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THE "ENGLISH RULE" ON PAYMENT OF COSTS OF CIVIL LITIGATION

Introduction

English courts have the discretion to award legal costs to any party to civil litigation, but its exercise is subject to the requirement that *costs follow the event*, i.e. that the losing party pays the costs of the winning party.[1] The genesis of this *English rule*, as it is referred to in the United States, can be traced back to a 13th century statute allowing costs to successful plaintiffs; by 1607 recovery was also allowed to prevailing defendants.[2]

The rule is not straightforward, and it is not in every case that a successful litigant can expect to recover his costs, nor does he always recover all his costs. A study reveals that in cases in which costs are submitted for review by the court, the winning party's bill is reduced by an average of around 20%.[3] On the other hand, the perilous position of the losing party must not be understated. In a high stakes gamble of *double or quits* a loser may end up paying a huge price for attempting to obtain justice.[4]

Taxation of costs

In a great majority of civil cases litigants reach agreement on the costs incurred. Where there is disagreement, the party contesting the costs may submit them for *taxation* to the court's taxing office. An elaborate system of taxation of costs has been developed for determining the amount to be reimbursed to the winning litigant. The review, which may include a hearing, is conducted by officials, known as taxing masters or officers, who usually apply a *standard basis* for awarding costs. This basis is defined as a "reasonable amount in respect of all costs reasonably incurred," with any doubts as to their reasonableness being resolved in favor of the paying party. Until 1986, costs were applied on a restrictive party-to-party basis under which expenditures that were *necessarily and properly* incurred were allowed. The use of this basis resulted in the winner recovering between 33 to 25% less than the costs actually incurred. The present *standard basis* allows a greater recovery to the winner.

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[1] Supreme Court Act 1981, §51; RULES OF THE SUPREME COURT ("RSC"), Order 62, rr. 2, 3(3) & 4.

[2] A. L. Goodhart, *Costs*, 38 YALE L.J. 849, 852 (1929).

[3] HAZELL GENN, *Survey of Litigation Costs* 4 (1996).

[4] T. Cornwell, *Quayle Likes the 'English Rule' But Brits Have Their Doubts,"* XIV LEGAL TIMES 1,12-13 (No. 38, Feb. 10, 1992), reporting an English action for medical malpractice in which an award of $396,000 by the trial judge was overturned by the Appeals Court, leaving the victim's widow to pay the defendant doctors' legal costs of $144,000.

Other rules

The recovery of costs by the winning litigant may be further reduced under other rules of procedure. For routine matters, such as an action for a debt, the rules provide a fixed range of costs. These are all that the winner can recover. The taxing officer may also disallow costs that are considered unjustifiable. This ensures that the litigant who has been extravagant in pursuing his claim cannot make the losing party pay for the excessive costs incurred.

The English system leans heavily on encouraging litigants to settle out of court. Among those inducements are rules providing that if a reasonable offer to compromise a claim is refused by the other party, the court may deprive the latter of his costs from the date of the offer. Further, a litigant may at any time make a payment into court of what he thinks to be a reasonable amount to settle the action. The other party has the choice of accepting the sum or continuing the action. If the judgment obtained is for less than the amount paid to the court, the winner must pay his own costs from the time of the payment into court.

Apart from the merits of the case, the court may also base its discretion to award costs on the manner in which the case was conducted. Costs may thus not be allowed to the winner if the court determines that he has unreasonably or improperly done or omitted to do something or has wasted costs as a result of an unreasonable or negligent act.

Legal aid

The source of financing of litigation has a bearing on the payment of costs. Legal aid, including assistance in civil proceedings, is available to about half of the population. In applying for legal aid, the litigant must show that his disposable income and capital does not exceed the limit set from time to time by legal aid authorities and submit evidence that he has a good cause of action. Where a successful party is legally aided, costs are recovered in the normal way. Where, however, the loser is legally aided, the order of costs made against him cannot exceed an amount which is considered to be reasonable under the circumstances, including the financial resources of all the parties and their conduct in connection with the dispute. In these cases, the court commonly awards costs in modest sums, the effect of which is that a legally aided person has a substantial tactical advantage.

The legal aid scheme is stated to cushion the impact of the English Rule. The English lawyer who lost the high stakes medical malpractice action cited in footnote 4 nonetheless stated: "Without legal aid, the system would be weighted disproportionately in favor of the defendants. If a legal-aid system hadn't been in place, maybe we would have gone in the American direction."[5]

There are concerns, however, that the scheme is not cost-effective and that it does not properly target its resources on those in most genuine need. Its cost has doubled in the last five years although eligibility on financial grounds has dropped from about 70% of households in the 1980s. There is also a widespread belief about the unfairness created by legal aid towards unassisted winning litigants who often have no prospects of recovering their costs from legally-aided opponents. The grant of legal aid provides little incentive for keeping costs down, and legally-aided parties are thus able

[5] *Id*. at 13.

to drive up their opponents' costs. Consequently, unassisted parties are under pressure to settle cases even though their opponents' cases may be relatively weak.

The government has accordingly submitted proposals for reforming civil legal aid so that it will gradually become a scheme in which services are provided through contracts with fixed prices.[6] The initiative in the White Paper is also aimed at keeping legal costs at affordable levels, proportionate to the matter in dispute, and to bring about greater certainty about how cases are conducted and the costs that the parties may face. Legislation is awaited on the issues.

Contingency fees

The English Rule must also be viewed in the context of the prohibition placed on lawyers from acting for clients on a contingent basis. A number of reasons have been advanced for maintaining the ban on contingency arrangements, viz, a conflict of interest may arise if the lawyer has a stake in the outcome of the litigation, rendering him unable to provide impartial advice; the lawyer being tempted to encourage the client to settle early in order to avoid bringing the case to court; and concentration by lawyers on cases with a high nuisance value where the defendant is likely to offer to settle the case. Experience in the United States is also thought to indicate that contingency fees encourage juries to award excessive damages and encourage litigants to pursue cases with little merit, leading to an explosion in litigation.

Some years back a government proposal called for the introduction of contingency fees for reasons of greater competition among and commitment from lawyers and to increase the opportunity for those who do not qualify for legal aid but are not able to afford expensive litigation. Following a debate, however, it was decided not to allow the arrangement on grounds of principle and anticipated *undesirable side effects.*[7]

The White Paper instead outlined a "conditional fee, on a speculative basis," an arrangement already in use in Scotland. The principle of this arrangement is that it is reasonable for a lawyer who represents a client on a speculative basis to balance the risk of losing the case and ending up with no costs by charging a higher fee if the case is successful.

The Conditional Fee Agreements Order 1995,[8] in effect from July 5, 1995, specifies the following proceedings in which the agreements are allowed:

(1) personal injuries;

(2) dissolution of companies; and

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[6] Lord Chancellor's Department, *Striking The Balance: The Future of Legal Aid in England and Wales*, Cm. 3305, June 1996.

[7] Lord Chancellor, *Legal Services: A Framework For The Future*, Cm. 740, at 41 (1989) (White Paper).

[8] S.I. 1995, No. 1674.

(3) cases before the European Commission of Human Rights and the European Court of Human Rights.

The maximum percentage by which fees may be increased for these proceedings is 100%. After the first few months only a few lawyers were operating under conditional fee arrangements.[9]

Comments and criticism

The English Rule has been subjected to extensive analysis in the United States.[10] While a number of commentators have suggested its virtues, it cannot be gainsaid that the English rule is a product of very different legal system and culture. One author, after discussing the difficulties that would have to be overcome in adopting an "Americanized English rule," states:

> Viewed from afar, the English rule appeals to its supporters as a mechanism for dealing with what some have described as an overly litigious American society. To its opponents, the rule is a nightmare that threatens to deny many victims their rightful compensation and puts many lawyers into financial crisis.

The truth is that these hopes and fears about the English rule have some validity.[11]

An English study on the settlement of personal injury actions attests to what is probably the greatest virtue of the English system: "99 per cent of claims are concluded out of court, in private, on the basis of an agreement negotiated between the injured party's solicitor and the defendant or the defendant's legal adviser."[12] If even a small percentage of these cases were to go to trial, an immense diversion of the resources of the legal system would be necessitated. The incentive provided by the English Rule against bringing actions to trial must be considered to play a significant role in encouraging litigants to settle out of court.

Professor Genn's study of personal injury cases, however, also reveals the steep price paid by the compromising litigants who receive damages that are much less than what might have been obtained had their cases gone to trial or if they had awaited increased offers for settlement. The pressure exerted on plaintiffs by uncertainty and delay in litigation and the fear of payment of costs is so great that two-thirds of injured parties accept the first offer made by defendants.[13] The extent of

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9 K. Underwood, *Conditional fees and the public*, 145 NEW L.J. 1655 (1995).

10 For example, *see* E. H. Kellogg, Jr. *Why the 'English Rule' Won't Work Here*, LEGAL TIMES 25 (June 26, 1996); K. N. Hylton, *Litigation Cost Allocation Rules and Compliance with the Negligence Standard*, 22 J. OF LEGAL STUDIES 457 (1993); publications cited in J. Vargo, *The American Rule in Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, at fn. 15 (1993); P. Figa, *The 'American Rule' Has Outlived Its Usefulness; Adopt the 'English Rule,'* 9 NAT'L L.J. 13 (1986).

11 H. Kritzer, *The English Rule*, 78 A.B.A. JOURNAL 54 (Nov. 1992).

12 HAZEL GENN, *Hard Bargaining* 2-3 (1987).

13 *Id*. at 106-107.

the reduced damages received is indicated by data showing that where a first offer is rejected, the amount of the second offer is on average between one-third and one-half more than the first; where a third offer is received, it averages about one-third more than the second.[14] It has thus been suggested that plaintiffs are inclined to accept whatever is offered to avoid the risk of paying the other party's legal costs. A judge has stated that a privately funded litigant "must take what is offered to him and be glad that he has got something."[15]

Professor Genn's findings lead John Vargo in his article on fee allocation to the conclusion that if "the intent is to provide full compensation to the successful defendant and to provide greater access for the small claimant, the English Rule does not appear to operate efficiently."[16] To him, the English Rule is effective only if the intent is to reduce access to courts and to reduce the number of claims regardless of merit.

Reform of the English Rule

In response to expressions of concern of a serious crisis in the administration of civil justice, brought about by cost, delay and complexity, the government asked a senior judge to review the rules and procedures of civil courts with the aims of:

- improving access to justice;
- reducing the complexity of the rules; and
- removing unnecessary distinctions of practice and law.

In both the interim and final reports issued by Lord Woolf, now the Master of the Rolls, the head of the Court of Appeal, the system of taxation of costs and cost shifting is held out for criticism and reforms suggested. The interim report noted that because of modifications, such as in small claims and a no-costs rule before most tribunals, the English rule in its pure form applied largely to more substantial litigation between non-legally aided parties only. The report, however, did not think that its limited use was an argument for excluding its operations altogether.

The interim report enumerated the main arguments in favor of and against the English rule: **For:** a) It is fairer to allow a party who succeeds in litigation to recover the major proportion of his own costs from the unsuccessful opponent. This approach applies regardless of the size of the claim, but the greater the amount of the costs invested in a legal proceeding the greater the unfairness if the costs are not recoverable; b) It deters unmeritorious litigation and encourages earlier settlement. Available research indicates that those who are not confident of success are less likely to press ahead because of the risk faced by unsuccessful litigants. **Against:** a) The rule deters meritorious as well as unmeritorious claims. Since the outcome of litigation is always uncertain, and the consequences of

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14 *Id*.

15 Per Judge Devlin, quoted in Kritzer, *supra* note 18, at 56.

16 Vargo, *supra* note 10, at 1636.

losing too severe, the meritorious litigant may consider the risk to be too great; b) It favors the wealthy litigant, especially a "repeat player" with many cases, who can undertake the risk of losing a given case; c) The rule can so increase the costs that parties are forced to go on, thus making it impossible to reach a settlement.

While retaining the English rule, the final report recommends that the principle that costs follow the event should be relaxed so that the court can use its wide discretion to support the conduct of litigation in a proportionate manner and to discourage excess. The report recommends that instead of treating costs as a whole, the court should pay greater regard to the manner in which the successful party has conducted the proceedings and be more willing to identify areas where costs have been unnecessarily incurred. A new rule is, therefore, proposed which would require that the courts, in their new role of more actively managing cases, must take into consideration whether the likely benefits of taking a particular step will justify the cost of taking it.[17]

The Woolf report also recommended an increased focus on costs as a sanction against wasteful litigation tactics. At present interlocutory applications of dubious merit are made with impunity as the liability on the loser to pay is postponed until the end of the case and the costs are usually lost in the overall settlement. The report calls for orders for cost to be made at the end of each interlocutory hearing, to be payable by the party who occasioned the hearing. Moreover, he recommends that costs should reflect not only the general outcome of the proceeding in favor of the party seeking the order but also how the proceedings have been conducted. Under this approach, judges will have to make different orders on different issues rather than the present single order in favor of one party. The method of taxation of costs is also likely to be changed in that the amount of costs to be awarded on a new standard basis of what is "reasonable to both parties to the taxation."

The 370-page report which is the product of two years work by a team of experts has put forward more than 300 proposals aimed at simplifying the civil justice system in England. The present trial by combat approach which encouraged unreasonable behavior from parties is sought to be replaced by a new system which is simpler, more accessible and more flexible.[18] Referred to as providing a "blueprint for a revolution in the English civil justice system" the proposals are addressed to the Lord Chancellor, the head of the judiciary, who will be able to implement many of them without the authority of legislation.

The suggested modifications of the English rule are expected to strengthen the rule to make it a more effective instrument.

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[17] Lord Woolf, *Access To Justice; Final Report to the Lord Chancellor on the civil justice system in England and Wales* 80 (July 1996); *Access To Justice; Interim Report* (June 1995).

[18] F. Gibb, *Reforms aim to make litigation the last resort*, THE TIMES (London), July 27, 1996.