The fracturing legal profession: the case of plaintiffs’ personal injury lawyers

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Introduction

The legal profession is a popular icon in American and other Western cultures. As such it is often associated with what is wrong or problematic about society. Political leaders and commentators who draw on the profession’s iconic value typically present the profession as a unitary body that stands in opposition to many of the interests of the broader society. So, for example, the profession is often attacked for simply defending the interests of lawyers at the cost of the larger society. In his 2000 campaign for the presidency of the United States, George W. Bush took aim at the profession as was clearly stated in the Republican Party Platform:

Reform of the legal profession is an essential part of court reform. Today’s litigation practices make a mockery of justice, hinder our country’s competitiveness in the world market and, far worse, erode the public’s trust in the entire judicial process.

Avarice among many plaintiffs’ lawyers has clogged our civil courts, drastically changed the practice of medicine, and costs American companies and consumers more than $150 billion a year.

We fully support the role of the courts in vindicating the rights of individuals and organizations, but we want to require higher standards for trial lawyers within federal jurisdiction, much as Governor Bush has already done in Texas—and as we encourage other States to do within their own legal codes. To achieve that goal, we will strengthen the federal rules of civil procedure to increase penalties for frivolous suits and impose a ‘Three Strikes, You’re Out’ rule on attorneys who repeatedly file such suits.

To protect clients against unscrupulous lawyers, we will enact a Clients’ Bill of Rights for all federal courts, requiring attorneys to disclose both the range of their fees and their ethical obligation to charge reasonable fees and allowing those fees to be challenged in federal courts. Because private
lawyers should not unreasonably profit at public expense, we will prohibit federal agencies from paying contingency fees and encourage states to do so as well. Even more important, we will require attorneys to return to the people any excessive fees they gain under contract to States or municipalities.

Attacks on lawyers are by no means limited to the United States. As the financing of most civil litigation involving individuals in England has shifted away from legal aid toward a form of a no-win, no-pay fee, solicitors representing claimants in England have often come under attack, either for milking the legal aid system or for being greedy in the ‘uplift’ received for handling cases on a conditional fee basis:

On 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 solicitor, 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.3

While the target is often lawyers representing plaintiffs or claimants, these attacks typically refer to lawyers rather than specifically to ‘trial’ lawyers or ‘plaintiffs’ solicitors.4 Similarly, Marc Galanter’s analysis of lawyer jokes and humour often places lawyers in particular settings, but the jokes seldom recognise differences among lawyers.5

While the public does not typically draw a lot of distinctions among groups within the legal profession, other than sometimes between ‘my’ lawyer who is trying to help me versus the ‘other guy’s’ lawyer who is trying to screw me,6 scholars have long recognised that the legal profession is far from a politically or economically united interest. Recognised lines of stratification include social class and ethnic origins as well as clientele.

This essay suggests that, at least in the United States and probably in England as well, it is time to recognise a new line of stratification, one that exists within what in the US is traditionally labelled the ‘plaintiffs’ bar’. While there have always been important lines of differentiation among those lawyers who handle personal injury claims for injury victims, a variety of developments have created very significant lines of cleavage that either did not previously exist or that could be submerged within a broader common interest of the plaintiffs’ bar. Some of these developments include, in the US:

- changes in the nature of some areas of personal injury litigation, particularly the development of mass torts;
- the spectacular successes of some types of litigation (e.g. some of the cases brought against tobacco companies);

and in England,

- changes in the allocation of responsibility for litigation (the granting of rights of audience in higher courts to some solicitors);
• massive changes to the rules concerning the financing of litigation (the legalisation of simple no-win, no-pay fees by the Court of Appeal in *Thai Trading Company v. Taylor* [1998] QB781, the development of the conditional fee which includes an ‘uplift’ beyond the ‘usual’ fee as allowed by the Courts and Legal Services Act 1990, the availability of after-the-event legal expense insurance, making ‘uplift’ and premiums for after-the-event legal expense insurance recoverable from the defendant by the Access to Justice Act 1999, and the demise of legal aid for a number of important areas of civil litigation); and

• the rise of highly visible mass-market claims management companies and claims brokering services such as Claims Direct, Accident Assist, and Claimline.

While developments differ in the US and England, some of the implications may be similar. Thus where in the past prominent American plaintiffs’ lawyers such as Joe Jamail or Phil Corboy might have been admired for their success in litigating high profile and high fee cases, today American lawyers such as Stanley Chesley, Joe Rice, Walter Gauthier, Robert Habush, Michael Ciresi, and John O’Quinn are becoming controversial figures within the American plaintiffs’ bar as well as beyond it. While there may not be equivalents to these highly visible American lawyers in England, recent developments in England have produced controversial players such as the co-founders of Claims Direct, Colin Poole and Tony Sullivan, who made huge profits when Claims Direct went public in 2000, with one major newspaper reportedly going so far as to label them as ‘bandits’.

Cleavage and stratification within the legal profession

*Traditional approaches*

As noted above, while much of the public may view the legal profession as a unitary group, thoughtful observers and scholars have long recognised that the profession is highly fractured. In fact, the legal profession as a single entity is a relatively recent development. Within England, where there is still a formal distinction between solicitors and barristers, those two branches of the profession emerged through an evolutionary process of merger among a wide variety of more specialised groups including attorneys, scriveners, conveyancers, King’s Counsel, sergeants-at-law, and proctors as well as barristers and solicitors. While merger and evolution within the English legal profession left only the two branches at the beginning of the nineteenth century, solicitors and barristers remained highly distinct in terms of both class origins and training. The solicitor’s branch was a means of attaining professional status for the sons of the merchant and middle class, largely through a system of apprenticeship. In contrast the barrister’s branch was an occupational outlet for the sons of the gentry (particularly second and later sons who would not inherit the family estate); as such, preparation typically involved first obtaining a classical education through ‘public’ schools and degrees from elite universities, followed by a period of gentlemanly association at the Inns of Court where the barrister-to-be
attended dinners to listen to barristers tell them about the art of advocacy. While today, entry into both branches is typically through a university education in law, elements of these distinctions, particularly the class-related aspects, remain.

In the United States, class and ethnicity have been a central line of cleavage within the profession at least since the latter part of the nineteenth century, and some argue as early as the first part of that century. In the first 50-75 years after independence from England, the legal profession was represented by the image of lawyers like Abraham Lincoln who learned the law through personal study and apprenticeship. By the latter part of the century the growth of the corporation, and the demands for legal services it created, led to growing distinctions between lawyers who served the corporate interests and those who worked on behalf of individuals and small businesses. This coincided with the growth of university-based legal education, the organisation of the American Bar Association, and pressures to regularise legal training and control entry into the profession. During this period, one saw developments such as the case-method of legal education and the beginnings of the ‘Cravath’ system for corporate law firms. In some ways the growing rift within the profession between those lawyers who championed the interests of workers and the common man, and those who derived their income from corporations was epitomised by the controversy over Louis Brandeis’ nomination to become the first Jew to sit on the United States Supreme Court. Brandeis represented the rise of the immigrant class, although Brandeis in fact was from a German-Jewish family that had immigrated to the United States before the Civil War. Until well after World War II, it was common to explicitly exclude Jews (and other undesirables) from the ‘white shoe’ corporate firms, and even today these firms are much more likely to draw from the ranks of white Anglo-Saxon Protestants than is the profession as a whole.

The most extensive research on stratification in the American legal profession is the work by Heinz, Laumann and Nelson. Heinz and Laumann’s seminal study of the Chicago bar as of 1975 showed that among lawyers one could identify two distinct ‘hemispheres’, one oriented toward serving large corporate clients (and their wealthy owners and executives) and one oriented to ‘personal services’ (or ‘personal plight’) including the needs of small family businesses. Lawyers in the corporate-services hemisphere were more likely to come from ‘establishment’ backgrounds while those in the personal services sector came more from ethnic, working class, and lower middle class backgrounds. The former were likely to have attended elite and near elite law schools while the latter were likely to have attended state university law schools or law schools associated with other local universities. A replication of the 1975 study 20 years later shows that the basic cleavage persists. Perhaps the most important change is that the corporate hemisphere is consuming an increasing share of legal effort; where corporate services comprised just over half of legal effort in 1975, by 1995 it consumed about two thirds of lawyer effort.

A second change noted by Heinz and his colleagues relates to another line of distinction among lawyers, and this is fields of specialisation. The Cravath system marked the beginning of specialisation within the American bar as we have come to know it today. Heinz and his colleagues report that substantive fields are more
distinct in the 1990s than they were in the 1970s, an indicator of ever-increasing substantive specialisation among lawyers. There is a fairly clear pecking order among specialisations, with fields most closely linked to work for large corporations (securities, tax, anti-trust, patents) at the top and fields like divorce and landlord-tenant at the bottom.

Traditional perspectives on stratification in the plaintiffs’ bar

While most research on stratification in the legal profession has distinguished among lawyers from different types of backgrounds or serving different types of clients, a number of scholars have recognised that there are distinctions to be drawn within the plaintiffs’ bar itself. While not specifically focused on the plaintiffs’ bar per se, Carlin’s study of solo practitioners devoted significant attention to lawyers handling personal injury claims. Carlin distinguishes between what he calls the ‘lower’ and ‘upper’ segments of the solo bar handling personal injury cases. The former drew his (most, if not all, of the lawyers in Carlin’s study were male) clients largely from a neighbourhood or ethnic base, and was most likely to handle personal injury cases in the context of a general practice; lawyers in this lower segment were very concerned about competition for clients. In contrast, the ‘upper’ segments of the solo, personal injury bar tended to be specialists who frequently drew clients through ‘suppliers’, including referrals from other lawyers; these lawyers were much less concerned about competition for clients. Ross’ study of the settlement of automobile accident claims also found a clear distinction between lawyers who handled these cases as part of a general practice and those who specialised in negligence cases; in his analysis of claims outcome, Ross found that specialists (which he defined in terms of membership in the predecessor to the Association of Trial Lawyers of America) obtained recoveries that on average were considerably higher than those obtained by other lawyers. Rosenthal, in his study of representation in personal injury claims, again found specialists to be more likely (67%) to obtain a ‘good’ result than non-specialists (47%).

More recent studies of the plaintiffs’ bar have emphasised the role of ‘markets’ and link markets to specialisation. During the period that Carlin, Ross and Rosenthal were writing, the market for legal representation for injured persons was essentially local. While there were some occasional exceptions, they came through networks of lawyer referrals, typically for fairly rare and high profile cases such as those arising out of air crash disasters. Advertising and modern communication has changed that. Today, markets for legal services are bounded largely by limitations on legal practice (i.e. admission to state bars). Regional (within state) or statewide marketing by plaintiffs’ lawyers is now common-place. Furthermore, certain types of plaintiffs’ litigation, most prominently medical malpractice, have come to require increasing levels of substantive expertise combined with significant resources for experts and trial preparation. The result is that the market for personal injury representation now is tiered along several dimensions: geography, size of claim, and
substantive expertise. This is most clearly explicated in Van Hoy’s study of the plaintiffs’ bar in Indiana.\textsuperscript{32} Van Hoy distinguishes among lawyers who are local versus statewide in their client base, lawyers who handle special areas such as medical malpractice and products liability (who tend to be statewide in their practices), and lawyers who limit their practices to ‘significant’ injuries (which he defines as those involving damages of $15,000 or more) versus those whose practices are primarily composed of ‘moderate value injuries’. While moderate value, general injury practices tend to be local in their geographic markets, this is by no means necessarily the case, particularly for high volume firms that rely on extensive advertising. Many of the patterns reported by Van Hoy are also described by Daniels and Martin in their study of the Texas plaintiffs’ bar.\textsuperscript{33}

Research on the plaintiffs’ bar in England is more limited. The leading work on this subject is Hazel Genn’s study of personal injury litigation in the mid-1980s.\textsuperscript{34} As with much of the American research, the key line of demarcation Genn finds is between the specialist and the generalist. She finds that the former are more effective, although some of this is due to the way that individual clients’ cases are financed and whether the client has to be concerned about the downside risk of having to pay the other side’s costs. The combination of expertise and risk-protected clients allow solicitors to obtain settlements that are higher than that which are typically obtained by non-specialists, particularly non-specialists representing self-financed clients. While specialisation has existed for some time, the visibility of a specialist claimants’ bar handling personal injury was relatively invisible to the larger public. The rough English equivalent of the Association of Trial Lawyers of America (ATLA), the Association of Personal Injury Lawyers (APIL) was not founded until 1990.

The changed nature of the plaintiffs’ bar

The dimensions of market, specialisation, substantial versus moderate injuries only begin to capture the nature of the stratification that has emerged in the American plaintiffs’ bar over the last decade. While the vast majority of claims handled by lawyers are well below six figures, to say nothing of seven or eight figures, in the United States today one is no longer surprised to see cases involving nine, ten, or 11, or in the case of the tobacco litigation, 12 figures: $206,000,000,000 in the national tobacco settlement, or $145,000,000,000 in punitive damages awarded by a jury in a Florida class action jury verdict. While these are extreme, they do epitomise the gap that has developed between routine and even very significant litigation (e.g. ‘bad baby’ medical malpractice cases with eight figure settlements or verdicts) and extraordinary cases. What is significant here is that the biggest are getting so big as to represent a different world entirely, different even from what Hensler has characterised in terms of multiple worlds of tort litigation;\textsuperscript{35} rather than ‘multiple worlds’ or litigation, perhaps we need to start thinking about ‘multiple solar systems’ or ‘multiple universes’.

In its 2001 “survey of the largest jury verdicts”, the \textit{National Law Journal} (19 February 2001) listed 16 verdicts, not including the Florida tobacco case,
ranging from a low of $25 million to $122.59 million (mean = $58 million). Data reported by Jury Verdict Research shows that something like 12% of personal injury verdicts exceed $1 million, and that percentage is growing; importantly JVR also finds that the median personal injury verdict has been stable over the last 7 years at $50,000. This is particularly noteworthy given that JVR's database tends to be slanted toward larger cases because of their manner of data collection. Research has shown clearly that verdicts reported in the press are skewed toward the larger cases; most people realise that typical jury verdicts are in the thousands rather than the millions. However, the visibility of large, and now occasionally astronomical, verdicts highlights that there is something different going on in at least some types of litigation.

**Patterns of change**

One of the first ways that change in structure of the plaintiffs’ bar is evident is the growth of bureaucratic structures in a small segment of the bar. This growth is actually happening at both the bottom and the top of the case universe. At the bottom, there are now firms designed specifically to process high volumes of low value cases. Van Hoy describes one such firm in Indiana:

Greg operates a mass advertising, mass production personal injury practice that is focused almost completely on the firm’s home market. The firm employs “about seven secretaries that we train ourselves” who screen the 75-100 calls the firm receives each day from the local television, radio, and telephone book advertising. The secretaries, who are supervised by Greg and one associate attorney, are responsible for working most case files until settlement.

My own interviews with plaintiffs’ lawyers in Wisconsin involved contact with lawyers in several such firms; one of those lawyers described how his practice operated by tracing a hypothetical case:

After our initial interview you would go into an interview room. Now I turn it over to a paralegal. She takes the background, she fills out a bunch of forms, finds out all the doctors, where you live, medical background, medical authorisations, has you sign a retainer agreement, wage authorisations, takes pictures of injuries, and then the file goes into our, for lack of a better term, assembly line. We put it into a fairly sophisticated assembly line. Someone takes the interview; it gets entered into a computer system. It starts then going to various different places. If a case needs investigation, the file including the interview and police report would go to one of the investigators who would immediately try to get statements and interviews, and pin down the facts. We would set it up; we would confirm the insurance. All the people working on the case at this point are non-lawyers . . . the interviewer is a non-lawyer, investigator is a non-lawyer, and everyone is given the following mission: number one, look at the case, look
at the case, look at the case. What risk do we take, what is the assessment of the risk. These persons are trained to look at the files because lawyers will take cases because they want numbers, they want to say I’m a big rainmaker, I’ve got a lot of cases. So, the paralegals are trained to go to our managing partner and say this is a case I’m involved in and I don’t think it looks like a good liability situation, I don’t think it looks like a good risk, I don’t think there’s insurance, I don’t think there’s a mode of recovery here, the person doesn’t appear that injured, and they are told to bring to us and review with us what they think of the case. They know cases as well as lawyers know cases. And we find that clients will tell them [paralegals] stuff that they won’t tell us [lawyers].

While these firms are bureaucratic in how they operate, they typically involve a small number of lawyers. Galanter has attributed the small size of plaintiffs’ firms to a combination of factors, including the personality of lawyers who are very successful as contingency fee litigators (“the ‘alpha male’ characteristics of many of the most successful plaintiffs’ lawyers”) and the nature of the capital involved in plaintiffs’ firms which typically has been highly dependent on the name of an individual lawyer.42

In England, the rise of conditional fees has produced some changes that have elements of bureaucratisation. Conditional fees, combined with the increased size of cases that must be filed in the County Courts, have accelerated the development of specialist firms with offices distributed around the country as well as networks of individual firms tied together by referral systems (e.g. ABC Direct, Accident Compensation Helpline).43 These organisations and networks require rules and policies that are bureaucratic in nature.

However, at the top end of the spectrum in the US, one is beginning to see the development of larger and more highly bureaucratised firms.44 One aspect of change is the shift from the individual charisma of the star litigator toward what is more equivalent to ‘brand names’ tied to a firm rather than to an individual lawyer.45 A firm that has accomplished this in Wisconsin is Habush, Habush, Davis, and Rottier (HHDR). HHDR, with ten offices around Wisconsin and over 30 attorneys,46 relies upon a large advertising budget, along with a well-earned reputation for successful representation (one of the cases listed among the National Law Journal’s top verdicts of 2000 was a $99 million dollar award arising from a construction accident at a new baseball park in Milwaukee—Robert Habush was the lawyer who won that award). However, while most lawyer advertising focuses on the lawyer almost always showing pictures of the lawyers, HHDR’s tends to focus on satisfied clients showing pictures of smiling families. HHDR uses a combination of television, radio, and Yellow Pages advertising (it has an advertisement on the back cover of the telephone book in most larger towns and cities in Wisconsin), and a significant fraction of the Wisconsin population will spontaneously name the Habush firm as a law firm to contact in case of accidental injury.47 In fact, a report about a baseball park construction accident that resulted in three deaths related that one of the victims of the accident had specifically told his wife some days before his death, in a premonition
of what was to happen, “If anything ever happens to me, I want you to call Bob Habush”. HHDR’s prominence in Wisconsin is further reflected in the fact that it was one of three firms representing the State of Wisconsin in the tobacco litigation that led to the $206 billion multi-state settlement (earning a third or more of the resulting $75 million fee).

Law firms that litigate huge, complex cases, such as tobacco, breast implant, and the like, require staff and financial resources beyond the scale of the traditional plaintiffs’ firms. It is no accident that HHDR was involved in the tobacco litigation; it could bankroll the litigation, and even absorb a loss if that had been the end result. It is also no accident that around the country it was firms such as Robins, Kaplan, Miller & Ciresi in Minnesota, or Ness, Motley, Loadholt, Richardson & Poole in South Carolina, that have played lead roles in the tobacco litigation. These firms combine experience in complex litigation with extensive resources, both in terms of people and money, to handle such cases and their attendant risks. For example, Ness Motley built its resources through its major role in the asbestos litigation that burst onto the national scene 20 years ago (an area that continues to be a major part of the firm’s practice). Today Ness Motley is a firm of over 70 lawyers, plus a sizeable support staff, with a practice of national proportions (while the firm has offices in only four states, lawyers in the firm are licensed to practice in 20 states). Robins Kaplan, a firm of 200 lawyers (and 300 support personnel) with offices in five states and Washington, DC, is somewhat different in that its practice goes well beyond personal injury to include business litigation and other areas of business practice; nonetheless, Robins Kaplan lists 66 lawyers as practicing in the areas of personal injury, medical malpractice, mass torts, and catastrophe litigation. Unlike Ness Motley, Robbins Kaplan has long approached plaintiffs’ practice in a way that more resembles a corporate firm than the traditional small plaintiffs’ firm headed by a single star litigator. At the time that name partner Michael Ciresi was handling hundreds of Dalkon Shield and Copper-7 IUD cases in the 1980s, the firm already had 200 lawyers, and the importance of these resources was beginning to be recognised; in the words of another lawyer then handling large numbers of Copper-7 cases, “Robins, Kaplan is a big firm, and it had the resources to stand toe to toe with Searle [the manufacturer of the Copper-7 IUD] … They were able to make the case. We weren’t”. The importance of the resources of a firm like Robins Kaplan was captured in a news article about the hiring by the firm of a top litigator, Jim Fetterly, who specialises in catastrophe cases (e.g. the MGM Grand fire in Las Vegas). Fetterly closed his own ten-attorney boutique firm because the resources required to represent clients had begun to exceed the firm’s ability to finance cases.

While in some ways Robins Kaplan is unique, in others it is not. There is an increasing number of firms that specialise in litigation in a way that includes both large-scale commercial litigation (typically done on an hourly basis) and high visibility plaintiffs’ class action done on a contingency basis. Such firms include Boies, Schiller & Flexner (founded in 1997) with 100 lawyers offices in ten cities and Susman Godfrey with 50+ lawyers headquartered in Houston. In addition there are firms that specialise in plaintiffs’ class action such as Lieff, Cabraser,
Heimann & Bernstein (45 lawyers based in San Francisco) and Waite, Schneider, Bayless & Chesley (16 lawyers based in Cincinnati).

Central to all of these firms is resources: the ability to bring to bear substantial legal effort and to deal with the cost of extended, monster-scale litigation. These are repeat players\textsuperscript{54} in the truest sense of the word. Like the traditional repeat players on the defence, they are in the game for the long term, and have the resources to sustain cases that until recently would have bankrupted virtually any lawyer or plaintiffs’ law firm.\textsuperscript{55} Where in the past, one might start with the assumption that the defendant had the resources to swamp the plaintiff, these firms have accumulated sufficient capital through major victories in cases such as asbestos, tobacco, Dalkon Shield, etc. that it may well be the plaintiff that is in the stronger resource position. Having greater resources does not insure victory, as evident by the lack of success to date in recent cases brought against the gun industry by lawyers bankrolled with tobacco winnings,\textsuperscript{56} but losing is something these firms can now afford.

The situation in England is both similar and different. There are few firms that are able to undertake large-scale, complex personal injury cases on a conditional fee basis. Under the old legal aid system, it was possible to obtain funding from legal aid for strong cases. Under fee shifting, firms could be expected to be paid either by the opposing party if they recovered or by legal aid if they were not successful.\textsuperscript{57} In fact, some of the pressure to move away from legal aid toward conditional fees was probably a result of some spectacular losses on legally aided cases. One example involved claims concerning a drug called benzodiazapine,\textsuperscript{58} in which legal aid paid out £40 million in legal fees and costs before withdrawing its support without the case ever getting to trial.\textsuperscript{59}

There are some large plaintiffs’ specialist firms in England. One example is Leigh, Day & Co. This firm has 60 lawyers in offices in London and Manchester and handles a wide range of cases including complex injury cases and multi-party actions.\textsuperscript{60} Leigh Day was the lead firm in an unsuccessful action seeking compensation for childhood leukaemia sufferers in and around Sellafield where a nuclear waste reprocessing plant has resulted in a high level of radioactive contamination.\textsuperscript{61} The firm has also been an key player in tobacco litigation in Britain,\textsuperscript{62} continuing on with the case on a conditional fee basis after legal aid was withdrawn;\textsuperscript{63} when the firm eventually dropped the litigation after losing on a key legal point, it was out £2 million in fees.\textsuperscript{64}

Donns, a personal injury firm based in Manchester, has 240 staff. It handles a range of case types, including multi-party actions. Its website claims that it handles more than 10,000 claims per year (200 per week). That works out to about 40 new cases per business day (five per hour in an 8-hour day).\textsuperscript{65} While the bulk of the practice involves routine cases, the firm also handles clinical negligence and catastrophe cases. Large caseloads can create problems in managing relationships with large numbers of clients. To deal with this, Donns has been innovative in its use of technology, providing electronic access by clients to files containing information on the progress of their claims.

One effort to mobilise resources for large cases was a network of 21 law firms that called itself the Allied Lawyers Response Team. The goal of this group was to
identify potential areas of major litigation, research those areas, and mobilise to represent clients with potential claims. However, attempts to visit its website (www.alertuk.com) produced responses that the site could not be found, and a search of the Current News (CURNWS) file on Lexis/Nexis which covers news reports of the last 2 years located no stories for ‘Allied Lawyers Response Team’.  

One of the founders of Allied Lawyers Response Team, Graham Ross, confirmed that the effort had been abandoned.

One issue that will be answered in the coming years is the impact of possible limits on the uplift that firms can charge. As originally created, the uplift came out of the client’s recovery, much like the American contingency fee which was paid from the recovery; to protect the client, the uplift was typically limited to no more than 25% of the recovery. The Access to Justice Act 1999 made the uplift (as well as the premium for ‘after the event’ insurance taken out to cover the downside risk of having to pay the defendant’s legal fees) recoverable from the defendant; this eliminated the ‘protect the client’ rationale of the 25% cap. It will take several years before the courts have clarified exactly what is reasonable as a recoverable ‘party and party’ cost. In the first major decision on this issue, Callery v. Gray, the Court of Appeal indicated that the uplift for ‘modest road accident cases’ should be on the order of 20%; it also suggested a two stage approach so that cases that settle within 90 days (the ‘protocol period’) of the insurer being notified of a claim should have a reduced uplift, perhaps as low as 5%, with cases not settling quickly having uplifts of as much as 100%.

One possible impact of Callery is to enhance further the position of high volume firms that are able to routinise work in a way that relies on lower paid staff. That is, while a 20% uplift might well cover the costs associated with cases yielding no recovery, it probably does relatively little for a firm’s profitability unless the firm can reduce its actual costs while handling substantial numbers of cases with an uplift at that level. This situation is likely to advantage the firms that are able to design efficient procedures and systems for processing cases (see below for further discussion of the opportunities for efficiency associated with high case volumes).

**The impact of the divisions within the plaintiffs’ bar**

**The US situation**

While competition is nothing new within the plaintiffs’ bar, it now functions in a way that differs from competition of the past. The plaintiffs’ firms with large bankrolls have a capability to dominate the market for large high profit cases in a way that was not previously possible. The largest of the bankrolls has accrued to the firms that took on the tobacco cases, and they are now beginning to use those bankrolls to open new avenues of litigation. Firms with efficient systems for handling high volumes of potential clients and claims may be able to attract a significant share of the market for even smaller, more routine cases. In England, the ‘uplift’ that is available for cases handled on conditional fees may allow firms that are able to exploit this opportunity to take on more challenging and risky cases, or to capitalise on an infrastructure that allows for extremely efficient handling of such cases.
Traditionally, within a highly competitive market for clients and cases, the plaintiffs' bar has nonetheless seen itself as sharing common interests: the need for sympathetic judges, the need for rules that favour plaintiffs, restrictions on client solicitation and advertising, and general opposition to various aspects of tort reform such as limitations on the contingent fee, limitations on various types of damages (punitive damages, non-economic damages), changes to the American rule on fee shifting, eliminating joint and several liability, and statutes of repose. The general assumption is that if a change might hurt some plaintiffs' lawyers' clients and thus hurt those lawyers themselves, it must be bad for all plaintiffs and all plaintiffs' lawyers. In fact, what is in the interest of one segment of the plaintiffs' bar need not be in the interest of other segments.

Direct mailers versus the brand names. One clear example of conflict with the plaintiffs’ bar has to do with the limitations on client solicitation. Those law firms that have invested heavily in advertising and have through that medium established themselves as a ‘brand name’, have a strong incentive to try to limit the ability of other lawyers to reach out to clients via direct mail contacts in the wake of an injury producing accident. The ‘brand name’ firms want potential clients to think of them first; receiving a mail solicitation from another firm has a significant likelihood of diverting the potential client to the mailer when otherwise the potential client might have called the ‘brand name’ firm.

It may well be the case that the kinds of clients that the brand name firm wants differ from those of the direct mailer. That is, the brand name and direct mailer firms may not actually be in all that much competition for clients most of the time; however, the brand name wants first crack. Moreover, the kinds of clients the brand name wants (i.e. significant damages, fairly clear liability) are more likely to want to see a lawyer before considering a settlement than is the case for many if not most of the direct mailer’s potential client; those clients, with relatively lesser damages and less clear liability, are prime targets for quick and early settlements offered by a seemingly friendly and sympathetic insurance adjuster. Most limitations on direct mail bar such contacts by attorneys for 30 days after an injury producing accident; this is prime time for insurance adjusters to contact injury victims and to try and reach a quick, and almost certainly advantageous from the insurer’s perspective, settlement. The injury victims most likely to settle at this stage are the bread and butter clients of the direct mailers, but may be of much less importance to the brand name firms. Of course, the brand name firms will express their opposition to direct mail not in terms of their own interests, but rather in terms of professional dignity or concerns about ‘ambulance chasing’.

Those handling speculative litigation versus those handling routine litigation. More important, particularly in terms of understanding the impact of litigation such as the tobacco litigation on the plaintiffs’ bar, is the distinction between high risk, high return, speculative litigation, and low risk, low return, routine litigation. The lawyers who undertook the current round of tobacco cases were incurring significant risks: no one had ever prevailed in personal injury cases against the tobacco industry
where the injury arose from the long-term exposure to tobacco products; in fact, it was not until this year (2001) that any individual had actually collected money as compensation for an injury caused by their own smoking.\textsuperscript{75} The lawyers who undertook these suits combined a kind of risk-sharing pool and significant firm-specific resources to make the litigation viable; states turned to contingency fee arrangements as a way of eliminating their own risks of having to devote substantial dollars or other resources to the litigation. The tobacco industry poured many millions of dollars into legal fees and expert consultant fees to fight the cases brought against them. Imagine what difference it might have made if the states or their contingency fee lawyers had been at risk of having to pay a significant portion of the tobacco industry’s legal expenses? It is hard to imagine that the litigation could have gone forward under that circumstance.

\textit{Fee shifting.} Generally it is assumed that fee shifting rules are bad for plaintiffs; I have made that argument in my own writing.\textsuperscript{76} However, the little systematic empirical research that has been done on the subject\textsuperscript{77} in the US context of contingency fees shows that the picture is more complex. While fee shifting does create disincentives to litigate, particularly for persons in the middle class who have assets that could be used to satisfy a fee award, it also strengthens the hand of the plaintiff who has a good case by effectively increasing the value of the case by some portion of the plaintiff’s lawyer’s fees; this is particularly true for the impecunious plaintiff who would not be able to pay any of the defendant’s legal costs if the defendant won the case. One can imagine fee shifting regimes that include insurance for plaintiffs against the down side risk of losing and having to pay the other side’s fee.\textsuperscript{78} For example, imagine a system where the lawyer agreed to bear the plaintiffs’ downside risk in return for receiving the ‘shifted’ fees in addition to the commission fee that Americans call a contingency fee.\textsuperscript{79} Research shows that most contingency fee lawyers decline most relatively risky cases, and that the key risk contingency fee practitioners face is in terms of how much of their time a case will require and how much of a fee they will actually receive.\textsuperscript{80} A significant percentage of cases are declined because the amount that the lawyer estimates can be recovered will not yield a fee sufficient to cover the lawyer’s time.\textsuperscript{81} If the lawyer’s fee were to include both the percentage of the recovery and an amount paid by the defendant, the calculation changes. While the defendant’s ability to recover some of its costs from the plaintiff or the plaintiff’s lawyer if a case results in a verdict for the defendant will lead some defendants to litigate some cases that are strong for the defence rather than settle,\textsuperscript{82} it is also true that the ability to recover costs from the defendant if the case goes to trial will make a plaintiffs’ lawyer’s threat to go to trial more credible in a modest case. Furthermore, the additional fee will mean that many valid cases that today are not economical for a lawyer to handle will have the potential of producing a satisfactory fee. Some of these cases may be quite significant, and relatively clear on liability, but simply uneconomical given current defendant practices (e.g. modest but reasonably clear cut medical malpractice cases).

A lawyer-financed fee shifting system would be very problematic for lawyers
who handle more speculative cases of the type that produces fees in eight figures or more. This litigation is speculative simply because of the risks involved. Settlements occur in part because the defendants perceive the potential cost of losing as being so high that they make a considered business judgment about the potential costs (of losing and of litigating) and the risks associated with them. Plaintiffs’ lawyers can pursue these cases because what they put at risk is considerably less than would be true under a fee-shifting system where they covered their clients’ downside risk. For the lawyers handling high risk cases, a fee shifting regime such as I describe would make such cases much less attractive.

Damage caps. The American plaintiffs’ bar has been united in its opposition to caps on punitive damages and other types of non-economic damages (e.g. compensation for pain and suffering). Typical caps that have been proposed in the United States have been on the order of $250,000 and/or some link to the amount of economic loss. For most lawyers handling personal injury cases, these caps are essentially irrelevant. For such caps to be relevant, the injuries must be such that the lawyer can justify either a large punitive award or a large pain and suffering award. Punitive awards in personal injury cases are quite uncommon, and even when they do occur they tend toward the modest side; in 1992, less than 1% of plaintiff verdicts in tort cases in 45 large counties produced punitive awards exceeding $250,000, and in 1996 the figure was considerably less than 1%.

As for pain and suffering awards, it is economic damages that drive most awards and settlements, combined with a source of compensation. The most common source of compensation is a defendant’s insurance policy, and most of these have damage limits well below the caps that have been discussed, particularly in routine road accident cases. The problem for most lawyers most of the time is making a case for significant pain and suffering damages. One could readily imagine reforms in non-economic damages that would actually work to the advantage of most lawyers: place some limits at the upper end, but permit plaintiffs’ lawyers to prove pain and suffering through per diem arguments; alternatively, set some statutory guideline for non-economic damages in routine cases that is indexed to the cost of living. The idea that some mechanism other than juries would be used to set non-economic damages is an anathema to most plaintiffs’ lawyers, but for those working with low end, routine injuries something other than the ‘shadow of the jury’ might be more effective and actually produce increased compensation for injuries where pain is a major component. While there is an assumption that juries are more favourable to plaintiffs than are judges, empirical evidence is beginning to mount that calls that assumption into question.

These arguments may even apply for major medical malpractice cases. The cases in which the largest damages are paid are not driven by pain and suffering but by the high cost of long-term intensive medical care. The standard line about punitive damages and non-economic damages is that it is the threat of huge awards that convince defendants and insurers to make realistic settlement offers for economic damages. However, in most types of cases, the threat of massive economic damages associated with long-term medical care is more than enough to convince a defendant
to settle. Again, the assumption that juries are the key to reasonable compensation may not be true in medical malpractice cases. In 1996 the median medical malpractice award by a judge was $454,000 compared to about half that awarded ($254,000) by a jury, similarly, judges found for plaintiffs in 38% of medical malpractice trials compared to juries which found for plaintiffs in only 23% of trials.

Given that the controversy over damage caps is often tied to ‘out of control juries’, one might imagine a situation where a compromise over damage caps might be that such caps would apply only to jury trials requested by plaintiffs. That is, if a plaintiff agreed to have a case tried to a judge, then no cap would apply. A defendant could insist on a jury trial, but in doing so, the defendant would waive any damage caps.

This type of compromise might be very attractive to lawyers handling large cases other than what I have termed ‘speculative’ cases. It is the most speculative cases where the uncertainty about extreme jury verdicts is most important, and the type of limitation I described would be most threatening to those lawyers.

The situation in England and Wales

The impacts in England and Wales are somewhat different because of both the absence of percentage-based contingency fees which have the potential of extremely high profits, and the general situation of funding civil litigation has been in great flux over the last decade. The changes among plaintiffs’ lawyers in England and Wales reflect the scramble among firms to be in a good position to profit from the shifting rules concerning litigation funding. There clearly are some opportunities, and those opportunities will have important implications for plaintiffs’ lawyers.

High volume practices. As noted above, a number of high volume firms are coming to prominence in the handling of routine injury cases. These firms are able to create procedures that increase the profitability of such work. While the firms are more limited in terms of their fee structures than are their American counterparts, the structure of fees in England does make possible significant profits. The key feature, in addition to the ‘uplift’ available upon success with conditional fees, is that ‘costs’ are based often on activities completed rather than time. Many of these activities (preparing routine letters, reviewing accident reports, examining medical records) can be done by ‘non-qualified staff’ (i.e. non-lawyers); the fees collectible for such activities do not depend on who does them. The result is that solicitors with high case volumes can train staff to do this work and collect fees as if the work was being done by lawyers. The resulting profits go to the firm partners.

A second advantage that can accrue to the high volume firm has to do with insuring the client against the risk of having to pay the other side’s costs should the action be unsuccessful. The various insurance programmes that were created at the time that conditional fees came into play have encountered problems, and premiums have more than doubled for at least some of the programs. Undoubtedly this is in no small part a result of the moral hazard problem whereby a lawyer may take on a riskier portfolio of cases than the insurer had planned on. High volume
firms are in a position to have a better knowledge of the likelihood of success across their case portfolios. This may put them at an advantage in two ways. First, they may be able to bargain with those providing the insurance for their clients to obtain reduced prices conditional on their pattern of success staying more or less the same. Second, practice rules permitting, the high volume firms would be able to self-insure their own clients. Exactly what case volume would be necessary to make self-insurance practical is not clear, but given that some firms are handling 10,000 cases per year with success rates of up to 95%, those firms would be in a position to do so.92

**Competition from non-lawyers.** The legal profession in England has enjoyed a much more limited monopoly on the services it can provide than has the profession in the United States. In the area of recovering compensation for persons suffering personal injury, the profession’s monopoly extends only to representation in courts of law. In negotiations directly with insurers, or in proceedings before administrative tribunals, there are no formal bars to non-lawyers providing representation on a fee-for-service basis.93 Non-lawyer ‘loss assessors’ or ‘claims assessors’ have been providing such representation in England for many years,94 and have typically charged on a percentage of recovery basis, 15–25% or more.95 Historically, many of the non-lawyers were former claims inspectors for insurance companies handling the same types of cases that they dealt with on behalf of injured parties.96 For many years, it was considered a violation of professional ethics for solicitors to accept cases referred to them by claims assessors;97 in practice, however, claims assessors did make referrals to solicitors if they were unable to resolve a meritorious claim.98

In addition to traditional claims assessors, a number of claims management companies have come into existence; these companies rely upon a combination of solicitors who accept referrals and non-lawyer claims processors. The best known, some would say the most notorious, is Claims Direct. Claims Direct has existed for 20–25 years, but only came into prominence with the adoption of conditional fees, which served to make more visible and legitimate the ‘no win, no pay’ service offered by these companies. Prior to 1998 or 1999, claims management companies would charge on the basis of a percentage of recovery. In the wake of the adoption of conditional fees, they adopted other fee structures, often tied to ‘after the event’ legal expense insurance policies, the cost of which was made recoverable from the opposing insurer by the Access to Justice Act 1999.

Claims management companies have posed serious competitive risks to traditional solicitors’ firms.99 The claims companies have engaged in massive advertising programs,100 and have adopted outreach policies such as meeting in clients homes and other client-friendly procedures. At its peak Claims Direct was reported to be opening 5,000 new claims per month,101 which would translate into 60,000 claims per year. Estimates of the total number of claims in England range from between 300 and 350 thousand102 to twice that number.103 This would mean that Claims Direct was handling, at least for a brief period of time, on the order of at least 10%, and as many as 20% of the injury claims in England. Not surprisingly, some solicitors decided to accept cases from Claims Direct while others either do not accept cases or have not been offered cases; this has lead to tension among solicitors,
and raises questions of standards of professional conduct about how cases are obtained and who controls the conduct of cases.

In significant part because of the competitive threat, the Lord Chancellor’s Department was urged to undertake a study of non-lawyers providing claims services, either as claims assessors or through claims management companies. The resulting report was able to obtain little hard data, and ended up doing little more than listing the issues that concern members of the legal profession.\textsuperscript{104}

A recent Court of Appeal decision, \textit{Callery v. Gray} (2001), may affect the viability of the business model of claims management firms. These firms have typically charged premiums for after-the-event legal insurance substantially above that charged by most solicitors (£1,340 for basic cases compared to £314-714 by firms associated with the Law Society-endorsed referral network, Accident Line Direct). Clients do not actually pay the premium, only the interest on a loan arranged by firms like Claims Direct; the claims management firm counts on being able to recover the cost of the insurance premium under the terms of the Access to Justice Act 1999. Defendant insurers have balked at the cost of the premium for which claims management companies have been seeking recompense.\textsuperscript{105} \textit{Callery v. Gray} has set some very rough guidelines for the level of ‘uplift’ and insurance premiums that can be recovered by successful claimants; however, it does allow defendant insurers to challenge the reasonableness of the premium for after event insurance, specifically commenting that “On the face of it, adoption of [a £997 premium policy] would be hard to justify”.\textsuperscript{106}

\textit{Handling high risk cases.} Certain types of cases involve considerably more risk to the firms and the clients than do others. One such area would be clinical negligence; another would be newer issues of products liability. These cases are almost never undefended, and take large amounts of solicitor time. Under legal aid, the lawyers could be confident of payment and the clients were protected from the costs risk should the case prove unsuccessful. This situation made such cases particularly problematic for privately-financed clients who had to worry about having to pay both their own lawyer and the other side’s costs. Without legal aid, these cases are much riskier for the lawyer and for the client; the cost of insurance against the risk of losing is also much higher.

A firm that is able to combine a specialist high risk practice with a high volume routine litigation practice should be in a position to better handle the risk associated with the high risk practice. In a real sense, such a firm is engaged in a kind of portfolio diversification.\textsuperscript{107} Provided that the potential returns from the high risk practice are sufficient, a high volume low risk practice operated in parallel would smooth out the unevenness that is inevitable in handling high risk cases. Furthermore, this would probably increase the number of high risk cases a firm could handle which would in turn increase their expertise and allow them to make better judgments on the likelihood of success of their cases.

\textit{Broader impacts on the personal services sector.} The traditional personal services sector of the English legal profession focused on a set of fairly specific areas: property
transfers (conveyancing), succession (preparing wills and handling estates), divorce, criminal cases, and personal injury cases. In many firms, particularly in smaller communities, it was common for young lawyers to start out in practice handling relatively minor matters for younger clients. The lawyer’s work would then ‘mature’ as the clients matured; later work would include conveyancing when the client got around to purchasing a house, preparing a will when the client married and had children, perhaps a divorce or a personal injury case, and possibly minor criminal matters if the client’s children got into trouble with the police. For most firms personal injury was a minor part of the work, often a relatively unprofitable component because fees tended to be what could be recovered from the insurer as party and party costs. Many lawyers handled personal injury cases primarily as a convenience to the clients who provided them with more profitable conveyancing work.

The end of the conveyancing monopoly brought on by the Thatcher Government in the mid-1980s led to a sharp drop in the fees that lawyers were able to charge for conveyancing. The result was a significant change in the economics of small firm, personal services sector practice. Interestingly, while it took over a decade, it was soon after the end of the conveyancing monopoly that the first signs that solicitors might support some form of no-win, no-pay fee for personal services work began to appear. While there was significant continued opposition to no-win, no-pay fees during the period the idea was debated, the changed economic circumstances of the personal services sector of the solicitors profession created a need to find a potentially profitable area of work to replace the highly diminished proceeds from conveyancing.

The ‘uplift’ allowed under the conditional fee represents an opportunity for solicitors to increase the profitability of contentious work. However, the mindset necessary for undertaking work on a no-win, no-pay basis requires a break from the way that many personal sector solicitors have traditionally viewed what they do. Moreover, the relationship between volume and profit potential creates the types of tensions detailed above. The first systematic study of conditional fees found a relationship between size of firms and the likelihood of undertaking conditional fee work. One interpretation of this pattern is that the smaller firms did not feel able to undertake the risks associated with the conditional fee.

If conditional fee work does prove to be quite profitable, firms will begin to think about ways of increasing their client base. While advertising is one means of doing this, another way could be to offer other services as ‘loss leaders’ to establish relationships with clients. Thus, while historically, the handling of personal injury work might have been a loss leader to attract (and/or retain) clients who in the future might provide more lucrative conveyancing and succession work, it may be that conveyancing will become the loss leader to create relationships with potential conditional fee clients. To the degree that the amount of recovery is a factor in the fees that can be charged, home-owning clients may well be among the more attractive conditional fee clients because their wage loss is likely to be higher.

This analysis suggests that there is a potential for significant tension between traditional general practice ‘family’ solicitors serving the needs of individuals and
those practitioners who move aggressively to capitalise on the potential opportunities afforded by the conditional fee. Most importantly, that tension may reflect not only an increasing concentration of personal injury work, but also a loss of other types of traditional work as successful personal injury firms seek to build up their client base. The result may highly marginalise a significant segment of solicitors’ firms.

Conclusion

The practice of law is “a changin’” to paraphrase Bob Dylan. The economic structures that have governed the work of the personal services sector are shifting in significant ways in both the United States and England. While the underlying causes of change differ in the two countries—shifts in government policy regarding litigation funding and solicitor compensation in England versus the growth of high volume and/or high profit firms in the United States—it is the economics of personal services practice that has been transformed. The common result may be increasing stratification and conflict among lawyers who previously shared a set of interests because of the common plight of their client base.

The changes discussed above are occurring in the context of broader changes, both political and technological. Where in England, the tradition was long to discourage recourse to the courts, increased attentiveness to issues of human rights is changing that so that use of the courts is both more legitimate and more broadly based. In the words of Lord Millett, in Thai Trading Co. v. Taylor ([1998] QB781, 786):

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

Furthermore, the disincentives of the indemnity rule, while perhaps overstated given the actual practice of that rule in England, are being ameliorated by after-the-event insurance. The combination of these developments, in concert with outreach efforts of solicitors and claims management companies, is changing the litigation/compensation picture in England. While in England even modest doubts about liability tended to discourage claims, that will probably be changing. In the United States, the long campaign by business interests to reform the civil justice system has borne some results. While these results may not be in large-scale legal changes to the tort system, there is evidence of shifting attitudes among potential jurors. While juries are still willing to render large awards in cases of significant corporate malfeasance, they are becoming more sceptical of the bread-and-butter cases of the tort system; as suggested in the discussion above, one result of this is that defendants now prefer juries in certain types of cases where before the jury was the plaintiff’s friend.

All of these changes are occurring at the same time as information technology is radically changing the practice of law. As noted above, one firm in England has
gone so far as to provide its personal injury clients with electronic access to their case files so that the client is able to monitor the case’s progress. The ability to capitalise on technology is dependent on resources to implement and maintain the technological tools. That same technology serves to broaden the access to knowledge and information so that what was once the preserve of the professional is more broadly available. It is not hard to imagine an ‘expert system’ designed to assist a potential claimant to gather information necessary to file a claim, to then evaluate that information against a database of prior claims, and then to advise the user on the likely range of recovery given. Even before such systems are available to end users, they almost certainly will become available to competitors to legal professionals. Most likely this has been the approach of the claims management companies in England. How long can legal professionals resist such competition in the United States? The ‘post-professional’ age being produced by developments such as these presents a challenge to the legal profession, one that will force change and aggravate the divisions I have suggested in this essay.

Notes

[1] This is a revision of a paper prepared for the 2001 W.G. Hart Workshop, Institute for Advanced Legal Studies (London), 26–28 June. It expands on themes discussed in a paper prepared for the Seventh Annual Clifford Symposium on Tort Law and Social Policy, DePaul University College of Law, 5–6 April 2001, published as: From litigators of ordinary cases to litigators of extraordinary cases: stratification of the plaintiffs’ bar in the twenty-first century (2001) 51(2) DePaul Law Review 219–240. I would like to thank the anonymous reviewers of this paper for many very helpful comments and suggestions.


[4] Bush-senior was more likely to single out the plaintiffs’ bar: “You know I’m not anti-lawyer, but let me tell you something. We spend up to $200 billion every year on direct costs to lawyers. Japan doesn’t spend this; Germany doesn’t. And I want to take on those ambulance chasers and reform our lawsuit-happy legal system. You see, when doctors are afraid to practice, when people are afraid to help somebody along the highway, when coaches are afraid to coach Little League, my message is this: as a nation, we must sue each other less and care for each other more”. From a campaign speech delivered in Holland, MI, 12 October 1992; found at http://bushlibrary.tamu.edu/papers/1992/92101203.html (visited 9 March 2001).


[22] In another paper based on the 1995 Chicago data, Sandefur and Heinz suggest that the market for legal services is becoming more competitive, and may be moving toward a “winner-take-all market”. See R.L. Sandefur & J.P. Heinz, *Winner-Take-All Markets for Legal Services and Lawyers’ Job Satisfaction* (1999).

[23] For lawyers with substantial practice in some areas, the substantive area is the primary basis of distinction rather than client base; in those areas, it is common for lawyers to have both business and non-business clients (although the business clients may be of the family business variety).


Ibid., p. 193.


30. H. Genn, *Hard Bargaining: Out of Court Settlement in Personal Injury Actions* (Oxford, Oxford University Press, 1988). I should probably note, however, that my own analysis of plaintiffs’ success in cases actually filed in court, albeit in a study not limited to personal injury cases or personal plight cases more generally, did not show any impact of lawyer specialisation or lawyer experience; specialisation did improve success from the viewpoint of the contingency fee lawyer [see H.M. Kritzer, *The Justice Broker: Lawyers and Ordinary Litigation* (New York, Oxford University Press, 1990), pp. 135-161]; however, in another study which did include contingent fee lawyers in one setting, I did find that specialisation was a very significant factor in effectiveness [see H.M. Kritzer, *Legal Advocacy: Lawyers and Nonlawyers at Work* (Ann Arbor, University of Michigan Press, 1998b)].


34. Genn, op. cit.


37. A study of jury verdicts in 45 of the 75 largest counties in the US for 1996 found the median verdict in tort cases to be $31,000, and that only 5.8% of the tort verdicts exceeded $1 million [C.J. DeFrances & M.F.X. Litras, *Civil Trial Cases and Verdicts in Large Counties, 1996* (Washington, Bureau of Justice Statistics, US Department of Justice, 1999), p. 7]; these figures actually constitute a decline from 1992, when the comparable figures for the same counties were $51,000 and 7.8% [C.J. DeFrances, S.K. Smith, P.A. Langan, B.J. Ostrom, D.B. Rottman & J.A. Goerdt, *Civil Jury Cases and Verdicts in Large Counties* (Washington, DC, Bureau of Justice Statistics, US Department of Justice, 1995), p. 5].


39. In a recent national survey [H.M. Kritzer, Public perceptions of civil trial verdicts (2001) 85(September-October) *Judicature* 78-82, I asked respondents “In addition to deciding guilt and innocence in criminal trials, juries are used in the US to determine liability and damages in noncriminal cases. From what you know, can you give me an estimate of the typical or average amount of damages that juries award in a personal injury case of the type that arises from auto accidents, injuries from defective products, medical negligence and the like?” About 42% replied that they could not give an estimate; of the 58% of respondents who did give an estimate, the median was $100,000; 23.8% of the respondents who could provide an estimate gave a figure of $1 million or more. Eight respondents gave a figure exceeding $100 million—which seems absurd until you recall that the survey was in the field around the time of the Florida tobacco verdict!

40. Van Hoy (1999), op. cit.

41. More details on this study can be found in several articles based on the research. H.M. Kritzer, Contingency fee lawyers as gatekeepers in the civil justice system (1997) 81 *Judicature* 22-29; H.M. Kritzer, Contingent-fee lawyers and their clients: settlement expectations, settlement realities, and issues of control in the lawyer-client relationship (1998a) 23 *Law & Social Inquiry* 795-822; H.M. Kritzer, The wages of risk: the returns of contingency fee legal practice (1998c)


[43] In England, one need not be a lawyer to negotiate settlement of personal injury claims with an insurer on behalf of a fee-paying client [H. Jacob, E. Blankenburg, H.M. Kritzer, D.M. Provine & J. Sanders, Courts, Law and Politics in Comparative Perspective (New Haven, Yale University Press, 1996), p. 142]. As a result, one also finds organisations of non-lawyers, such as Claims Direct, competing with lawyers. The competition of non-lawyers is not new, but has become much more prominent since the adoption of conditional fees [Law Society, Memorandum on Maintenance and Champerty: Claims Assessors and Contingency Fees (London, Law Society, 1970)]; I discuss the implications of this competition later in this essay.


[45] The ‘brand name’ phenomenon is by no means unique to the plaintiffs’ bar; see C.N. Hines, A legal eagle (his ad claims): with mascots and slogans, lawyers turn to advertising, New York Times, 15 November 2001, pp. C1, C4.


[57] Legal aid also had the incidental function of protecting the client from the downside risk of having to pay the defendants costs; this function has been taken over by a system of insurance, but how well that works for large, complex cases is not clear.


Legal aid paid out £8 million in fees and costs; see Oliver Tickwell, The price of justice, The Guardian, 10 December 1997, p. 4.


Both of these searches were done on 25 May 2001; a search of the Lexis/Nexis ARCNWS file (stories more then 2 years old) produced 16 hits.

Email to author, 20 November 2001.


There is another interesting implication of conditional fees which might actually reduce the number of cases handled by solicitors. Insurers in England have long resisted claims from unrepresented clients; one study from the early 1980s showed that only 8% of personal injury claimants who recovered damages were unrepresented [D. Harris, M. Maclean, H. Genn, S. Lloyd-Bostock, P. Penn, P. Corfield & Y. Brittan, Compensation and Support for Illness and Injury (Oxford, Oxford University Press, 1984), p. 81]; more recent research suggests that by the late 1990s this had not changed in any significant way [H. Genn, Paths to Justice: What People Do and Think About Going to Law (Oxford, Hart Publishing, 1999), p. 162]. Prior to conditional fees (and the insurance now routinely available for the claimants downside risk), insurers probably counted on significant numbers of claims not being pursued because the potential claimant did not want to face the risks of having to pay costs, both the claimants and the insurers, if the claim was unsuccessful; most clients no longer have to face that risk. This may make it more attractive to the insurers to try to settle before a solicitor becomes involved, particularly now that the insurer has to cover the uplift associated with the conditional fee.


A. Lipson, California Enacts Prejudgment Interest: A Case Study of Legislative Action (Santa Monica, CA, Rand Institute for Civil Justice, 1984).

Insurance adjusters are also under pressure to close claims quickly simply as a measure of productivity (see Ross, op. cit., pp. 59–61).


These kinds of insurance schemes have been developed in England over the last half dozen years in conjunction with the introduction of the ‘conditional fee’ form of contingency fee; the most widely used, Accident Line Protect was developed in conjunction with the Law Society.

Several scholars have considered a system such as this: see J.J. Donohue, III, The effects of fee shifting on the settlement rate: theoretical observations on costs, conflicts, and contingency fees (1991) 54(3) Law and Contemporary Problems 195–222; B.L. Smith, Three attorney fee-shifting rules and contingency fees; their impact on settlement incentives (1992) 90 Michigan Law Review


[82] A defendant will be less inclined to settle a case that it strongly believes it can win simply for its nuisance value (i.e. some fraction of the cost of defence) if the defendant can recover some or all of its costs.

[83] An excellent example of this kind of decision can be seen in the litigation over Bendectin. Ultimately Merrill Dow prevailed but the company sought to avoid the costs of litigation and the potential costs of losing by agreeing to a $180 million settlement. The litigation proceeded because that class certification that was central to that settlement was thrown out by the Sixth Circuit Court of Appeals; see J. Sanders, Bendectin on Trial: A Study of Mass Tort Litigation (Ann Arbor, University of Michigan Press, 1998).

[84] DeFrances et al., op. cit., p. 8.

[86] K.M. Clermont & T. Eisenberg, Trial by jury or judge: transcending empiricism (1992) 77 Cornell Law Review 1124–1177; DeFrances & Litras, op. cit.; T. Eisenberg, N. Lafountain, B. Ostman, D. Rottman & M.T. Wells, Juries, judges, and punitive damages: an empirical study (2002) 87(3) Cornell Law Review 743–782; W. Glaberson, A study's verdict: jury awards are not out of control, New York Times, 6 August 2001, p. A9. I have been told by a number of plaintiffs’ lawyers that, in today’s climate, they would just as soon try a routine soft tissue injury case to a judge than to a jury. In fact, 1996 verdict data from 45 of the 75 largest counties in the US show that in automobile tort cases, the median award by judges was higher ($200,000) than the median award by juries ($180,000), and that judges’ verdicts were more likely to exceed $250,000 (12.2% versus 8.4%) or $1 million (7.1% versus 3.0%) than were juries (DeFrances & Litras, op. cit., p. 8).

[87] Ibid., p. 8.
[88] Ibid., p. 6.

[89] I am not proposing this as a system change. There are a variety of side impacts that would need to be examined, the most obvious of which would be the increased role of judges, and the implications of that for judicial selection processes.


[92] This firm’s success rate may not be atypical; one study which obtained data on over 100 cases from 34 firms found a ‘success rate’ of 93% (N. Rose, Call for return of 25% cap on CFAs, The Gazette, 2000, p. 1), and it may be the case that after the event insurers such as Accident Line Protect actually require solicitors to achieve success rates of 95% or higher (M. Day & F. Patterson, Deal that could spell the end of legal aid, Times, 20 April 1999). Note that ‘success’ here refers simply to obtaining some recovery versus no recovery; success is in fact very relative, and must consider both whether any recovery was obtained and what that recovery was relative to some standard or expectation [Kritzer (1990), op. cit.; Kritzer (1998c), op. cit.].


[94] Law Society, op. cit.
[96] Ibid.
[97] Law Society, op. cit.
[98] I base this on interviews I conducted with claims assessors and insurance company officials in 1987.


[100] At one time, at least, Claims Direct reported direct client solicitation through up to 500,000 cold calls per year (Winnett, op. cit.).

[101] This figure has dropped, both due to competition from other claims management companies and


[108] This discussion draws upon interviews I conducted with solicitors in several smaller communities in northern England during 1986-87.


[116] I do not mean to suggest that there have been no legal changes, but rather that the large-scale changes advocated by proponents of reform have not occurred broadly in the United States.

