



The Law Society

Civil litigation costs and funding

Results of an online survey 1 January to 31 March 2009

supporting
solicitors

Contents

Introduction	3
Executive summary	4
Detailed results	6

Introduction

This was a web based consultation where consultees were invited to respond by answering a number of questions online, including demographic information, after they had considered the full consultation paper which was made available in both electronic and hard copy versions. This consultation was not restricted to members of the Law Society and was therefore open to any individual or organisation.

The Society was anxious to present a balanced consultation which did not seek to influence the outcome in any way. Arguments were included for and against the principle of contingency fees. Although the arguments were not an exhaustive list, it was hoped that they covered the most important aspects.

The total number of responses to the web survey was 99. Of those who responded, 80% indicated that they were from a law firm based in England or Wales. Further demographic information can be found in Appendix A.

In addition to the web survey, 10 written responses were received as follows:

Law Firms	5
Local Law Society Branches	2
Other Representative Bodies	3

Two of the law firms, one of the local Law Society branches and one of the representative bodies did not specifically answer the consultation questions. Whilst general views will be taken into account by the Law Society wherever conveniently possible, regrettably information from the written responses have been omitted from the demographics at appendix A and the detailed results which follow.

For the sake of clarity, the main part of the consultation paper has been repeated in the detailed results section before the responses to the consultation questions.

1. Executive summary

Contingency fees

The overwhelming majority of those responding (82%) agreed that solicitors should have access to a wide number of funding options in order to assure access to justice.

In the main, the majority of those responding agreed with the arguments in favour and the arguments against contingency fee agreements and their relationship with ethical duties as put forward in the paper.

Views expressed on what matters should be excluded from a contingency fee agreement were those cases involving:

- children and vulnerable persons
- low value claims
- personal injury claims involving clients who needed long term care

Most of those responding (74%) favoured a mechanism to set the limit of the recoverable percentage fee. The possibilities of seeking independent legal advice and control by the judiciary were also mentioned in order to protect clients.

Whether or not existing mechanisms for CFA were sufficient for contingency fees was unclear as the vote was virtually even (51% yes and 49% no). Some respondents suggested that the indemnity principle had caused problems with CFA costs in the past and should be abandoned. Others felt the need for stricter limits and more guidance to avoid exploitation of clients.

The majority (53%) considered that certain work (e.g. clinical negligence) should not be excluded from contingency fees but that certain elements of damages (51%) should be. The most common elements mentioned in this respect were future and past care, future loss of earnings and special damages.

An overwhelming majority (79%) considered that costs should continue to follow the event as it focused the parties minds on the merits of the claim.

The majority view (53%) on safeguards included suggestions that the percentage fee should be challengeable at the end of the case if considered to be disproportionately high or, alternatively, capping the fee at 25%. However, many who answered this question either felt that contingency fees should only be allowed in certain cases or not allowed at all.

On the question of unmeritorious claims as a result of CFAs, a large majority (78%) of respondents confirmed that they were unaware of any evidence to substantiate

Conditional fees

The majority of respondents (79%) agreed that CFAs had succeeded in providing access to justice and that there was no evidence of solicitors acting unethically. There was also a strongly held view (77%) that CFAs had not led to a profusion of claims.

Third party funding

The most of the views expressed regarding the protection of the claimants interest where a third party was funding the action were that the funder should not have control of the case, such arrangements should be more transparent and better regulated and that any contingent fee should be capped at 25%. A substantial majority (74%) considered that a third party funder should be responsible for all of the unsuccessful party's costs.

A majority (67%) considered that Solicitors Conduct Rule 9.01(4) should not be removed but there was almost an even split on voting (49% yes/51% no) when asked if solicitors should be allowed to engage in third party funding activities.

Other costs issues

On the subject of the indemnity principle, views were that it resulted in an unfair windfall to losing parties and that it creates increased and unnecessary satellite litigation. Others thought that it was an effective brake on unmeritorious claims. Of those who responded, the majority (62%) believed that the principle should be abolished. An overwhelming majority (80%) believed that the costs shifting rule should be retained.

Detailed results

2. Contingency fees

Arguments in Favour of Contingency Fee Agreements

2.1 The arguments in favour of permitting contingency fee agreements appear to involve the following elements:

- It could be argued that they give greater access to justice as there are instances where other forms are not available often in what might be seen as the most deserving of cases.
- In seriously contested cases they may offer clients an assurance of their lawyer's motivation to win their case.
- They may offer a wider range of choice for funding litigation required because After the Event insurers are not supporting some types of CFA cases due to perceived higher than acceptable risks of not succeeding.
- They are already used to fund a wide range of disputes in the Employment Tribunals including certain types of contractual disputes and injury disputes where the contentious tribunals have a parallel jurisdiction.
- They are already extensively used in some areas of contentious work without any apparent problems, for example the predictable costs regime in RTA cases is to all intents and purposes a contingency fee regime in that costs in the event of success are percentage of the damages recovered payable by the Defendants.
- They offer costs recovery which is proportionate to the value of the case meeting the increasing call for costs to be so proportionate as reflected in the increasing move to fixed costs

- The recovered costs may be structured as capped/ recoverable in a way that they do not put at risk certain client recoveries for example future care costs.

2.2 Where people are involved in civil litigation, the funding of such litigation is a crucial issue and one which can deter people from obtaining appropriate compensation. While the conditional fee system has significantly widened access to justice, there remain gaps. Also, CFAs have proved to involve complications whereas contingency fee agreements may prove simpler in operation. It must also, as a matter of policy, be appropriate for individuals to have a choice about the way in which litigation is funded, provided that there are appropriate safeguards for the administration of justice and to protect clients and their opponents being faced with unjustified costs demands.

1) Do you agree that these are the main arguments in favour of contingency fees?	Number of answers	Percentage of total answers
Yes	53	58
No	38	42

Comments:

Generally, views expressed were that although contingency fee agreements may be the only way that a client could fund a case, in other jurisdictions the award of damages is significantly higher to allow for a proportion of the damages to be paid to the lawyer.

Concerns were also expressed about the potential conflict of interest in such arrangements in that it could encourage solicitors to act in the best interest of themselves and not necessarily for their clients.

Arguments against contingency fee agreements

2.3 The main arguments against solicitors being able to undertake contentious work on a contingency fee basis have been as follows:-

- They give solicitors an interest in the action, which may conflict with the duties they owe to their clients and to the court.
- The English legal system aims that damages should cover the actual loss suffered and make appropriate provision for the future, particularly in the case of seriously injured claimants – there is a danger that this could be jeopardised if costs account for a substantial proportion of those damages.
- If costs are to be recovered from the other side, there may well be an increase in the costs of litigation generally.
- There might be an increase in unmeritorious claims.
- They may lead to an increase in damages to compensate for the fact that damages will be eroded.
- Although they offer proportionality they do not get over the fact the client may be paying a proportion of their damages towards the solicitors costs.
- There may be reputational damage to the profession as has arisen to an extent from the conditional fee system.

2a) Do you agree that these are the main arguments against contingency fees?	Number of answers	Percentage of total answers
Yes	80	88
No	11	12
2b) Are there others that ought to be mentioned? – see below	23	N/A

Comments

The responses to question 2b generally indicated that:

- practitioners believed contingency fees could increase litigant in persons, as claimants would be unwilling to pay a proportion of their damages to their solicitors if damages were not increased significantly to counteract this; or that work would be passed to less qualified representatives;
- it was also felt that it could lead to potential unethical practices which would not be in the best interest of the client;
- difficult, unusual or low value cases would be rejected leaving some clients with no access to justice;
- an increase in the fixed costs system to other areas of litigation may reduce costs to insurers.

Relationship with ethical duties

2.4 Solicitors owe duties to the court to act in the interests of justice and to clients to act in their best interests. It has been suggested that the fact that the solicitor has an interest in the case (in this case, the question of whether or not he or she will be paid for the work) is likely to place an incentive to behave unethically (for example by not disclosing damaging material or by advising acceptance of an unduly low settlement).

2.5 In fact, these incentives exist equally under the current conditional fee system. There has been no evidence to suggest that in fact solicitors have behaved unethically or that settlements have been unduly low. The arrangements have been in place for over 13 years and it is likely that such evidence would have been observable by now. Indeed, it is arguable that a contingency fee arrangement is less likely to lead to a disadvantageous settlement because of the direct link between the fee and the level of damages.

2.6 The existing regime prohibits conditional fees being used in criminal and family cases because it is thought that these cases, particularly those involving children or criminal matters are inherently unsuitable for such fees – the lawyer's

duties to the justice system and to the interests of the child generally are more likely to be put under pressure. Moreover, the fact that the outcome of these cases rarely involves money suggests that they would be particularly inappropriate for contingency fees. However, there are exceptions to this, which will be discussed below.

3a) Do you agree with these views?	Number of answers	Percentage of total answers
Yes	73	79
No	19	21
3b) If not, please give reasons – see below		

Comments:

A view expressed generally in response to question 3b) was that there was a belief that there would be a conflict of interest to push a case towards settlement and this would encourage lawyers to meet targets instead of acting in the best interest of their clients. Some respondents also expressed views that unscrupulous practises were already endemic in firms which carry out CFA work and that the temptation to inflate costs was high. They considered that this is going unchecked by the SRA and therefore required greater investigation. However, they also expressed the view that in the vast majority of personal injury cases solicitors did not allow the conditional fee regime to affect their professional judgment or integrity.

Deciding the percentage

2.7 There would clearly need to be some mechanism which limited the proportion of damages that could be claimed as a contingency fee. This could be set:

- simply as a general cap on the proportion of damages that could be claimed as a contingency fee;
- as a sliding scale depending on the value of the claim (so that high claims did not lead to disproportionately high fees); or

- on assessment after the event, to take account of whether the amount agreed adequately reflected the level of risk of the case.

In deciding which is the most suitable, a balance will need to be struck between protecting the litigant from unreasonable percentages, the need to ensure that the lawyer's risk in undertaking the case is adequately reflected and the need for certainty.

2.8 It is suggested below (2.13) that at least some of the element of the Contingency fee would be recoverable under the normal cost shifting rule from the defendants as at present and it could be provided that unsuccessful defendants would bear the same base costs as they do now. This is desirable as if the contingency fee were not recoverable from the other side, then the uplifted fee would need to come from the damages. Unless the basis on which damages awards are made is changed radically, this would be likely to mean that the costs would come out of the client's damages. While this might be thought to be unimportant in a minority of cases (e.g. defamation), this could be particularly unfortunate where an award has been made which includes, for example, an element to pay for long term care. Such a reduction could lead to serious consequences for the victim later on. There may be other cases where any diminution of damages would have similar effects.

2.9 It may be that this issue could also be addressed by prohibiting contingency fees in particular areas of work (e.g. any personal injury claim where care damages would be a significant element of the award) in addition to those currently prohibited. However, it may also be that some of these cases are difficult to fund but they could also be the ones where some solicitors are most likely to welcome contingency fee arrangements because of the opportunities for enhancing the fee. The effect of such a restriction could be to deny litigants access to justice in particularly complex cases.

2.10 It may also be appropriate to review the types of case where conditional fees are currently prohibited. One example of an area in which contingency fees might be appropriate could be high value matrimonial cases where there are no children involved and it is hard to see the public policy reasons for prohibiting contingency fees in such cases.

2.11 The existing conditional fee regime provides for various safeguards (for example, the other side must be informed if a CFA is in place) and these should probably apply equally in contingency fee cases.

4a) If costs were not recoverable, should certain types of case be excluded from contingency fee funding?	Number of answers	Percentage of total answers
Yes	65	74
No	23	26
4b) Please give your reasons: – see below		

Comments:

Responses to question 4b) generally indicated that solicitors believed contingency fees are wrong in principle and gave lawyers a bad name, particularly in the US, and that damages would need to be significantly increased to compensate the client. Also - cases involving children and vulnerable persons should be excluded as well as low value claims and personal injury claims involving clients who needed long term care as a result of their injuries.

5a) Do you agree that a mechanism needs to be set to limit the percentage of damages that can be claimed as a contingency fee?	Number of answers	Percentage of total answers
Yes	70	74
No	24	26
5b) Please give your reasons – see below		

Comments:

Most of those who responded to question 5b) did not consider that contingency fees should be allowed. Others considered that safeguards should be in place which reflected the risk. The majority believed that contingency fees should be transparent, predictable and should be seen to operate fairly; and if percentages were set, these should be open to challenge. Some expressed the view that contingency fee arrangements should be limited to complex and high value claims only.

6. What mechanism do you favour? Please give your reasons	Number of answers
– see below	59

Comments:

The majority of those who responded favoured a percentage cap, on a sliding scale, dependent on complexity and value of the claim. The possibility of introducing a requirement to seek independent legal advice prior to entering into such an agreement was also put forward. Several responses indicated that the control should be judicially exercised.

7a) Do you agree that the existing mechanisms for conditional fees are sufficient for contingency fees?	Number of answers	Percentage of total answers
Yes	46	51
No	45	49
7b) Should there be others?		
Yes	41	49
No	43	51

Comments:

The majority of respondents to question 7b) believed that CFA's worked well in practice for clients. Some felt the indemnity principle had caused difficulties and

should be abandoned as it had given rise to an increase in satellite litigation. It was felt however that contingency fees would need stricter limits and more guidance to avoid exploitation of clients.

8a) Should certain work, for example clinical negligence, be specifically excluded from any contingency fee arrangements?	Number of answers	Percentage of total answers
Yes	42	47
No	48	53
8b) If yes, please specify and give reasons. – see below		

Comments:

The majority view of those who answered yes to question 8a) indicated that all injury claims should be excluded from contingency fees, but particularly where future loss was an issue as the idea of taking a percentage of the client's damages was "wrong" in principle. If they were to exist for personal injury claims, including clinical negligence, damages awarded should increase significantly.

Others believed that mental health, employment, family and criminal law cases should be excluded.

9a) Should certain elements of damages in personal injury and clinical negligence claims be exempt from the contingency percentage calculation?	Number of answers	Percentage of total answers
Yes	46	51
No	44	49
9b) If yes, please specify and give reasons: – see below		

Comments:

Specific elements of future care as well as past and future loss of earnings and special damages were the most common responses to this question.

Recovery of costs

2.12 The English legal system has tended to work on the basis that costs should follow the event – in other words, the loser will pay the costs of the successful party (subject to an assessment that those costs are reasonable). The extension of this to conditional fees in 1999 meant that the problem of the reduction in damages was avoided. However, it did lead to extensive satellite litigation over exactly what costs could be recovered and what uplifts were reasonable in particular cases.

2.13 The Law Society's policy has always been that the principle that costs should follow the event should be maintained. It would obviously be possible for the losing party to pay, in addition to the damages, the proportion of the damages payable in costs, together with the disbursements. It is hard to see why the defendant should not pay the costs simply because a contingency fee agreement is in place. In such circumstances, it is inevitable that satellite litigation will arise over the reasonableness of the proportion, emphasising the need to have a clear mechanism for assessing this.

10a) Do you agree that costs should follow the event where there is a contingency fee agreement?	Number of answers	Percentage of total answers
Yes	74	79
No	20	21
10b) Please give your reasons: – see below		

Comments:

Most of those who responded to question 10b) believed that costs should follow the event as it focused the mind of the parties on the merits of proceeding with the claim.

Some also expressed the view that there should be no uplift in costs where there was a contingency fee arrangement as it caused unfair pressure on a party facing a contingency funded opponent to consider unreasonable settlement offers because of the risk of higher legal costs.

11a) Are there additional safeguards needed to protect defendants from inappropriate high contingency fees?	Number of answers	Percentage of total answers
Yes	47	53
No	42	47
11b) Please give your reasons: see below		

Comments:

A number of those who responded believed that contingency fees should be challengeable at the end of a case if it was felt to be disproportionately high, with the possibility of the challenger facing a risk of costs. Others felt that a 25% maximum ceiling was fair and that a requirement to seek independent legal advice was a reasonable safeguard prior to entering into such an arrangement. However many felt that contingency fees should only be allowed in certain cases or should not be allowed at all.

2.14 It may also be the case that such arrangements may increase the costs of litigation. It is certainly unlikely that a claimant's solicitor will choose an arrangement where the likely outcome will be lower than could be achieved from the other option. Thus, a relatively low value case is more likely to be done under a conditional fee agreement and a higher value case under a contingency fee. The Law Society does not consider that this is inappropriate and believes that, as a result, solicitors are more likely to take on a wider range of cases. Obviously, it is appropriate for there to be additional safeguards.

12. Do you agree that it is appropriate for solicitors to have access to a wide number of funding options in order to assure access to justice?	Number of answers	Percentage of total answers
Yes	78	82
No	17	18

Unmeritorious claims

2.15 It has been suggested that conditional fee agreements have given rise to a growth in unmeritorious claims and, therefore, that contingency fee agreements will exacerbate this. There is no evidence to suggest that this is the case. The Law Society's view is that the fact that the solicitor has a stake in the action is likely to mean that he or she is more careful about the merits of cases they accept on this basis. However, it also means that clients are likely to have greater access to justice for claims that have merit but would otherwise be too expensive to pursue.

2.16 We consider that the insurance industry is well placed to resist unmeritorious claims. It can do so both by resisting such cases in court and, in its own interests, through the cases that it accepts by way of after the event insurance.

13a) Are you aware of evidence to suggest that there are unmeritorious claims being put forward as a result of the existence of conditional fee arrangements?	Number of answers	Percentage of total answers
Yes	21	22
No	74	78
13b) If so, please give full details: – see below		

Comments:

Of the 21 (22%) respondents who answered yes to this question several of them held the view that some solicitors took on unmeritorious claims in the knowledge that defendants would settle where CFA's are in use and that the indemnity principle just exacerbated the problem.

However others believed that CFA's sifted out unmeritorious claims through the requirement by insurers that a claim should have a 51% success rate, which some referred to as "cherry picking".

One respondent had personal experience of unmeritorious claims in the defamation field.

Evidence of unscrupulous practices is apparently being investigated in relation to "personal injury scams", which is said to be due to "ambulance chasing" claims management companies and the practice of referral fees.

3. Conditional fees

3.1 This is also an opportune moment to consider whether the existing conditional fee system works well or whether it needs reform. The Law Society's view is that it has succeeded in providing appropriate access to justice. There is no evidence of solicitors acting unethically. Difficulties that have arisen have, in our view, have largely been as a result of the involvement of unregulated claims managers and we believe that the new arrangements to regulate these will address the concerns.

14. Do you agree with this view of conditional fees?	Number of answers	Percentage of total answers
Yes	66	70
No	28	30

15a) Do you consider that CFAs have led to a profusion of unmeritorious claims?	Number of answers	Percentage of total answers
Yes	21	23
No	71	77
15b) If so, please give reasons and provide supporting evidence: – see below		

Comments:

Of those who answered “yes” to this question, “personal observation” was cited by the majority of them as “evidence” of the increase in unmeritorious claims which they considered was as a result of referral fees.

3.2 The Government is undertaking a review which will investigate whether no win, no fee arrangements are still operating in the best interests of giving people access to justice. The Society will be engaging with the Government about this review so as to ensure that reforms to the existing CFA regime do not hinder access to justice.

16. Are there any reforms which you think should be made?
<p>Suggestions included:</p> <ul style="list-style-type: none"> • no “touting” for business by solicitors or others; • a limit of 25% of the award for contingency fees; • increased regulation /protection for consumers; • consumers given the choice of solicitors and funding methods; • abolition of claims management companies or stricter regulation of claims management companies; • no referral fees;

4. Third party funding

4.1 It can be said that third party funding is well established and has been accepted by the courts as, in certain cases, a lawful means of funding litigation. It would not, therefore, seem appropriate for the Law Society to stand in the way of what is perceived to be another method of funding which increases access to justice, albeit for higher value cases. However, the law on this is developing piecemeal in response to individual cases and there is considerable uncertainty as to what counts as legitimate third party funding and the extent to which a third party funder should be liable for costs if the action is unsuccessful.

4.2 Third party funders can take a wide variety of forms. They can include:

- the Government acting through the legal aid fund;
- charities, unions or representative groups supporting particular cases;
- commercial providers who see the action as a source of income.

4.3 It is understandable that there might be particular concerns about the last class of funder. In those cases the funder will be seeking a portion of the damages on success and the concerns that arise out of contingency fees where there is no cost shifting will apply here. There will also be a concern that such providers are not currently regulated and, unlike solicitors, are under no duty to act in the interests of the client. There is an obvious danger that clients using such organisations may suffer considerable loss if there is no proper protection.

4.4 Such arrangements could also pose problems in respect of access to justice. It is possible that commercial providers will have firms of solicitors on their panels and it will be important to clarify to whom those solicitors will owe their duty, how far the funder is required to continue the action if it becomes significantly more costly and how this fits with a client's choice of solicitor.

4.5 There are a number of options for regulating third party funding. These include:

- General statutory provisions governing third party funding, including limiting the proportion of damages that can be obtained;
- Extending the powers of the Claims Managers Regulator, the SRA or the FSA to licence those who are not currently regulated;
- A new regulatory regime with detailed rules governing conflicts of interest etc.

4.6 The question also will obviously arise as to whether these arrangements should be limited to commercial providers or whether all funders should be subject to them.

17. What arrangements in your view are most suitable to ensure that claimants' interests are properly protected where a third party is funding the action?

The majority of views expressed were that:

- third parties should not have “control” of a case and that a claimant should have the freedom to choose their own solicitor and method of funding (from a wider range of funding possibilities).
- where there was a contingency fee arrangement, it was felt that this should be capped at a maximum of 25% of the claim.
- a better regulated and more transparent arrangement was needed to protect claimants' interests.

4.7 One of the major considerations about TPF is the funder's liability for adverse costs and whether or not they should be liable for the full amount or just an amount equivalent to their outlay (as happened in the Arkin case – see paragraph 1.30). Given that the case would be unlikely to have continued without the support of the funder, it seems reasonable that the funder should be required to pay the reasonable costs of the other side if the case is lost. There seems no reason why this should not apply to all such funders whether they have a commercial interest or not.

18. Should third party funders in an unsuccessful case be responsible for all of the successful party's costs?	Number of answers	Percentage of total answers
Yes	67	74
No	23	26

4.8 At the moment, TPF is an unregulated activity. There is no statutory limit on the percentage charged as a contingency although it is likely that the factors dictating this are commercial (most funders require a return of 3 or 4 times their potential exposure) and dependent on the merits of each particular case.

19a) Should third party funders be restricted to a maximum amount that they can charge on a contingency basis?	Number of answers	Percentage of total answers
Yes	58	64
No	32	36
19b) If so, what should the maximum be? – see below		

Comments:

It was widely considered that there was a need to restrict the amount charged by third party funders, but there was no consensus on how this could be achieved. In essence practitioners believed it should be set at a level at which the funders would not make huge profits from supporting claims, but would allow them to operate an economic business. One respondent highlighted the differences faced by (a) a celebrity footballer not “turning a hair” at having to lose 90% of his damages to costs in a libel case; and (b) a disabled child surviving past their predicted longevity whereby a 10% loss through costs would be devastating.

4.9 Solicitor’s Conduct Rule 9 (Referrals of Business) prevents Solicitors from acting for a personal injury client with the benefit of third party funding. Rule 9.04(1)

states “You must not, in respect of any claim arising as a result of death or personal injury..... act in association with any person whose business, or any part of whose business, is to make, support or prosecute (whether by action or otherwise, and whether by a solicitor or agent or otherwise) claims arising as a result of death or personal injury, and who, in the course of such business, solicits or receives contingency fees in respect of such claims.”

4.10 Whilst it is unlikely that claims arising from personal injury or death will be a large market for third party funders, it is, nevertheless, an area which is likely to become an issue.

20. In the light of the changing attitudes of the judiciary and the current regulatory regime of Claims Management Companies, should Solicitors Conduct Rule 9.01(4) be removed?	Number of answers	Percentage of total answers
Yes	27	33
No	56	67

21a) Should solicitors be permitted to engage in third party funding activities?	Number of answers	Percentage of total answers
Yes	45	49
No	46	51
21b) If yes, should solicitors be permitted to fund their own client's case? – see below		

Comments:

The responses to question 21b) indicated that solicitors’ funding their own cases could provide a further option to clients provided proper safeguards were in place. However, some believed this could lead to a conflict of interest.

5. Other costs issues

5.1 The satellite costs litigation (“the costs wars”) in respect of CFAs have been based on breaches of the indemnity principle¹ which, simply put, states that in contentious business matters a solicitor may not recover from a paying party more than the client would be liable to pay. Consequently, if any funding agreement between a solicitor and client is held to be unenforceable, the unsuccessful party has no liability to pay the successful party’s solicitor’s costs. This results in a “windfall” for the wrongdoer or tortfeasor, or more usually, their insurer.

5.2 For some time now it has been the recommended policy of the Law Society’s Civil Litigation Committee that the indemnity principle should be abolished. When this was last raised with the Ministry of Justice (then the Department for Constitutional Affairs) they considered that this may require legislation and consequently any proposal in this respect was likely to take some time.

5.3 However, in June 2003, s.51(2) of the Supreme Court Act 1981 (‘the SCA 1981’), which stated:

“Without prejudice to any general power to make rules of court, such rules may make provision for regulating matters relating to the costs of those proceedings including, in particular, prescribing scales of costs to be paid to legal and other representatives ...”

was amended so as to add:

“or for securing that the amount awarded to a party in respect of the costs to be paid to such representatives is not limited to what would have been payable by him to them if he had not been awarded costs.”

Whilst the amendment did not abolish the indemnity principle it delegated its curtailment to the Civil Procedure Rules.

5.4 The amendment conferred the power to make Rules of Court which provided for the inter-party recovery of costs which would otherwise be precluded by the

¹ S.60(3) Solicitors Act 1974

Indemnity Principle. Because of this and the fixed costs regime in RTA cases (CPR Parts 45.7 to 45.14) the High Court has previously decided² “.....the receiving party does not have to demonstrate that there is a valid retainer between the solicitor and client merely that the conditions laid down under the Rules have been complied with.” Consequently, in cases falling with the RTA fixed costs regime, compliance with the CFA regulations is irrelevant to the recovery of the fixed costs or the success fee as the indemnity principle will not apply in these cases. This principle has not, as yet, been challenged in the Court of Appeal.

5.5 Whilst there appears to be some doubt that full abolition of the indemnity principle without legislation is possible it is likely that it could be disapplied in specific areas under existing legislation and by amendment to the CPR.

5.6 As stated by Michael J Cook,³ “removal would end the validity of challenges by paying parties and leave funding arrangements where they ought to be – between client and solicitor.”

22a) Should the indemnity principle be abolished?	Number of answers	Percentage of total answers
Yes	56	62
No	34	38
22b) Please give reasons – see below		

Comments:

Respondents to question 22b) generally considered that the indemnity principle provided an unfair “windfall” to losing parties and should be abolished; others spoke of the increased and unnecessary satellite litigation the indemnity principle has created. Those who wished to retain the rule believe that it is an effective brake on unmeritorious claims where parties have acted “badly” and represents a sensible constraint preventing a party from recovering more costs than they have incurred.

² Butt v Nizami [2006] EWHC 159 (QB)

³ Cook on Costs 2005 edition

23. Should the costs shifting rule be retained?	Number of answers	Percentage of total answers
<i>Yes</i>	<i>70</i>	<i>80</i>
<i>No</i>	<i>17</i>	<i>20</i>

Demographics

Is your organisation a law firm in England and Wales?	Count	%
Yes	75	80 %
No	19	20 %

Which of the following best describes the location of your firm's head office?	Count	%
Rest of London	16	18 %
North West	15	17 %
South West	11	12 %
City of London	9	10 %
South East	9	10 %
East Midlands	7	8 %
West Midlands	7	8 %
Yorkshire and Humberside	6	7 %
Wales	4	4 %
North East	3	3 %
Eastern	2	2 %

If yes, what is the size of your firm measured by the partner equivalent count?	Count	%
2-4 partners	24	30 %
Sole practice	20	25 %
11-25 partners	15	19 %
5-10 partners	13	16 %
26-80 partners	5	6 %
81 or more partners	3	4 %