The UK experience

Many cases in which the Convention has been raised have come before UK courts and it is therefore reasonable to expect students to be able to quote some of these as examples of the use of the Articles of the Convention by claimants. As an introduction, however, it has emerged from the case law that if a human rights point is taken it should be taken properly and not thrown into the case as a makeweight. Advocates wishing to rely on the Convention are under a duty to the court to make available any material in terms of decisions of the European Court of Human Rights on which they could rely or that might assist the court (see *Barclays Bank plc* v *Ellis and Another* (2000) *The Times*, 24 October).

An advocate should also consider carefully whether the 1998 Act and Convention add anything to the argument (*Daniels* v *Walker* [2000] 1 WLR 1382) and should not use court hearings as an international seminar on human rights (*Williams* v *Cowell* [2000] 1 WLR 187).

Finally, although the Court of Appeal has found certain of the provisions of the Consumer Credit Act 1974 incompatible with the Convention (see below), the impact of the Act of 1998 to date has not been as far-reaching as some commentators said it would be. This is hardly surprising. It would be rather odd if UK law was found to be full of serious deficiencies. What we have seen is many challenges to substantive law by reference to the Act and Convention. This process is likely to continue.

Case law Art 6: right to a fair trial of disputes

Wilson* v *First County Trust (No 2) [2002] QB 74

In this case the Court of Appeal held the absolute bar on the enforcement of a consumer credit agreement in s 127(3) of the Consumer Credit Act 1974 which provides that such an agreement is unenforceable if it fails to contain the terms prescribed under s 61 of the 1974 Act, infringed the trader's rights for the purposes of Art 6. He was unable to recover a loan and interest simply because the agreement had misstated the amount owing in the loan agreement. The court made a declaration of incompatibility of the relevant sections of the 1974 Act.

The above ruling of the Court of Appeal was reversed by the House of Lords in *Wilson* v *First County Trust (No 2)* (2003) *The Times*, 11 July. The House of Lords ruled that although s 127(3) of the Consumer Credit Act 1974 led automatically and inflexibly to a ban on a court making an enforcement order if a regulated agreement did not comply with the statutory requirements about the form and content of the agreement, it was open to Parliament to decide as a matter of social policy that despite the severity of its effect that was an appropriate way to protect consumers. Therefore, s 127(3) was compatible with the Human Rights Convention.

Comment The Consumer Credit Act 2006 repeals s 127(3) of the Consumer Credit Act 1974 but not the whole section. The result is that, for the future, the previous bars to a court granting an enforcement order in respect of an agreement that is improperly executed have gone. The court is left with a discretion under s 127(1) to refuse an enforcement order if it considers it just to do so and according to the degree of prejudice to any party or person. This is in line with the thinking in the House of lords in *Wilson* because their Lordships may well have regarded s 127(3) as contrary to the Convention if all credit agreements were non-regulated. At the time of the action, a credit agreement was non-regulated only if the credit exceeded £25,000. Section 2 of the 2006 Act removes the limits so that all agreements for credit or hire will be regulated under the 1974 Act though there are exemptions, e.g. credit over £25,000 to large businesses. In future, situations like *Wilson* would be decided under the just and equitable principle of s 127(1) and there would be no absolute bar to the court granting an enforcement order so that the 1974 Act, after amendment by the 2006 Act, is not contrary to Art 6.

R (on the application of Fleurose)* v *Securities and Futures Authority [2002] IRLR 297

Here the House of Lords held that it was justifiable for the SFA to require stock market traders to answer its questions and that the traders could not invoke the privilege against self-incrimination (a general rule in legal proceedings) because this would prevent the SFA from carrying out its duty to protect the public against infringements of the Authority's rules. In this case those involved had been manipulating prices in the stock market to make a profit. The Financial Services Authority took over from the SFA at the end of November 2000 with similar powers and protection by this case.

Case law Art 9: freedom of thought, conscience and religion

The Court of Appeal has ruled against a high school which sent home a pupil Shabina Begum for wearing a jilbab, i.e. a gown covering the whole of her body except her hands and face.

R (on the application of SB)* v *Headteacher and Governors of Denbigh High School
[2005] 2 All ER 396

The relevant provision of the Convention on Human Rights reads as follows:

Article 9: Freedom of thought, conscience and religion

(1) Everyone has the right to freedom of thought, conscience and religion; this includes freedom to change his (or her) religion or belief and freedom either alone or in community with others and in public or private to manifest his (or her) religion or belief in worship, teaching, practice and observance.

(2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety for the protection of public order, health or morals or for the protection of the rights and freedoms of others.

The Court of Appeal ruled that the school had infringed Miss Begum's freedom to manifest her beliefs by taking the view that a shalwar kameez was acceptable for the majority of Muslims and that she accept this garment which showed more of the body.

Lord Justice Scott Baker said: 'Every shade of religious belief if genuinely held is entitled to due consideration under Art 9.'

Comment The school could have considered whether a limitation of Miss Begum's right was justified under Art 9(2) (above), but since it had not done so, it was impossible to conclude what the result would have been. The House of Lords reversed this decision (see [2006] 2 All ER 887).

Case law Art 10: freedom of expression

Steen* v *HM Attorney-General (2001) *The Times*, 30 March

In this case the Court of Appeal ruled that the proviso to an injunction preventing disclosure of any information obtained by any member of the Security Service in the course of his employment that required a person wishing to publish material within the terms of the injunction to get clearance from the Attorney-General was a restriction on the freedom of the press out of proportion to any public interest and was thus ineffective as being contrary to Art 10.

V and Another* v *News Group Newspapers Ltd and Others [2001] 1 All ER 908

This case may well be the most well-remembered case to date on human rights law. Jon Venables and Robert Thompson who were convicted of murder at the age of 11 took action against Newsgroup Newspapers and Associated Newspapers for an injunction to protect

information that might lead to them being identified on release from detention. The High Court upheld their claim. In exceptional circumstances individuals who were seriously at risk of death or injury if their identity or whereabouts became public knowledge could be protected by an injunction as an exception to the defendant's right to freedom of expression.

Coroners' courts

These courts, which commenced in 1194, are amongst the oldest English courts still in existence. Their chief function is to inquire into cases of violent, unnatural or suspicious death, including suicide, together with cases of sudden death without apparent cause. They also inquire into deaths in prison.

A coroner has jurisdiction to hold an inquest on a body lying within his jurisdiction even though the death and cause of death have not occurred in England and Wales. Thus, in *R* v *West Yorkshire Coroner, ex parte Smith* [1982] 3 All ER 1098 the Court of Appeal decided that the coroner was obliged under what is now s 8 of the Coroners Act 1988 to hold an inquest into the death of a nurse who had died in Saudi Arabia but whose body had been brought back to this country. However, the coroner faces special difficulties in such a case because he cannot summon witnesses from abroad or request the production of documents (see further Chapter 5).

The procedure is that of an inquest or inquiry; it is not a trial. The object is to find out the identity of the deceased, the cause of his death, and where the death took place. It is not the purpose of an inquest to apportion blame (*R* v *Coroner for North Humberside and Scunthorpe, ex parte Jamieson* (1994) *The Times*, 28 April). The coroner's officer, a serving police officer, collects evidence before the inquest begins. All witnesses are under oath, but the rules of evidence are not applied as strictly as they are in other courts. The coroner decides what constitutes relevant and admissible evidence, and has much discretion at all stages of the investigation.

The coroner's jury

In cases such as suspected murder or death in prison, the coroner may summon a jury of from seven to 11 persons, and he may accept the verdict of the majority so long as there are not more than two dissentients. He is required to summon a jury under s 8(3) of the Coroners Act 1988 where the death with which he is concerned occurred in circumstances the continuance or possible recurrence of which is prejudicial to the health or safety of the public or any section of the public. An example from earlier legislation is the decision of the Court of Appeal in *R* v *Hammersmith Coroner, ex parte Peach* [1980] 2 All ER 7, where it was held that the suspicious or unauthorised use by a police officer of a lethal weapon was a matter coming within s 8, and accordingly it was compulsory to have a jury. Section 8(3) also requires a coroner to summon a jury where the deceased was in police custody or death resulted from an injury caused by a police officer in the purported exercise of his duty.

Section 9 of the 1988 Act provides that a person is not qualified to serve as a juror at an inquest held by a coroner unless he is for the time being qualified to serve as a juror in the Crown Court, the High Court, and the county court (see further Chapter 4). The Act also provides criminal penalties for evasion of service on a coroner's jury.

The coroner can require a *post mortem*, and the attendance of medical and other witnesses who may be examined on oath. He can also invite an expert to sit with him (*R* v *HM Coroner for Surrey, ex parte Wright* (1996) *The Independent*, 5 July).

If the court finds that a death was a result of murder, manslaughter or infanticide, this does not operate to convict the person said to be responsible, and a coroner can in no case charge a person with those offences.

It may happen that before the end of the inquest a person is charged with an offence, e.g. murder or manslaughter, in connection with the death of the deceased. On being informed of this by, e.g., a clerk to magistrates, the coroner must adjourn the inquest until after the conclusion of the relevant criminal proceedings and if he has summoned a jury he may, if he thinks fit, discharge them. This is to prevent inquests turning into, in effect, murder trials as they sometimes did in the 1920s.

After the conclusion of the relevant criminal proceedings the coroner may resume the adjourned inquest if, in his opinion, there is sufficient cause to do so. If he does resume an inquest, the finding of the inquest as to the cause of death must not be inconsistent with the outcome of the relevant proceedings (Coroners Act 1988, s 16(7)).

Under s 1 of the Coroners Act 1988 coroners are appointed for each coroner's district in a Metropolitan County or Greater London and for each Non-Metropolitan County and for the City of London by the relevant Councils. Appointment is from persons with a five-year general qualification within s 71 of the Courts and Legal Services Act 1990 or legally qualified medical practitioners who have had at least five years in practice.

Section 6 of the 1988 Act provides that every coroner must appoint a deputy coroner and *may* appoint an assistant deputy provided in each case that the approval of the Chairman of the relevant Council is obtained. This is to ensure continuity in the office where a coroner dies or retires. The qualifications for a deputy or assistant deputy are as for a coroner himself. All the appointments referred to above are generally part-time and there can be dismissal for inability or misbehaviour. The Lord Chief Justice and the judges of the High Court are by reason of holding that office also coroners *ex officio* as it is referred to.

Reform

The Home Office independent review group that reported in 2003 recommends that mandatory inquests into suicides, deaths at work and road accidents should be abolished. This says the report would respect the sensitivities of families in these cases. The report recommends that the circumstances of death should be settled administratively in private and without publicity and with respect for family privacy. Legislation will be required to effect the reforms.

At the time of writing there has been no implementation of the above proposals.

Treasure

The jurisdiction of coroners referred to in s 30 of the Coroners Act 1988 is exercisable in relation to anything which is treasure for the purposes of the Treasure Act 1996.

Treasure is any object which when found is at least 300 years old and if not a coin has a metallic content of silver or gold of at least 10 per cent by weight. This applies to coins which are at least 300 years old if they are one of at least two coins which taken together have the above percentage of gold or silver. Furthermore, if a coin is at least 300 years old and is one of at least 10 coins in the same find, it is treasure regardless of its metallic composition. A coin found on its own is not treasure.

Objects which are part of the same find whether found at the same time or earlier are also treasure so, for example, the pot (or whatever) in which the treasure is found is also treasure. The Secretary of State has a power to designate other types of objects as treasure, provided they are at least 200 years old. The power is exercisable by statutory instrument. Ownership

of treasure will in general terms vest in the Crown. This ownership applies without regard to the place where it was found or the circumstances in which it was left. The Act removes the need to establish that the relevant objects were hidden with a view to their being later recovered. A new criminal offence of non-declaration of treasure is created. The finder must notify the coroner within 14 days from the date of the find or from the date when the finder believes or has reasonable grounds to believe that the object is treasure. The coroner's inquest held to decide whether what has been found is treasure may be held without a jury. If it is not treasure the finder, and not the Crown, acquires a good title to it.

If it is treasure (and so vests in the ownership of the Crown) and is to be transferred to a museum, the Secretary of State must decide whether a reward is to be payable by the museum prior to transfer. Under the old law a reward if payable was paid only to the person who found the treasure – often a person with a metal detector who made the discovery as a trespasser. The 1996 Act gives landowners and occupiers a right to a share and a right to be informed of finds which have been reported and are on their land. There is to be a code of practice which will deal among other things with how rewards will be paid and shared.

In the spring of 2006 the government issued a consultation paper containing proposals to speed up treasure handling by transferring administration of the process from the Department for Culture, Media and Sport to the British Museum. Currently, those finding treasure have to deal with both institutions at different stages of the process. The DCMS will retain its function to decide on valuations after being advised by the Treasure Valuation Committee. The consultation paper is entitled *Amendments to the Treasure Act 1996 Code of Practice* and can be accessed at **www.culture.gov.uk.**

Reform

The government has announced its intention to reform the law relating to treasure. The reform is aimed at clamping down on treasure hunters and dealers who sell items recovered without asking the landowner's consent to the excavation. Previous attempts have failed because of lack of parliamentary time. There is still no implementation of the above proposals.

Adjournment in event of judicial inquiry

Under s 17A of the Coroners Act 1988 (as inserted by s 71 of the Access to Justice Act 1999) coroners' inquests will normally be adjourned where a public inquiry is to be held which, in the opinion of the Lord Chancellor, will adequately investigate the death. At the end of the public inquiry the Lord Chancellor is required to inform the coroner, who will certify the facts ascertained at the inquiry as if they had been found at the inquest. The section reduces the possibility that inquests and inquiries may lead to conflicting findings of fact or lead to problems of self-incrimination.

Reform

The coroners' system is set for considerable reform under a draft Coroner Reform Bill. The main change relates to the families of the deceased person who is the subject of the inquest. Families will have the right to ask the coroner for a 'second opinion' on a death certificate about which they have concerns, together with a right to challenge coroners' rulings. A complaints system will be established.

All coroners will have to be legally qualified and will be given new powers to call evidence. The Department for Constitutional Affairs has stated that this means that no more solely

medically qualified coroners will be appointed but the changes will not be retrospective and doctors without legal qualifications already in post will continue to act.

The right to seek a *review* of coroners' decisions will be easy to access and will not require the hiring of lawyers.

There will be a Chief Coroner for England and Wales to provide leadership and guidance to coroners in much the same way as the Lord Chief Justice does for the judiciary. The Chief Coroner will hear appeals against coroners' rulings, oversee their training and bring in judges to deal with complex matters. The Chief Coroner will be supported by a Coronial Advisory Council, which will act as a further check on standards and will advise on what service and strategic issues may require further scrutiny.

In addition, all coroners will be full-time appointments. Co-ordination between coroners will be improved and a 'Coroners' Charter' will be published, laying down the standard of service that bereaved family members can expect.

A suggested flaw in the draft Bill is that it does not provide legal aid to families to have legal representation *at inquests*. Thus, in a complicated inquest the coroner will have the benefit of advice from legal counsel and medical advice but the family will not have these benefits legally aided.

Legal services

Generally

Under the current regulatory system there are, for our purposes, six forms of legal service that are subject to statutory control mainly under the Courts and Legal Services Act 1990 as amended by Part III of the Access to Justice Act 1999. These services are:

- **The right to conduct litigation**. This is in the main the function of solicitors and legal executives.
- **The right of audience**. This is the right to be heard on a client's behalf by a judge. Barristers, solicitors and legal executives have these rights, with some restrictions on legal executives.
- **Certain probate services**. e.g. the right to draw up or prepare any papers in regard to the obtaining or opposing of the grant of probate of a will or letters of administration where there is no valid will. Probate or letters are necessary to effectively administer the estate of a deceased person.
- **The preparation of the documents required to convey land** from the ownership of one person into that of another.
- **Notorial services**. This is explained below.
- **Acting as a commissioner for oaths**, where the law requires that to validate a particular document a person must swear an oath before a commissioner as to its truth.

As regards the fitness of individuals to act in the above areas, this is left to authorised bodies, such as the Bar Council and the Law Society, which are concerned, in addition to other functions, with the education and training of those who are called to the Bar as barristers or entered on the Rolls as a solicitor or admitted to membership of the Institute of Legal Executives. There are a number of higher level regulators over the professional bodies, such as the Secretary of State for Constitutional Affairs (formerly the Lord Chancellor), the Master of the Rolls, who may refuse entry on the Rolls, and the Office of Fair Trading in regard, for

example, to anti-competitive practices by the primary regulators such as the Bar Council and the Law Society.

Rights of audience

In order to understand current arrangements, it is necessary only to know that barristers have for many years been advocates presenting cases in court, whereas solicitors have been engaged, so far as actions in a court of law were concerned, in pre-trial work and briefing barristers to appear in court to present the case – something which they could not, in general do, at least at the level of the High Court and above. In today's environment, advocacy is still the work of barristers, but since the 1990 Act pre-trial work is called litigation and has been, and is, carried out by solicitors.

The position today is that, subject to satisfying the rules of the Bar Council (barristers) and the Law Society (solicitors), solicitors and barristers can appear and be advocates in all proceedings in every court and solicitors retain their function as litigators. However, the Bar Council has set up a scheme known as BARDIRECT under which, from 2003, people needing legal services including other professionals are able to bypass solicitors and engage a barrister direct. The barrister will then do both the litigation and advocacy elements of the case. The move is in response to threats from the Office of Fair Trading to stop restrictive practices that are not in the public interest.

A further and important development for users of legal services has resulted from the approval by the Secretary of State for Constitutional Affairs of a change in the Bar Council's code of conduct under which barristers who have been called to the Bar for at least three years and have practised for that time are able to liaise directly with the public without the need for a solicitor to act as intermediary. Before barristers can accept any direct access instructions, they must have attended a training course designated by the Bar Council. The move will cut costs in the more straightforward cases. In complicated claims, clients may still need the services of a solicitor.

Employed lawyers of either profession who are qualified as advocates can appear in court for their employers, but not for clients or customers of their employers.

The Institute of Legal Executives may make regulations under which legal executives, who are in general employed by solicitors, may conduct litigation, i.e. pre-trial work and advocacy, having a right of audience in civil and family proceedings in county counts and magistrates' courts. There is a proposal to extend their advocacy rights in criminal proceedings in the magistrates' and youth courts.

Overriding duties of advocates and litigators

These are as follows:

- to act with independence in the interests of justice; and
- to comply with rules of conduct.

Rights of audience and the employees of the Crown Prosecution Service

This is a special case because of the problems of impartiality. Nevertheless, the Crown Prosecution Service can now put its own advocates into court instead of, e.g., briefing barristers at the Bar at some expense. The CPS is now able to train its own employed advocates and put them into trials in the Crown Court and above. The hope is that they will not be swayed by a need for higher conviction rates. The reforms take effect under the Access to Justice Act 1999.

Conveyancing services

Sections 34–52 of the Courts and Legal Services Act 1990 are concerned to develop legal services by providing a wider choice of persons who may practise conveyancing which involves the preparation of the document (conveyance) which transfers a freehold interest in land after sale and the necessary documentation involved.

A sole regulatory body is set up by the 1990 Act. It is called the Authorised Conveyancing Practitioners Board and it is given the task of authorising, supervising and disciplining practitioners authorised for conveyancing work. Previously such work was restricted to solicitors, barristers and licensed conveyancers. They now face competition from authorised conveyancing practitioners.

A conveyancing ombudsman scheme to investigate complaints against authorised practitioners is set up and rules regulating the scheme are made by the Board. The Ombudsman can make compensation orders against practitioners including sums of money to represent inconvenience and distress as well as loss.

There is also the Council for Licensed Conveyancers which was set up under the Administration of Justice Act 1985, Part II to grant licences to practitioners of conveyancing services. This continues under the regulator, the Authorised Conveyancing Practitioners Board, but s 53 of the 1990 Act extends the powers of the Council so that it can extend the licences given to licensed conveyancers to allow them to undertake probate work, i.e. to get formal proof of a will, which must be applied for when the person making the will dies, or to get letters of administration to wind up the estate when there is no will, and to grant some rights of audience and rights to conduct litigation.

Probate services

Formerly, it was an offence for any person other than a solicitor or barrister to draft or prepare *for payment* the papers leading to a grant of probate or letters of administration. However, under ss 54 and 55 there is machinery by which bodies may apply for approved status under which their members could become 'probate practitioners' (s 55) (as the Institute of Chartered Accountants in England and Wales has already successfully done). The employees of banks, building societies and insurance companies can also do so under s 54.

Administration of oaths and the taking of affidavits

It is sometimes necessary for a person to make a statement on oath as to the truth of what is said in a document. If the statement in the document is false to the knowledge of the person giving the oath, that person commits the crime of perjury and can be prosecuted and may be fined or imprisoned. Every solicitor with a practising certificate can administer oaths and take affidavits (see below), but now s 113 provides that in the interests of competition authorised litigators and advocates may do so and may use the title 'Commissioner for Oaths', as can Licensed Conveyancers.

The Commissioners for Oaths (Prescribed Bodies) Regulations 1995 (SI 1995/1676) empower members of the Institute of Legal Executives to administer oaths and take affidavits (i.e. where the oath is administered in connection with the verification of the contents of a document) (and see also the notary public, at p 110).

Legal services: business structures

There are currently some statutory restrictions on the type of business structures through which legal services may be provided. These include a prohibition on lawyers entering into

partnership with non-practising lawyers, other types of lawyers and non-lawyers, e.g. accountants. There are also restrictions on unregulated persons being formally involved in the management of a regulated legal practice and also on unregulated persons having a stake in the ownership of a legal practice. Thus, in general terms neither different types of lawyers, e.g. barristers and solicitors, nor lawyers and non-lawyers can work together in legal partnerships.

Legal services: consumer complaints

A complaint by a consumer of legal services must first of all be taken up with the legal practice concerned. Where the complaint is not resolved by the practice, the consumer can contact the relevant regulator, e.g. the Law Society. If the complaint is not resolved, the consumer may refer the complaint to the Legal Services Ombudsman. The Ombudsman will investigate the way in which the regulator handled the complaint and the response from the professional body. If the Ombudsman is not satisfied that the complaint has been handled properly, then he or she will recommend that the professional body look at the matter again.

Reform: the Legal Services Bill

Following a review of the provision of legal services by Sir David Clementi in 2004/05, the government has published the Legal Services Bill. It will be put before Parliament in the session 2006/07. Its main provisions are:

- To enable different types of lawyers and other professionals such as accountants to work together to provide legal and other services.
- To allow external investment in businesses offering such services.
- To create a Legal Services Board to regulate the legal profession. The majority of the Board will consist of non-lawyers. This new regulator will provide consistent oversight of the front-line regulators, such as the Bar Council and the Law Society with power to devolve day-to-day regulatory responsibilities to them subject to their competence and governance arrangements.
- To set up an Office for Legal Complaints to carry out independent investigation of complaints.
- To establish a consumer panel to represent consumer interests to the Legal Services Board.

Several companies, including the Co-op and the AA, have stated that they will set up provision of legal services once the Bill becomes law.

Payment for legal services

Conditional fees

In the past any form of contingency fee arrangement between a lawyer and a client, e.g. to give the lawyer a share of the damages or an increased fee if successful but nothing on failure, was unenforceable in English law. The position is now governed by ss 58, 58A and 58B of the Courts and Legal Services Act 1990 (as inserted by the Access to Justice Act 1999). These sections authorise:

- no-win, no-fee arrangements for lawyers and their clients; and
- discounted fee arrangements where a case is lost; and
- similar arrangements for those who fund litigation.

These arrangements are available for all claims except family cases, cases relating to children and criminal cases. The relevant agreements must be in writing.

At the present time the law allows a conditional fee arrangement under which the lawyer involved receives no fee if the client loses the case, but receives a fee enhanced by a success fee of up to a further 100 per cent if the client wins (see the Conditional Fee Agreements Order 1995 (SI 1995/1674)).

When a client approaches a solicitor for a conditional fee arrangement, it will be discovered that before an action can be commenced, a single premium after the event insurance policy must be entered into by the client to pay the other side's costs if the client loses and the client's court fees, though obviously the client will not have to pay the lawyer. In this context it should be noted that for, e.g., a personal injury claim of an estimated £100,000 the one premium insurance could be quite high, and this and the success fee were not recoverable from the other side even where the client won the case.

Under amendments made to the Courts and Legal Services Act 1990 as indicated above, the success fee is now recoverable from the losing side as is the insurance premium.

With regard to discounted fee arrangements, there is no element of success fee here. The lawyer takes his normal fee if the client wins but agrees to, say, discount the fee by 30 per cent if the case is lost. The lawyer's normal fee is, of course, recoverable from the losing party as costs in the normal way.

Regarding conditional fees, the initial premium remains a problem for some claimants even though it is recoverable if the case is won. However, it may be possible to negotiate with an insurance company so that the premium is only paid if the claimant wins. If the case is lost, the insurance company merely pays the agreed costs and the other side's claim where the insurance is, in addition to a cost insurance, a liability insurance as well, though it need not be a liability insurance. In the above situation, the insurance company is, in effect, working on a 'you pay only if you win' basis.

Costs funded by non-parties

In many cases the cost of legal representation of one party, be it the claimant or the defendant, may be funded by a non-party, e.g. a trade union or an insurance company, especially in road accident cases. If the case is lost, the non-party pays the costs. If the claim or defence succeeds, the non-party will be able to recover the usual full reasonable costs.

Callery v *Gray* (2001) and other case law

Now that legal aid for personal injury claims (except clinical negligence) has been abolished, the risk of losing a claim is borne either by after the event insurance (ATE) and the claimant's solicitors or by before the event insurance (BTE). Case law is now beginning to give guidelines as to what is involved.

The case law is arising because the insurers of the losing party have become involved in actions where they have disputed the size of the premium on the other party's ATE or BTE insurance that they are having to pay as part of the costs. The following cases are illustrative.

Callery v *Gray (No 2)* (2001) *The Times*, 24 October is a decision of the Court of Appeal. It was a straightforward claim for damages arising out of a road accident – a whiplash injury, in fact. Damages were agreed but costs were not, hence the litigation. The claimant's solicitors argued for a success fee of 98 per cent and the recovery of a premium of £350 for ATE insurance. The defendant's insurers appealed against recovery of these sums particularly because the matter never came to trial because the defendant settled by admitting liability within the three-month Pre-Action Protocol period. The Court of Appeal ruled that the ATE premium

was recoverable because 'it did not seem unreasonable in terms of the service it offered'. However, as regards the success fee in a straightforward case such as this settled out of court, a 20 per cent success fee was all the court would allow.

Personal injury lawyers were not too pleased with this ruling but were less pleased with the ruling of the Court of Appeal in *Halloran* v *Delaney* (2002) 146 Sol Jo 815 where the court ruled that in a straightforward road traffic case involving personal injury and settled out of court a success fee of only 5 per cent was appropriate. The judgment in *Halloran* was delivered by Brooke LJ who sat in the *Callery* case.

Sarwar v *Alam* [2001] 4 All ER 541 is also instructive. It decided that a claimant could recover an ATE premium even though he had a BTE insurance as part of his motor insurance, because the ATE insurance gave additional service. Nevertheless, the Court of Appeal advised solicitors involved in this type of litigation to see whether the client had BTE insurance and as to its adequacy. Failure to do this said the court could lead to ATE insurance taken out in addition being disallowed as a head of costs.

Intervention of the Civil Justice Council

The ruling in *Halloran*, in particular, had affected the willingness of lawyers to take on the large number of road traffic injuries cases where settlement without trial is common. The Civil Justice Council, set up by s 6 of the Civil Procedure Act 1997 to keep the civil justice system under review, then brokered a deal with the legal profession for road accident cases that are settled out of court for up to £10,000. Lawyers handling these cases will receive a basic fee of £1,400 plus an additional fee on a sliding scale, examples of which are as follows: £1,000 for a case settling for £1,000, £1,200 for a case settling for £2,000 and £1,950 for a case settling for £6,000. The Civil Justice Council consists of the Master of the Rolls, judges, lawyers, consumers of legal services to give lay advice and litigant representatives.

Advocates' fees

What is said above relates to the fees of the solicitor and court fees. If it is thought that the services of a barrister will be required, further negotiations will be expected with a member of the Bar. There is no compulsion for members of the Bar (or solicitors) to enter into conditional fee arrangements. Since September 1999, all barristers and solicitors have acquired full rights of audience on call to the Bar or admission to the Rolls (of solicitors), subject to satisfying the Bar or Law Society requirements. Thus, it may not be necessary to brief a barrister but to use a solicitor/advocate throughout the case. It may be necessary to seek the services of a barrister in a difficult case and in such cases the barrister is not likely to be prepared to enter into conditional fee arrangements.

Conditional fees – rights of defendant/claimant

The claimant must disclose the amount of the success fee to the defendant within seven days of entering into such an agreement or the commencement of proceedings. The conditional fee agreement may, of course, be entered into later than the commencement of proceedings. The basic fact of the claimant's insurance but not its details must also be disclosed to the defendant within seven days of commencement of the claim or of entering into the insurance (if later). The defendant (through his insurance company) can challenge the cost of the insurance on final assessment of costs. The above rules apply to disclosure and challenge by a claimant to a defendant where the latter has entered into a conditional fee agreement.