

# From Barretrie, Maintenance and Champerty to Litigation Funding

## Harbour Litigation Funding First Annual Lecture

### Lord Neuberger, President of The Supreme Court

Gray's Inn, 8 May 2013

#### (1) Introduction<sup>1</sup>

1. A little over 10 years ago, Professor Michael Zander observed that litigation funding in England and Wales was '*in the throes of a revolution*'<sup>2</sup>. He was very prescient. Three major changes were under way or about to happen. First, Conditional Fee Agreements (CFAs), also known as success fee arrangements, which had first been introduced in 1990<sup>3</sup>, had just been significantly revised following the passing of the Access to Justice Act 1999<sup>4</sup>. Since then, there have been two further significant revisions to CFAs, the first in 2005<sup>5</sup>, the second on 1 April this year, following the introduction of the Jackson Reforms<sup>6</sup>. Secondly, Contingency Fee Agreements, or Damage-Based Agreements (DBAs), have been introduced, again following the Jackson reforms<sup>7</sup>. Thirdly, third-party litigation funding was transformed in a series of decisions, culminating with *Arkin v Borchard Lines Ltd* in 2005<sup>8</sup>, and has been developing at speed since then. Given all this activity, it may seem surprising that today's lecture is only the first Harbour Litigation Funding annual lecture. I think that it is safe to say that it won't be the last.

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<sup>1</sup> I wish to thank John Sorabji for all his considerable help in preparing this lecture.

<sup>2</sup> M. Zander, *Will the Revolution in the Funding of Civil Litigation in England eventually lead to Contingency Fees?* (2002) 52 DePaul Law Review 259 at 259.

<sup>3</sup> Courts and Legal Services Act 1990, section 58.

<sup>4</sup> 1990 Act, section 58A (added by the Courts and Legal Services Act 1999) and The Conditional Fee Agreements Regulations 2000 (SI 2000/692); *Hollins v Russell* [2003] 1 WLR 2487.

<sup>5</sup> Conditional Fee Agreements (Revocation) Regulations 2005, SI 2005/2305.

<sup>6</sup> Legal Aid, Sentencing and Punishment of Offenders Act 2012, section 44.

<sup>7</sup> Legal Aid, Sentencing and Punishment of Offenders Act 2012, section 45, and The Damage-Based Agreements Regulations 2013, SI 2013/609.

<sup>8</sup> *Arkin v Borchard Lines Ltd* [2005] EWCA Civ 655, [2005] 1 WLR 3055.

2. I would like to begin this evening's lecture with a digression, the relevance of which will, I hope, become apparent. In their recent book, *Why Nations Fail*, two US academics, Professors Daron Acemoglu and James A. Robinson, offer an explanation why some nations are prosperous while others are not<sup>9</sup>. To introduce their subject, they invent the city of Nogales, the northern half of which lies in the United States of America, the southern half in Mexico. A fence runs through the middle of the city. They start by noting the differences between the two halves.
3. In the northern, US, half of the city, average income is \$30,000 a year, most adults have a high school education, and the population generally has a long life expectancy, with most having ready access to healthcare. They also have ready access to a wide range of other public services, such as sanitation, a good road network linking it to the rest of the US, electricity, phones etc. And finally, they are well served by institutions of law and order and democratic governance.
4. By contrast, in the southern, Mexican, half of the city, average annual income is around \$10,000 a year, most adults do not have a high school education, and life expectancy is lower than in the north, with high rates of infant mortality. The population does not have as ready access to healthcare or public amenities. The provision of law and order is worse than in the north; crime rates are higher and, as they put it, the residents '*live with politicians' corruption and ineptitude every day*'<sup>10</sup>.
5. Obviously, the two halves of the city share the same geography and climate, and the same health risks, although their ability to combat disease is mediated by available health care. Acemoglu and Robinson go on to say that,

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<sup>9</sup> D. Acemoglu & J. Robinson, *Why Nations Fail – The Origins of Power, Prosperity and Poverty* (Profile Books) (2012).

<sup>10</sup> Ibid at 8.

*‘The inhabitants of Nogales, Arizona, and Nogales, Sonora, share ancestors, enjoy the same food and the same music, and we would hazard to say, have the same “culture”.’<sup>11</sup>*

Given these similarities, the authors ask, what explains the differences between the two halves of the city?

6. The answer is, as they say, both simple and obvious. It lies in the differences in the political and economic institutions of the United States and of Mexico. The same answer lies behind the difference in development patterns of North and South Korea<sup>12</sup>, just as it did behind those of East and West Germany. Different political institutions create different economic incentives and institutions, which in turn produce differing levels of economic and social prosperity. The question then becomes: which types of institutions enable prosperous societies to develop, and which result in nations that fail?
7. At the risk of oversimplifying their analysis, the answer offered by Acemoglu and Robinson is that there are two basic types of political and economic institutions: inclusive and extractive<sup>13</sup>. They describe them in this way,

*‘Extractive political institutions concentrate power in the hands of a narrow elite and place few constraints on the exercise of this power. Economic institutions are then often structured by this elite to extract resources from the rest of society (in other words, they exist in order to enrich the elite by ensuring the transfer of society’s wealth into their hands, or overseas bank accounts). . . Inclusive political institutions, vesting power broadly (i.e., pluralistic institutions which encourage economic growth), would tend to uproot economic institutions that expropriate the resources of the many, erect entry barriers, and suppress the functioning of the markets so that only a few benefit (in other words, they do not exist to enrich the elite at the expense of society).’<sup>14</sup>*

8. Thus, the explanation of the difference between the two halves of Nogola, between North and South Korea, East and West Germany, and more broadly between prosperous societies and those which fail, lies in whether they have inclusive or extractive

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<sup>11</sup> Ibid at 8 – 9.

<sup>12</sup> Ibid at 70ff.

<sup>13</sup> Ibid at 81ff.

<sup>14</sup> Ibid at 81.

institutions. Institutions in inclusive societies encourage economic activity, productivity and innovation, thereby incentivising investment and economic growth. Equally, institutions in such societies provide the right environment for the provision of essential infrastructure: roads, regulation, health care, and education, necessary to foster economic activity.

9. However, social and economic infrastructures are not sufficient. Economic activity, productivity and innovation will only thrive, as Adam Smith explained more than two centuries ago<sup>15</sup>, in an environment which affords secure property rights and effective freedom of contract. Investors need to know that the political elite will not expropriate their profits or their businesses at will. Individuals and businesses have to be able to enforce contracts, to protect their intellectual property and to obtain effective redress not merely against other individuals and businesses, but also against the State. To that end, the State has to provide fair and clear laws equally applicable to all, a legal system readily available to all, and an effective and efficient court structure readily accessible to all. It must, in other words, secure the rule of law<sup>16</sup>. And here we see the link back to inclusive political institutions: only they can effectively guarantee the rule of law, which itself underpins the growth of inclusive economic institutions. As they have it, the institutions of inclusive states operate as a virtuous circle<sup>17</sup>.
10. This apparent digression is relevant to barrety, maintenance, champerty, and litigation funding because it helps to explain our historic approach to these issues, as well as the shift in public policy that has legitimised litigation funding, and lies behind its growth. Before making that explanation good, I should perhaps explain what is meant by the three

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<sup>15</sup> Adam Smith, *Inquiry into the Nature and Causes of the Wealth of Nations* (1776).

<sup>16</sup> *Ibid* at 75 – 76.

<sup>17</sup> *Ibid* at 302.

historic expressions, which have since medieval times variously signified crimes, torts and unlawful arrangements<sup>18</sup>.

## (2) Barretry, Maintenance, and Champerty

11. First of all, maintenance. This was '*the procurement, by direct or indirect financial assistance, of another person to institute, or carry on or defend civil proceedings without lawful justification.*'<sup>19</sup>
12. Champerty was an aggravated form of maintenance, in which the maintainer received '*a share of the proceeds of the action or suit or other contentious proceedings where property is in dispute.*'<sup>20</sup> Originally, it simply referred to providing maintenance in return for a share in land, a *campi partitio* or share of the field, but in due course it applied to a share in any financial return from action<sup>21</sup>.
13. Barretry had three distinct meanings, only one of which is relevant in the present context. In the *Case of Barretry*<sup>22</sup>, decided the same year as the Spanish Armada sailed, a person who practised barretry was defined in the following way

*'A common barretor is a common mover or stirrer up or maintainer of suits, quarrels, or parties, either in Courts, or in the country, in Courts of Record, and in the County, Hundred, and other Inferior Courts.'*
14. Thus, champerty and barretry were simply subsets of maintenance, or aggravated forms of it, in that champerty was maintenance for profit, and barretry was serial maintenance. Barretry is not as well known as maintenance and champerty in this country, but it is a term that appears to live on in the USA, which is often more traditional on matters of

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<sup>18</sup> *Giles v Thompson* [1994] 1 AC 142 at 153.

<sup>19</sup> Law Commission, *Proposals for the reform of the Law Relating to Maintenance and Champerty* (1966) at [9] <<http://www.bailii.org/ew/other/EWLC/1966/7.html>>; *Hill v Archbold* [1968] 1 QB 686.

<sup>20</sup> *Re Trepcia Mines Ltd (No.2)* [1963] Ch 199 at 224; *Trendtex Trading Corp v Credit Suisse* [1980] 1 QB 629 at 663.

<sup>21</sup> Ordinance against Conspirators, 33 Edward I (1304).

<sup>22</sup> (30 Eliz) 8 Rep 36, 77 ER 5.

English law than ever we are in England. *The New York Times*, for instance, recently reported how in Texas, where barrety can result in a maximum prison sentence of ten years, there is currently a crackdown on barreters, in the form of lawyers who are said to be ‘*illegally soliciting business after accidents*’<sup>23</sup>, i.e. ambulance chasing. Barrety, it seems, is on the increase across the USA: as the report states, ‘*[it ranges] from small-scale operations — case runners approaching accident victims at their home or a hospital, and then selling the case to a lawyer — to large-scale schemes, such as when telemarketers, chiropractic firms and legal offices conspire to lure patients, inflate injuries and bank millions of dollars from fraudulent insurance claims.*’<sup>24</sup> There is a certain familiarity about that list.

15. Historically, maintenance, champerty and barrety were all criminal offences. They were first formally declared to be unlawful in 1275 by the Statute of Westminster, which prohibited court officials from providing maintenance on its own or by way of champerty, and barred attorneys from abusing the litigation process<sup>25</sup>. At least eighteen further Acts, each of which, like the Statute of Westminster were said to be simply declaratory of the common law<sup>26</sup>, repeated, developed or varied the statutory prohibitions from then until 1576. They continued to apply albeit subject to various statutory restrictions in the 19<sup>th</sup> and 20<sup>th</sup> centuries<sup>27</sup>. Maintenance, champerty and barrety finally ceased to be criminal offences and torts by virtue of sections 13 and 14 of the Criminal Law Act 1967, following recommendations made by the Law Commission, which described maintenance and champerty as dead letters that were no more than useless ‘*lumber*’ that ‘*ought to be*

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<sup>23</sup> B. Aaronson, *Crackdown intensifies on Barrety*, *New York Times*, 23 June 2012  
<[http://www.nytimes.com/2012/06/24/us/crackdown-intensifies-on-barrety.html?\\_r=2&](http://www.nytimes.com/2012/06/24/us/crackdown-intensifies-on-barrety.html?_r=2&)>.

<sup>24</sup> *Ibid.*

<sup>25</sup> Statute of Westminster I (1275) (3 Edw. I, C 25, 28 and 33).

<sup>26</sup> *Pechell v Watson* (1841) 8 M & W 691, 700; P. Winfield, *The History of Maintenance and Champerty* (1919) 35 LQR 50 at 56.

<sup>27</sup> E.g., the Statute Law Revision Act 1863; Statute Law Revision and Civil Procedure Act 1881; Statute Law Revision Act 1948; *Martell v Consett Iron Co. Ltd* [1955] Ch 363 at 375.

*discarded in practice*<sup>28</sup>, and treated barrety as an outdated offence<sup>29</sup>. The 1967 Act did not however entirely abolish them. A saving provision gave them a continuing half-life, as its provisions did not affect ‘*any rule of law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal.*’<sup>30</sup>

16. Having summarised the statutory approach to maintenance, champerty and barrety between the 1270s and the 1960s, let me look a little more closely at why they were so frowned on for so long.

### **(3) The historic prohibition on litigation funding**

17. The prohibition on maintenance, and its more aggravated forms, has a long history. It can be traced back to Ancient Greece. If you engaged in too much maintenance in Athens or Sparta (maintenance being not entirely prohibited then) you received a unique epithet. You were engaged in sykopanteia. You were a sycophant. In Ancient Rome, maintainers were likely to find themselves liable to an action for calumnia<sup>31</sup>. How those early measures found their way into English law is, as Lord Mustill said in a case in the 1990s, lost in the mists of time<sup>32</sup>. But they did.

18. The most likely explanation for their development here was the medieval feudal system, under which each of the Barons and other nobles maintained his (or very occasionally, her) own retinues. The barons, as I will call them in the best traditions of *1066 And All That*<sup>33</sup>, ruled their own ‘*little kingdoms*’ as they saw fit<sup>34</sup>. If they came into conflict with each other, especially in respect of land disputes, they could, until the late 12<sup>th</sup> century,

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<sup>28</sup> Law Commission *Proposals for the reform of the Law Relating to Maintenance and Champerty* (1966) at [7], cited in Zander, *ibid* at 260.

<sup>29</sup> Law Commission, *Proposals To Abolish Certain Ancient Criminal Offences* (1966).

<sup>30</sup> Section 14(2) Criminal Law Act 1967; *Trendtex Trading Corp v Credit Suisse* [1982] AC 679 at 702.

<sup>31</sup> M. Radin, *Maintenance by Champerty*, 24 Cal. L. Rev. 48 (1935) at 49ff.

<sup>32</sup> *Giles v Thompson* [1994] 1 AC 142 at 153.

<sup>33</sup> WC Sellar and RJ Yeatman, *1066 And All That* (1931) Chapter 19.

<sup>34</sup> J. Stephen, *History of the Criminal Law of England* (1883) Vol. III at 238.

resort to trial by battle. Or they could take the law into their own hands, and, using their own retinue, they could, as Holdsworth described it, wage ‘*private war*’ against each other to settle their disputes<sup>35</sup>. Once private war could no longer be waged and judge and jury finally replaced trial by battle, the feudal lords had no choice but to resort to the courts. As a result, to quote Holdsworth again,

*‘when those who are wronged are compelled to have recourse to the law, much of the unscrupulousness and trickery which accompany the waging of a war are transferred to the conduct of litigation. The courts are besieged with angry litigants who fight their lawsuits in the same spirit as they would have fought their private or family feuds. This . . . was especially apparent in medieval England. . . contemporaneously with the growth of the power of the royal courts, we get the growth of many various attempts to pervert their machinery. . .’*<sup>36</sup>

19. Accordingly, attempts would be made to bribe or intimidate judges and juries, to procure claims in order to intimidate adversaries or stir up trouble for them through soliciting and supporting the prosecution of worthless claims<sup>37</sup>. The law could become an instrument of oppression and injustice. The development of the prohibitions on maintenance etc was the means by which such attempts to abuse the litigation process were combated. Through those prohibitions, the common law sought to combat the ‘*last flaring up of feudalism*’<sup>38</sup> and to protect the justice system from abuse.

20. The prohibitions arose at a time when medieval society was undergoing wider evolutionary change. The original source of those changes was the tension that arose between the feudal barons and King John, which resulted in Magna Carta, whose 800<sup>th</sup> anniversary we are two years away from celebrating. At Runnymede, the barons

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<sup>35</sup> W. Holdsworth, *A History of English Law* (4<sup>th</sup> ed) Vol. III at 394 – 395.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Giles v Thompson* [1994] 1 AC 142 at 153, ‘mechanisms of justice lacked the internal strength to resist the oppression of private individual through suits formented and sustained by unscrupulous men of power. Champerty was particularly vicious, since the purchase of a share of litigation presented an obvious temptation to the suborning of justices and witness and the exploitation of worthless claims, which the defendant lacked the resources and influence to withstand.’

<sup>38</sup> M. Radin, *ibid* at 65.



famously got the King's consent to a document that, amongst other things, guaranteed, in words which resonate down the ages,

*'No freeman is to be taken or imprisoned or disseised of his free tenement or of his liberties or free customs, or outlawed or exiled or in any way ruined, nor will we go against such a man or send against him save by lawful judgment of his peers or by the law of the land. To no-one will we sell or deny or delay right or justice.'*<sup>39</sup>

This Chapter, 29, placed the Crown under an obligation to secure due process of the law; to secure equal justice for all freemen and to ensure that property rights were not infringed except by due process of the law. Magna Carta also put in place what we might now see as a regulatory mechanism. In Chapter 61, the barons secured the King's agreement to them being able to select twenty-five of their number who would be given the power to enforce all its terms.

21. For Acemoglu and Robinson, Chapters 29 and 61 of Magna Carta represent a turning point in our history, the moment when England started to move from being a purely extractive society to an inclusive one. It was a limited start, not least because King John, living up, or rather down, to his reputation, got the original Magna Carta revoked by Pope Innocent III some six weeks after it was sealed<sup>40</sup>. But John died the following year, apparently after eating too many peaches<sup>41</sup>, and, in order to keep the kingdom from falling apart, the Magna Carta was re-affirmed on a number of occasions by successive kings throughout the 13<sup>th</sup> and 14<sup>th</sup> centuries.
22. By subjecting the Crown to the political power of the barons, Magna Carta had taken the first step towards developing a pluralist polity. That first step was followed in 1265 – fifty years after Magna Carta was first sealed and ten years before the first statutory prohibition of maintenance, champerty and barratry – by the calling for England's first

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<sup>39</sup> Magna Carta (1215) Chap. 29.

<sup>40</sup> J.C. Holt, *Magna Carta* (2<sup>nd</sup> ed, Cambridge Univ Press) (1992).

<sup>41</sup> W.L. Warren, *King John* (new ed, Yale University Press) (1997).

elected Parliament<sup>42</sup>. We were a long way from becoming a properly inclusive society, but we had started on an evolutionary path.

23. One can, I think, discern in the development of the prohibitions against the various forms of maintenance a broader policy rationale than simply protecting the courts from what Jeremy Bentham described in his critique of maintenance and champerty as ‘*the sword of a baron, stalking into court with a rabble of retainers at his heels...*’<sup>43</sup>. Just as Chapter 61 protected the integrity of the Magna Carta guarantees that the Crown would be subject to the law, the prohibitions of maintenance, champerty and barretry protected the integrity of the legal process, because a primary ingredient of a proper legal system is that the law applies equally to all who come before the courts.
24. In taking that role, these prohibitions did not only protect the litigation process. By acting as a deterrent against conduct that could have corrupted the process, they were a vital factor in enabling the development of secure property rights and commerce, by ensuring that ownership and contractual rights were respected. If a baron or powerful landowner knew that he could not corrupt the process through intimidating the court or individuals with whom he had a dispute, he would be more likely to hold to his bargain, and less likely to try unlawfully expropriating land. By protecting the legal process, the prohibitions helped lay the foundations for the development of inclusive economic institutions, just as Magna Carta and the development of Parliament helped lay the foundations for the development of inclusive political institutions.

#### **(4) From medieval history to the 20<sup>th</sup> Century**

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<sup>42</sup> Acemoglu and Robinson, *ibid* at 184ff.

<sup>43</sup> J. Bentham, *The Works of Jeremy Bentham* (ed. Bowring) (1843) (William Tait, Edinburgh) *Volume 3, Part 1, A Defence of Usury*, Letter XII, *Maintenance and Champerty*, at 19.

25. The prohibitions on maintenance, champerty and barretry in medieval England were therefore justified because they protected the integrity of the legal process from the swords of the barons. As the rule of law developed and strengthened, judges started to carve out exceptions from the general prohibition; Lord Esher MR described some of those exceptions in a case I shall refer to shortly. Maintenance, he explained, would not fall foul of the prohibitions where there was between maintainer and maintained a common legal interest, even a contingent one, or a family, landlord-tenant, or master-servant, relationship. Maintenance was also permissible if given by ‘*a man in (sic) behalf of a poor man, who but for the aid of his rich helper could not assert his rights, or would be oppressed and overbourne in his endeavour to maintain them.*’<sup>44</sup>
26. By 1800, the days of the feudal barons had long since receded into the history books. The idea, as Bentham had mockingly put it, that an English judge would care for ‘*the swords of a hundred barons*’ was beyond ridicule. As he said, restrictions against litigation funding were a ‘*barbarous precaution*’ born out of a ‘*barbarous age*’<sup>45</sup>, as judges were ‘*ready with equal phlegm to administer, upon all occasions, that system, whatever it be, of justice or injustice, which the law has put into his hands . . .*’<sup>46</sup>. However weak and in need of protection the justice system was in the Middle Ages, that was a time long past. The Bill of Rights 1688, the Act of Settlement 1701, the growth of Parliamentary sovereignty, the power of the elected House of Commons, and the development of the great common law and Chancery courts, had all ensured that England had moved far beyond its feudal origins. So the courts began to question the prohibitions, as is illustrated by two cases in the last twenty years of the 19th century.

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<sup>44</sup> *Alabaster v Harness* [1895] 1 QB 339 at 343 per Lord Esher MR.

<sup>45</sup> J. Bentham, *ibid.*

<sup>46</sup> J. Bentham, *ibid.*

27. *Bradlaugh v Newdegate* arose out of a Parliamentary dispute. Mr Bradlaugh, after being duly elected as an MP, sat and voted in the House of Commons, even though he had refused, contrary to statute, to take the required oaths. Mr Newdegate, another MP, took exception to this. He procured a Mr Clarke to bring proceedings against Bradlaugh to ensure that he suffered the statutory penalty for his actions. Newdegate underwrote Clarke's legal costs. The claim ultimately failed. Bradlaugh then sued Newdegate for the tort of maintenance, and, unlike Newdegate and his cipher, he succeeded. In the course of his judgment in the case, Lord Chief Justice Coleridge had this to say about the nature of the tort,

*'It is not useful to go very far back, because no doubt things were held to be maintenance some centuries ago which would not be held to be maintenance now. It may be that the danger of the oppression of poor men by rich men, through the means of legal proceedings, was great and pressing; so that the judges of those days, wisely according to the facts of those days, took strict views on the subject of maintenance. ... [T]he earliest case to which I think it is useful to refer is that of Wallis v Portland.'*<sup>47</sup>

28. In that late 18<sup>th</sup> century case of *Wallis*, Lord Loughborough explained the rationale lying behind the prohibitions of maintenance. He described it in these terms: *'parties shall not by their countenance aid the prosecution of suits of any kind; [because] every person must bring [his action or suit] upon his own bottom, and at his own expense.'*<sup>48</sup> Whatever the merits of the historic, medieval justification, as Lord Chief Justice Coleridge noted, Lord Loughborough's decision was one that had been supported by the House of Lords when it affirmed his decision<sup>49</sup>.

29. The second late 19<sup>th</sup> century case is *Alabaster v Harness*, where Lord Esher MR in the Court of Appeal questioned the rationale that lay behind the prohibitions, saying this,

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<sup>47</sup> (1883) 11 QBD 1 at 7.

<sup>48</sup> *Wallis v Duke of Portland* 3 Ves. Jun. 494 at 502.

<sup>49</sup> (1883) 11 QBD 1 at 7.

*‘The doctrine of maintenance, which . . . was discussed briefly by Lord Loughborough in Wallis v Portland, and more recently elaborated by Lord Coleridge CJ in Bradlaugh v Newdegate, does not appear to be founded so much on general principles of right and wrong or of natural justice as on considerations of public policy. I do not know that, apart from any specific law on the subject, there would necessarily be anything wrong in assisting another man in his litigation. But it seems to have been thought that litigation might be increased in a way that would be mischievous to the public interest if it could be encouraged and assisted by persons who would not be responsible for the consequences of it, when unsuccessful.’<sup>50</sup>*

Lord Esher went on to outline how the strict application of the prohibitions had been relaxed over time, with the exceptions I have described.

30. The rationale for the prohibitions of maintenance thus rested on public policy, which is of course never static. The original public policy concerns were to protect property and contractual rights and to weaken the hold of gangster barons. By the late 18<sup>th</sup> century, the policy had become, as explained by Lord Loughborough, the desire to ensure that individuals did not stir up litigation at no risk to themselves. But why should individuals have to bring claims at their own expense? It is a question that Bentham raised. He started off by raising a concern about a ‘*gentleman of his acquaintance*’, who inherited an estate producing £3,000 a year, a substantial sum in the early 19<sup>th</sup> century, just under a third of what, according to Jane Austen, Mrs Bennett thought Mr Darcy was worth<sup>51</sup>. It should have left him comfortably set up for life. However, he had the misfortune to inherit while he was a minor. The estate was consequently placed in the hands of a guardian, who not only concealed the value of the estate from the heir, but had the title to the estate transferred to him for, as Bentham has it, ‘*a trifle*’. More swindler (to use one of Bentham’s favourite words), then, than guardian.

31. The question Bentham raised is how exactly was his acquaintance to go about recovering his estate. He has a cast iron legal case, but he has no money – the guardian has taken it –

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<sup>50</sup> *Alabaster v Harness* [1895] 1 QB 339 at 342.

<sup>51</sup> Jane Austen, *Pride and Prejudice* (1813), Chapter 59.

and bringing cases is ruinously expensive. However, he finds “two gentlemen” who offer to pay his legal costs in return for half the estate, but then one of them comes across the medieval statutes prohibiting champerty. As Bentham put it, ‘*This blew up the whole project.*’<sup>52</sup> What is the difference between Bentham’s no doubt fictitious example, and the various exceptions to the rule that Lord Esher MR outlined? It was a meritorious case. It could not have been prosecuted without the funding. Why should this claim not be funded simply because the two gentlemen were not prepared to provide their support on the grounds of charity or compassion? A right had been infringed, and they were prepared to enable its vindication.

32. Here we see why Lord Esher was rather sceptical about the prohibitions. His observations suggest that he considered that there was nothing inherently wrong in maintenance, and saw it more as an historic relic than appropriate to modern times. Lord Loughborough’s rationale seems to ignore one of the fundamental principles that underpins any self-respecting legal system: that rights must be capable of enforcement. Otherwise they are not true rights: they are privileges. While it is true that the prohibitions on maintenance etc stopped individuals stirring up vexatious or meritless litigation, through offering to fund spurious claims, they also prevented support for meritorious claims. Worse than that, they did not even properly stop the prosecution of vexatious claims, if the relationship between maintained and maintainer fell within the scope of one of the exceptions to the prohibitions. The rationale is thus unconvincing.
33. It is also somewhat ironic. The original, medieval, rationale for the prohibitions was to protect the poor and weak from exploitation by the rich and powerful. The introduction of the prohibitions one of the first, tentative steps, towards securing the integrity of the justice system; to enable it properly to vindicate rights without fear or favour. It helped

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<sup>52</sup> J. Bentham, *ibid* at 19.

provide the basis for society to develop inclusive, rather than extractive, institutions. The later, 19<sup>th</sup> century, rationale was, in practice if not in theory, to the opposite effect: a person had to be independently wealthy to bring a case to court. Given the notorious expense of litigation at the time, the prohibitions effectively placed justice out of reach of most people in society. Their effect was, to borrow Bentham's conclusion, to give wealth the '*monopoly of justice against poverty*'.

34. And what would Professors Acemoglu and Robinson say is likely to happen in such circumstances? Well, Bentham got there first: '*such monopoly it is the direct tendency and necessary effect of regulations like these to strengthen and confirm.*'<sup>53</sup> Where access to the courts is limited to a certain limited class of society, then one of the conditions on which the development, indeed the retention, of inclusive institutions is based, is seriously undermined.

##### **(5) Maintaining equality before the law**

35. Fortunately, the 19<sup>th</sup> century rationale did not survive long enough to cause such damage. Indeed, even in the late 19<sup>th</sup> century, while the then-Lord Chief Justice and Master of the Rolls were seeking to defend the law against maintenance, the first breach in the wall was being made by the court. In 1880, the Court of Appeal approved the practice of third party litigation funding albeit provided that it was limited to an insolvency context<sup>54</sup>. So, once you were bankrupt it was fine for your trustee simply to auction your cause of action, but so long as you were merely poor, it was wrong, indeed (at least until 1967) a criminal offence, for you to get a third party even to fund your litigating the cause of action, whether or not in return for a share of the proceeds.

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<sup>53</sup> J. Bentham, *ibid* at 19.

<sup>54</sup> *Seear v Lawson* (1880) 15 Ch D 426.

36. Following the Second World War, it seems to have started to dawn on legislators and lawyers that the accelerating and fundamental changes in society meant that the basic policy which used to justify the prohibitions of maintenance could now be more sensibly invoked to justify the abolition of those prohibitions. It also was starting to become apparent that the law on litigation funding generally was a bit of a mess. Changes were due, and over the last 65 years, particularly over the past 15 years, things have moved very fast, with both the legislature and the courts playing their part in Professor Zander's revolution in litigation funding.
37. In the mid-1950s, the Court of Appeal in *Martell v Consett Iron Co Ltd*<sup>55</sup> disapproved Lord Loughborough's rationale for the prohibitions on maintenance and litigation funding generally, and further exceptions to the prohibitions developed through the courts. By that time, the introduction of legal aid, as recommended by the 1945 Rushcliffe Report, had created a state-funded exception<sup>56</sup>. The growth of insurance and trade union funded litigation equally made significant inroads into the prohibitions, a point made by the Law Commission in 1967, when it recommended abolition of maintenance and champerty. And, as already noted, that abolition was carried through, and the prohibitions ceased to be crimes and torts, although they lived on in a public policy-based half-life.
38. The introduction of legal aid by the Legal Aid and Advice Act 1949 did not only represent the most important piece of legislation to ensure that ordinary citizens should have access to the courts, but it was also the most important statutory breach of the rule against maintenance. Following its introduction in 1950<sup>57</sup>, successive pieces of legislation have gradually cut down eligibility for civil legal aid. When the civil legal aid scheme started in 1950, it provided around 80% of the population with a means-tested entitlement

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<sup>55</sup> *Martell v Consett Iron Co. Ltd* [1955] Ch 363 at 399 – 400.

<sup>56</sup> Report of the Committee on Legal Aid and Legal Advice in England and Wales (Cmd. 6641) (HMSO).

<sup>57</sup> For an interesting assessment of the position before 1949, see R. Morgan, *The Introduction of Civil Legal Aid in England and Wales, 1914–1949* *Twentieth Century Brit Hist* (1994) 5 (1) at 38.



to legal aid. By 1973, this had dropped to 40%, and by 2008, it only applied to just under 30%<sup>58</sup>. At first sight, that can be partly explained by the increased prosperity throughout the country, but I suspect that, while the average citizen has become significantly better off in the last seventy years, the average cost of fighting a case in court has increased at least as much, and probably more quickly. However, it should be added that, at any rate for its first forty or fifty years of life, legislation broadened the types of litigation which could be funded by legal aid, and it became a very fast-growing item of government expenditure.

39. As for CFAs, so-called no win no fee arrangements with lawyers, they were first rendered lawful by the Court and Legal Services Act 1990. The introduction of CFAs can be analysed in economic terms as another inroad into the prohibition on maintenance, because they enable lawyers implicitly to fund the litigation: they do not get paid if their client loses and they get paid more than their usual fee (sometimes called a success fee) if their client wins – so they are funding the litigation through providing their time and expertise for nothing, in return for a larger-than-usual fee if they win.

40. CFAs were substantially liberalised in 2000, through the Access to Justice Act 1999, in part to mitigate the adverse impact on access to justice for those of limited means owing to the reduction in legal aid which was also included in the 1999 Act. This resulted in the highly questionable consequence that successful claimants and their lawyers could recover the so-called success fee element of their costs from the defendant – a state of affairs which was one of the main reasons why Lord Clarke, as Master of the Rolls, commissioned Sir Rupert Jackson to investigate the issue of costs. The expansion of CFAs had a more positive aim, namely the opening up of access to justice for those who

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<sup>58</sup> S. Hynes & J. Robins, *The Justice Gap* (2009, LAG) at 21.

would previously have neither qualified for legal aid nor been able to fund litigation themselves.

41. Another development was through the European Convention on Human Rights, which effectively became part of UK law in 2000 through the Human Rights Act 1998. Its article 6 reinforces the common law right to fair trial: the right to due process and equality before the law that had been enshrined in Magna Carta. The Strasbourg court has had some things to say on access to justice, and the need for the state to provide civil legal aid in certain circumstances<sup>59</sup>. They have also had things to say about the level of fees, in the light of the fact that the success fee element of the successful claimant's lawyers' charges was recoverable from the unsuccessful defendant<sup>60</sup>.
42. So far as litigation funding is concerned, the courts have had their part to play too. In 1994, the House of Lords adopted a more pragmatic approach than previously taken to a funding agreement, and emphasised the importance of the question whether it corrupted public justice<sup>61</sup>, but they seem to have endorsed what Fletcher Moulton LJ said in a case in 1908<sup>62</sup>, namely that the law against maintenance was 'directed against wanton and officious intermeddling with the disputes of others in which the [maintainer] has no interest whatever'.
43. However, only a few years later, in 2002, the Court of Appeal in *Factortame (No 8)* explained that only those funding arrangements that tended to '*undermine the ends of justice*' should fall foul of the prohibition on maintenance and champerty<sup>63</sup>. The natural consequence of this opening of the doors to maintenance was faced in a subsequent Court of Appeal decision in 2005, *Arkin v Borchard Lines*<sup>64</sup>, where it was held that a

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<sup>59</sup> See eg *Airey v Ireland* 6289/73, [1979] ECHR 3.

<sup>60</sup> *MGN Ltd v UK* Case Reference Application No 39401/04, [2011] ECHR 66, especially at [218] – [220].

<sup>61</sup> *Giles v Thompson* [1994] 1 AC 142.

<sup>62</sup> *British Cash and Parcel Conveyors v. Lamson Store Service Company* [1908] 1 KB 1006 at 1014.

<sup>63</sup> *R (Factortame) v Secretary of State for Transport (No 8)* [2003] QB 381 at 400.

<sup>64</sup> *Arkin v Borchard Lines Ltd* [2005] 1 WLR 3055.

professional litigation funder could be potentially liable for the opposing party's costs of the litigation<sup>65</sup>.

44. Since 2005, the perception of the public policy background has shifted further. The Jackson reforms produced more CFA reforms<sup>66</sup>, which some fear may result in a reduction in access to justice. If it does, then that is the price of a very necessary re-balancing of the CFA system introduced by the 1999 Act, and it has been mitigated by an increase in damages<sup>67</sup>, as well as by other innovations. One of those innovations was the introduction of DBAs<sup>68</sup>, contingency fee arrangements, which enable lawyers to share the fruits of the litigation with their clients. As Jackson recognised, DBAs are a natural consequence of CFAs: once lawyers can benefit from winning the case, as they undoubtedly do under CFAs, it is very difficult to raise any principled objection to contingency fees. It is also worth mentioning that contingency fees have always been lawful for non-contentious legal work, and that DBAs have long been permitted in employment tribunal cases<sup>69</sup>.

45. Similarly, following Jackson, there has been a substantial development in third party litigation funding. It is a development with which the Civil Justice Council has had some engagement – not least through facilitating the development of the present self-regulatory regime, or code, in November 2011. The Code and the Association of Litigation Funders, which describes itself as '*dedicated to promoting best practice in the Litigation Funding industry*' seems to have done well enough so far, but we are still in early days.

## **(6) Concluding comments**

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<sup>65</sup> [2005] 1 WLR 3055 at [41] – [42]; for a discussion see P. Cashman & R. Mulheron, *Third Party Funding: a changing landscape*, C.J.Q, 2008, 27(3) 312 at 327ff; J. Sorabji & R. Musgrove, *Litigation, cost, funding, and the future*, in D. Dwyer (ed), *The Civil Procedure Rules Ten Years On*, (OUP) (2009) 229 at 237ff.

<sup>66</sup> See footnote 5.

<sup>67</sup> *Simmons v Castle* [2012] EWCA Civ 1039 at 1288.

<sup>68</sup> See footnote 7.

<sup>69</sup> See eg Courts and Legal services Act 1990, section 58AA.

46. What might Bentham or the two professors have to say in the light of this? Bentham's possible answer we can guess from the conclusion he reaches in the *Defence of Usury*. As he put it,

*'... so long as the expense of seeking relief at law stands on its present footing [which is to say it is expensive], the purpose of seeking that relief [i.e., funding] will of itself, independently of every other, afford a sufficient ground for allowing any man, or every man, to borrow money on any terms on which he can obtain it.'*<sup>70</sup>

For him, as long as litigation, access to the courts, remains expensive, then anyone who has a right that stands in need of vindication should be able to obtain funding from anyone willing to offer it and on whatever terms it is offered. The public policy rationale is simple in his opinion: access to the courts is a right, and the State should not stand in the way of individuals availing themselves of that right.

47. I believe that the logic of Acemoglu and Robinson's argument points in the same direction. In order for a state to remain inclusive it must not just express a commitment to the rule of law: it must provide effective mechanisms through which its citizens have genuine access to the courts. Only then can they begin to have equality before the law; only then can they hold the powerful to account; only then can they render their legal rights a true reality rather than words on paper. Where significant groups of citizens are financially unable to gain such access, one of the most important means by which inclusive societies prosper is missing or at best weakened. And as such, the potential for society to become extractive and, ultimately, to fail, markedly increases. If all members of society cannot gain genuine access to the courts, then the possibility exists for society to become exploitative, as some elements take advantage of the fact that they can ignore the law with relative impunity. It is pleasing to note that, as so often, what is in the

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<sup>70</sup> J. Bentham, *ibid* at 20.

medium and long term interest of society coincides with principle, in this case the principle of the rule of law.

48. Thus, the public policy rationale regarding maintenance and champerty has turned full circle. Originally their prohibition was justifiable as a means to help secure the development of an inclusive, pluralist society governed by the rule of law. Now, it might be said, the exact reverse of the prohibition is justified for the same reason. The argument advanced by Acemoglu and Robinson appears positively to support the development of litigation funding, as a means of securing effective access to justice. Given the retreat from legal aid, that argument may well gain more traction.
49. The development and promotion of any form of litigation funding is not without risks; we should not forget that aspect of the prohibition's original rationale. What can be used for the benefit of all can also be abused to the benefit of some. There still remains the risk that litigation funding can be used as a means to promote unmeritorious claims, in the expectation that, once the opposing side is aware of the existence of funding, they are more likely to be brought to settle in order to buy off the claim. The problems which arose after the 1999 Act's amendments to CFAs could be replicated if less than scrupulous funders provide funding. Such behaviour would in its own way be extractive, and would no doubt fall foul of Acemoglu and Robinson's argument.
50. The ethical pressures on lawyers to which any of these funding arrangements may give rise must also be acknowledged. The pressures will presumably be heavier with CFAs and DBAs where there is a real opportunity for conflict of interest for the lawyers, as they have a financial stake in the outcome of the litigation concerned. Their financial interest in a successful outcome means that there may be a strong personal temptation not to be straight with their opponents and with the court. It can also risk putting them in conflict with their clients – the obvious example is accepting an early offer so as to avoid doing a

lot of work. Third party litigation funding does not give rise to such problems, but the commercially driven pressures from expert serial litigation funders on lawyers could be significant.

51. These challenges may be compounded by the parallel innovation of alternative business structures, which some people fear will add to the pressures on maintaining ethical standards. Having said that, it may equally be that, as all these changes have made us peculiarly aware of ethical standards, they will have a beneficial effect rather than the opposite. Such a view may with some justification be characterised as worthy of Dr Pangloss, but there is no doubt that, whatever one's view, the price of a reliable and accessible legal system, like the price of liberty, is eternal vigilance.

52. How litigation funding will develop in the years to come is something that we will all watch keenly, because funding is the life-blood of the justice system. As Sir Jack Jacob famously said,

*'The administration of civil justice plays a role of crucial importance in the life and culture of a civilised community. It constitutes the machinery for obtaining what Lord Brougham called 'Justice between man and man.' It manifests the political will of the State that civil remedies be provided for civil rights and claims, and that civil wrongs, whether they consist of infringements of private rights in the enjoyment of life, liberty, property or otherwise, be made good, so far as practicable, by compensation and satisfaction, or restrained, if necessary, by appropriate relief. It responds to the social need to give full and effective value to the substantive rights of members of society which would otherwise be diminished or denuded of worth or even reality.'*<sup>71</sup>

53. In other words, it helps maintain our society as an inclusive one, which if Acemoglu and Robinson are correct will help ensure that it remains a society that can prosper.

54. Before I end, there are two topics which I should mention, because no talk on litigation funding is complete without them, namely legal aid and litigation cost. I appreciate that, in doing so, I may be at risk of being castigated as a latter day Cato the Elder, who

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<sup>71</sup> J. Jacob, *The Reform of Civil Procedural Law*, in *The Reform of Civil Procedural Law and Other Essays in Civil Procedure* (Sweet & Maxwell) (1982) at 1.

finished every speech in the Roman senate with the admonition *Delenda est Carthago*<sup>72</sup>, until everyone was so fed up with him, they did destroy Carthage. I would not relish that, because Cato has always struck me as a pretty unattractive character, even though he appears to have achieved quite a lot<sup>73</sup>.

55. Contrary to the Jackson review's recommendation<sup>74</sup>, but perhaps understandably in the light of economic pressures, it looks likely that the availability of civil legal aid is in the process of being reduced further<sup>75</sup>. This could give rise to a real problem in terms of access to justice, because CFAs, DBAs, and third party funding are fine where there is a reasonably sizeable claim or where there are lots of little claims. But they cannot do the business where the claim is small. And there are plenty of claims which are small and important to the citizen concerned, and there are even quite a few claims which are small but important to society. In a sense, every genuine claim is important, because every citizen should be able to bring his or her case to court, and without legal aid many people are prevented from doing so, or seriously disadvantaged when they do so. I appreciate that pressures on government finances are very great, but access to justice is of the essence in a civilised society. And, while it is true that legal aid is higher per capita in the UK than in almost all other countries in Europe, our judicial and court costs are much lower per capita: we have common law judges who are simply umpires, they have judges d'instruction who are far more pro-active. England and Wales have fewer than 40 appeal court judges; Paris alone has, I believe, over 150.

56. My second point is that it is not just the government: all those involved in the legal system, that is litigators and judges, have a vital role to play in improving access to

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<sup>72</sup> [Plutarch](#), biography of Cato, *Parallel Lives*, quoting Cato's expression as *δοκεῖ δέ μοι καὶ Καρχηδόνα μὴ εἶναι*, [Pliny the Elder](#), *Natural History*, 15.23, [Aurelius Victor](#), *De Viris Illustribus*, 47.8, [Livy](#), *Ab urbe condita*, XLIX., [Florus](#), *Epitoma de Tito Livio bellorum omnium annorum DCC, Liber* (all courtesy of Wikipedia).

<sup>73</sup> Plutarch, *op cit*, Livy, *History of Rome*, xxxiv, Forde, *Cato the Censor* (1975 Twayne).

<sup>74</sup> R. Jackson, *Review of Civil Litigation Costs: Final Report* (HMSO) (December 2009) at 70.

<sup>75</sup> Pursuant to the provisions of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, sections 8-12.

justice. And that means cost-effective justice. The reforms propounded by both Woolf and Jackson are based on the need for proportionality. So far as is consistent with it being even-handed, principled, and clear, justice must be practical and realistic. Lord Brougham LC once said in a parliamentary debate nearly 200 years ago *“better something of justice than nothing . . . I should rather even slovenly justice than the absolute, peremptory and inflexible denial of justice.”*<sup>76</sup>

57. Then, as now, quick and rough justice is better than no justice, and for many people with relatively small claims, no justice may be all that is on offer, unless one is prepared to take a disproportionate risk. And, in ordinary cases, quick and rough justice, whose costs are commensurate with the issues involved, may actually mean better justice than would be achieved by incurring cost and delay by invoking the full force of the Civil Procedure Rules. Disclosure and cross-examination may alter the outcome in a few cases, but I do wonder how cost-effective they are in the great run of average cases in which ordinary citizens are involved. But these general comments are much, much easier to express than they are to put into effect.

58. Lawyers, especially advocates, have a duty to the legal system, which is not limited to working in it and warning the legislature and the executive about risks. The duty extends to helping ensure that the system functions properly. In relation to his proposals for criminal legal aid, the Lord Chancellor is facing a strong reaction from the bar, even strikes, because of the cuts he is making as a result of the reduction in his Department’s budget. He has made it clear that he will happily listen to alternative proposals, and I hope that it will be possible for advocates to come up with some suggestions. I appreciate that many may feel that the irreducible minimum is fast approaching or has even been reached, but, rather than talking about the end of the bar, barristers and other advocates

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<sup>76</sup> (1830) HC Deb XXIV, column 259.



should be working out how to ensure it survives. Of all professions, advocates should be able to adapt to realities, and to live through the present vicissitudes, so that, when the financial situation improves, advocates will be able to say, like Abbe Sieyes, when asked what he had done during the French Revolution, “J’ai vécu”, I survived.

59. Well, I have survived this talk; I hope that you have. Thank you.

David Neuberger

8 May 2013