition,

[t]he ethical standards of the profession would be lowered The phenomenon of “ambulance chasing,” which reached a nadir of cynicism after the Bhopal disaster and the Lockerbie crash, would become an inevitable feature of English life, as it has in the U.S.A. . . . Award-sharing arrangements would lead to a greater number of unmeritorious claims the main purpose of which would be to “black-mail” defendants into settlements for the benefit of lawyers. This is a well-known and much regretted feature in the U.S.A.

Litigation would also become more expensive. The Bar Council concluded, “[T]o embark on allowing any such form of arrangement at a time when the United States are seeking to bring this kind of arrangement under control and to curb the serious abuses which result would not be wise.”⁵¹

The Bar Council found the Green Paper’s failure to discuss a CLAF “extraordinary,” “surprising[,] and disappointing.” This “important possibility” could “operate strongly in the public interest.” It urged “a carefully controlled pilot scheme.”⁵²

The Bar Council reiterated that award-sharing contingency fees would create conflicts of interest causing “serious disadvantage to the client. It is naive to suppose that the client’s interest can receive adequate protection from professional codes of conduct, especially when such codes, excellently drafted, exist in the United States but have failed to prevent the grave abuses found there.” The Bar Council warned of “the potential for an increased volume of litigation.” It stated, “It is unrealistic to assume . . . that we would not follow behind the United States in becoming an excessively litigious society. It is illogical to assume that there would not be an increase in unjustified

51. *Id.* at ¶¶ 24.9-13.

52. *Id.* at ¶¶ 24.14-16.

litigation." The Green Paper's belief in enhanced access to justice was "superficial and even doctrinaire." The Bar Council found that

[t]he concept of clients 'shopping around' lawyers to obtain the best contingency fee deal is illusory It does not follow that the lawyer offering the cheapest contingency fee deal has the competence to do the case properly. Indeed it might be supposed that the least competent would be likely to offer the lowest rates to try and attract business which they could not otherwise obtain.⁵³

The Bar Council concluded,

[A]ccess to justice for all who need access to justice could not be affected more than minimally by any contingency fee arrangement . . . [even CLAF]. The choice is ultimately between making adequate provision to protect the legal rights of those who cannot afford to protect themselves, or leaving the poor, the disabled, the sick without effective legal rights.⁵⁴

After the consultation period ended, Lord Benson reiterated his warning, joined this time by executives from major companies and financial institutions: "The US experience demonstrates where the contingency-fee system can lead."⁵⁵ Even laissez-faire ideologues like the (British) Adam Smith Institute and the (American) Manhattan Institute for Policy Research, which usually applauded deregulation, organized a conference on the terrible "Lessons from America on the Reform of Legal Services."⁵⁶ America's

own legal experts readily admit, justice comes a poor second to economics [American lawyers exploit the legal system's] instability to make quick profits and . . . the most successful lawyers are the slickest salesmen and sharpest entrepreneurs U[.]S[.] mistakes had led to excesses which manifested themselves in a litigation explosion which is out of control.⁵⁷

Lord Hailsham⁵⁸ said contingency fees would expose defendants "to a whole world of frivolous, vindictive, or purely blackmailing claims What has been built up over the years in the way of integrity and impartiality, mutual trust and avoidance of conflicts of interest will be swept away in a wave of populist enthusiasm."⁵⁹

53. *Id.* at ¶¶ 24.18-20.

54. *Id.* at ¶ 24.22.

55. Lord Benson, *The Character of a Profession*, FIN. TIMES, May 31, 1989, at 21.

56. *Don't Follow Us Says US*, L. SOC'Y GAZETTE, June 7, 1989, at 6-7.

57. *Id.* See *Letters to the Editor*, TIMES (London), June 9, 1989; *Poor "Lose Out" in Contingency Fees Lottery*, L. SOC'Y GAZETTE, June 7, 1989, at 7.

58. Hailsham was the previous Lord Chancellor, except for a brief hiatus, and the longest serving in the Twentieth Century.

59. Lord Hailsham, *The Future Roles of Solicitors and Barristers*, THE PRIVATE INVESTOR 17 (Summer 1989).

Lord Mackay's White Paper, published in July, retreated on many fronts. Responses to the Green Paper revealed "a clear consensus that it would not be right in principle, and would be likely to have a number of undesirable side-effects, for a lawyer to be permitted to undertake a case in return for some percentage of whatever damages might be received." There was also fear of an "unacceptable" conflict of interest. Few objected to Scottish speculative actions, and some supported an uplift, which the Government proposed to empower the Lord Chancellor to fix "as a moderate percentage of the normal costs."⁶⁰ The Courts and Legal Services Bill published in December did just this.

The Lords debate at the beginning of 1990 surpassed even the previous year's bombast, although most of the attack focused on the threat to the Bar from expanding solicitors' rights of audience. Lord Rawlinson recounted his recent visit to a post-communist Poland, which was "anxious to follow our practice." He told Poles that "they had better hurry because the shadow of authority . . . stalks our profession." He denounced conditional fees, which would introduce the American system in which "everybody sues everyone else, and the lawyers are very rich indeed." He stated,

We have seen it—ambulance chasing, the natural disaster, the plane crash. We saw it in India where there [was] the leak of chemicals. The US lawyers on the scene, the offers to relatives, to the injured, no win, no fee 20 to 30 to 40 percent of the damages. Vultures, instead of the profession which I am proud to belong to.

Hailsham repeated that the conditional fee was evil, corrupt, and inherently immoral, stating, "It undermines the whole ethic of advocacy."⁶¹ Nevertheless, this section of the Bill passed as drafted.

Although the Courts and Legal Services Act authorized the Lord Chancellor to allow conditional fees at the beginning of 1991, neither he nor the profession seemed very eager. He initially favored a 10% uplift because "very high payments in successful cases" might "generate a risk of the lawyer developing an improper personal interest in a particular case." The Law Society wanted it higher, but also objected that all the conditional fee "does is to put pressure on the solicitor to fund the action instead of the government." The Manchester Law Society president asked, "[W]hy should my firm invest in a lottery?" Defense solicitors, perversely, were more enthusiastic: "[L]awyers who

60. LORD CHANCELLOR, *LEGAL SERVICES: A FRAMEWORK FOR THE FUTURE* ¶¶ 14.1-5 (1989) (Cm 740).

61. See *TIMES* (London), Jan. 18, 1990, at 9; *Rawlinson Attacks Legal Reforms Bill*, *TIMES* (London), Jan. 26, 1990, at 15; "American System" *Law Reform Warning*, *DAILY TELEGRAPH*, Jan. 30, 1990, at 11; *Peers Attack "Conditional Fee" Proposal*, *TIMES* (London), Feb. 6, 1990.

don't want to share in the risks of litigation are living in cloud cuckoo land, frankly."⁶² Mackay simultaneously announced a civil legal aid eligibility review, which included conditional fees and legal expenses insurance because he believed, "[T]he problem of access to justice does not begin with legal aid. It begins with the way in which lawyers choose to operate and how they charge for their services." The *Solicitors Journal* responded that conditional fees "will be given as a reason by the Government for not increasing legal aid eligibility limits."⁶³

When the LCD increased the proposed uplift to 20% two years later, the Law Society dismissed the doubling as "a damp squib," and "half-hearted and marginal," making "virtually no contribution to improving access to justice."⁶⁴ From the opposite perspective, Action for Victims of Medical Accidents called it "a fraud on the client."⁶⁵ The Labour Party law officer, John Morris QC, MP, echoed Irvine's reservations, by stating that the conditional fee was "the wrong road to go down." He further stated, "We are not impressed by what's happening in America." The LCD Parliamentary Secretary retorted, "I'd like my lawyer to have an interest in winning." When legal aid was unavailable, the *Solicitors Journal* remained skeptical that conditional fees would be attractive "where there are going to be serious arguments on liability" but would be used only in "dead-cert" cases, which did not justify the uplift.⁶⁶

In August 1993, three months after doubling the proposed uplift to 20%, Mackay increased it fivefold to 100%.⁶⁷ Law Society President Rodger Pannone (a plaintiffs' personal injury specialist) saw "a real chance that conditional fees will make justice available to some people who would otherwise be denied it." The Law Society's Council, by a large majority, refused to limit the uplift to a proportion of damages, dismissing the criminal law committee chairman's reminder that the conditional fee "not so long ago[,] was regarded as a professional sin." Defense lawyers raised predictable objections. Such objections in-

62. Evlynn Gilvarry, *Defence Lawyers Design Contingency Fee Model*, L. SOC'Y GAZETTE, Oct. 7, 1992, at 9.

63. Evlynn Gilvarry, *CLAF Option for Litigants*, L. SOC'Y GAZETTE, June 5, 1991, at 4. See Marion McKeone, *LCD Seems to Favour Legal Aid Safety Net*, L. SOC'Y GAZETTE, June 5, 1991, at 3; *Hostile Reception for Mackay's "Safety Net"*, 135 SOLIC. J. 664 (1991); *If You Want the Fee, You Must Win the Case*, INDEPENDENT, Aug. 14, 1992, at 24; *Comment: Contingency Fees*, 136 SOLIC. J. 883, 883 (1992).

64. Evlynn Gilvarry, *Society Dismisses "Half-hearted" No-win-no-fee Scheme*, L. SOC'Y GAZETTE, May 12, 1993, at 5.

65. *Not So Uplifting*, 137 SOLIC. J. 443, 443 (1993).

66. *Comment: Conditional Fees*, 137 SOLIC. J. 447, 447 (1993). See *Perils of "No-win, No fee,"* TIMES (London), May 25, 1993.

67. *Contingency Fees*, 143 NEW L. J. 678, 678 (1993).

cluded: county courts, “already snowed under with cases . . . could be buried with a myriad of dubious, speculative personal injury actions over which there will be no control”; and that “[p]laintiffs’ solicitors are running riot through the legal system.” In addition, the chairman of the Bar Council legal aid committee feared the 100% uplift “gives the lawyer far too great an interest in the outcome of a case.” Another silk called it “a contingency fee by another name.”

The *New Law Journal* blew hot and cold. Conditional fees would increase access to law but only for those with a “cast iron case.” Lawyers “who survive on contingency work” would be unable “to view matters with sufficient dispassion” and would file “blackmailing action[s].” An American personal injury lawyer cautioned that his colleagues were regarded as “the rough equivalent of swamp leeches,” saying, “Too many charlatans [and] thieves . . . are bringing us into disrepute.” The journal echoed “the Bar’s initial scepticism,” stating that “[r]eal litigants will lose real money in significant amounts.” The *Solicitors Journal* expressed the opposite fear and called for a minimum uplift: “[B]y shopping around, the potential plaintiff could receive quotes of . . . as little as 10 per cent.”

Opposition remained widespread. The Lord Chief Justice told the Bar’s 1994 conference that conditional fees had “serious disadvantages,” including American-style speculative litigation and “nuisance settlements.” The Lord Chancellor’s Advisory Committee on Legal Education and Conduct urged both a 10% uplift and a limit on the percentage of damages, as well as rules against strike suits. Even plaintiffs’ lawyers were suspicious. A member told the annual conference of the Association of Personal Injury Lawyers (APIL) that the 100% uplift was “very bad news” for public relations. Sir Ivan Lawrence QC, chairman of the Commons Home Affairs Select Committee, as well as the All-Party Parliamentary Barristers Group and the Back Bench Conservative Legal Committee, wanted a line “drawn under all this destructive, revolutionary reform of the legal system.” Lord Ackner, one of Mackay’s fiercest opponents, urged him to cap the uplift at 10% of damages, fearing that “otherwise we outdo the United States in speculative litigation.” He accused the Lord Chancellor of having “created a monster,” which “will give rise to all kinds of abuse and blackmail.”⁶⁸ He asked, “What is he doing messing about with this when he knows the Lord Chief Justice and the judiciary hate it?”⁶⁹ Mackay replied that he lacked statutory power to cap fees at a

68. *Ackner Slams Mackay Over New Fees*, 138 SOLIC. J. 1090, 1090 (1994).

69. *Id.*

proportion of damages. The Law Society recommended that they not exceed 25%; the Bar Council limited them to 10%, but called the disparity intolerable.⁷⁰ The chairman of the Bar Council legal aid and fees committee did not think conditional fees would "take hold in this country because the majority of barristers are very cautious."⁷¹ He called it "a potential nightmare."⁷² David McIntosh reiterated his criticism of the "overzealousness" of "noisy campaigning solicitors looking for cases to pursue at public expense," which had wasted "millions of pounds of private and public money on unsuccessful litigation."⁷³

III. THE ATTACK ON LEGAL AID

Contemporaneously, both private and public critics were calling for a radical revision of legal aid. In July 1994, the conservative Social Market Foundation published a pamphlet declaring that "no Government can afford to continue to finance a [legal aid] programme which doubles its real cost every seven years." The fact that the Legal Aid Board was "remote from the services supplied by the [lawyer] agents . . . and the legally-aided individual relies on the lawyers to decide what services they will supply . . . create the potential for *supplier-induced demand*."⁷⁴ Among the solutions they proposed was the withdrawal of legal aid from money cases "so lawyers and their clients are

70. *Row Looms Over Conditional Fees*, 138 SOLIC. J. 1089, 1089 (1994).

71. *Id.*

72. *Id.*

73. *Two-pronged Onslaught on Lawyer Fees*, L. SOC'Y GAZETTE, Feb. 8, 1995, at 4. See *Mackay Gives Boost to Conditional Fees*, 137 SOLIC. J. 780 (1993); *No Foul, No Fee*, 143 NEW L. J. 1213 (1993); Don de Keiffer, *Contingent Justice*, 143 NEW L. J. 1223 (1993); *Mackay Rethink Over Fee Uplifts*, L. SOC'Y GAZETTE, Aug. 25, 1993, at 4; *Legal Fees "Out of Proportion"*, L. SOC'Y GAZETTE, Oct. 6, 1993, at 4; *Mackay's Advisers Warn on Conditional Fees*, L. SOC'Y GAZETTE, Nov. 10, 1993, at 3; *"No Win, No Fee" Carries PR Risk*, L. SOC'Y GAZETTE, Nov. 24, 1993, at 6; *PI Work "Self-Financing"*, 143 NEW L. J. 1667 (1993) (finding that 161 of 600 firms responded; 1400 cases); *Conditions and Fees*, 143 NEW L. J. 1665 (1993); *"No Win, No Fee" on Free Terms*, L. SOC'Y GAZETTE, Feb. 2, 1994, at 5; *"No Win No Fee" Legal Battle Looms*, SUNDAY TELEGRAPH, Mar. 6, 1994; *PI Lawyer Backs Conditional Fees*, 138 SOLIC. J. 224 (1994); *Lawyers in Double Fee Dilemma*, TIMES (London), Mar. 15, 1994; *"No Win No Fee" Cap*, L. SOC'Y GAZETTE, May 11, 1994, at 3; *Comment: Good News Conditionally*, 138 SOLIC. J. 463 (1994); *Conditional Fees "Still on Course"*, L. SOC'Y GAZETTE, Mar. 16, 1994, at 7; *Mackay Urged to Rethink Fees Plan*, TIMES (London), June 14, 1994; *No Win No Fee*, L. SOC'Y GAZETTE, July 13, 1994, at 4; *Taylor Joins Critics of "No Win, No Fee" Court Cases*, TIMES (London), Oct. 4, 1994; *Age of the No Win, No Fee Outfits*, TIMES (London), Oct. 4, 1994; *No Win, No Fee Risk to Client*, L. SOC'Y GAZETTE, Oct. 7, 1994, at 6; *"Milking" Lawyers*, L. SOC'Y GAZETTE, Oct. 12, 1994, at 4; *Law Lord to Attack Conditional Fees*, 138 SOLIC. J. 1060 (1994); *Cutting Your Losses*, GUARDIAN, Oct. 25, 1994, at 17; *Greed is Not Good for You, Lawyers Told*, DAILY TELEGRAPH, Feb. 3, 1995, at 6; STEPHEN FENNELL, *THE FUNDING OF PERSONAL INJURY LITIGATION* (1994).

74. See David Wall, *Legal Aid, Social Policy and the Architecture of Criminal Justice: The Supplier Induced Inflation Thesis and Legal Aid Policy*, 23 J. OF L. AND SOC'Y 549 (1996); Roger Smith, *Can Fundholders Cut the Legal Aid Bill?*, TIMES (LONDON), Sept. 20, 1994; Richard

only prepared to pursue cases which they are likely to win." Mackay appeared to accept the thesis of "supplier-induced demand."⁷⁵ The Law Society, by contrast, called the charge "plainly farcical as far as criminal and civil legal aid is concerned."⁷⁶ Even one of the pamphlet's authors, a former Law Society President, was a "bit edgy."⁷⁷

Addressing the Social Market Foundation in January 1995, Mackay embraced most of its proposals. The legal aid scheme

contains no mechanism for a proper and objective assessment of need. If anything, the present system makes it possible to create and exploit demand in ways which may not always be in the best interests either of the legal aid scheme, or indeed of the clients concerned. It is perhaps significant that it is often described as "demand led."

The system had to require providers "to assess, and reassess frequently, whether what they are doing is providing value for money both to the client, and the tax payer."

Newspaper editorials generally praised this "biggest shake-up" of legal aid since its founding more than forty years earlier.⁷⁸ The *Daily Telegraph* agreed, "[T]he traditional system of legal aid is no longer sustainable."⁷⁹ It noted that

[o]n the streets of Merseyside certain paving stones, rather like the herms of the ancient world, have become objects of reverence and pilgrimage, where wayfarers, under the encouragement of their so-

Moorhead, *Legal Aid in the Eye of the Storm: Rationing, Contracting, and a New Institutionalism*, 25 J. OF L. AND SOC'Y 365 (1998).

75. See Stephen Ward, *Mackay Reveals Plan for Cash Limits on Legal Aid*, INDEPENDENT, Jan. 12, 1995, at 4; Clare Dyer, *Legal Aid Plans Will Ration Justice*, GUARDIAN, Jan. 12, 1995, at 9; *Mackay Rejects Fundholders*, L. SOC'Y GAZETTE, Sept. 28, 1994, at 5; *Building on Franchising*, 145 NEW L. J. 6 (1995); *Mackay Demands Legal Aid Changes*, L. SOC'Y GAZETTE, Jan. 18, 1995, at 2; *Justice Rationed*, 145 NEW L. J. 5 (1995).

76. Evlynne Gilvarry, *Mackay Taken by Fundholding*, L. SOC'Y GAZETTE, Sept. 7, 1994, at 3. See Charles Elly, *Service and Independence*, L. SOC'Y GAZETTE, Oct. 7, 1994, at 2; *Solicitors Accuse Tories of Sinister Plan to Cut Legal Aid Cash*, TIMES (London), Oct. 8, 1994; *Fundholder Concept "Still on the Cards"*, L. SOC'Y GAZETTE, Oct. 7, 1994, at 10; Evlynne Gilvarry, *NHS-style Reform Sought for Legal Aid*, L. SOC'Y GAZETTE, July 20, 1994, at 3; Robert Shrimpsley, *Society to Block Proposed Legal Aid Scheme*, 138 SOLIC. J. 863 (1994); *Thin Milk*, 145 NEW L. J. 41 (1995); Evlynne Gilvarry, *Labour Plea*, L. SOC'Y GAZETTE, Jan. 11, 1995, at 1; Charles Elly, *President's Column: A Time to Listen*, L. SOC'Y GAZETTE, Jan. 25, 1995, at 14.

77. *Id.* See *Fundholders Still a Live Issue*, LAWYER, Oct. 4, 1994, at 1; *President Demands Civil Justice "People Can Afford"*, TIMES (London), Oct. 8, 1994; GWYN BEVAN ET AL., ORGANISING COST-EFFECTIVE ACCESS TO JUSTICE 2, 5, 9, 11-20 (1994); Gwyn Bevan, *Has There Been Supplier-Induced Demand for Legal Aid?*, 15 CIVIL JUSTICE Q. 58 (1996).

78. Terence Shaw, *Mackay Pledges to Curb £1.4bn Legal Aid Bill*, DAILY TELEGRAPH, Jan. 12, 1995, at 4. See *Plan Wins Press Praise*, L. SOC'Y GAZETTE, Jan. 18, 1995, at 2; Stephen Ward, *Escalating Costs Eat into Scheme*, INDEPENDENT, Jan. 12, 1995, at 4; *Legal Aid*, FIN. TIMES, Jan. 12, 1995, at 15. *But see Putting Lawyers Under the Knife*, INDEPENDENT, Jan. 12, 1995, at 15; Roger Smith, *Who Needs Legal Aid?*, TIMES (London), Jan. 17, 1995.

79. *An Unanswered Question*, DAILY TELEGRAPH, Jan. 12, 1995, at 18.

licitor, may trip and sue the local authorities. It has become not unknown for solicitors to tout for work in public houses, secure in the knowledge that the taxpayer will pay even for speculative cases.⁸⁰

The *Economist*, by contrast, conceded that contingent fees and the American rule on costs would "mean more litigation," but also felt they would provide "more access to the courts for more people."⁸¹ Legal aid "could be curtailed drastically and applied only to a handful of special cases," and "every citizen in the land would, at last, have a fair opportunity to have a case heard in the nation's courts." The Treasury chief secretary reiterated that the legal aid scheme's "fundamental weakness" was "the strong element of moral hazard in funding arrangements." He would "welcome the extension" of legal expenses insurance from the present £70 million in premiums to something comparable to the £400 million in France or the £1.25 billion in Germany.⁸²

IV. INTRODUCING CONDITIONAL FEES

As the Lord Chancellor was about to authorize conditional fees, the *Times* exhorted him to "hold firm" against a "twitchy legal establishment," who "have elected as their target a scheme that will make justice affordable for a wide swath of society, and make litigation easier for the middle class."⁸³ An insurance company offered a policy protecting losing plaintiffs against defendants' legal costs and winning plaintiffs against the uplift. In April, Mackay formally proposed a 100% uplift in personal injury, insolvency, and human rights cases.⁸⁴ Law Society President Charles Elly called this "a major contribution"

80. *Id.* See Clare Dyer, *A Purse but with Strings Attached*, *GUARDIAN*, Jan. 10, 1995, at T20; *Mackay Proposes Reforms to Cut the Cost of Legal Aid*, *TIMES* (London), Jan. 12, 1995; *Advice Will Be Offered Only by Contracted Suppliers*, *TIMES* (London), Jan. 12, 1995; *Legal Aid*, *EVENING STANDARD*, Jan. 12, 1995; *An Unanswered Question*, *DAILY TELEGRAPH*, Jan. 12, 1995, at 18; Roger Smith, *Comment: An Invitation to Debate*, *L. SOC'Y GAZETTE*, Jan. 18, 1995, at 14; *Legal Aid Debate Kicks Off*, *L. SOC'Y GAZETTE*, Jan. 18, 1995, at 3; *Comment: Legal Aid*, 139 *SOLIC. J.* 35 (1995); *Legal Aid Consultation*, *COUNSEL* 5 (1-2.95); Lord Mackay, *Radical Change and Public Confidence*, *COUNSEL* 27-29 (1-2.95); *Less Haste: More Speed*, *LEGAL ACTION* 3 (2.95); Paul Johnson, *Let the Lawyers Pay for Legal Aid*, *EVENING STANDARD*, Mar. 3, 1995, at 9; *Board Drops Reform Plans*, *L. SOC'Y GAZETTE*, Mar. 15, 1995, at 1; *Managing Justice*, *LEGAL ACTION* 3 (5.95); *Mackay Under Fire for Legal Aid Proposals*, 139 *SOLIC. J.* 3 (1995).

81. *Bring the Balance Back*, *ECONOMIST*, Jan. 14, 1995, at 13.

82. See Aitken *Fixes Eye on Legal Aid Expense*, *L. SOC'Y GAZETTE*, Feb. 15, 1995, at 64; *Legal Expenses Insurance*, 139 *SOLIC. J.* 33 (1995); *Aitken Wants More Legal Expense Cover*, *LAWYER*, Feb. 21, 1995; *Legal Insurance Best, Says Aitken*, *LEGAL ACTION* 5 (3.95). *But see Comment: Treasury Fallacy*, 139 *SOLIC. J.* 135 (1995).

83. *The Advocate's Devil*, *TIMES* (LONDON), Apr. 10, 1995, at 17.

84. Nick Hilborne, *Lawyers Split Over Mackay Fee Plans*, *L. SOC'Y GAZETTE*, Apr. 26, 1995, at 2. See *Fees Uplift*, *L. SOC'Y GAZETTE*, June 7, 1995, at 6; Lord Mackay, *Reducing Risks for Clients*, *L. SOC'Y GAZETTE*, July 5, 1995, at 10.

to access to justice.⁸⁵ Bar Council Chairman Peter Goldsmith QC “welcomed” this “if it means people are able to bring claims which they couldn’t before,” but he added, “[W]e are sceptical.”⁸⁶ The Consumers’ Association thought it would “help some of those people who have been left out in the cold.”⁸⁷

In the June Lords debate, however, the Lord Chief Justice again condemned conditional fees as “an alien creature in our justice system” that should not be allowed to run amok and the 100% uplift as an “outrageous percentage.”⁸⁸ Lord Irvine urged that conditional fees not involve “the exploitation of litigants for the benefit of lawyers.”⁸⁹ Lord Ackner’s motion limiting the uplift to 20% and restricting it to a proportion of damages lost by only five votes, and the Government proposals passed by the same margin because Labour’s front bench, although critical, abstained by convention.⁹⁰

The *Solicitors Journal* gave conditional fees a “conditional welcome,” calling it “an oddity” that they were intended for “the most vulnerable clients.”⁹¹ The *New Law Journal* ridiculed the “insulting” argument “that the solicitors’ profession is entirely packed with unscrupulous people who cannot wait to . . . trick poor innocent accident victims out of their damages.”⁹² But Clive Boxer, of the City insurance defense firm Davies Arnold Cooper, warned that “lawyers are courting disaster.”⁹³ He stated,

Once we go down an uncontrolled path of conditional fee litigation or contingent fee litigation, for that is what it really is, English lawyers are heading in the same direction as has led to denigration of the legal profession in the USA Lawyers will advise plaintiffs to divest themselves of assets if they can and will be seen as using impoverished clients as a means of forcing offers out of defendants Blackmail litigation will become *de rigueur*.⁹⁴

David McIntosh, a senior partner at the same firm, feared the importation of the American “victim culture,” which was “aided and abetted by a proliferation of single-issue consumer groups and by far too

85. *Id.* See Sean O’Neill, *Lawyers Split Over No Win, No Fee Scheme*, DAILY TELEGRAPH, Apr. 22, 1995, at 6.

86. O’Neill, *supra* note 85.

87. *Conditional Fee Cover For All*, LAWYER, Feb. 21, 1995, at 1. See Frances Gibb, *Mackay Unveils “No Win No Fee” Scheme*, TIMES (London), Apr. 21, 1995; *Inns and Outs*, TIMES (London), Oct. 22, 1996, at 41.

88. Nick Hilborne, *No Win No Fee Clears Hurdle*, L. SOC’Y GAZETTE, June 14, 1995, at 1.

89. *Id.*

90. David Conn, *Conditional Fees Clear Final Hurdle—Just*, 139 SOLIC. J. 571, 571 (1995).

91. *Comment: Conditional Welcome*, 139 SOLIC. J. 575, 575 (1995).

92. *Comment: Care and Control, and Conditional Fees*, 145 NEW L.J. 985, 985 (1995).

93. Clive Boxer, *Lawyers Courting Disaster*, 145 NEW L.J. 1069, 1070 (1995).

94. *Id.* at 1069.

many ambulance chasing lawyers who portray themselves as missionaries but who behave as mercenaries."⁹⁵ Plaintiffs' lawyers should be responsible for defendants' costs.⁹⁶

The launch of conditional fees in July provoked considerable contention. The Law Society, which made its disciplinary apparatus available to barristers seeking to collect fees from solicitors, threatened to exclude conditional fees.⁹⁷ The Academy of Experts objected to solicitors asking members to work on contingent fees.⁹⁸ Goldsmith called this further evidence that conditional fees "pander to the greed of lawyers."⁹⁹ Several companies offered plaintiffs insurance against liability for defendants' costs, selling over a thousand policies a month within a year.¹⁰⁰

In anticipation of conditional fees, some lawyers aggressively sought business. Two solicitors enrolled twenty-four firms in their Allied Lawyers Response Team to investigate group actions and contact potential clients. They explained defensively, "The ambulance-chasing solicitor identifies the client first and seeks to persuade them to sue. We identify the potential action . . . and if we think there is a case, we say this to the public at large."¹⁰¹ They invited more than one thousand general practitioners to prepare medical reports on workplace asthma victims, paying £100-150 each.¹⁰² The Law Society thought the campaign "novel," though not unprofessional; but the Association of

95. *Victim Times*, L. SOC'Y GAZETTE, July 5, 1995, at 2.

96. See Clive Boxer, *Opinion: Contingency Fees*, 139 SOLIC. J. 704 (1995); CONDITIONAL FEE AGREEMENTS ORDER AND REGULATIONS 1995.

97. See Nick Hilborne, *Solicitor-Barrister Fee Row Intensifies*, L. SOC'Y GAZETTE, July 19, 1995, at 2; *No-Win, No-Fee Impasse*, L. SOC'Y GAZETTE, Nov. 8, 1995, at 2.

98. See Nick Hilborne, *Concern at Experts' Pay*, L. SOC'Y GAZETTE, Sept. 6, 1995, at 1; Michael Napier & Peter Goldsmith QC, *Working on Condition*, L. SOC'Y GAZETTE, Oct. 18, 1995, at 11.

99. *Buying Experts*, L. SOC'Y GAZETTE, Sept. 6, 1995, at 10.

100. See Nick Hilborne, *First Claims on Accident Line*, L. SOC'Y GAZETTE, July 3, 1996, at 1; Nick Hilborne, *Conditional Fee Cases Rise by 50% Over the Last Six Months*, L. SOC'Y GAZETTE, Mar. 26, 1997, at 4; Nicolas Rufford, *US-Style Legal Aid Scheme to Expand*, TIMES (London), July 20, 1997, at 24; Dan Bindman, *No Win, No Fee, No Premiums*, L. SOC'Y GAZETTE, Mar. 17, 1999, at 4; Robert Sayer, *Final Pitch*, L. SOC'Y GAZETTE, July 3, 1996, at 13; Grania Langdon-Down, *Pay to Win*, GUARDIAN, Nov. 5, 1996, at 17; *SunAlliance Launches New Scheme*, 143 SOLIC. J. 257 (1999); *No Win, No Fee Insurance Grows*, L. SOC'Y GAZETTE, Apr. 22, 1998, at 1; *Conditional Fee Pressure*, L. SOC'Y GAZETTE, Oct. 23, 1996, at 5; Nick Hilborne, *Discretionary Fund Caution*, L. SOC'Y GAZETTE, Jan. 10, 1996, at 3; Nick Hilborne, *Conquest Launches Rival Accident Scheme*, L. SOC'Y GAZETTE, Jan. 10, 1996, at 3; *Fee Insurance*, L. SOC'Y GAZETTE, July 13, 1995, at 3; *Fee Insurance*, L. SOC'Y GAZETTE, Aug. 9, 1995, at 3; *Insurance Scheme Tops 1000*, L. SOC'Y GAZETTE, Aug. 31, 1995, at 2; *Legal Diary*, TIMES (London), Mar. 16, 1999, at 37.

101. Nick Hilborne, *PI Firms Seek Out Causes of Action*, L. SOC'Y GAZETTE, June 21, 1995, at 5.

102. Nick Hilborne, *PI Lawyers Defend Tactics*, L. SOC'Y GAZETTE, June 26, 1996, at 5.

Personal Injury Lawyers (APIL) assailed it as "wholly inappropriate."¹⁰³ Legal Marketing Direct (LMD) offered solicitors forty thousand personal injury prospects at £1-2.50 a name (cheaper for quantity).¹⁰⁴ A survey of fifty personal injury solicitors found that a third had been approached. Although three-fourths disapproved and 84% said they would not use the scheme, LMD claimed that twenty firms had paid £5,000 and four hundred more had shown interest; it was planning two more lists of 25,000 and 60,000 names.¹⁰⁵ Claims Direct, which sold franchises to laypersons to negotiate claims on behalf of injury victims, was paying seventeen solicitors firms £72.50 to "evaluate" each claim.¹⁰⁶

Law Society President Martin Mears urged solicitors "to consider the effect on public opinion."¹⁰⁷ He stated, "We do not want the American perception that if anyone suffers hurt, someone is made responsible for it."¹⁰⁸ Although the Law Society did not disapprove of Claims Direct, APIL President Michael Napier warned against "taking the marketing of accident claims one step further down a slippery route."¹⁰⁹ He also attacked LMD: "This type of aggressive advertising will simply damage the image of the legal profession." Goldsmith called it "the most offensive form of ambulance chasing yet seen in this country" and "hard to reconcile with the professionalism lawyers aspire to."¹¹⁰ He questioned, "[I]s it really credible that people living in this country do not know that, if injured in an accident which was somebody else's fault, they can sue?"¹¹¹ (More than a decade earlier the Oxford Centre for Socio-legal Studies documented that damages were recovered by only 12% of victims suffering serious disability, 29% in road accidents, 19% in work injuries, and just 2% in other injuries, which represented 86% of the total.)¹¹²

103. *Id.*

104. See *Personal Injury Lists*, 145 NEW L.J. 1251 (1995); Nick Hilborne, *Mears Calls for Curbs on Name Sales*, L. SOC'Y GAZETTE, Aug. 31, 1995, at 3; *Accident Names*, L. SOC'Y GAZETTE, Oct. 25, 1995, at 2.

105. Nick Hilborne, "No" to Names Sale, L. SOC'Y GAZETTE, Aug. 31, 1995, at 1.

106. See Hilborne, *supra* note 104, at 3.

107. *Id.* See *List of Accident Victims "Sold Out,"* 139 SOLIC. J. 1089 (1995).

108. *Personal Injury Lists*, *supra* note 104, at 1251.

109. Dan Bindman, *Accident Scheme Attacked by APIL*, L. SOC'Y GAZETTE, Mar. 27, 1996, at 2.

110. Michael Napier & Peter Goldsmith QC, *Working on Condition*, L. SOC'Y GAZETTE, Oct. 18, 1995, at 11.

111. *Id.*

112. DONALD HARRIS ET AL., COMPENSATION AND SUPPORT FOR ILLNESS AND INJURY 31, 51 (1984) [hereinafter COMPENSATION AND SUPPORT]. See *Referrals Scrutiny*, L. SOC'Y GAZETTE, Mar. 20, 1996, at 1; Martin Mears, *President's Column: Try, Try, Try Again*, L. SOC'Y GAZETTE, Mar. 27, 1996, at 17; *Claims Firm Scoops Up PI Work*, L. SOC'Y GAZETTE, Aug. 2, 1996, at 5.

APIL invested in public relations to “counterbalance sensational headlines,” but initially rejected a code of conduct.¹¹³ Incoming president Caroline Harmer dismissed as “nonsense” the charge “that legal aid and conditional fees allow ambulance-chasing lawyers to get rich on speculative litigation.”¹¹⁴ Instead, they “bring about safer products and better safety on the roads and in the workplace.”¹¹⁵ In a public lecture, Mackay declared there was “no rational basis for limiting access to the civil justice system simply for fear of more litigation” and dismissed dire warnings of “US-scale litigation.”¹¹⁶ But APIL, “concerned that public perception is being whipped up against personal injury lawyers,” adopted a code prohibiting its three thousand members from cold calling and unsolicited mailing and payments for referrals.¹¹⁷

This did nothing to dampen competition for clients. Some three hundred solicitors joined the ABC Solicitors Group to launch a £1 million television campaign, paying in proportion to the population of their exclusive territories (plus £10 per referral from the central telephone number).¹¹⁸ One advertisement showed cash being placed in an upturned hand. Accident Compensation Helpline enrolled another one hundred firms in a £2.3 million television campaign offering referrals and conditional fee insurance at competitive premiums.¹¹⁹

Housing specialists urged public housing tenants to sue for delayed repairs, offering gifts of cash or cheap watches. The *New Law Journal* asked:

[W]hat is the difference between this and the gifts offered by insurance companies for us to take out policies? It does not mean that the claims are necessarily fraudulent. It may be an unattractive way of conducting business, but this is the road down which the Law Society has, in broad terms, chosen to drive.¹²⁰

When the Chartered Institute of Housing accused solicitors of “tapping an easy market” by leafleting housing projects to offer representation in repair cases, the Housing Law Practitioners Association (HLPA) replied, “The local authorities are trying to distract attention

113. Nick Hilborne, *APIL Chief Hits Out at Anti-Fee Lobby*, L. SOC'Y GAZETTE, Nov. 15, 1995, at 2. See *APIL Question Publicity Code*, 139 SOLIC. J. 807 (1995).

114. Caroline Harmer, *Comment: The PI Challenge*, L. SOC'Y GAZETTE, May 9, 1996, at 15. 115. *Id.*

116. *Litigation Lessons From Abroad*, L. SOC'Y GAZETTE, June 19, 1996, at 16.

117. *APIL Approves a Mandatory Conduct Code*, LAWYER, Nov. 19, 1996, at 1. See *APIL Seeks to Improve Public Image*, 140 SOLIC. J. 548 (1996).

118. *PI Lawyers Buy into TV Ads*, L. SOC'Y GAZETTE, Dec. 13, 1996, at 4.

119. Nick Hilborne, *PI Referral Network Launches No Win-No Fee Insurance Scheme*, L. SOC'Y GAZETTE, Jan. 29, 1997, at 4.

120. *Fiddling Again*, 144 NEW L.J. 697, 697 (1994).

from their own inadequacies.”¹²¹ The Law Society took “a dim view of ‘Green Form’ marketing, but . . . solicitors who are representing clients are only doing what the law allows.”¹²²

Two years later, however, a *Daily Mail* article, headlined *Millions from Misery: Law firms ‘pocket cash earmarked for repairs,’* accused solicitors of profiting by encouraging public housing tenants to sue.¹²³ The deputy chairman of the Liverpool Council housing committee called the firms “false Galahads who were guilty of morally abhorrent behaviour.”¹²⁴ The Council sought a way “whereby the rapacious actions of solicitors, in touting for trade and encouraging claims, can be countered.”¹²⁵ But the HPLA condemned the “clearly orchestrated campaign,” stating, “Most of us don’t leaflet drop or advertise. There is no need to. The demand for help is so high we can’t cope.”¹²⁶ A solicitor for one of the named firms said its only crime was having “successfully, fearlessly and independently” represented tenants.¹²⁷ Two firms sued the paper for defamation, one settling for damages “well into five figures.”¹²⁸

In May 1995, the Labour Party, far ahead in the polls and eager for the general election required within two years, published its “Access to Justice” policy. The publication stated that the conditional fees uplift “should be very much lower than 100%” and limited to a percentage of damages.¹²⁹ Conditional fees were “an experiment to be monitored closely.”¹³⁰ Labour “do not expect their introduction to make a significant improvement to access to justice. They are, at present, little more than a gimmick designed to mask the chaotic state of the legal aid scheme and court service.”¹³¹

121. “Don’t Blame Us” Say Solicitors, 140 SOLIC. J. 244, 244 (1996).

122. *Id.*

123. *Press Round-up*, L. SOC’Y GAZETTE, Apr. 29, 1998, at 12.

124. *Id.*

125. Sue Allen, *Mersel Firms Sue Over Mail Claim*, L. SOC’Y GAZETTE, Feb. 3, 1999, at 3.

126. Nick Hilborne, *Solicitors Fight Back Against Local Authorities*, 143 SOLIC. J. 99, 99 (1999).

127. *Id.*

128. See *Libel Victory*, L. SOC’Y GAZETTE, Sept. 15, 1999, at 4; *Three-Partner Firm Triumphs Over Daily Mail*, 143 SOLIC. J. 847 (1999).

129. *Opening the Legal Aid Debate*, LEGAL ACTION 4-5 (6.95); LABOUR PARTY, ACCESS TO JUSTICE: LABOUR’S PROPOSALS FOR REFORMING THE CIVIL JUSTICE SYSTEM 12 (1995).

130. *Id.*

131. See *Labour on Justice*, L. SOC’Y GAZETTE, May 17, 1995, at 4; *Labour Creates a Future Vision*, L. SOC’Y GAZETTE, Feb. 22, 1995, at 1; *Labour Backs Major Review*, L. SOC’Y GAZETTE, June 28, 1995, at 4; *Fee “Gimmick,”* L. SOC’Y GAZETTE, July 26, 1995, at 6.

Almost simultaneously, the Lord Chancellor's Department (LCD) published its legal aid Green Paper, sounding very much like the Social Market Foundation. The current scheme "allows assisted parties to pursue cases which turn out to be unmeritorious." It was "a system of lawyer led services," which the "country can no longer afford." Finally, it stated, "Where the client has no financial disincentive against proceeding to trial and the lawyer . . . has a positive incentive to proceed, there is a clear danger of cases being litigated unnecessarily."¹³²

Anticipating its White Paper a year later, the LCD named the twenty firms with the highest legal aid earnings, which had averaged £2 million in 1994/95.¹³³ Leigh Day & Co earned over £5 million more than its closest rival, mostly from the unsuccessful claim for childhood leukemia against the Sellafield nuclear power plant.¹³⁴ Although Martin Day explained that the work had taken six years, newspapers criticized his firm for "raking in money" in failed cases.¹³⁵ The Legal Aid Practitioners Group (LAPG) responded with its own survey showing that the average income of legal aid solicitors was just £25,563 a year; nearly half worked more than fifty hours a week. The *Solicitors Journal* declared that the average legal aid lawyer earned £10 an hour.¹³⁶ Accusing the government of trying to "create a climate in which their Draconian proposals will be accepted," the Law Society proposed a contingent legal aid fund and limits on touting for Green Form advice work.¹³⁷ Just before publication, LCD junior minister Gary Streeter denounced legal aid recipients as "state-funded rottweilers," attacked a "somewhat ropey" successful application for legal aid, and challenged the Legal Aid Board chief executive to justify a cancer patient's lawsuit for medical negligence.¹³⁸ The Law Society condemned this "contemptible" abuse.¹³⁹

The White Paper reiterated that litigants pursued "too many weak or trivial cases." Applicants "should pay as much as they can reasonably afford" and everyone should pay some minimum:

132. LORD CHANCELLOR'S DEPARTMENT, LEGAL AID TARGETING NEED: THE FUTURE OF PUBLICLY FUNDED HELP IN SOLVING LEGAL PROBLEMS AND DISPUTES IN ENGLAND AND WALES ¶¶ 1.12, 3.8, 4.2, 7.8, 9.7, 12.26 (1995) (Cm 2854).

133. *Top Aid Firms Hit £2m*, L. SOC'Y GAZETTE, May 9, 1995, at 6.

134. *Id.*

135. *Id.*

136. *Comment: In Need of Support*, 140 SOLIC. J. 887, 887 (1996).

137. Dan Bindman, *Society to Propose Legal Aid Savings*, L. SOC'Y GAZETTE, June 19, 1996, at 1.

138. Dan Bindman, *Dire Warnings Over Legal Aid*, L. SOC'Y GAZETTE, June 26, 1996, at 5.

139. *Id.* See *Letter to the Profession: Upsetting the Balance*, L. SOC'Y GAZETTE, July 3, 1996, at 15.

People who do not have to pay a contribution can take or conduct cases with little or no regard to the cost. This is . . . one of the reasons why spending on legal aid has increased so much. . . . [Because] conditional fees have proved satisfactory . . . we intend to allow them in a wider range of cases and would consider excluding legal aid where they were available.¹⁴⁰

Media enthusiasm may have exceeded the LCD's expectations, and even its wishes. The *Daily Telegraph* called the "shortcomings" of legal aid so great "that only a lawyer could even attempt to defend it."¹⁴¹ It stated, given "its enormous cost and the distortions it produces, legal aid in civil cases would best be abolished. Legal insurance is available, and if lawyers were free to accept all cases on a no-win, no-fee basis, the most reasonable claims would get a hearing."¹⁴² The *Sun* welcomed the "crackdown on loony legal aid" to "stop taxpayers funding bizarre lawsuits" and excluding "foreigners."¹⁴³ Although other tabloids like the *Daily Mail* and *Daily Express* voiced similar sentiments, the rest of the quality press (*Times*, *Guardian*, and *Independent*) were more qualified.¹⁴⁴ The *New Law Journal* cited a "strictly embargoed" report on "reasons for refusal of offers of contributory legal aid," which it called "the equivalent of high grade semtex."¹⁴⁵ The journal reported, "Government ministers see benefit-grabbing, litigation-hungry hordes which can be demonised as little short of hounds from hell. The researchers found a group of incredibly poor people sufficiently depressed by the demands currently made of them simply to give up."¹⁴⁶

The Law Society, advice agencies, law centres, and consumer groups held a protest meeting at the House of Commons, and the Law Society retained a public relations group for £12,000 a month.¹⁴⁷ Streeter told legal aid lawyers he was "not the slightest bit concerned that some, very few . . . [of them] expressed concern" with his

140. LORD CHANCELLOR'S DEPARTMENT, STRIKING THE BALANCE: THE FUTURE OF LEGAL AID IN ENGLAND AND WALES 5, 9, 10, 20-21, 29, 33, 44, 47 (1996) (Cm 3305).

141. *Legal Aid in the Dock*, DAILY TELEGRAPH, July 4, 1996, at 23.

142. *Id.*

143. *Crackdown On Loony Legal Aid*, SUN, July 3, 1996, at 5; *Too Slow*, SUN, July 3, 1996, at 5.

144. See Francis Gibb, *Shake-up Aims to Curb £1.4bn Costs of Justice*, TIMES (London), July 3, 1996, at 6; Walter Merricks, *Till the Pips Squeak*, GUARDIAN, July 3, 1996; *Justice for the Poor*, GUARDIAN, July 3, 1996, at 14; Patricia Wynn Davies, *Gate to Law Closes Tighter*, INDEPENDENT, July 3, 1996, at 1.

145. See *Hounding the Poor*, 146 NEW L. J. 977 (1996); *Coming to the Aid of Justice*, DAILY EXPRESS, July 3, 1996, at 9; *Curbs to End the Legal Aid Shambles*, DAILY MAIL, Mar. 7, 1996, at 6; *A Scandal Fuelled by Greed*, DAILY MAIL, July 3, 1996, at 6.

146. *Id.*

147. Dan Bindman, *Legal Aid Battle Commences*, L. SOC'Y GAZETTE, July 24, 1996, at 5.

rottweiler metaphor.¹⁴⁸ He said that “hardly a surgery goes by” without a constituent complaining about “being pursued by someone with legal aid.”¹⁴⁹ People saw the scheme as “lopsided and wasteful.” Streeter also stated, “If a person in a serious situation can’t afford a very modest contribution, I believe that is a reflection of their commitment.”¹⁵⁰ Law Society President Tony Girling accused the government of “wilful ignorance of the facts” and urged it not to “sweep away the Child Bs, the victims of human growth hormones, the brain-damaged children, the victims of asbestosis, the personal injury cases, [and] the tenants living in unfit properties.”¹⁵¹

Two months after the White Paper, the Law Society, advice agencies, law centres, and anti-poverty and civil liberties groups created the Legal Aid Joint Forum to warn that “the community as a whole would suffer” if “punitive” contributions prevented the “weakest members” from enforcing their rights and testing “the lawfulness of the conduct of large institutions and the Government.”¹⁵² Law Society surveys found that 91% of the public felt “legal aid is a vital part of helping people get justice.”¹⁵³ Law Society Vice-President Phillip Sycamore called it “the logic of the madhouse” to assume that poor litigants relegated to conditional fees could pay opponents’ costs.¹⁵⁴

Addressing the Bar’s annual conference in September, Lord Irvine promised to “restore legal aid to the status of a public social service, so highly regarded for its economy and efficiency that, with public support, it can compete for scarce resources with the most highly valued social services, health and education.” Universal contributions were a “powerful deterrent.” The White Paper was “substantially a dead letter.” But even a Labour Government cannot “make money grow on gooseberry bushes.” In a published version of this lecture, he expressed concerns about a 100% success fee with no ceiling on the proportion of damages, stating:

[Labour] will require close monitoring of conditional fee agreements, in the consumer interest, to see that 100 per cent uplifts do not become the norm. That would be totally inappropriate in the very many cases where the prospects of success are very high and well in excess of 50-50. The success rate in personal injury cases is

148. Dan Bindman, *Streeter Talk*, L. SOC’Y GAZETTE, July 24, 1996, at 5.

149. *Streeter Confirms Legally-Aided Litigants are Rottweilers*, 146 NEW L.J. 1378 (1996).

150. *Id.*

151. *Id.* See *Society Targets Profession with Legal Aid Campaign*, 140 SOLIC. J. 728 (1996); *More Attacks on Legal Aid Curbs*, 146 NEW L. J. 1143 (1996).

152. *United Front to Campaign on Legal Aid*, L. SOC’Y GAZETTE, Sept. 12, 1996, at 1.

153. Peta Sweet, *Surveys Provide Ammunition in Legal Aid Battle*, 140 SOLIC. J. 987, 987 (1996).

154. *Legal Aid Fight*, L. SOC’Y GAZETTE, Sept. 25, 1996, at 6.

very high. Consumer protection requires that the maximum permitted uplift in cases that win should not be disproportionate to the risk of losing.

The Legal Action Group said Irvine's "reasonable" vision was "steady as she goes' or . . . 'as she went before Lord Mackay's green and white papers.'"¹⁵⁵

Legal Aid Board Executive Director Stephen Orchard condemned "unreasoned" and "knee-jerk" criticism of the White Paper.¹⁵⁶ He cited "comments in high profile cases where the grant of legal aid has been heavily criticised, not least by trial judges."¹⁵⁷ Mackay added that "very many judges and lawyers, who see legal aid cases every day, firmly believe" there are "undeserving cases."¹⁵⁸ So do "Members of Parliament," who "write expressing their concern every week."¹⁵⁹ Some "legally aided people pursue cases irresponsibly because they have little to lose."¹⁶⁰

The press continued to report criticism of personal injury litigation. Dismissing the benzodiazepine cases, the Court of Appeal berated solicitor advertising for encouraging plaintiffs to bring "hopeless" actions.¹⁶¹ The defendant solicitor praised the court for striking "a note of sanity" and protecting "the public, the tax-payer and the legal system."¹⁶² At a meeting organized by large United Kingdom and United States firms, a City litigation partner warned of "US-style blackmail litigation."¹⁶³ Some solicitors "undoubtedly look to drum up claims in order to line their own pockets."¹⁶⁴ An APIL spokesman denounced this as a "myth perpetrated by defendant insurance companies and their lawyers."¹⁶⁵ A few months later, the London International Insurance and Reinsurance Market Association exemplified APIL's charge by deploring "the development of an American-style compensation

155. See *Dead Letters, Live Thoughts*, LEGAL ACTION 3 (11.96); Lord Irvine of Lairg QC, *The Legal System and Law Reform Under Labour*, in LAW REFORM FOR ALL 4, 11 (David Bean ed. 1996). See also *Irvine Sets Out Labour's Vision*, L. SOC'Y GAZETTE, Oct. 2, 1996, at 1.

156. Steve Orchard, *Letters: LAG, LAB and the Legal Aid White Paper*, LEGAL ACTION 26 (10.96).

157. *Id.*

158. Lord Mackay, *Comment: Realistic Proposals*, 146 NEW L.J. 1716 (1996). See Lord Mackay, "This is Only the Start," TIMES (London), Oct. 22, 1996, at 41.

159. *Id.*

160. *Id.*

161. Neil Rose, *Court Criticises PI Advertising*, L. SOC'Y GAZETTE, Feb. 19, 1997, at 4.

162. *Id.*

163. Robert Verkaik, *Business Warned of Creeping US-Style "Blackmail Litigation"*, L. SOC'Y GAZETTE, Apr. 3, 1997, at 10.

164. *Id.*

165. *Id.*

culture” and blaming plaintiffs’ lawyers for having “transformed the level of damages being awarded.”¹⁶⁶

V. “NEW LABOUR’S” OLD CONSERVATISM

After Labour’s May 1997 victory, pressure mounted to expand conditional fees. The Vice-Chancellor, Sir Richard Scott, urged inclusion of all civil cases. The Law Society agreed there was “no good reason why clients should not benefit in other areas.” Acknowledging that “it is no longer good enough for lawyers or others connected with the justice system simply to call for more and more legal aid . . . without showing how that could be funded,” President Phillip Sycamore derided the criticism that a Contingency Legal Aid Fund (CLAF) cross-subsidized cases as “a counsel of perfection.”¹⁶⁷ Bar Council Chairman Robert Owen QC called the benefits of a CLAF “obvious”: “no means testing . . . open to all [and] . . . dramatically expanding effective access to justice . . . it would save the cost to the legal aid fund.”¹⁶⁸

The *Sunday Times* leaked a Policy Studies Institute report in July, describing a retired couple who “got £280,000 in legal aid to fight a case with their neighbours over a wall that fell down at their home.”¹⁶⁹ Publishing the study in September, the Lord Chancellor’s Department (LCD) Parliamentary Secretary Geoff Hoon said, “conditional fees are achieving their dual aim of increasing access to justice and widening consumer choice.”¹⁷⁰ He “would find it hard to justify maintaining the exemptions on conditional fees and effectively limiting access to justice for a large number of people.”¹⁷¹ Because the new Lord Chancellor, Irvine, favored “extension into more areas of litigation . . . the question . . . is rapidly becom[ing] not whether they should be extended, but how far?”¹⁷² Irvine wanted “to begin to consider other funding mechanisms, such as contingency fees.”

The study hardly warranted such enthusiasm. Solicitors evaluated 40% of their conditional fee agreement (CFA) cases as 60-80% likely

166. *PI Awards Rising*, L. SOC’Y GAZETTE, July 2, 1997, at 4.

167. Phillip Sycamore, *Winners Should Pay into the Pot*, TIMES (London), Sept. 16, 1997, at 35.

168. Robert Owen QC, *Chairman’s Column: Access to Justice*, COUNSEL 3 (9-10.97).

169. Nicolas Rufford, *US-Style Legal Fee Scheme to Expand*, SUNDAY TIMES (London), July 20, 1997, at 24.

170. Frances Gibb, *Government Backs “No Win, No Fee” System*, TIMES (London), Sept. 24, 1997, at 8.

171. Rachel Halliburton, *Hoon Flags No Win No Fee Expansion*, L. SOC’Y GAZETTE, Sept. 24, 1997, at 1.

172. *Conditional Fees Fever*, 147 NEW L.J. 1379, 1379 (1997).

to succeed and 14% as only 50-59%.¹⁷³ A “cynical interpretation is that some solicitors might be deliberately overestimating risk to justify charging clients a higher uplift.”¹⁷⁴ The uplift was too high twice as often as it was too low. The report found “serious cause for concern about whether the scheme is operating fairly and consistently.”¹⁷⁵ Hoon cautioned against attributing too cynical a motive to this finding too quickly.¹⁷⁶ The Association of Personal Injury Lawyers (APIL) President Michael Napier criticized it for denying that conditional fees increased access to justice. Although solicitors might previously have “spiced the odd road traffic accident,” they did not “spec” tripping or work accidents. Sycamore praised conditional fees as a “lifeline” for the middle class,¹⁷⁷ stating that this research “gives the green light for the extension of conditional fees to other areas of civil litigation.”¹⁷⁸ But the *Solicitors Journal* called a blanket extension “unwise” and warned that CFAs might replace legal aid.¹⁷⁹

Observers, especially within the profession, greeted the new Lord Chancellor hopefully. Owen took comfort from Irvine’s observation “that the Legal Aid budget is currently within estimates and under broad control so that he saw no immediate imperative for cost capping.”¹⁸⁰ The *Solicitors Journal* hoped that “the presence of seven lawyers in the Cabinet” would be “good news for the legal profession,” noting “Labour has promised a less confrontational approach.”¹⁸¹ Three months after taking office Irvine declared:

I do not believe in blueprints. I do not believe in grand schemes. They usually end in grief and tears I think the public spats between the [former] government and the judges and the lesser spats between the professional bodies and the [former] Lord Chancellor were extremely bad for public confidence in our system. I want [the relationship] to be 100% different.¹⁸²

But Tony Blair initiated his premiership by vowing to end legal aid abuse, blacklisting barristers who brought frivolous cases, and recov-

173. STELLA YARROW, *THE PRICE OF SUCCESS: LAWYERS, CLIENTS AND CONDITIONAL FEES* xxi (1997).

174. *Id.* at xii-xiii.

175. *Id.* at xv.

176. See *Inns and Outs*, *TIMES* (London), Sept. 23, 1997, at 33.

177. Halliburton, *supra* note 171.

178. *How Far Should We Go?*, 141 *SOLIC. J.* 883, 883 (1997).

179. *Id.* See Francis Gibb, *Scott Urges More “No Win, No Fee” Litigation*, *TIMES* (London), May 17, 1997, at 9; *Self-Financing Legal Aid Proposed by Barristers*, *TIMES* (London), Sept. 1, 1997, at 1; Nick Hilborne, *Extension of Conditional Fees a Matter of Time*, 141 *SOLIC. J.* 879 (1997); *Big Rise in Conditional Fee Insurance Premiums*, 141 *SOLIC. J.* 879 (1997).

180. Robert Owen QC, *Chairman’s Column: Legal Aid*, *COUNSEL* 3 (3-4.97).

181. *Ask the Lawyers for a Change*, 141 *SOLIC. J.* 423, 423 (1997).

182. Robert Aberman, *Irvine’s Overture*, *L. SOC’Y GAZETTE*, July 30, 1997, at 11.

ering legal aid payments from clients with hidden resources. Echoing his Conservative predecessors, Hoon attacked the benzodiazapine litigation, which "cost almost £40 million and achieved little."¹⁸³ He urged lawyers to "bid for cases[,] . . . an innovation in the law which is commonplace elsewhere in life."¹⁸⁴ He promised that the LCD's "radical thinking" would include the extension of conditional fees.¹⁸⁵

Within weeks of the election, Irvine announced a three-month review of civil justice and legal aid by Sir Peter Middleton, Thatcher's permanent secretary to the Treasury and now deputy chairman of Barclays Bank.¹⁸⁶ Middleton made his report in September, although Irvine did not release it until just before the Law Society conference. Middleton appeared to credit the charge of "supplier-induced demand," stating that people should "pay what they can reasonably afford towards the cost of their own cases" and everyone should contribute something as "a sign of a client's commitment to a case" because "legal aid supports a significant number of cases that litigants would not consider important enough to pursue if any contribution was required." He urged an end to "restrictions on the way that lawyers can charge for their services . . . to stimulate a more competitive market, widen access to justice generally and . . . offer an alternative to publicly-funded legal aid." In addition, he stated that legal aid should not be available "for cases that could be pursued satisfactorily under . . . a conditional fee agreement." He further stated that there was "no essential difference in principle between conditional and contingency fees and in some ways the latter may be preferable." Finally, he said that concern with the American experience "may be misplaced" given "the cost-shifting rule and the fact that juries here do not generally set damages."¹⁸⁷

On the basis of Hoon's comments at the annual Labour Party conference, the *Times* ran a front-page article on October 4, 1997, suggesting the Government planned to replace legal aid with conditional

183. Geoff Hoon, *Legal Aid Must Give Good Value*, *TIMES* (London), July 1, 1997, at 41. See Dan Bindman, *Irvine's View*, *L. SOC'Y GAZETTE*, May 14, 1997, at 14.

184. *Id.*

185. Evlynn Gilvarry, *Hoon Signals Radical Thinking*, *L. SOC'Y GAZETTE*, July 23, 1997, at 5. See *End of Legal Aid in War on Cheats*, *DAILY MAIL*, June 23, 1997, at 1; *Time to Stop Legal Aid Rot*, *DAILY MAIL*, June 23, 1997, at 8; Geoff Hoon, *The Limited Magic of Numbers*, 147 *NEW L.J.* 1092 (1997).

186. See Nick Hilborne, *Irvine Plans Snap Summer Review*, *L. SOC'Y GAZETTE*, May 21, 1997, at 1; Nick Hilborne, *Ex-Treasury Man to Lead Irvine Review*, *L. SOC'Y GAZETTE*, June 11, 1997, at 1.

187. SIR PETER MIDDLETON, *REPORT TO THE LORD CHANCELLOR* ¶¶ 3.1, 3.38, 3.41, 5.42, 5.47-50 (1997).

fees in all money claims.¹⁸⁸ “Middle-class people who cannot afford to go to law should gain access to the courts,” said Hoon.¹⁸⁹ The changes would save taxpayers “up to £800 million” annually.¹⁹⁰ Sycamore immediately called for resistance. Owen warned of the “very real danger of abuse” because of the “conflict of interest at the very heart of these conditional fee agreements.”¹⁹¹ He continued, “The blunt truth is that people will end up paying more to lawyers.”¹⁹² The Legal Aid Practitioners Group (LAPG) predicted “chaos” in “the short term.”¹⁹³ At his annual press conference the Lord Chief Justice reasserted “the traditional view” that “it is undesirable for lawyers to have a stake in damages because it encourages unethical behaviour.”¹⁹⁴

At the Law Society annual conference on the weekend of October 16-17, Irvine accepted Middleton’s principal recommendations. Having become a “leviathan with a ferocious appetite,”¹⁹⁵ legal aid had to “be re-focused.”¹⁹⁶ The merits test would require a 75% chance of success because, as Irvine articulated, “I would not myself litigate at my own expense with any lesser prospects.” Irvine rejected Middleton’s proposed minimum contribution. From the following April, all money claims would be handled exclusively by conditional fees. A CLAF could not work “because lawyers would prefer to cream off the stronger cases under no-win, no-fee agreements.”¹⁹⁷ Below a headline proclaiming *How I’ll give the law back to the people*, he asked in the *Times*, “Why should anyone on a modest income contribute through his taxes to the income of an inefficient professional?”¹⁹⁸

There was a “storm of protest” in the profession at the “most radical shake-up of legal services in 50 years.” Sycamore called the “se-

188. See Frances Gibb & Nicholas Wood, *Legal Aid Scheme to Be Scrapped: “Justice for the Middle Class in Law Reform,”* TIMES (London), Oct. 4, 1997, at 1.

189. *Id.*

190. *Id.*

191. Frances Gibb, *No Win, No Fee Justice Will Be a Rip-Off, Says Bar Chairman,* TIMES (London), Oct. 16, 1997, at 8.

192. *Id.*

193. Dan Bindman, *Deep Concern Over Threat to Legal Aid,* L. SOC’Y GAZETTE, Oct. 8, 1997, at 1.

194. *Bingham Fees Fear,* L. SOC’Y GAZETTE, Oct. 15, 1997, at 4. See *End of Civil Legal Aid in Sight, Report Claims,* 141 SOLIC. J. 935 (1997); Dan Bindman and Rachel Halliburton, “*Time for Action*” Says Lord Irvine, L. SOC’Y GAZETTE, Oct. 15, 1997, at 1; *Lord Irvine Sets the Scene for Cardiff,* 141 SOLIC. J. 963 (1997).

195. Dan Bindman, *Irvine Reforms Slash Legal Aid,* L. SOC’Y GAZETTE, Oct. 22, 1997, at 1.

196. *Legal Aid System Set for the Most Radical Changes Since its Inception, Solicitors Hear,* L. SOC’Y GAZETTE, Oct. 22, 1997, at 12.

197. *Id.*

198. Lord Irvine of Lairg, *How I’ll Give the Law Back to the People,* TIMES (London), Oct. 18, 1997, at 22.

vere withdrawal of access to justice a considerable curtailment of rights.”¹⁹⁹ The *Law Society's Gazette* urged lawyers to “dip into your files and bring to light examples to prove that such crude swopping of funding is not so easy.”²⁰⁰ The Legal Action Group (LAG) warned that Irvine’s proposals “will deprive ordinary people of legal backing against powerful vested interests and rob the poor of their compensation rights.”²⁰¹ “A group of the poorest litigants will . . . lose up to 25 per cent of their compensation.” The change was “likely to lead to a backlash” against lawyers. But the *Solicitors Journal* conceded that Irvine “already has the backing of the popular press and a large proportion of the public for his measures.”²⁰²

Both branches of the profession and LAG worried that the insurance market was unprepared and some clients would be unable to afford premiums. Insurers were surprisingly critical. Abbey Legal Protection, which insured plaintiffs against defendants’ costs, said conditional fees “re-franchise the middle class” but “leave the poorest out.”²⁰³ The Association of British Insurers agreed, stating, “[A]ll logic tells you that the less well off will suffer from this measure.” The Forum of Insurance Lawyers (FOIL) concurred it would reduce access to justice. David McIntosh thought it was “extraordinary” to assume that “this considerable increase in insurance capacity is going to be there,” and that the scheme would create “a potential, unbridgeable gap in access to justice.”²⁰⁴ The *New Law Journal* feared that pressure for high success rates would lead to low settlements, “which reflect the solicitor’s own interest just as much as that of the client.” Warning that conditional fees were inappropriate where expert evidence was necessary, the Vice Chancellor urged care “to ensure that deserving cases do not fall into a black hole.”²⁰⁵

199. Frances Gibb & Nicholas Watt, *Lawyers Fear Poor Will Lose Out in Reform of Legal Aid*, *TIMES* (London), Oct. 18, 1997, at 2.

200. *Help Shape the Future*, *L. SOC'Y GAZETTE*, Oct. 22, 1997, at 16.

201. Roger Smith, *The More Things Change . . .*, 147 *NEW L.J.* 1543, 1543 (1997).

202. See *Divided We Fail*, 141 *SOLIC. J.* 1047, 1047 (1997); Nicolas Rufford, “Safety Fund” to Replace Legal Aid, *SUNDAY TIMES* (London), Oct. 19, 1997, at 28; Phillip Sycamore, *Fit for the 21st Century*, *L. SOC'Y GAZETTE*, Oct. 22, 1997, at 20; Nick Hilborne, *Outrage Over Legal Aid Cuts*, 141 *SOLIC. J.* 991 (1997); *Listen and Ignore?*, 147 *NEW L.J.* 1537 (1997); *Facts, Not Flannel*, 141 *SOLIC. J.* 995 (1997); *Bringing Home the Bacon*, *LEGAL ACTION* 3 (11.97).

203. Dan Bindman, *Doubts Over Expenses Insurance*, *L. SOC'Y GAZETTE*, Oct. 22, 1997, at 5.

204. David McIntosh, *Comment: New Labour's Lip Service*, *L. SOC'Y GAZETTE*, Oct. 22, 1997, at 16.

205. See Frances Gibb & Nicholas Watt, *Lawyers Fear Poor Will Lose Out in Reform of Legal Aid*, *TIMES* (London), Oct. 18, 1997, at 2; Michael Napier & Fiona Bawdon, *The Gate Keepers to Justice*, 147 *NEW L. J.* 1559 (1997); Sir Richard Scott, *A Cut Too Far?* *GUARDIAN*, Oct. 28, 1997, at 17.

At a meeting soon thereafter, Hoon “reacted very badly” when the Consumers’ Association legal affairs director said he “absolutely did not think legal aid should be scrapped.”²⁰⁶ The shadow Lord Chancellor called the proposals “seriously flawed.” Hoon hoped a “culture change” would convince lawyers to recoup legal insurance premiums from their fees. In addition, Hoon said, “For the first time this century, perhaps ever, access to justice for all in this country will be a reality—not just a slogan.”²⁰⁷ “There are few areas of profitable business activity where some money is not put at risk in order to realise an overall and positive return.” He opposed state funding for cases of brain-damaged babies, questioning, “Whose interest is served if those cases proceed on the slim hope that some benefit may accrue? Not, I suspect, the parents?”²⁰⁸ Irvine added that “competent and busy firms should be able to absorb the cost of insurance and investigation” and “recover them if they win.”²⁰⁹

Benedict Birnberg, a noted human rights solicitor, feared solicitors would become “commercial speculators and bankers first and lawyers second.”²¹⁰ The Gwynedd (Welsh) Law Society unanimously opposed degrading solicitors to “mere financial speculators.”²¹¹ The national Law Society asked how solicitors would maintain an income stream until there were enough recoveries “five years down the line.”²¹² Sycamore declared that “outside personal-injury mainstream work the insurance industry doubts the market will develop to provide that cover.” Law Society Deputy Vice-President Robert Sayer predicted that “the prudent solicitors will only take on cases they are confident they can win.”²¹³ APIL said the proposals “simply won’t work.” The National Consumer Council deplored the lack of empirical information on the operation of conditional fees. The Consumers’ Association objected to curing the exclusion of “middle income Britain” by “freezing the poorest and most vulnerable out of the system.”²¹⁴ LAG Director Roger Smith accused the government of using “a very blunt

206. Nick Hilborne, *Little Sign of Compromise*, 141 SOLIC. J. 1015, 1015 (1997).

207. Geoff Hoon, *Access to Justice—The Reality Not the Slogan*, 147 NEW L.J. 1611, 1611 (1997).

208. *Simple But Revolutionary Changes, Says Hoon*, 147 NEW L.J. 1646, 1646 (1997).

209. See *I’m Not Attacking Poor, Says Irvine*, 141 SOLIC. J. 1044 (1997); Dan Bindman, *Opposition to Reform Steps Up After Debate*, L. SOC’Y GAZETTE, NOV. 26, 1997, at 5; Dan Bindman, *Hoon Faces Friendly Fire in Legal Aid Debate*, L. SOC’Y GAZETTE, NOV. 26, 1997, at 11.

210. Benedict Birnberg, *Community Legal Service*, 147 NEW L.J. 1703, 1703 (1997).

211. *Welsh Resolution*, L. SOC’Y GAZETTE, NOV. 26, 1997, at 4.

212. Rachel Halliburton & Andrew Darling, *Legal Aid Lobbying Effort Begins*, L. SOC’Y GAZETTE, OCT. 29, 1997, at 4.

213. Robert Sayer, *Comment: Joining Battle*, L. SOC’Y GAZETTE, OCT. 29, 1997, at 22.

214. Frances Gibb, *Mind the New Gap*, TIMES (London), NOV. 18, 1997, at 41.

instrument” to save just £80 million annually.²¹⁵ But echoing Irvine, Hoon told solicitors to “absorb the up-front costs” of investigation and “bear the risks of the other side’s costs.”²¹⁶ He added, “[If] as few people are satisfied with the [legal aid] system as it now appears, you’ve got the problem, not me.”²¹⁷

A month after Irvine’s bombshell, the LCD announced it would hire an outside consultant to analyze the impact on solicitors. Sycamore called the inquiry “clear proof that the Lord Chancellor’s proposals are unrealistic.”²¹⁸ Wondering why this had not been done earlier and “appalled by the government’s inflexibility,” the Law Society retained its own expert.²¹⁹ During the Prime Minister’s question time, Opposition leader William Hague said the proposals could “prevent people who are seriously disabled in accidents from pursuing personal injury claims.” The Society of Labour Lawyers (whose more than one thousand members included Irvine) voted overwhelmingly to ask the government for “further research and experience to establish [that CFAs] are working fairly in the interests of consumers.”²²⁰

Attacked in Parliament, Hoon said the Government was reconsidering both the 75% merits test and the April 1998 target for ending legal aid for money claims. But he declared that “go-ahead lawyers, insurers and others” were “talking about a new world that is opening up and how they will meet the challenges and seize the opportunities.” Shadow Attorney General Edward Garnier QC (briefed by the Law Society) accused the Government of having “betrayed many people’s trust in its haste to appear relevant, radical and modern.” He stated that the proposals would “turn lawyers into a cross between insurers and bookmakers,” and he added, “At worst, we will be creating a system for the bent or the brave.”²²¹ A Labour backbencher called it “a real denial of justice if a genuine claim were to lie unpursued for want of the means to pay for insurance.”²²² Sycamore appealed for “exam-

215. LAG Director “Heart-Broken” Over Cuts, 141 SOLIC. J. 1068, 1068 (1997).

216. Dan Bindman, *Community Legal Service Talks Could Offer “Glimmer of Hope,”* L. SOC’Y GAZETTE, Nov. 12, 1997, at 5.

217. See Sayer, *supra* note 213. See *Sparks Fly Over Small Claims Increase*, 141 SOLIC. J. 1068 (1997).

218. Dan Bindman, *Dash to Test Impact of Reform on Firms*, L. SOC’Y GAZETTE, Nov. 19, 1997, at 1.

219. *Id.*

220. Rachel Halliburton, *Labour Lawyers Snub Reform Plan*, L. SOC’Y GAZETTE, Dec. 10, 1997, at 4. See *Stop and Listen*, L. SOC’Y GAZETTE, Nov. 19, 1997, at 15; Rachel Halliburton, *Reforms Study*, L. SOC’Y GAZETTE, Feb. 4, 1998, at 4.

221. Dan Bindman, *Hoon Faces Friendly Fire in Legal Aid Debate*, L. SOC’Y GAZETTE, Nov. 26, 1997, at 11.

222. *Id.*

ples of cases which demonstrate just how dramatic the effects of these changes will be.”²²³ Irvine retorted that he was “a minister in a listening government” but “openness and consultations only work if those consulted react responsibly . . . [and are] measured and well-informed in their responses.”²²⁴ He further stated, “[Some critics] have gone so far as to accuse me and my colleagues of betraying the poor. Savage and grave allegations [sic].”²²⁵

In January 1998, the Bar responded to Irvine’s proposals. The 75% merits test was “unfair and impractical.” It strongly opposed extension of CFAs, which would “create a litigation market under the dominant control of insurance companies.” It found that there was “no evidence of any similar system operating successfully elsewhere.” In addition, CFAs would create conflicts of interest in setting the uplift and evaluating settlements and encourage the “suppression of crucial documents” and the “suborning and excessive coaching of witnesses or misrepresentation of facts or law.” It was “inevitable that standards of integrity will fall. For those who claim otherwise see the American example.” American firms “go bankrupt, especially in complex claims.” “It would be disastrous if the habits, practices and consequent contempt for lawyers found in the USA were to become commonplace here.” The need to spread risk would produce “larger but far fewer firms.” As much as “34% of plaintiffs’ damages overall could well go to lawyers.” Insurance premiums would cost £17,768,675 a year. Because the Bar had exempted CFAs from the cab-rank rule, which requires barristers to accept every client within their sphere of competence, “the most capable practitioners will prefer, and will do, insurance and other work with guaranteed payment, leaving the plaintiff field to the less able, or young and inexperienced.” The Bar urged that legal aid be available to the poor and less educated, infants and patients, litigants against the state, housing claims, multi-party actions, public interest claims, professional negligence, and defendants.²²⁶ The Bar also renewed its call for a CLAF, which it had advanced with detailed costing the previous August. This would “spread risk far more widely than any firm of solicitors,” thereby lowering client costs, and

223. Phillip Sycamore, *Facing Up to Change*, L. SOC’Y GAZETTE, Nov. 26, 1997, at 16.

224. Lord Irvine, *Sill Listening*, L. SOC’Y GAZETTE, Dec. 17, 1997, at 17.

225. *Id.* See Dan Bindman, *Opposition to Reforms Steps Up After Debate*, L. SOC’Y GAZETTE, Nov. 26, 1997, at 5; *Tories Join Anti-Cuts Alliance*, 141 SOLIC. J. 1120 (1997).

226. BAR COUNCIL, ACCESS TO JUSTICE: A FAIR WAY FORWARD. THE BAR’S RESPONSE TO THE GOVERNMENT’S PROPOSALS ¶¶ 1.5-8, 1.13, 2.1.3-5, 2.6, 2.7.2, 2.8.1-2, 4.2, 5.3.5, 5.4.1, 5.5.2, 9.2, 10.4 (1998). See Alan Tunkel, *Improving Access to Justice—4*, 148 NEW L.J. 301 (1998); *Letters to the Editor: Judgement on the “Evils of Litigation,”* TIMES (London), May 21, 1998, at 23.

“eliminat[ing] the profit element in insurance premiums.” The success fee would be “calculated on a case by case basis by reference to risk.”²²⁷

The *Times* said, “Irvine argued, rightly, that the taxpayers should not have to support cases which lawyers did not believe were strong enough to accept on a ‘no-win, no-fee’ basis. The State should no more be picking winners in litigation than in industry.”²²⁸ Although the head of litigation at Eversheds, one of the largest regional solicitors’ firms, expressed concern that the proposal would “exclude one social group,” he also maintained that “businesses are often forced to settle cases where their defence is strong, simply because there is no incentive for the legally aided party to play fair, and act reasonably.” The existing threshold for “speculative litigation” was “extremely low,” often leading to “spurious cases.”²²⁹

VI. AN ORWELLIAN “ACCESS TO JUSTICE ACT”

The Lord Chancellor’s Department (LCD) published its consultation paper on “Access to Justice with Conditional Fees” on March 3. Because “justice always has a cost,” the Government wanted “to encourage fair settlements of disputes before they go to court.” It did “not want to create a litigious society” or “import ‘ambulance chasing.’” Conditional fees would “ensure that the risks of litigation are shared between the lawyer and the clients.” Government planned to extend them to all cases except family and criminal. It also would use a “tougher merits” test to exclude legal aid for weak cases.²³⁰ It stated, “Too many weak cases are granted legal aid. The hopes of litigants are unrealistically raised, and the opposing party is exposed to unnecessary costs which they cannot recover.” In addition, it noted that legal aid “was not intended to give assisted persons or the lawyers of assisted persons a tool to use in litigation to bring claims of doubtful merit which effectively blackmail defendants into submission.”

227. BAR COUNCIL, CONTINGENCY LEGAL AID FUND: AN IDEA WHOSE TIME HAS COME? (1997); MARTIN CHALKLEY, FUNDING A CONTINGENCY LEGAL AID FUND (1997); BAR COUNCIL, CONTINGENCY LEGAL AID FUND: PRELIMINARY FEASIBILITY STUDY ¶¶ 12-13 (1998).

228. *Irvine’s Law: The Lord Chancellor Bows to Others, But Keeps on Course*, TIMES (London), Mar. 5, 1998, at 23.

229. Martin McKenna, *Why Legal Aid Could Soon Aid Very Few*, INDEPENDENT, Feb. 4, 1998, at 27.

230. Frances Gibb, *Legal Aid May Go in 60 per cent of Civil Disputes*, TIMES (London), Mar. 5, 1998, at 12.

Government rejected Bar Council and Law Society proposals for a Contingency Legal Aid Fund (CLAF).²³¹

Hoon hoped to make conditional fee agreements (CFA) the sole means of funding medical negligence. He had not heard “a single complaint” about the thirty thousand CFA cases, “whereas [he did] receive regular complaints about legal aid.”²³² Sycamore declared there were “still problems with availability, affordability and the funding of up-front disbursements.”²³³ However, Hoon maintained that “personal injury cases are the wrong target.”²³⁴ The Association of Personal Injury Lawyers (APIL) accused the “horrific” proposal of “using a sledgehammer to crack a nut,” because personal injury cases represented only 2.5% of the legal aid budget.²³⁵ The *Gazette* dismissed the proposal as “misguided,” not “a viable option for many personal injury cases.”²³⁶ Bar Council Chair Heather Hallett QC called it “illogical, unfair and premature,” and “simply unrealistic to believe that no win, no fee agreements can take the place of legal aid.”²³⁷

The Forum of Insurance Lawyers (FOIL) denounced as the American system of “penalties or fines” the Legal Action Group’s (LAG) suggestion that winning plaintiffs recover success fees and legal insurance premiums from defendants.²³⁸ FOIL also warned that the government’s “appalling approach” would stop a lot of personal injury claims getting to court.²³⁹ But a few months later it said its clients endorsed the proposals, stating that “[f]or years, they have been paying out for claims backed by legal aid, irrespective of their liability but just on the basis of economics—it was cheaper to pay out than to fight

231. LORD CHANCELLOR’S DEPARTMENT, ACCESS TO JUSTICE WITH CONDITIONAL FEES ¶¶ 1.1, 1.3, 1.5-7, 1.12, 2.7, 2.17, 3.4, 3.12, 3.18, 3.23, 4.9-10 (1998).

232. *All Change on the Legal Landscape*, L. SOC’Y GAZETTE, Mar. 11, 1998, at 18.

233. Neil Rose, *Irvine: Reforms to Come in Two Stages*, L. SOC’Y GAZETTE, Mar. 5, 1998, at 1.

234. See *All Change on the Legal Landscape*, *supra* note 232.

235. Andrew Darling, “Horrific” Plan Slammed by PI Lawyers, L. SOC’Y GAZETTE, Mar. 5, 1998, at 1.

236. *No PI Panacea*, L. SOC’Y GAZETTE, Mar. 5, 1998, at 15.

237. *Reactions to the Legal Aid Consultation Paper*, 148 NEW L.J. 360 (1998). See *Irvine Bows to Backbench Protests Over Legal Aid Cuts*, TIMES (London), Feb. 31, 1998, at 1; *Lobby Groups Stand Ground on Personal Injury*, L. SOC’Y GAZETTE, Mar. 11, 1998, at 10; *Solicitors Rebuff Insurers’ Insult*, L. SOC’Y GAZETTE, Mar. 11, 1998, at 4; *Press Round-up*, L. SOC’Y GAZETTE, Mar. 11, 1998, at 14; *Press Round-up*, L. SOC’Y GAZETTE, Mar. 18, 1998, at 12; Caroline Harmer, *Comment: Best for the Majority?*, L. SOC’Y GAZETTE, Mar. 25, 1998, at 15; *Don’t Make Personal Injury the Scapegoat, Harmer Says*, 142 SOLIC. J. 436 (1998).

238. See Gibb, *supra* note 230.

239. Frances Gibb, *Legal Aid “Only Route for Personal Injury Claims,”* TIMES (London), Mar. 24, 1998, at 6.

it.”²⁴⁰ The Iron Trades Insurance Group denounced personal injury as “a nice little earner for the lawyers.” It stated, “[W]e consider the insurance industry as being mugged by lawyers.” When the Law Commission recommended expanding liability for negligent infliction of emotional distress, the *Evening Standard* condemned the growth of a “compensation culture.” Predicting that insurance premiums would “rocket,” as in America, the Company Solicitor for *Times* Newspapers warned that “every brass-necked liar will try to get conditional fee funding for an action against the press in hope that he will hit the jackpot before the truth comes out.”²⁴¹ Eight months later, the leading libel firm of Peter Carter-Ruck & Partners offered to accept conditional fees; within seven months, it had thirty-two such cases.²⁴²

The proposals not only provoked fierce professional opposition, but also divided the government. Concerned that the National Health Service (NHS) had paid £235 million for medical negligence in 1996/97, up 15% from the previous year, Health Secretary Frank Dobson accused lawyers of “milking the NHS of millions.” Opposing conditional fees, he told the Royal College of Midwives:

As far as I am concerned, the best place for a lawyer in the NHS is on the operating table, not sliding around causing trouble for other people We see the situation in the USA where people are not concerned with what is best for the mother and baby but are thinking “How would this look in court?”

The Medical Protection Society declared, “Doctors are not being more negligent [T]he trouble is that solicitors are now advertising and putting ideas into patients’ heads.” The *Gazette* called Dobson’s joke “wildly unfunny.” The chairman of Aid to Victims of Medical Accidents (AVMA) “absolutely disagreed” with Dobson’s proposal for no-fault compensation. He stated, “Claimant lawyers have done an enormous amount for the victims of medical accidents while nobody else, including the government, was doing anything at all.” Perhaps to ward off no-fault, FOIL agreed that “if you are a victim of medical negligence then there is fault and there should be compensation.”²⁴³

240. Frances Gibb, *FOIL Cries Foul*, *TIMES* (London), June 2, 1998, at 39.

241. Alastair Brett, *No Win, No Fee: No Free Press*, *TIMES* (London), Apr. 28, 1998, at 18.

242. Frances Gibb, *Costs Cover for “No Win, No Fee” Libel Cases*, *TIMES* (London), July 7, 1999, at 4. See Roger Smith, *Comment: Spinning in the Wind*, 148 *NEW L. J.* 357 (1998); *Lawyers on a Loser with No Win, No Fee Cases*, *INDEPENDENT* (Friday Review), July 10, 1998, at 20; *Bitter Pill to Take*, *GUARDIAN*, July 14, 1998, at 17; *No Win-No Fee for Libel Cases*, 142 *SOLIC. J.* 1096 (1998).

243. See Andrew Darling, *Dobson Attack “Misleading,”* *L. SOC’Y GAZETTE*, Mar. 5, 1998, at 5; *A Little Courtesy*, *L. SOC’Y GAZETTE*, May 7, 1998, at 15; *Press Round-up*, *L. SOC’Y GAZETTE*, Mar. 11, 1998, at 14; *Letters to the Editor: Cost to NHS of Negligence Litigation*, *TIMES* (London), May 7, 1998, at 23; *Lawyers Reject “Chasing” Label*, *L. SOC’Y GAZETTE*, June 16, 1998, at 3.

The Law Society approved the extension of CFAs to all civil non-matrimonial cases but opposed the withdrawal of legal aid: "Since many solicitors would find conditional fee agreements financially unviable, even where they are not responsible for paying the insurance premium, there is a risk that there will be insufficient solicitors prepared and able to offer conditional fee agreements." Clients with risky cases would have to shop around, work would be concentrated in fewer large firms, and the image of law and lawyers would suffer. CFAs would be suitable for "only the most straightforward medical negligence cases." A sample of twenty-four firms unanimously shared these views. They also felt that work accident, industrial disease, and medical negligence cases could not be tried for fees limited to 25% of damages and the financial burden of complex cases would be great, perhaps overwhelming.²⁴⁴

The Bar continued to oppose the basic principle of CFAs, which it purported "will undermine the objectivity of lawyers toward their clients and compromise their duty to the Court." The Bar's role "as an independent referral profession made up of sole practitioners" would be inconsistent with "risk and profit sharing." The inability of barristers within a risk pool to represent both sides of a dispute "would have a *dramatic* effect on the ability of the public to instruct the barrister of their choice."²⁴⁵

Advocacy groups were divided. The Consumers' Association (CA) felt the substitution of CFAs for legal aid was premature and certainly should not include medical negligence. The National Consumer Council (NCC) accepted the withdrawal of legal aid in personal injury. LAG, Justice, and the Public Law Project all opposed substituting CFAs for legal aid.²⁴⁶

When an LCD-commissioned study found that firms of all sizes could make CFAs profitable within three years, Hoon declared that "solicitors' anxiety . . . is unfounded."²⁴⁷ Condemning the report's "excessively optimistic assumptions,"²⁴⁸ the Law Society said its own re-

244. LAW SOCIETY, ENSURING JUSTICE? EXECUTIVE SUMMARY 4-5, ¶¶ 3.9, 3.47, 5.2-5 (1998); JOANNA SHAPLAND ET AL., AFFORDING CIVIL JUSTICE vi-ix (1998).

245. BAR COUNCIL, ACCESS TO JUSTICE WITH CONDITIONAL FEES ¶¶ 1.3, 1.6, 1.9, 1.11, 1.18, 5.9-23 (1998).

246. See CONSUMERS' ASSOCIATION, ACCESS TO JUSTICE WITH CONDITIONAL FEES (1998); NATIONAL CONSUMER COUNCIL, ACCESS TO JUSTICE WITH CONDITIONAL FEES (1998); LEGAL ACTION GROUP, LEGAL ACTION GROUP'S RESPONSE TO THE LORD CHANCELLOR'S DEPARTMENT'S CONSULTATION PAPER ON CONDITIONAL FEES (1998); JUSTICE, ACCESS TO JUSTICE WITH CONDITIONAL FEES (1998); PUBLIC LAW PROJECT, A RESPONSE TO "ACCESS TO JUSTICE WITH CONDITIONAL FEES" (1998).

247. *CFA Profits Forecast Challenged*, L. SOC'Y GAZETTE, Apr. 16, 1998, at 1.

248. *Id.*

search revealed difficulties “in complex cases involving questions of liability and serious injury . . . which involve considerable investigative cost and effort.”²⁴⁹ The *Gazette* dismissed the report as “PI in the sky.”²⁵⁰ Although the new APIL president refused “to concede that the legal aid debate is over,” a few weeks later he admitted, “[T]he best we can hope for is that after three or four years [the Government] will realise that what is in place is simply not working.”²⁵¹

A Bar Council-commissioned report emphasized “the impossibility of a sole practitioner doing any significant amount of CFA work because of the individual’s inability adequately to spread risk.” The Council would “vigorously resist proposals that directly or indirectly change the structure or practice of the Bar so as to endanger the survival of an independent Bar.” CFAs would “dramatically” reduce “the public’s choice of [an] advocate” and “strike at the way we work” as “a referral profession.” Bar Council vice-chairman Dan Brennan QC told a conference of five hundred, “We are not just legal technicians but in fact pursuing a vocation. We have a higher professional ethic that goes beyond mere profit.” But a Southampton chambers, whose sixteen barristers had taken fifty CFA cases, maintained “the reforms have a great future You have to become more like solicitors. You have to see the papers more often and earlier on You are really co-venturing with the client and solicitor There is no real financial risk [T]he profits on the winning cases have more than offset my losses.” Hoon claimed the proposal would save the Government nothing the first year, £69 million the second, and £100 million the third.²⁵² The Legal Aid Board, which recouped 77% of the cost of personal injury cases from defendants, gave lower estimates of £15, £57, and £88 million.²⁵³

249. Dan Bindman, *Solicitors Stand Firm on Legal Aid Reforms*, L. SOC’Y GAZETTE, Apr. 29, 1998, at 1.

250. *PI in the Sky*, L. SOC’Y GAZETTE, Apr. 16, 1998, at 14.

251. Frances Gibb, *An End to Learn as You Earn?*, TIMES (London), May 26, 1998, at 37.

252. *Personal Affairs*, L. SOC’Y GAZETTE, June 3, 1998, at 10.

253. Dan Bindman, *Westminster Watch: Government Acts on Disability and LLP Lawyers*, L. SOC’Y GAZETTE, June 17, 1998, at 10. See Frances Gibb, *Riches Await “No Win, No Fee” Firms*, TIMES (London), Apr. 1, 1998, at 6; *Hoon Gets the Lawyers Lawyer-Bashing*, 142 SOLIC. J. 291 (1998); *Lawyers Attack LCD’s “Imaginary” Survey*, 142 SOLIC. J. 340 (1998); Frances Gibb, *Bar Leaps to Defence of QCs with Attack on “False” Pay Figures*, TIMES (London), Apr. 29, 1998, at 4; *Press Round-up*, L. SOC’Y GAZETTE, May 13, 1998, at 12; *Irvine Heaps Praise on “Disappointed” Lawyers*, 142 SOLIC. J. 435 (1998); Frances Gibb, *Cab Rank Ruled Out?*, TIMES (London), May 19, 1998, at 41; Dan Bindman, *Westminster Watch: Government Gives Way Over Human Rights as Private Bill Seeks More Legal Aid Limits*, L. SOC’Y GAZETTE, June 24, 1998, at 10; Dan Brennan QC, *The Future of the Bar: At the Crossroads*, COUNSEL 14 (6.98); GWYN BEVAN ET AL., *CONTRACTING FOR LEGAL SERVICES WITH DIFFERENT COST RULES* (1998).

Shadow Attorney General Andrew Garnier QC sent the Government responses by one hundred solicitors opposing the proposals. But Hoon dismissed them because some were written before the consultation paper, and the questions were “clearly aimed at soliciting unfavourable comments.” Given the Conservative Government’s view that the cost of legal aid was “totally out of control,” it had taken Garnier an “astonishing[ly] . . . short time” to “become so used to the ways of the opposition.” Judges also remained skeptical. The Lord Chief Justice warned that the poor would end up “paying the price” if government took “a leap into the unknown” by withdrawing legal aid. Several months later, he expressed concern that the “least affluent” continued to have access. Uncertain that CFAs could “occupy the ground now occupied by legal aid,” he exhorted government to “take it slowly.”²⁵⁴ Bar Council Chair Hallett hoped that “the Government will listen to these concerns and proceed very carefully with change.” The Law Society urged the public to write their members of parliament (MPs).²⁵⁵

In July, the breadth and depth of opposition persuaded Irvine to retain legal aid until October 1999, while extending CFAs to all non-family civil cases and planning legislation to allow successful plaintiffs to recover both the uplift and the insurance premium from defendants.²⁵⁶ The *Solicitors Journal* continued to insist that “personal injury and medical negligence” were “particularly unsuitable” for conditional fees.²⁵⁷ The Law Society declared legal aid expenditure “well under control,” noting that costs per case had fallen 2.8% in non-family civil matters.²⁵⁸ LAG agreed, “[T]here is absolutely no reason to cut the scope of the civil legal aid scheme, when the amount spent on it has decreased by £15 million.”²⁵⁹

The LCD White Paper in December proposed to extend CFAs to “cases about the division of matrimonial property” and abolish legal

254. Dan Bindman, *Senior Judges Enter Political Fray*, L. SOC’Y GAZETTE, Oct. 14, 1998, at 5.

255. See *Tory Canvass of Solicitors’ Firms Fails to Impress Hoon*, 142 SOLIC. J. 484 (1998); *Conditional Fees Might Not Be Enough, Bingham Warns*, 142 SOLIC. J. 556 (1998); *Bingham Warns of Risks Posed By Legal Aid Reform*, TIMES (LONDON) 12 (1998); *Society Warns Public of “Access Denied,”* 142 SOLIC. J. 637 (1998); *Lord Bingham Warns Against Legal Aid Cuts*, LEGAL ACTION 5 (7.98).

256. See Frances Gibb, *Irvine Defers Legal Aid Plans*, TIMES (London), July 17, 1998, at 2.

257. *Irvine Ushers in a New Era for Conditional Fees*, 142 SOLIC. J. 947 (1998); *Good News on Legal Aid*, 142 SOLIC. J. 687 (1998).

258. Dan Bindman, *Statistics Undermine Attack on Legal Aid*, L. SOC’Y GAZETTE, July 22, 1998, at 1.

259. See *A Welcome Delay*, L. SOC’Y GAZETTE, July 22, 1998, at 14; *Irvine Postpones Cut Until Autumn 1999*, 142 SOLIC. J. 683 (1998); Dan Bindman, *Irvine Defeats Effort to Restrict CFA Uplift*, L. SOC’Y GAZETTE, July 29, 1998, at 10.

aid wherever CFAs were available. The press was generally favorable. The *Times* applauded the substitution of CFAs for legal aid: “[T]he burden of risk in bringing a case to court should be shared between lawyer and client. If a lawyer considers the risk of a case too great, why should the taxpayer foot the bill?” The Law Society, Bar Council, LAG, NCC, and CA wrote the *Times* warning that “people on low incomes will not be able to afford the costs of legal insurance, or to pay for the essential expert evidence.” They formed an alliance seeking to retain legal aid in personal injury and prohibit CFAs in matrimonial property disputes.²⁶⁰

The House of Lords voted 182-111 for an amendment by Lord Goodhart (Liberal Democrat) guaranteeing access to justice for those without means, disabled, or in deprived areas. Irvine dismissed it as “a gimmick and completely unrealistic.”²⁶¹ The CA head of legal affairs retorted that “access to justice is not just a gimmick . . . [s]urely treating people equally before the law is a fundamental principle of justice.” The Government dropped conditional fees in divorce disputes, but Irvine defeated attempts to preserve legal aid for personal injury cases.²⁶²

While the Bill was pending the media renewed its attacks on frivolous litigation. The *New Law Journal*, usually the profession’s champion, warned that “ambulance chasers may ride again.” It ridiculed Lennox Lewis fans who had flown to New York to see him fight Holyfield and then sued the tour organizer when Lewis lost. It asserted that the claim illustrated “the nannying principle which has been foisted on us.” It concluded that the law should not “actively encourage” threats of litigation which will be settled “not on merit but on commercial grounds.”

260. LORD CHANCELLOR’S DEPARTMENT, MODERNISING JUSTICE: THE GOVERNMENT’S PLANS FOR REFORMING LEGAL SERVICES AND THE COURTS (1998). See *Legal Aid Revamp Seeks Better Value for Money*, TIMES (London), Dec. 3, 1998, at 14; *Letters to the Editor: Revision of Legal Aid*, TIMES (London), Dec. 9, 1998, at 19; Dan Bindman, *Legal and Consumer Groups Join to Plan Campaign on Justice Bill*, L. SOC’Y GAZETTE, Jan. 13, 1999, at 5; Dan Bindman, *Justice Bill Concessions Expected*, L. SOC’Y GAZETTE, Jan. 20, 1999, at 3; *Battle Begins*, L. SOC’Y GAZETTE, Jan. 20, 1999, at 14; Michael Mathews, *Presidents Column: Indemnity and Justice*, L. SOC’Y GAZETTE, Jan. 20, 1999, at 15.

261. *Headlines Save Lord Irvine*, TIMES (London), Feb. 23, 1999, at 41.

262. See Frances Gibb, *Lawyers Attack No Win, No Fee Divorce Plans*, TIMES (London), Jan. 19, 1999, at 9; *Irvine Gives Way on Divorce Plans*, TIMES (London), Jan. 28, 1999, at 6; *Irvine Abandons Conditional Fees for Family Cases*, 143 SOLIC. J. 75 (1999); Frances Gibb, *Irvine Heads Off Clash With Judges Over Powers*, TIMES (London), Jan. 25, 1999, at 2; Dan Bindman, *Irvine Ploughs Ahead With Legal Aid Reform Despite Powers Concession*, L. SOC’Y GAZETTE, Jan. 27, 1999, at 5; *Government Concession on Family Cases*, LEGAL ACTION 4 (3.99); *New Purpose Clause*, LEGAL ACTION 5 (3.99).

Unfortunately, it has all become part and parcel of a lessening of standards in the legal profession [L]awyers who indulge in speculative actions should, in certain circumstances, have to bear the brunt of the costs of those whom they have unsuccessfully sued.²⁶³

The *Times* lampooned an American plaintiff who sued a toothbrush manufacturer and the American Dental Association for failure to warn that overuse might cause dental abrasions.²⁶⁴ This “haliototic gust of legal madness” was inspired by tobacco litigation profits.²⁶⁵ It asserted, “American litigation has reached such a hallucinatory level . . . that it might just succeed.”²⁶⁶ The paper recycled the clichéd accounts of \$4 million for the defective BMW paint job and \$2.9 million for the McDonald’s coffee spill (neglecting to mention the drastic reductions of both verdicts).²⁶⁷ It added another anecdote: \$50,000 for a “New Hampshire teenager who got hung up on a basketball net by his teeth when attempting a slam dunk.”²⁶⁸ It concluded, “The system breeds lawyers, but also a primitive assumption that any setback, from sore teeth to expensive satellite dishes, is the fault of someone else who must be punished and made to pay.”²⁶⁹ The *Times* assailed “the dreams of avarice built up by a plague of lawyers and a culture where misfortune, even self-inflicted, has become the easiest way to make a fortune.”²⁷⁰ The *Sun* attacked a law firm that advertised on the back of a hospital appointment card. Under the headline *The Sue Nation*, it blamed lawyers who “lined their pockets” for the “new greed and blame culture.” A columnist declared: “We are turning into grasping whingers and self-pitying milksops” who make “loads of money for lawyers whose silken tongues persuade any of us that we are victims.”²⁷¹

The (conservative) Centre for Policy Studies published a report declaring that the proportion of tort victims consulting lawyers would soon be greater in the United Kingdom than the United States: “An

263. See *Ambulance Chasers May Ride Again*, 149 NEW L.J. 433 (1999).

264. Ben Macintyre, *By Gum, the Law Has Gone Mad*, TIMES (London), May 15, 1999, at 22.

265. *Id.*

266. *Id.*

267. See *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). (holding that \$4 million punitive damage award, which was five hundred times that of compensatory damages, was not reasonable given minor economic harm to plaintiff). *Liebeck v. McDonald’s Restaurant, Inc.*, No. CV-93-02419, 1995 WL 360301, at *1 (D.N.M. 1994) (reducing punitive damages of \$2.7 million to \$640,000 for a woman who suffered third degree burns from hot coffee spill).

268. See Macintyre, *supra* note 264.

269. *Id.*

270. *Id.*

271. See *Press Round-up*, L. SOC’Y GAZETTE, Jan. 20, 1999, at 10; *Press Round-up*, L. SOC’Y GAZETTE, Apr. 28, 1999, at 10.

American-style compensation culture is taking over in Britain which may be costing nearly £7 billion a year in payouts and legal fees.”²⁷² The public sector was paying at least £1.8 billion and perhaps as much as £3.1 billion.²⁷³ FOIL agreed with the report’s “fundamental point.”²⁷⁴ But APIL dismissed it as “propaganda not research” and replied to the Centre’s claim that local councils had closed playgrounds: “Isn’t that fair enough? Wouldn’t people rather have playgrounds that are safe?”²⁷⁵ Law Society Vice-President Robert Sayer added: “People are entitled to exercise the rights they have been given.”²⁷⁶

In the face of these atrocity stories of alleged litigiousness, the most careful and comprehensive study of claims behavior found that

eight in ten justiciable problems are dealt with . . . without any legal proceedings being commenced, without an ombudsman being contacted or any other ADR processes being used. This is despite the fact that about three in five members of the public took some advice about trying to resolve their problem, and that of those, about half received advice from a solicitor.²⁷⁷

Benedict Birnberg warned that the British tobacco litigation showed the danger of substituting conditional fees for legal aid.

Their ‘no win, no fee’ solicitors faced expenses of £2.5 million, and in return for the companies not pursuing the litigants for costs, agreed not to take action against the two companies for ten years and against any tobacco firm for five years . . . if public funding is no longer available, which lawyer will risk bankrupting himself in future when taking on big and wealthy corporations?²⁷⁸

Hoon bizarrely denied “that the Government is withdrawing legal aid from most money claims, or that as a quid pro quo for the withdrawal of legal aid we are allowing lawyers to use conditional fees.”²⁷⁹ He stated, “We simply have to reform legal aid and the way legal services are provided if we are to make access to justice not simply a slogan but a reality.”²⁸⁰

272. *Disputes Culture Grows*, TIMES (London), Apr. 19, 1999, at 2.

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.* See Jon Robins, *Compensation Culture Attack*, L. SOC’Y GAZETTE, Apr. 21, 1999, at 4; FRANK FUREDI, *COURTING MISTRUST* (1999).

277. HAZEL GENN, *PATHS TO JUSTICE: WHAT PEOPLE THINK AND DO ABOUT GOING TO LAW* 252 (1999).

278. Benedict Birnberg, *Letters to the Editor: Withdrawal of Legal Aid*, TIMES (London), Mar. 10, 1999, at 25.

279. Geoff Hoon, *Letters to the Editor: Access to Legal Aid*, TIMES (London), Mar. 22, 1999, at 21.

280. *Id.*

APIL responded to criticisms of medical negligence actions: "Personal injury lawyers are not out to exploit the NHS, but believe NHS staff should be held to account when their negligence causes injury to patients."²⁸¹ The National Audit Office reported the NHS faced £2.8 billion in negligence claims.²⁸² Extrapolating from the Harvard Medical Practice Study, AVMA claimed that only 15,000 of the 82,000 victims of actionable NHS injuries sued each year.²⁸³

Anticipating the Commons debate, Labour MP Robert Marshall-Andrews QC thought the title of the Access to Justice Bill "has an ominous, Orwellian ring" because it actually reduced access.²⁸⁴ He feared "a serious denial of justice to the poorest" and "the largest ever departure from the principles of the welfare state."²⁸⁵ The elimination of legal aid for personal injury was "a political gesture to the perceived interests of middle England."²⁸⁶ The legal aid system was "noble" and "the most efficient of all public services."²⁸⁷ It would be replaced by "the despised stock in trade of the ambulance chasers of America."²⁸⁸ He stated,

Galaxy-driving man [the stereotypical worker] . . . requires only the factory accident, blindness or incapacity to be reduced to the weekly cat's cradle of anxious benefit He will trail the coat of his potential damages from lawyer to lawyer searching for those holding the right portfolio of risk to fund his action . . . in permanent danger from the charlatan lawyer enhancing his fees to the maximum and churning the trial system by advising reckless action or early settlement to suit his own commercial benefit.²⁸⁹

But Marshall-Andrews feared the Bill would be "dragged through the breach behind a populist assault on lawyers themselves. There are few sensations that cause MPs more pleasure than the belief that they are punishing lawyers."²⁹⁰ Irvine derided this "nonsense." Hoon could not "understand how somebody who clearly understands so little can have taken such a violent dislike" to the Bill.²⁹¹

Because the English rule makes losing parties liable for the legal costs of winners, CFAs depended on the availability of insurance.

281. Ian Walker, *Letters to the Editor: Medical Negligence*, TIMES (London), June 9, 1999, at 21.

282. Dr. Gary Slapper, *Rise of Defensive Medicine*, TIMES (London), May 25, 1999, at 39.

283. *Id.*

284. Robert Marshall-Andrews QC, *Good, Bad and Awful*, GUARDIAN, Mar. 23, 1999, at 18.

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

289. Marshall-Andrews, *supra* note 284.

290. *Id.*

291. Jon Robins, *Press Round-up*, L. SOC'Y GAZETTE, Mar. 31, 1999, at 12.

Hoon was confident the industry would offer “only pay [the premium] if you win” products.²⁹² But Abbey Legal Protection (ALP) declined to do so and warned that CFA insurance was not “totally workable.”²⁹³ It had suspended thirty firms for not insuring low risk claims (to save clients the premium) and ultimately refused to reinstate eleven. The leading personal injury firm of Leigh Day & Co, which had brought the tobacco claims, was one of those suspended, although it won almost 95% of its cases, and costs in the three it lost totaled less than £10,000.²⁹⁴ Indeed, a study the previous year found that 98% of CFAs succeeded. Amicus Legal, a rival that also required solicitors to insure *all* personal injury clients, claimed that such adverse selection was “absolutely widespread,” involving about half of the firms. Tony Girling, a recent Law Society President, attacked the requirement to insure all clients as illegally fettering solicitors’ discretion and duty to clients: He called ALP not “sustainable.” Dismissing such fears and criticisms, Irvine urged solicitors to have “as much confidence in themselves as the insurance industry has in itself.”²⁹⁵ They were “very lucky in that they are not going to be asked to put up all the up-front costs.”²⁹⁶ The *Times* was of two minds. It stated, “The insurance market could act as a surer judge of which cases are worth pursuing than lawyers who can rely on the taxpayer to fund speculative actions.” But “injured people with cases which appear difficult may find it hard to find a solicitor.”²⁹⁷

Both branches publicized cases of sympathetic victims who allegedly would have been unable to bring their claims without legal aid. The Bar described a sailor rendered quadriplegic by a training accident and an eleven-year-old requiring twenty-four hour care following a pre-natal injury.²⁹⁸ The Law Society spent £700,000 on a “Justice Denied” campaign, placing ads daily for a week in the *Times*, *Guardian*, *Mirror*, and *Evening Standard* and once in twenty-one regional papers. The vignettes included a black victim of police brutality to whom “legal aid won’t be available unless he can prove he is almost certain to win his case” and a falsely imprisoned couple who won

292. Sue Allen, *Industry Scorns Hoon’s Optimism Over No Win, No Fee Insurance*, L. Soc’y GAZETTE, Feb. 24, 1999, at 4.

293. *Id.*

294. *Deal that Could Spell the End of Legal Aid*, TIMES (London), Apr. 20, 1999, at 41.

295. *Laying Down the Law*, L. Soc’y GAZETTE, Apr. 14, 1999, at 14

296. *Id.*

297. See *Small Firms Wary of Conditional Fees*, 143 SOLIC. J. 199 (1999); *Doubts Over Future of ALP*, 143 SOLIC. J. 200 (1999); *Wolf at the Door*, TIMES (London), Apr. 26, 1999, at 21; *Mind the Gap*, TIMES (London), Apr. 26, 1999, at 23; Peter Smith, *Letters to the Editor: Insurance for No Win, No Fee Cases*, TIMES (London), May 6, 1999, at 25.

298. See *Case Awards that Made Life Worth Living*, TIMES (London), Apr. 29, 1999, at 8.

£18,000: "Without legal aid, solicitors won't be able to do this kind of work. Only the very rich will be able to pursue such cases."

Lord Irvine denounced the Society's "irresponsible scaremongering": "Your misleading and inaccurate poster campaign falls substantially beneath the standards expected of a professional organisation," and "you have failed to apologise for propagating untruths about our intentions." He further stated, "Many vulnerable people will be made to believe that they will lose their access to legal aid. This is just not true."²⁹⁹ In fact legal aid will still be available in precisely the types of cases raised by the Law Society. President Michael Mathews retorted that the Society was "campaigning to ensure the rights of the poor and vulnerable are properly protected."³⁰⁰ It resented Irvine's accusation that it was "not telling the truth."³⁰¹ "We have him on the run." Every major paper covered what the *Observer* called a "battle royal."³⁰² The paper condemned the "press campaign" depicting lawyers as "sinister bloodsuckers threatening enterprise and good government." The *Gazette* decried that the Government had "used every available media outlet to attack the Society's campaign in the most scathing, and unsuitable terms" in order to "attempt to deflect attention from [reduced access] by scoring cheap points at lawyers' expense."³⁰³

To rebut the charge of self-interest, the Law Society and Bar Council enlisted groups championing housing, the poor, children, and legal and advice services. They published a survey showing that 93% of the public thought legal aid should be a right and 85% wanted it retained for accident victims.³⁰⁴ But only a third of one hundred MPs responding to an inquiry wanted to keep legal aid for personal injury. The Society declared victory: "[T]he government has spun this Bill as an attack on lawyers. It has not worked."³⁰⁵

Such triumphalism was premature. An *Evening Standard* columnist called the Society's campaign "one of the most tasteless and ill-advised pieces of public relations in [his] memory, motivated solely by

299. *Irvine Clashes with Law Society*, TIMES (London), Apr. 26, 1999, at 12.

300. Dan Bindman, *Battle Over Legal Aid Goes Public*, L. SOC'Y GAZETTE, Apr. 28, 1999, at 1.

301. *Legal Diary*, TIMES (London), Apr. 27, 1999, at 39.

302. *Press Round-up*, L. SOC'Y GAZETTE, Apr. 28, 1999, at 10.

303. *Cheap Shots from Whitehall*, L. SOC'Y GAZETTE, Apr. 28, 1999, at 14. See Robert Verkaik, *I'll See You Out of Court*, INDEPENDENT, Apr. 27, 1999, at 14; *Let's Scare All the Lawyers*, 149 NEW L.J. 701 (1999); Michael Mathews, *President's Column: A Just Fight*, L. SOC'Y GAZETTE, May 6, 1999, at 22; Frances Gibb, *Irvine Attacks Law Society*, TIMES (London), Apr. 28, 1999, at 6.

304. *Ministers Enraged by Law Society Adverts*, 143 SOLIC. J. 403 (1999).

305. Michael Mathews, Robert Sayer, & Kamlesh Bahl, *Who's in Step?*, L. SOC'Y GAZETTE, Apr. 28, 1999, at 16.

the professional cupidity of the legal profession.” The Society was crying “crocodile tears” and had forfeited “what marginal respect” it enjoyed. A *Guardian* columnist launched a parodied LawyerAid for the reform’s “true victims:” “The solicitors need your support and they need your cash. Just a modest donation from each *Guardian* reader should be enough to put the Law Society back on its feet.” The *Times* published critical letters from three laypeople. The first letter stated: “[M]ost people who do not have any vested interest in these matters will know that a change is drastically needed in the whole culture of our litigation process where lawyers are motivated not by justice but more often just pure greed, and this is surely wrong.”³⁰⁶ The second letter stated:

Would not the interests of the individual who features in the Law Society’s expensive advertisement today be best served by a competent lawyer (confident in their own ability to gain a reward in a no-win, no-fee arrangement) rather than by someone who wanted guaranteed payment regardless of their ability to plead the case successfully? Or is the Law Society saying its members deserve to be paid regardless of their competence?³⁰⁷

The third letter stated:

[T]he Law Society . . . is worried that a litigant can only win legal aid if “he can prove he’s almost certain to win his case.” For decades lawyers have told clients that they are bound to win their case and should immediately apply for legal aid. Now it appears the Government has at last called their bluff.³⁰⁸

Soon thereafter, the *Times* published a long feature story quoting Adam Smith’s identification of professions with conspiracies in restraint of trade, adding that “Smith had not even heard of . . . [t]he solicitors’ trade union, as the Law Society is careful never to call itself.”³⁰⁹ The advertising campaign was “paid for by all of us through the taxes which go on legal aid and the fees accumulated by conveyancing.”³¹⁰ There was “scant evidence” that the Bill “will deny justice to the deserving.”³¹¹ Solicitors have “taken up all manner of unsuitable cases.”³¹² The taxpayer has been “a supporter of actions with bot-

306. Charles Holcombe, *Letters to the Editor: “Cries of Pain” at Legal Aid Reform*, *TIMES* (London), Apr. 28, 1999, at 21.

307. Gerard Cosgrove, *Letters to the Editor: “Cries of Pain” at Legal Aid Reform*, *TIMES* (London), Apr. 28, 1999, at 21.

308. Julian Nettlefold, *Letters to the Editor: “Cries of Pain” at Legal Aid Reform*, *TIMES* (London), Apr. 28, 1999, at 21.

309. Michael Gove, *Tony’s Tory on the Woolsack*, *TIMES* (London), May 4, 1999, at 20.

310. *Id.*

311. *Id.*

312. *Id.*

tomless pockets.”³¹³ The growth of legal aid “has been a conspiracy against the public for too long.”³¹⁴ It allowed solicitors “to wallpaper their offices with taxpayer’s [sic] money for years.”³¹⁵

Law Society Vice-President Robert Sayer replied that the campaign was “funded solely by [Law Society] members and not by the taxpayer.”³¹⁶ The ads “encouraged more people to stand up and publicly voice their concern that under government plans legal aid would no longer be an entitlement but a discretionary benefit.” Former President Martin Mears agreed that “for once, the fogeyish old Law Society could not be accused by its members of rolling on its back and yelping feebly in the face of governmental assault.”³¹⁷ But APIL President Ian Walker did not think the campaign “has helped the fight . . . [a]ll it has done is to provoke a rather extreme over-reaction from the Lord Chancellor and his Minister of State.”³¹⁸ Hoon had told him the Government was “absolutely immovable in terms of general principle.”³¹⁹ Nevertheless, the alliance of fourteen groups held a press conference calling for a number of changes in the Bill, including retention of legal aid for personal injury claims “for the most vulnerable people.”³²⁰

In the Commons Committee stage, the Government won a vote of 313-146 to eliminate the purpose clause inserted by the Lords guaranteeing legal aid to vulnerable groups and defeated 291-173 Marshall-Andrews’s amendment to retain legal aid in personal injury cases for the disabled, mentally ill, children, and those on income support.³²¹ Hoon insisted that victims of police violence and domestic abuse (like those featured in the Law Society advertisements) would still receive help. The Bill passed easily.³²²

313. *Id.*

314. Gove, *supra* note 309.

315. *Id.*

316. Robert Sayer, *Letters to the Editor: Legal Aid Reform*, TIMES (London), May 11, 1999, at 21.

317. Martin Mears, *Ignoring the Strong Arm of the Law*, TIMES (London), June 22, 1999, at 37.

318. *APIL President Attacks Both Sides in Advertising Row*, 143 SOLIC. J. 476, 476 (1999).

319. *New PI Strategy*, L. SOC’Y GAZETTE, May 19, 1999, at 4.

320. *Fight Begins Over Legal Aid Reform*, TIMES (London), May 27, 1999, at 8. See *Goodnight and Goodbye Ms. Bahl*, 149 NEW L.J. 667 (1999); *Access to Justice Update*, 149 NEW L.J. 702 (1999); *Alliance Calls for LCD Guarantees*, 149 NEW L.J. 794 (1999); Frances Gibb, *Hidden Cost in Advertising*, TIMES (London), May 25, 1999, at 41.

321. Nick Hilborne, *No Sign of Concessions from Hoon*, 143 SOLIC. J. 603, 603 (1999).

322. See *Labour Revolt Over Legal Aid Curbs*, GUARDIAN, June 23, 1999, at 8; *Labour Revolt Over Personal Injury Cut*, 143 SOLIC. J. 603 (1999); *Access to Justice Bill: Commons Committee Stage*, LEGAL ACTION 4 (6.99); *Labour Rejects Purpose Clause for Justice Bill*, L. SOC’Y GAZETTE, May 6, 1999, at 10.

Immediately after passage, ALP disclosed that it had been losing money on conditional fees insurance since it began offering such policies four years earlier and would have to increase premiums from £92 to £148 for road accident claims and from £155 to £315 for others; claims over £15,000 would be assessed individually.³²³ Echoing Tony Girling a year earlier, it warned that Accident Line Protect “might not survive.” Declaring this made “nonsense” of government claims that CFAs could replace legal aid, APIL sought a two-year delay. But the LCD dismissed the sums involved as “small when compared with other litigation costs.” The Law Society agreed to make success fees and insurance premiums recoverable from losing defendants, over FOIL’s strong objections.³²⁴ A study of CFAs found that clients seriously misunderstood the financial arrangements, degree of risk, and alternatives.

A working party of lawyers, academics, journalists, and judges, organized by the Society for Advanced Legal Studies, expressed concern that CFAs “raise inevitable and serious conflicts of interest between clients and lawyers, and between lawyers’ financial interests and their duties to the courts.”³²⁵ It reported “anecdotal” evidence that insurers required a 95% success rate; one solicitors’ firm was temporarily removed from the panel for undershooting its success rate by 0.3%.³²⁶ The group recommended that total costs payable by the client be limited to a percentage of damages and that lawyers (not clients) pay the cost of a defendant’s successful challenge to the uplift. The uplift should be based on “the assessment of risk in the particular case,” and blanket uplifts should be professional misconduct.³²⁷

In March 2001, the Director General of Fair Trading issued a report on “Competition in the Professions.” He found that removal of the Law Society prohibitions on “cold calling” clients and advertising comparative fees “could enable small firms to compete more effectively and would help prospective clients to evaluate relative value for money” and looked “for progress within 12 months” toward their abolition. He also observed that “restrictions on receiving a payment for referring a client . . . may be hampering . . . the development of an

323. Sue Allen, *No Win, No Fee Scheme to Double Premiums*, L. SOC’Y GAZETTE, Oct. 13, 1999, at 1.

324. Sue Allen, *Success Fee Recovery Backed*, L. SOC’Y GAZETTE, Dec. 1, 1999, at 4.

325. SOCIETY FOR ADVANCED LEGAL STUDIES, ETHICS AND LAWYER FEE ARRANGEMENTS WORKING GROUP, *THE ETHICS OF CONDITIONAL FEE ARRANGEMENTS V*, 31-32, 109-14 (2001).

326. *Id.*

327. *Id.* See STELLA YARROW & PAMELA ABRAMS, *SUMMARY: NOTHING TO LOSE: CLIENTS’ EXPERIENCES OF USING CONDITIONAL FEES* (1999); *Risky Business*, L. SOC’Y GAZETTE, Oct. 13, 1999, at 16.

online marketplace” and welcomed “indications that this restriction may be abolished.”³²⁸

VII. CONCLUSION

The shift from anathematizing to idealizing conditional fees was sudden and rapid. The Labour-appointed Royal Commission on Legal Services summarily rejected them in 1979; accepting the report in 1983, the Conservative Government concurred. In 1988, both the Government’s Civil Justice Review and the profession’s Marre Committee repeated the criticisms, while calling for further study. Just a year later, however, Lord Mackay’s Green Paper proposed conditional fees and even entertained the possibility of regulated contingent fees. Having waged war against the trade unions under the banner of *laissez faire*, the Thatcher Government may have felt that ideological consistency required similar treatment of the professions, among whom lawyers were by far the least popular. Personal injury litigation was particularly vulnerable by reason of its association with touting, non-lawyer claims adjusters, and fraud. And though no one said so (except Michael Zander), everyone knew that conditional fees might ultimately replace legal aid, reducing government expenditures and, thus, the burden on taxpayers.

The central players in this drama assumed predictable roles. In opposition, Labour sought to make maximum political capital out of the Tories’ attack on legal aid and promotion of the sleazy “American” contingent fee. Within months of gaining power, however, Labour did a complete about face. As Shadow Lord Chancellor, Irvine had denounced conditional fees as a “gimmick” and “justice on the cheap”; now on the Woolsack, he extolled them as the one and only route to universal access and used his favorite epithet “gimmick” to deride a proposal to guarantee representation to the most disadvantaged.³²⁹ The 100% uplift was no longer excessive but just right. Six months before the 1997 election, Irvine had promised to “restore legal aid to the status of a public service” that could compete for funding with health and education. Six months after the 1997 election, legal aid had become a “leviathan with a ferocious appetite.”³³⁰ Forgetting it had proudly created legal aid fifty years earlier as one of the pillars of the post-war welfare state and had consistently resisted eligibility cuts, Labour outdid the Conservatives in assailing skyrocketing costs (even

328. DIRECTOR GENERAL OF FAIR TRADING, *COMPETITION IN THE PROFESSIONS* 14 (2001).

329. See *supra* note 48 and accompanying text.

330. See *supra* note 195 and accompanying text.

when they had stopped rising). Irvine used the Law Society's spirited opposition to his program as a justification for seizing the power to strip it of the ability to represent solicitors. Promptly embracing Labour's former position, the opposition Conservatives decried the substitution of conditional fee agreements (CFAs) (which *they* had introduced) for legal aid. Both parties shamelessly played politics: Within the neo-liberal consensus, they had few differences about the roles of state and market in ensuring access to justice and equal interest in pandering to the public by promising tax cuts.

The innately conservative English legal profession expressed fear, even loathing, of the proposals. Mackay hastily repudiated contingency fees after the Green Paper (which may have been deliberately provocative so the government could appear "reasonable" by making concessions), initially proposed a clearly unworkable 10% uplift, and then took two years to raise it to an equally unworkable 20% before finally conceding 100%.³³¹ Both branches feared their status would decline to that of the despised American lawyers. Barristers, as always, were more averse to change than solicitors. CFAs would require them to abandon ancient practice arrangements: risk-spreading mechanisms were inconsistent with the fundamental tenet of solo practice; early engagement with solicitors and clients in evaluating cases threatened the Bar's superiority as a consultant profession. The "survival of an independent Bar" was at stake.³³² Yet it casually jettisoned the "cab rank" rule, a foundation of its claim to exclusive rights of audience in the higher courts, so barristers could reject CFA cases. Displaying a principled disregard for self-interest, the Bar Council even capped barristers' fees at 10% of damages (while resenting solicitors' higher cap of 25%).³³³

Long after the battle was clearly lost, the Bar continued to advance the patently false contentions that CFAs were economically unworkable and could not increase access. The *Solicitors Journal* also perversely declared that personal injury and medical negligence cases were "particularly unsuitable" for CFAs.³³⁴ The Bar made unfounded (and empirically dubious) claims that conditional fees would accelerate concentration among solicitors (although most American personal injury plaintiffs lawyers practice alone or in small firms) and propel firms into bankruptcy (although the more spectacular American dissolutions have been among large corporate firms that grew too rapidly

331. See *supra* note 67 and accompanying text.

332. See *supra* note 252 and accompanying text.

333. See *supra* note 70 and accompanying text.

334. See *supra* note 257 and accompanying text.

or slowly, and most English defaults were among conveyancing and legal aid firms). In this battle, as others, the Bar received strong support from the judiciary, composed entirely of ex-barristers whose names remained on chambers' directories and who dined daily with former colleagues in the Inns of Court. This produced the extraordinary spectacle of legal aid being defended by conservative judges and the Conservative-dominated House of Lords (which passed the Access to Justice Act by just five votes) against a Labour government determined to eliminate it!

Solicitors were torn. They fought against the loss of legal aid, yet the Law Society inconsistently opposed CFAs while simultaneously lobbying for the maximum uplift and resisting a cap on fees as a percentage of damages. Critics claimed both that conditional fees would make lawyers *overly* aggressive (in seeking business, pursuing nuisance claims, and fabricating evidence) and *insufficiently* loyal to clients (by settling early and low). Personal injury specialists in APIL, who were most intensely affected, feared erosion of their public image enough to impose more stringent restraints on member solicitation of business. Both branches fruitlessly promoted a Contingency Legal Aid Fund (CLAF) as a way of preserving their existing fee structures while spreading the costs among winning plaintiffs and losing defendants. Economists must have been astonished by the spectacle of lawyers in both branches resisting the chance to double their fees with little risk.

The media, confident that they reflected public opinion, welcomed the Government proposals. They cited opposition by lawyers (especially the Bar) as further evidence of the profession's self-interest and venality, and they regularly published atrocity stories of allegedly frivolous civil claims. The *Daily Telegraph*, generally sympathetic to the profession and suspicious of government regulation, actually called for the abolition of civil legal aid. Distrust of the profession was so high that the *Evening Standard* denounced the Law Society's campaign to retain legal aid for the disadvantaged as "one of the most tasteless and ill-advised pieces of public relations" in memory, "motivated solely by professional cupidity."³³⁵ The *Times* published readers' letters praising the Government for "calling [the] bluff" of lawyers "motivated not by justice but more often just pure greed,"³³⁶ who brazenly claimed they "deserve to be paid regardless of their competence."³³⁷

Although the insurance industry depended on risk, it seemed more anxious about the actuarial uncertainties of an untested innovation

335. See *supra* note 306 and accompanying text.

336. *Id.*

337. See *supra* note 307 and accompanying text.

than eager to capture a new market. After insisting CFAs were economically unfeasible, it soon changed its mind. It perversely opposed the elimination of legal aid for money claims, which would greatly enlarge the demand for legal insurance (perhaps fearing it would be compelled to cover weaker claims). It also strangely opposed recovery of plaintiffs' success fees and legal insurance premiums from defendants able to pass these costs on to consumers. It even assailed this proposal as an "American" system of what it inappropriately called "penalties and fines" (although the proposal simply extended the English rule on costs). Other institutional defendants, such as the National Health Service (NHS), similarly sought to limit liability. And solicitors who regularly appeared for either plaintiffs or defendants sided with their clients in the controversy (casting doubt on lawyers' pretensions to "independence").

The debate over financing was driven by strongly held views about how much and what kind of litigation there should be. The Government, the media, and the insurance industry and its legal representatives accused plaintiffs of filing "excessive" cases, some of them "frivolous," "vindictive," and "unjustified." The Centre for Policy Studies pronounced (without evidence) that tort liability already cost Britain £7 billion annually, £1.8-3.1 billion paid by the public sector.³³⁸ Commentators nostalgic for an olde England of stiff upper lips were particularly contemptuous of its pollution by an "American-style" "victim," or "greed and blame," or "compensation" culture of "grasping whingers" and "self-pitying milksops" encouraged to complain to a "nannying" state by a "plague" of "inefficient" lawyers "lin[ing] their pockets" with "loads of money."³³⁹ These lawyers were financed by "loony legal aid," encouraging them to "wallpaper their offices with taxpayers' money" and represent "foreigners" in "all manner of unsuitable cases."³⁴⁰ The insurance industry complained of being "mugged by lawyers," who were accused by the Minister of Health of "milking the NHS of millions" and by the Medical Protection Society of "putting ideas into patients' heads."³⁴¹ Lawyers were "scavengers," "vultures," "mercenaries," and "state-funded rottweilers." Conditional fees were a "cancer," "evil, corrupt, inherently immoral," and an "alien creature," which could run amok. Mackay seemed quickly persuaded by the conservative Social Market Foundation's empirically

338. See *supra* notes 272-273 and accompanying text.

339. See *supra* note 271 and accompanying text.

340. See *supra* note 143 and accompanying text.

341. See *supra* note 243 and accompanying text.

shaky “supplier-induced demand” thesis, which the Law Society dismissed as “plainly farcical.”³⁴²

Attacks on tort claims provoked retorts that lawyers were essential to access to justice and litigation necessary to enforce rights and promote safety. Law, however, lacked the appeal of medicine or education because it could not be connected to justice the way they were to health or to human capital and productivity. To defuse charges of self-interest, lawyers forged alliances with advocacy groups for the disadvantaged.

Both sides relied heavily on colorful, but unrepresentative, anecdotes. Critics of litigiousness portrayed claimants as criminals, immigrants, or wealthy, while defenders of legal rights highlighted vulnerable victims: children, women, the elderly, the severely disabled, the poor, and racial minorities. Critics pointed to the collapse of expensive cases involving tobacco, benzodiazapine, and leukemia. Defenders noted that only 15,000 out of an estimated 82,000 victims of actionable medical negligence sued each year.³⁴³ Critics maintained that legal aid unfairly advantaged plaintiffs; while defenders maintained that its withdrawal would unfairly advantage tortfeasors. None offered any evidence for their positions, such as a comparison of litigation levels, changes in litigation rates, or the relative number of false positives (unwarranted claims) and false negatives (actionable claims never made).

The two sides advanced equally confident, and ungrounded, contentions about the effect of alternative financing schemes on litigation. The Social Market Foundation asserted that legal aid bred supplier-induced demand as lawyers, guaranteed state payment, and sought out victims and encouraged them to make weak claims. Critics of legal aid wanted client contributions raised and made universal because those unwilling to pay “a very modest contribution” lacked sufficient commitment to their cause. This assumed clients were best positioned to make a cost-benefit analysis of their claims and the market was the best mechanism to allocate access to justice. Critics also wanted the merits test tightened, giving the state power to ration. Some critics of legal aid even proposed that plaintiffs’ lawyers fund personal injury litigation themselves—exactly what laws against champerty and maintenance had prohibited for centuries. Others declared that insurers, and lawyers under their influence, would do a better job of separating deserving from undeserving cases. The two sides also disagreed about

342. See *supra* notes 74-76 and accompanying text.

343. See *supra* note 283 and accompanying text.

whether legal aid or CFAs were more likely to produce fair settlements, but none of the debaters offered any evidence of the frequency with which lawyers filed weak cases or defendants paid blackmail to settle nuisance claims.

Enthusiasm for the previously despised conditional fee was intimately associated with a radical reconceptualization of lawyers. For decades, English commentators had equated contingent fees with unethical practice, declaring (naturally without data) that American lawyers were guilty of fabricating evidence, inducing witnesses to exaggerate, misrepresent, or lie, turning experts into partisans, overreaching during direct and cross examination, and making misleading legal arguments. Critics complained that contingent and conditional fees encouraged touting, aggressive advertising, solicitation, payments for referrals, and advancement of costs. (Of course, all such practices could be found under traditional fee structures, if often with the implicit understanding that nothing would be paid if the case failed.) Critics maintained that conditional fees impaired the independence of lawyers by giving them a stake in the outcome, forcing sole practitioners into financial arrangements with others, and subjecting lawyers to pressure from insurers.

Advocates of conditional fees replaced the image of the professional resisting corruption by money with that of the energetic entrepreneur. Brennan declared: "We are not just legal technicians but in fact pursuing a vocation. We have a higher professional ethic that goes beyond mere profit."³⁴⁴ But the Marre Committee believed conditional fees offered consumers more choice. And the Green Papers extolled conditional fees for encouraging "a greater level of commitment on the part of the lawyer" and "competition between lawyers as clients would be able to shop around," which "will place pressure on the solicitor to operate efficiently."³⁴⁵ The Conservative shadow Attorney General (a QC briefed by the Law Society) objected that Labour's proposals would "turn lawyers into a cross between insurers and bookmakers," rewarding the "bent and the brave."³⁴⁶ The Bar denounced a litigation market. Hoon retorted that "go-ahead lawyers, insurers and others" were "talking about a new world that is opening up and how they will meet the challenges and seize the opportunities."³⁴⁷ Rules against champerty and maintenance were "feudal."³⁴⁸

344. See *supra* note 252 and accompanying text.

345. See *supra* note 28 and accompanying text.

346. See *supra* note 221 and accompanying text.

347. See *supra* note 221 and accompanying text.

348. See *supra* note 28 and accompanying text.

A barrister waxed enthusiastic about “really co-venturing with the client and solicitor.”³⁴⁹ The media insinuated that real men risked their own money. For example, the *Times* said, “The burden of risk in bringing a case to court should be shared between the lawyer and client.”³⁵⁰ In addition, “The State should no more be picking winners in litigation than in industry.”³⁵¹ The *New Law Journal*, usually a champion of its lawyer readers, could see no difference between solicitors giving cash or a cheap watch to tenants who filed repair claims and “the gifts offered by insurance companies for us to take out policies.”³⁵² Law was nothing more than a business.

Critics of conditional fees delighted in recounting the hackneyed stories of the McDonald’s coffee spill and BMW paint job (omitting the drastic judicial reduction of damages). They embroidered myths about “legal madness,”³⁵³ and the “hallucinatory level”³⁵⁴ of litigation in America, which had become the “Sue Nation,”³⁵⁵ where “dreams of avarice”³⁵⁶ expressed the “primitive assumption” that someone should pay, making “misfortune, even self-inflicted . . . the easiest way to a fortune.”³⁵⁷ They accused ambulance chasers of displaying a “ghoulish alertness”³⁵⁸ to file “blackmailing actions”³⁵⁹ and warned that such “grave abuses”³⁶⁰ would become “an inevitable feature” in England.³⁶¹ They were appalled by the alacrity with which American lawyers reached Bhopal and (closer to home) Lockerbie, although surely the real horror was the tragedies themselves. Fear of tort liability allegedly created perverse incentives for inefficient behavior: “[E]very doctor is now obliged to take a course in law before picking up a scalpel.”³⁶² Product liability claims were (falsely) blamed for the bankruptcy of small plane manufacturers. William Rees-Mogg found it “hard to describe how much harm” the American legal system did “and how little good.”³⁶³ It was “one of the reasons why American

349. See *supra* note 252 and accompanying text.

350. See *supra* note 260 and accompanying text.

351. See *supra* note 228 and accompanying text.

352. See *supra* note 120 and accompanying text.

353. See *supra* note 265 and accompanying text.

354. See *supra* note 266 and accompanying text.

355. See *supra* note 271 and accompanying text.

356. See *supra* note 270 and accompanying text.

357. See *supra* note 269 and accompanying text.

358. See *supra* note 3 and accompanying text.

359. See *supra* note 2 and accompanying text.

360. See *supra* note 53 and accompanying text.

361. See *supra* note 51 and accompanying text.

362. See *supra* note 26 and accompanying text.

363. See *supra* note 34 and accompanying text.

industry has ceased to be competitive with the Japanese.”³⁶⁴ (Less than a decade later some attribute the continued stagnation of Japan’s economy to its relative *scarcity* of lawyers.) America’s alleged litigiousness, actually no greater than that of the United Kingdom, was blamed on such irrelevant factors as treble damages in private anti-trust actions (rarely brought), punitive damages (rarely awarded), and class actions (which actually *reduce* the number of lawsuits). An English expat warned his compatriots against putting an “American hamburger stand into the middle of St Paul’s Cathedral,” although England permitted far more aggressive legal marketing techniques than the United States.³⁶⁵ An MP speaking on behalf of the Law Society warned against the “charlatan lawyer . . . churning the trial system” or improperly urging “early settlement.”³⁶⁶

Arguments for conditional fees drew upon suspicion of regulation and enthusiasm for the market. Early commentators criticized restrictive practices, including the Bar’s refusal to allow barristers to lower fees in settled cases and the Law Society’s refusal to allow solicitors to forgo fees in unsuccessful cases. Market advocates believed that more fee options and greater competition among lawyers would benefit consumers. But the unavoidable asymmetries between lawyers and clients made regulation indispensable. Critics warned that CFAs would motivate lawyers to cherry pick the strongest claims and reject those with uncertain liability or low damages. Critics blamed CFAs for nuisance claims, but legal aid was more likely to encourage these. CFAs were said to under-compensate plaintiffs until the success fee and insurance premium were made recoverable from losing defendants, but legally aided clients also had to pay contributions. Critics claimed CFAs would over-reward lawyers because the market would not proportion uplift to risk, which research suggested lawyers systematically overestimated. At the same time, the Bar warned that CFAs would pay barristers too little, diverting the better lawyers (no longer constrained by the cab rank rule) to insurance defense. Critics said CFAs would encourage lawyers to accept quick, inadequate settlements. Indeed, one of the Government’s explicit goals was to foster settlement, but CFAs also eliminated the perverse incentive of legal aid, which acted to prolong and complicate cases unnecessarily. Legal expense insurance added further distortions. Insurers were even more risk averse than solicitors, because they earned no uplift from successful cases. Unlike the Government, their gatekeeper role was secret and

364. See *supra* note 35 and accompanying text.

365. See *supra* note 45 and accompanying text.

366. See *supra* note 289 and accompanying text.

immune from political pressure. At the same time, solicitors had an incentive to withhold the least risky cases from the insurance pool, although such adverse selection increased the cost of insurance (exactly the government's argument against a CLAF). Insurers responded by expelling solicitors whose success rates fell below a very high threshold (said to be 95%) and requiring solicitors to insure all personal injury cases.³⁶⁷

The appropriate mix of legal aid and CFAs to fund civil litigation raised numerous questions. Each source had its own rationing mechanism. For legal aid, this was the merits test (administered by a panel of lawyers overseen by the Legal Aid Board); the Labour Government wanted to raise this to 75%, thereby rejecting all the claims between 50% and 75%, which a rational victim would have brought.³⁶⁸ Insurers rationed CFAs both by setting premiums and by suspending solicitors who took excessively risky cases or withheld the least risky from the insurance pool. Incomplete evidence suggested that they demanded a 95% success rate, excluding even more cases a rational victim would bring. (This may explain why the Forum of Insurance Lawyers, representing defendants, favored conditional fees.) Lawyers' willingness to accept cases was influenced by reimbursement rates under legal aid and by risk, amount of work required, uplift, and damages under CFAs. Each financial source had a different effect on lawyer strategy. Legal aid offered an incentive to delay, complicate, and litigate; CFAs offered an incentive to settle quickly.

Each also allocated risk differently. The English rule on costs made losing parties pay the legal fees of both sides. Legal aid shifted the cost of losing plaintiffs to the government, slightly offset by client contributions, and made winning defendants bear their own costs. CFAs offered several possibilities. Government contemplated making lawyers pay for legal insurance premiums, presumably passing on the cost to winning plaintiffs and losing defendants. Instead, winning plaintiffs initially absorbed the cost of both insurance and success fees out of their damages; eventually, these were made recoverable from losing defendants. Losing plaintiffs bore the cost of insurance premiums, while their lawyers went unpaid but were compensated by the uplift when they won. Government proposed that only successful plaintiffs pay premiums, but insurers refused.

The two financing schemes offered access to different groups: legal aid to those beneath a means test ceiling (with progressively gradu-

367. See *supra* note 325-326 and accompanying text.

368. See *supra* note 195-198 and accompanying text.

ated contributions above a floor); and CFAs to those who could afford insurance premiums (i.e., all but the poor). Disregarding this obviously complementary relationship, Hoon made the patently false claim that *eliminating* legal aid would mean “for the first time this century, perhaps ever, access to justice for all in this country will be a reality” and “not simply a slogan.”³⁶⁹ He was virtually parroting the laissez faire orthodoxy of *The Economist*, which declared that “every citizen in the land would, at last, have a fair opportunity to have a case heard in the nation’s courts.”³⁷⁰ Although proponents characterized conditional fees as *enhancing* consumer choice, instead, it became the client’s *only* choice. The Orwellian-named Access to Justice Act represented a neo-liberal abandonment of welfare state redistribution, which enhanced equality, for a market mechanism reproducing inequality. Indeed, this may have been why both the media and public welcomed it.

Finally, the two schemes had different costs. The minimal burden of representing personal injury victims (after 77% of costs were recovered from defendants, who lost the vast majority of cases)³⁷¹ was only 2.5% of the legal aid budget.³⁷² Although Hoon initially made a wild boast that his proposal would save up to £800 million,³⁷³ the Legal Action Group (LAG) director Roger Smith thought the amount would be a tenth that large,³⁷⁴ and two government agencies estimated savings at about £170 million over three years. It was not clear why the Government felt this was worth another bitter fight with the legal profession, unless it cynically calculated that maligning legal aid lawyers, whom it consistently misrepresented as “fat cats,” increased its popularity with the electorate. CFAs simply transferred the transaction costs from the Government (and taxpayers) to insurance companies (and consumers), unless the “efficiency” gains of private enterprise over government bureaucracies exceeded insurers’ profits. The fact that the major insurer nearly doubled its premiums after operating at a loss for several years (at an annual cost of £18 million—approximately that of legally aided claims) suggests that CFAs were considerably more expensive, although the costs were hidden and private, rather than visible and public.

369. See *supra* note 207 and accompanying text.

370. See *supra* note 82 and accompanying text.

371. See *supra* note 253 and accompanying text.

372. See *supra* note 235 and accompanying text.

373. See *supra* note 190 and accompanying text.

374. See *supra* note 215 and accompanying text.

Little more than a decade ago, no English observer could have believed that a Labour Government would replace a crucial element of the welfare state it so proudly created after World War II with a device embarrassingly similar to the despised American contingent fee. It will be important to analyze the impact of this transformation on which victims are represented, in which cases, against which defendants, using which strategies, with what quality and outcomes, and at what cost.

