THE MODERN APPLICATION OF
THE MEDIEVAL LAW OF
MAINTENANCE AND CHAMPERTY

Eric TM Cheung
Assistant Professor
Department of Professional Legal Education
Faculty of Law, University of Hong Kong

Introduction

Earlier this year, a solicitor complained to the police that a legislative councillor had committed the common law offence of maintenance by funding two elderly residents of public housing estates to launch judicial review proceedings over the legality of the Link Real Estate Investment Trust Listing, which led to the sudden abortion of the flotation plan.¹ In May this year, the Law Society, on the basis of leading counsel’s advice that the claims recovery agents’ operation is champerous, issued a stern warning to its members that they should not act for accident victims financed by recovery agents for compensation claims.² These two events have rekindled the interest of the public as well as lawyers in the almost forgotten ancient doctrines of maintenance and champerty.

In simple terms, maintenance is the provision of support or assistance in another’s litigation improperly and without legitimate interest or concern.³ It is “directed against wanton and officious intermeddling with the disputes of others in which the [maintainer] has no interest

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¹ See eg “Albert Cheng’s Link role faces police probe”, South China Morning Post, 6 Jan 2005.
² Law Society Circular 05-261 (SU), 17 May 2005. See also the written reply by the Secretary for Justice to a question raised by the Hon Li Kwok-wing in the Legislative Council: LCQ 18, 15 June 2005.
³ “A person is guilty of maintenance if he supports litigation in which he has no legitimate concern without just cause or excuse...” per Lord Phillips MR in Fentiman v Secretary of State (No 2) [2002] 4 All ER 97 at 108, citing Chitty on Contracts; note also some slightly different descriptions (eg by Oliver L) in Trendtel Trading Corp v Credit Suisse [1980] 3 All ER 721 at 749, [1980] QB 629 at 663; by Kempster JA in Law Chiu Song v Koh Wah Bank Ltd [1991] 1 HKC 241 at 246B.
whatever, and where the assistance he renders to one or the other party is without justification or excuse. Champerty is regarded as an aggravated form of maintenance. It comes from the Latin campi partition (division of the field) and occurs when the maintainer stipulates for a share of the proceeds of the action in return for his support. In Hong Kong, maintenance (including champerty) is (a) a crime at common law; (b) an actionable tort; and (c) against public policy rendering the relevant contract unenforceable.

The doctrines of maintenance and champerty have previously received little attention in law school teachings or in daily legal practices in Hong Kong. Law students and practitioners might therefore be forgiven for not knowing the existence of these doctrines or for assuming that these doctrines, though they exist in theory, are devoid of any practical significance and are best consigned to the museum of legal history in Hong Kong. This however is a misconception. Indeed, the law of maintenance and champerty, though of ancient and obscure origins, can have important consequences for modern commercial transactions and daily legal practices.

Daily Practice Scenarios

One may perhaps consider the following scenarios that may be encountered in one’s daily legal practices, which highlight the practical significance of the law of maintenance and champerty:

(1) Your client company has a good claim for substantial damages against B, but it is in financial difficulties. It wants you to charge its legal costs only if it wins. You know that a lawyer in Hong Kong cannot charge a success fee. But can you agree to charge your client your normal fee if it succeeds, but no fee if it loses?
(2) Your bank client asks you to draw up an agreement under which its customer B assigns to it his claim for damages against C for around $3m in consideration of the bank agreeing to reduce B’s debt by $1m. The bank further intends to sell this cause of action to a US company for $1.1m and asks you to incorporate a clause permitting further assignment by the bank to a third party. Is there any legal prohibition?

(3) Your client has succeeded in its defence and obtained a costs order for $1m against P, who is a man of straw. You have evidence that P’s litigation against your client is funded by a claims company on a “no win, no fee” basis. What can you do?

(4) A representative of a claims company approaches you to take up a personal injury claim for B. You know that it has agreed to fund all litigation costs of B in return for a success fee of 25 per cent of any sum recovered. Can you accept the instructions to act for B?

Before one moves on to their modern application, perhaps it is useful to first examine the historical background of the ancient doctrines of maintenance and champerty as well as their evolution.

Historical Background

“My Lords, the crimes of maintenance and champerty are so old that their origins can no longer be traced, but their importance in medieval times is quite clear. The mechanisms of justice lacked the internal strength to resist the oppression of private individuals through suits fomented and sustained by unscrupulous men of power. Champerty was particularly vicious, since the purchase of a share in litigation presented an obvious temptation to the suborning of justices and witnesses and the exploitation of worthless claims which the defendant lacked the resources and influence to withstand. The fact that such conduct was treated as both criminal and tortious provided an invaluable external
discipline to which, as the records show, resort was often required . . . " per Lord Mustill in Giles v. Thompson.6

While the exact origins of maintenance and champerty can no longer be traced, the painstaking and skilful research done over many years by the legal historian Sir Percy Winfield7 showed numerous references to the crimes and torts of *manutenents curiales* (ie maintenance in the court) in a patchwork of statutes passed in the Middle Ages. Lord Coke took the view that maintenance was an offence at Common Law and the statutes merely reinforced or increased the punishment against maintainers. However, Winfield’s painstaking research found that there was no solid foundation for Lord Coke’s assertion of its Common Law origin, particularly the books of Glanvill and Bracton written before the passing of the statutes which dealt with the maintenance offences was silent about maintenance. Moreover, Lord Coke said,8 “Every champerty is maintenance, but every maintenance is not champerty, for champerty is but a species of maintenance, which is the genus.” However, Winfield found that, “historically it looks very much like an inversion of genus and species” and what really happened was that, “merely to maintain or support the suit of another was probably not a substantive wrong at all. But it was wrongful if the support were for the purpose of sharing the proceeds of the suit. This very soon got the name of champerty, but then it had no specific name and was expressed by some such phrase as maintaining suits for lands to have part thereof, as in 3 Ed Ic 25. Next it was seen that officiously aiding another in his suit should be made unlawful irrespectively of the ulterior motive of sharing the gains. This was prohibited, and so we reach the offence of maintenance.”9 In other words, as a matter of history, the offence of champerty appears to have come first.

8 According to Lord Coke, there is another species of maintenance called *manutenentia ruralis*, as stirring up and maintaining quarrels in the country other than the maintainer’s own, but it was punishable only at the suit of the King; see the seminal works of Winfield quoted above.
9 In the Second Institute at p 208.
10 *The History of Conspiracy and Abuse of Legal Procedure* op cit, pp 140-141.
Notwithstanding the doubt raised by Winfield, Lord Coke's view that maintenance is a Common Law offence reinforced in remedies by statute has prevailed. Whether or not Lord Coke's view was historically correct, an important rationale behind the creation and development of maintenance and champerty in medieval times was quite clear: it was to address the particular abuses which arose in the conditions of medieval English feudal society and judicial system. In those days, there was no independent judiciary and the civil justice system was not yet developed to an extent that could resist the oppression of private individuals against lawsuits maintained by unscrupulous men of power. There was therefore widespread practice of assigning doubtful or fraudulent claims to royal officials, nobles or other persons of wealth and influence, who could in those times be expected to receive a very sympathetic hearing in the court proceedings. As graphically described by Jeremy Bentham: "a man would buy a weak claim, in hopes that power might convert it into a strong one, and that the sword of a baron, stalking into court with a rabble of retainers at his heels, might strike terror into the eyes of a judge upon the bench."

While Lord Mustill described the offences and torts of maintenance and champerty as providing "an invaluable external discipline" to address the abuses in medieval times, it appears from Winfield's research that the effectiveness of such remedies in those days was rather doubtful. As explained by Winfield, "No branch of the law depended more for its efficacy on the uprightness of those who were called upon to enforce it. Unfortunately these men were frequently the worst offenders, and a vicious kind of cup and ball game went on between the corrupt sheriff..."
and the law which he controlled...But the offences of conspiracy and maintenance had a fatal attraction for all alike who held high office. At one moment the King, his Council, and the Parliament are giving remedies against these offences. At the next, he and they are committing them. The judges, the sheriffs, the Justices of the Peace, and the clergy were no better.\footnote{At p 154 of The History of Conspiracy and Abuse of Legal Procedure op cit.}

By the 9th century, a strong and independent judiciary was developed in England, and so one might have wondered why the crimes and torts of maintenance should still be retained. As Jeremy Bentham said in 1843, "At present, what cares an English judge for the swords of a hundred barons? Neither fearing nor hoping, hating nor loving, the judge of our days is ready with equal phlegm to administer, upon all occasions, that system, whatever it be, of justice or injustice, which the law has put into his hands." It appears that apart from the inertia against abolishing something already in place, one plausible reason for the retention (though with modification) of the doctrines after the development of an independent judiciary was people’s general attitudes towards lawsuits.

In those days, lawsuits were commonly regarded as evils to be discouraged. As Lord Shaw of Dunfermline observed in Neville v London "Express" Newspaper, Ltd\footnote{[1919] AC 368 at p 414.}: "Maintainers, it is said, include all such as assisted by opening the evidence to the jury; or by giving evidence officiously without being called upon to do it; or by speaking in the cause as one of the counsel with the party; or by retaining an attorney for him; or perhaps by barely going along with him to inquire for a person learned in the law.\footnote{Quoted from Hawkins’ Pleas of the Crown.} It was as if law courts were a plague-ridden or infected area, to help another into which was an injury and a crime." Although such extreme views in medieval times were no longer followed as centuries passed, litigation was still very much regarded as a personal affair. It was therefore considered against public policy that litigation should be promoted and supported by those who had no concern in it. As Lord Loughborough LC said in 1797 in Wallis v Duke of Portland\footnote{3 Ves 494 at 502; 30 ER 1123.}: "... that
parties shall not by their countenance aid the prosecution of suits of any kind, which every person must bring upon his own bottom and at his own expense." In 1895, Lord Esher MR in the case of Alabaster v. Harness18 said: "The doctrine of maintenance ... does not appear to me to be founded so much on general principles of right and wrong or of natural justice as on considerations of public policy ... But it seems to have been thought that litigation might be increased in a way that would be mischievous to the public interest if it could be encouraged and assisted by persons who would not be responsible for the consequences of it, when unsuccessful."

As Blackstone in his Commentaries19 says: "[Maintenance] is an offence against public justice, as it keeps alive strife and contention and perverts the remedial process of the law into an engine of oppression." In other words, the underlying rationale for maintenance was twofold, namely, to prevent a stranger from stirring up litigation and strife, and to prevent abuses to the administration of justice.

Narrow Exceptions for Lawful Maintenance

It should however be noted that the law from the earliest times has not condemned all maintenance; and some particular cases have been specifically allowed as constituting excuses for that interference in the suit of another which would otherwise have amounted to maintenance (for example, when the relations were such that there was a common interest, or the master was helping his servant, or even when the act was done out of charity to a poor man). However, cases before the early twentieth century show that the courts adopted a rather strict attitude towards the

18 [1895] 1 QB 342.
19 Book IV, c. 10, s. 12, quoted with approval by Lord Finlay, B.C. in Neville v. London Express Newspaper, Ltd op cit. Lord Abinger, CB also said in Provost v. Edmunds 1 Y & C. 481: "All our cases of maintenance and champerty are founded on the principle that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce." Note however that Lord Phillimore (dissenting from the majority's judgment that the offence of maintenance was constituted even though the claim maintained succeeded) disagreed with Blackstone's view that the "evil of maintenance lay in the stirring up of strife" and opined that the "doctrine was established to prevent injustice".
exceptions and were “not disposed to extend the exceptions from the rule against maintenance.”\textsuperscript{20} As Lord Coleridge, C] said in \textit{Bradlaugh v. Newdegate}\textsuperscript{21}: “But in all these cases the interest spoken of is an actual valuable interest in the result of the suit itself, either present, or contingent, or future, or the interest which consanguinity or affinity to the suitor gives to the man who aids him, or the interest arising from the connection of the parties, e.g, as master and servant, or that which charity and compassion gives a man in behalf of a poor man, who but for the aid of his rich helper could not assert his rights, or would be oppressed and overborne in his endeavour to maintain them.”

The facts of the \textit{Bradlaugh} case are quite interesting and one may find the shadow of the plaintiff Charles Bradlaugh in one of our honourable legislative councillors today. Charles Bradlaugh was the President of the Secular Society\textsuperscript{22}. He was unpopular with the authorities and was prosecuted many times under repressive Press Acts until these were suddenly repealed in 1869. He published a pamphlet in about 1876 called “Fruits of Philosophy”, in which certain checks upon the increase of population were described and recommended, which led to his prosecution by the authorities in 1877 for corrupting public morals. The jury found against him, but his conviction was successfully quashed on appeal on a technical ground due to insufficiency of the indictment.\textsuperscript{23} The authorities then obtained a special warrant from the metropolitan police magistrate to seize and destroy the pamphlets “Fruits of Philosophy”, but Bradlaugh succeeded in obtaining an order of certiorari to quash the warrant.\textsuperscript{24}

In the spring of 1880, Bradlaugh was elected to the House of Commons for the borough of Northampton. His opponents laid private prosecution of blasphemy against him in order to make him a convicted criminal and to disqualify him from the parliament, but was unsuccessful. Bradlaugh initially refused to take the required parliamentary oath and

\textsuperscript{20} per Lord Esher MR in the case of \textit{Alabaster v. Harness} op cit.
\textsuperscript{21} (1883) 11 QBD 1.
\textsuperscript{22} Some of the background facts recited here cannot be found from the law reports, but are taken from \textit{Pressure Through Law} by Carol Harlow and Richard Rawlings (Routledge, London, 1992).
\textsuperscript{23} \textit{Charles Bradlaugh and Annie Besant v The Queen} (1878) 3 QB D 607.
\textsuperscript{24} \textit{R v Justices of Middlesex; ex parte Bradlaugh} (1878) 3 QB D 569 [1874-1880] All ER Rep Ext 1623.
claimed that he had a right to make a solemn affirmation in lieu, on the basis that, as a secular person, the taking of an oath would have no binding effect on his conscience. The Select Committee of the House of Commons took the view that he was not allowed under the law to make a solemn affirmation in lieu. But when Bradlaugh expressed his willingness to take the required oath, the Committee took the view that he should not be allowed to do so, as he had admitted that he had no belief in God. On 2 July 1880, the House of Commons resolved that Bradlaugh be allowed to sit and vote at the House upon making the affirmation, but at his own risk for violating the law and thereby being subject to the penalty under the Parliamentary Oaths Act for the offence of participating in the parliamentary proceedings without taking the oath. Accordingly, Bradlaugh sat and voted in the House on that date, and within hours he received a Writ issued by a man of straw named Clark suing for the penalty under the Parliamentary Oaths Act. Clark’s claim against him was once successful at the lower courts, but eventually was overturned by the House of Lords on the ground that the right to sue for the penalty under the Parliamentary Oaths Act rested on the Crown, but not on a common informer. It transpired that Clark was procured and financed by Bradlaugh’s opponent, Newdegate (who was also a member of the House). Bradlaugh, being unable to recover his costs from Clark, then brought an action of maintenance against Newdegate. Bradlaugh succeeded in his maintenance action, as the court held that Newdegate and Clark had no common interest in the result of the action for the penalty. The court did not accept it as a common interest that Newdegate, being a fellow member of the House of Commons, could see that Bradlaugh complied with the Act when participating in the proceedings before the House.

Similarly, in Alabaster v. Harness the defendant was interested in the sale of certain electric appliances for the treatment of disease and asked an expert to write a favourable report on the appliances. However,

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25 Clark v. Bradlaugh (1881) 7 QB 58, 7 QB 151, and 8 QB 63.
28 [1895] 1 QB 342.
the expert was severely criticised by the plaintiffs in their newspaper and so the defendant instigated and financed the expert to bring a libel action against the plaintiffs. After successfully defending the libel claim, the plaintiffs were unable to obtain satisfaction from the expert for their costs. They therefore brought an action against the defendant for maintenance to recover damages for the unrecoverable costs. The Court of Appeal adopted a narrow interpretation of "common interest" and held for the plaintiffs. As explained by Lopes LJ: "It is said that in this case the defendant was justified in his maintenance of [the expert's] action because he had a common interest with him. In my opinion, he had no such common interest as could justify his interference in the action. In order to justify such interference on the ground of common interest, I think there must be some interest recognised by the law in what is called by Hawkins in his Pleas of the Crown 'the thing in variance'; by which I understand an interest in the subject-matter of the action at issue between the parties. In my opinion, there must be some legal, as distinguished from a sentimental, interest in the result of the action about to be tried, or in some question at issue between the parties in the action. The matter in issue in the action brought by [the expert] was whether the plaintiffs had libelled him. No question arose as between the defendant and the plaintiffs. ... I must say that I should be sorry to see any new exceptions engrafted on the rule."

In *Oram v Hurt*[^20] a man had slandered the general secretary of a trade union, accusing him of misconduct in the affairs of the union. The executive committee of the trade union authorised the general secretary to sue for slander and agreed to indemnify him against the costs. The general secretary won; but the defendant could not pay anything. So the trade union paid the costs incurred by the general secretary. One of the members of the union then sued the trustees of the union claiming that the payments were illegal. It was held that as no wrong had been done to the union, and so the union had no such common interest in the actions as to justify the payment of the officials' costs out of its funds. Accordingly, the agreement to indemnify the general secretary was void on the ground of maintenance.

Further Evolution and Development

However, later in the twentieth century, one can see significant changes to the law of maintenance, first under the common law and later as a result of legislative changes in England. Notwithstanding the doctrine of *stare decisis*, departure from earlier decisions on maintenance is justified under the common law on the ground that the law in this area depends on the question of public policy, which is not fixed and immutable. As rhetorically asked by Danckwerts J in 1954 in *Martell v. Consent Iron Co., Ltd.*: “How can such a doctrine founded on considerations of public policy become at some point frozen into immovable respectability, so as to be no longer capable of alteration?”

To better understand the changed attitudes adopted by the courts, one needs to note the following important changes in the society and the judicial system. First, the emergence of a truly independent judiciary and the development of effective court procedures have resulted in much lesser need to curb abuses via the offences or torts of maintenance. As Lord Mustill explained in *Giles v. Thompson*: “As the centuries passed the courts became stronger, their mechanisms more consistent and their participants more self-reliant. Abuses could be more easily detected and forestalled, and litigation more easily determined in accordance with the demands of justice, without recourse to separate proceedings against those who trafficked in litigation.” Second, instead of viewing litigation as an evil and treating the right to litigation as purely personal in character, the society gradually accepts the notion of access to justice as being an important public interest. As a result, there has been a rapid growth in the provision of financial assistance to support litigation by the State and various organisations, which can hardly satisfy the narrowly interpreted “common interest” exceptions for lawful maintenance. As explained by Lord Denning MR in *Hill v. Archbold*11: “Much maintenance is considered justifiable today which would in 1914 have been considered obnoxious. Most of the actions in our courts are supported by some association or other, or by the State itself. Very few litigants

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10 [1955] Ch. 363, see at p. 382; [1954] 3 All ER 339, at p. 347.

bring suits, or defend them, at their own expense. Most claims by work-
men against their employers are paid for by a trade union. Most defences
of motorists are paid for by insurance companies. This is perfectly justi-
fiable and is accepted by everyone as lawful, provided always that the
one who supports the litigation, if it fails, pays the costs of the other
side."

As a result, the courts have moved from a narrow interpretation of
“common interest” or a closed list of exceptions for lawful maintenance
in the past to a narrow interpretation of what constitutes unlawful main-
tenance (or alternatively a much broader interpretation of what
constitutes justification for lawful maintenance).

A significant turning point was attempted in 1908 by the Court of
Appeal in British Cash and Parcel Conveyors Limited v Lamson Store Service
Co Ltd. In that case, the plaintiffs sued the customers on the ground that
they had broken subsisting contracts with the plaintiffs when entering
into contracts with the defendants (who were the plaintiffs’ trade rivals).
The Court of Appeal held that the defendants could lawfully maintain
the defence of the customers by agreeing to indemnify them against any
damages and costs awarded against them. Cozens-Hardy MR did not pro-
ceed to analyse whether the defendants had a “common interest” as
narrowly interpreted in earlier cases or whether they fell within any of the
recognised exceptions, but simply held that the defendants “had a busi-
ness interest, a commercial interest, which fully justified the indemnities
or guarantees which they gave.” Fletcher Moulton LJ went further with a
bold statement that “[the early] decisions were based on the notions then
existing as to public policy and the proper mode of conducting legal
proceedings. Those notions have long since passed away, and it is indis-
putable that the old common law of maintenance is to a large extent
obsolete... The present legal doctrine of maintenance is due to an attempt
on the part of the Courts to carve out of the old law such remnant as is in
consonance with our modern notions of public policy. I doubt whether
any of the attempts at giving definitions of what constitutes maintenance
in the present day are either successful or useful. They suffer from the vice
of being based upon definitions of ancient date which were framed
to express the law at a time when it was radically different from what it
is at the present day, and these old definitions are sought to be made
serviceable by strings of exceptions which are neither based on any logical principle nor in their nature afford any warrant that they are exhaustive. These exceptions only indicate such cases as have suggested themselves to the mind of the Court, and it is impossible to be certain that there are not many other exceptions which have equal validity." At the end, instead of focusing on what constituted "common interest" or recognised exceptions from past cases, Fletcher Moulton LJ chose to emphasise the mischief being "directed against wanton and officious intermeddling with the disputes of others in which the defendant has no interest whatever, and where the assistance he renders to the one or the other party is without justification or excuse."

However, the bold approach of Fletcher Moulton LJ did not apparently gain much momentum or recognition at that time. While British Cash and Parcel Conveyors Limited v Lamson Store Service Co Ltd. was referred to by counsel, the Court of Appeal in Oram v Hutt did not deal with it in its judgment, but proceeded on the traditional and narrow view of "common interest" to find the maintenance unlawful. In Neville v London "Express" Newspaper, Ltd, the London Express published a series of articles in their newspaper alleging that the activities of the plaintiff were fraudulent and encouraging their readers to sue the plaintiff with an offer to pursue legal proceedings at the newspaper's expenses. The readers' action against the plaintiff succeeded, but the plaintiff retaliated with a tortious action against London Express for maintenance to recover the damages and costs paid by the plaintiff in the readers' action. The plaintiff succeeded at trial, but the House of Lords, by a majority of 3 to 2 held in favour of London Express on the ground that the plaintiff only suffered nominal damages as a result of the maintenance, but the tortious claim could not proceed in the absence of the proof of special damages. The questions of law framed before the House of Lords were not such as to call for any critical examination of the character or degree of the interest required for a lawful maintenance. However, the earlier Court of Appeal decisions in Alabaster and Oram were quoted without disapproval and it appears that the Law Lords simply proceeded on the traditional and narrow view of "common interest" and rejected London Express's argument that the maintenance was lawful. After citing British Cash and Parcel Conveyors Limited v Lamson Store Service Co Ltd, Lord
Haldane immediately said: "It is true that the courts are not to-day disposed to extend the principle, and that various legal excuses for it, such as that resting upon motives of charity, have been introduced. A common interest, speaking generally, may make justifiable that which would otherwise be maintenance. But the common interest must be one of a character which is such that the law recognises it. Such an interest is held to be possessed when in litigation a master assists his servant, or a servant his master, or help is given to an heir, or a near relative, or to a poor man out of charity, to maintain a right which he might otherwise lose. But in the present case none of these justifications is present, for the case is simply one of a newspaper undertaking to conduct a suit for any reader with a case who may apply to it, whether rich or poor and without distinction of person."

Another attempt at a breakthrough occurred in 1954. In *Martell v Consett Iron Co Ltd*, the Anglers' Co-operative Association (ACA) was a national association for the protection of the rights of owners and occupiers of fisheries, and for the prevention of pollution of rivers in Great Britain and Northern Ireland, whose membership was open to all who supported its objects. It financially supported an action brought against the defendants by some of its members (who were respectively a riparian owner and trustees of an angling club) to prevent the pollution of the River Derwent. The defendants claimed that the support was unlawful maintenance. On the face of it, the case did not fall within the charity exception as the plaintiffs were not impoverished and the ACA technically had no common interest in the proceedings. But the defendants’ application to stay the action on the ground that it was unlawfully maintained by the ACA was rejected by Danckwerts J, whose decision was upheld by the Court of Appeal. On the issue as to whether the maintenance was lawful, Danckwerts J refused to treat the earlier cases such as *Alabaster*, *Oram* and *London Express* as laying down any hard and fast rule on the recognised exceptions for lawful maintenance, but relied heavily on Fletcher Moulton LJ’s statements in *British Cash and Parcel*. Danckwerts J said: "A doctrine which was evolved to deal with

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cases of oppression should not be allowed to become an instrument of oppression, which it must be if humble men are not allowed to combine or to receive contributions to meet a powerful adversary ... What is the interest recognized by the law, and to be distinguished from 'a sentimental interest,' which exists in the cases of the trade unionists and the persons who carry on a similar trade, but does not exist in the case of persons who possess fishing rights or who wish to preserve the purity of the waters of the country's rivers or streams? ... Even Lord Esher in Alabaster v Harness did not think that, apart from any specific law on the subject, there would necessarily be anything wrong in assisting another man in his litigation. The specific law to which he referred is now a collection of out-of-date rules which no longer fit the conditions of modern life and were based upon a conception of public policy which has long since become obsolete."

While the Court of Appeal upheld Danckwerts J's decision, the appeal judges appeared to be more cautious in their reasonings. Jenkins LJ recognised the difficulties in reconciling British Cash & Parcel "with a strict application of the principle that maintenance can only be justified on the ground of common interest where the maintainer has some interest recognised by the law in the subject-matter of, or some issue in, the action". But His Lordship sought to find a way out by concluding that "a person who has a legitimate and genuine business interest in the result of an action must be taken for the purposes of the rule against maintenance to have an interest recognised by the law in the subject-matter of the action." His Lordship did not find it open to him not to follow Alabaster and Oram on the grounds of changes of public policy or social conditions\(^1\), but sought to distinguish the strict and narrow definition of "common interest" laid down in Alabaster and Oram on the ground that they concerned libel and slander claims which were personal to the claimants, while the pollution of the river affected many different people. Hence instead of focussing on "common interest", His Lordship referred

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\(^1\) Jenkins LJ said: "I find it impossible to hold that we would be justified in regarding ourselves as no longer bound by Alabaster v. Harness and Oram v Hut. on the strength of the changes in public policy or in social or economic conditions which are said to have taken place since those cases were approved in the year 1918 by a majority of the House of Lords in Neville's London "Express" Newspaper Ltd."

to “relevant interests” whose range was “potentially of great width”. Hodson LJ similarly recognised that according to the earlier Court of Appeal decisions in Alabaster and Oram as well as the House of Lords decision in London “Express” Newspaper, there was a formidable argument that “the list of exceptions is closed and that if this case does not fall within the recognised exceptions, the action is being unlawfully maintained” and that “the language used by the members of the Court of Appeal in Alabaster would not readily cover a common interest such as [the ACA’s]”. His Lordship also recognised that the common commercial interest upheld in British Cash & Parcel would “scarcely come within the strict limits of the language used in Alabaster”. His Lordship however did not expressly deal with the conflict, but was content to accept the distinction drawn by Jenkins LJ that “in dealing with the case of pollution of a river, a wider conception of common interest may be permitted than in the case, for example, of a libel action”.

It was not until 1967 that an actual breakthrough for a broader modern approach was achieved. Lord Denning MR in Hill v Archbold did what Jenkins LJ refused to do in Martell. On the basis of changes in public policy and social circumstances, Lord Denning boldly said that the Court of Appeal decision Oram v Hurt decided in 1914 was no longer good law and refused to follow it. His Lordship further applied the broader modern approach for lawful maintenance of libel actions.

Abolition of the Crime and Tort in England

In the same year, important legislative changes in England were introduced under the Criminal Law Act 1967, following the Law Commission’s Proposals for Reform of the Law relating to Maintenance and Champerty. The Law Commission opined that maintenance and champerty as crimes were “a dead letter in our law” and the action for damages for maintenance was an “empty shell”, and concluded that the “ancient and unused misdemeanours” and the “virtually useless
torts" should be consigned to "the museum of legal history". As a result, the Criminal Law Act 1967 was passed to abolish the offences and torts of maintenance and champerty as from January 1968. However, section 14(2) of the Act contained an important proviso that the abolition of the criminal and civil liability "shall not effect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal." Hence, an agreement falling foul of unlawful maintenance is still unenforceable. These legislative changes have not been followed here, and so maintenance remains a crime and an actionable tort in Hong Kong.

The abolition of the tort in England means that in practice it will be rare for the issue of pure maintenance (ie not being champerty) to be adjudicated in the English courts. One can no longer make any claim against a pure maintainer for damages suffered as a result of a maintained action. As a pure maintainer will receive no consideration or reward in return for his promise to support the litigation, such an agreement will likely be unenforceable for want of consideration in any event and it is also hard to imagine why any party wants to raise the issue of maintenance over such a gratuitous agreement. Even if the issue of pure maintenance is raised, it is difficult, if not impossible, to imagine that any judge nowadays would want to condemn someone for giving support to another's litigation voluntarily without any reward in return. Hence, the abolition of the tort, together with the infinitely more liberal attitude towards the supporting of litigation by a third party and the broader modern approach in recognising lawful justification or interest for maintenance, sounded the death-knell of the ancient doctrine of pure maintenance in England after 1967.

Champerty

However, the above comments do not apply to champerty with equal force. As stated by Lord Denning MR in Re Trepca Mines: "... the law on [pure maintenance] has broadened them very much of late (see Martell v Consett Iron Co Ltd) and I hope they will never again be placed in a strait waistcoat. But there is one species of maintenance for which the
common law rarely admits of any just cause or excuse, and that is champerty. ... The reason why the common law condemns champerty is because of the abuses to which it may give rise. The common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses. These fears may be exaggerated; but, be that so or not, the law for centuries has declared champerty to be unlawful, and we cannot do otherwise than enforce the law ...”

It should however be noted that even Lord Denning MR’s statement that “the common law rarely admits of any just cause or excuse” for champerty has since undergone considerable relaxation. On the other hand, while champerty may no longer be regarded with the same degree of disapproval as formerly, unlike pure maintenance it has not yet been diluted to the point of virtual disappearance.

**Modern Common Law Approach**

The most updated and authoritative statement on the modern common law approach to the law of champerty was given by Lord Mustill in his leading judgment in *Giles v Thompson*. In that case, car-hire companies hired substitute cars to motorists whose own cars had been rendered unroadworthy by accidents caused by the defendants, for the period while the damaged cars were being repaired. Under the agreements, the hire companies had the right to pursue actions against the defendants in the motorists’ names to recover those damages and if, as expected, the actions succeeded the hire charges would then be paid out of the claim proceeds. The issue in that case was whether the motorists could recover from the defendants as damages the costs of hiring the substitute cars. The defendants’ contention that the hire agreements were unenforceable as constituting champerty was rejected by the House of Lords.

In summary, Lord Mustill treated cases involving solicitors’ contingent fees and assignments of bare rights of action as two special species of champerty, where “there have evolved crystallised policies”. In those cases, “it is necessary first to consider whether the transaction bears the marks of unlawful champerty and then to inquire whether it is validated
by the existence of a legitimate interest in the person supporting the action distinct from the benefit which he seeks to derive from it. For this purpose close regard must be paid to Trendtex Trading Corporation v Credit Suisse.’” However, in all other cases, Lord Mustill emphasised that “the law on maintenance and champerty can best be kept in forward motion by looking to its origins as a principle of public policy designed to protect the purity of justice and the interests of vulnerable litigants.” In those situations, “the issue should not be broken down into steps. Rather, all the aspects of the transaction should be taken together for the purpose of considering the single question [framed by Fletcher Moulton LJ in British Cash Parcel]: whether there is wanton and officious intermeddling with the disputes of others where the meddler has no interest whatever, and where the assistance he renders to one or the other party is without justification or excuse.”

On the facts of that case, Lord Mustill ultimately answered this question as follows: “Returning to the car hire company, is it wantonly or officiously interfering in the litigation; is it doing so in order to share in the profits? I think not. The company makes its profits from the hiring, not from the litigation. It does not divide the spoils, but relies upon the fruits of the litigation as a source from which the motorist can satisfy his or her liability for the provision of a genuine service, external to the litigation.”

Modern Application

Solicitors’ contingency fees
As stated by Lord Mustill in Giles v Thompson, “there have evolved crystallised policies” in relation to solicitors’ contingency fee agreements. The crystallised policies under the common law are basically to condemn all contingency fee agreements as champertous without allowing any exception.

As stated by Lord Esher MR in Pitman v Prudential Deposit Bank Ltd in 1896: “In order to preserve the honour and honesty of the profession

[1896] 13 TLR 110 at 111.
it was a rule of law which the Court had laid down and would always insist upon that a solicitor could not make an arrangement of any kind with his client during the litigation which he was conducting so as to give him any advantage in respect of the result of that litigation. Notwithstanding the infinitely more liberal attitude towards the supporting of litigation by a third party later in the twentieth century, the strict common law rule on contingency fee agreements still remained intact in England in 1970s and 1980s. As observed by Scarman LJ in Wallersteiner v Moir (No 2)\(^{35}\) in 1975: "A contingency fee for conducting litigation is by the law of England champerty and, as such, contrary to public policy. This is law of longstanding. It has been frequently declared by the courts. ... It is to be noted that the rule does not depend upon solicitors' practice or their practising rules, but on public policy." In 1980, Lord Denning MR observed in Trendtex Trading Corp v Credit Suisse\(^{36}\): "Modern public policy condemns champerty in a lawyer whenever he seeks to recover not only his proper costs but also a portion of the damages for himself, or when he conducts a case on the basis that he is to be paid if he wins but not if he loses."

The rationale for the common law rule is that such agreements allowed the duty and interest of solicitors to conflict, with a resultant risk of abuse of legal procedure. As explained by Buckley LJ in Wallersteiner v Moir (No 2), "... the nature of the public policy question ... can ... be summarised in two statements. First, in litigation a professional lawyer's role is to advise his client with a clear eye and an unbiased judgment. Secondly, a solicitor retained to conduct litigation is not merely the agent and adviser to his client, but also an officer of the court with a duty to the court to ensure that his client's case, which he must, of course, present and conduct with the utmost care of his client's interests, is also presented and conducted with scrupulous fairness and integrity. A barrister owes similar obligations. A legal adviser who acquires a personal financial interest in the outcome of the litigation may obviously find himself in a situation in which that interest conflicts with those obligations."

\(^{35}\) [1975] QB 373 at 407, [1975] 1 All ER 849 at 872.

Maintenance and Champerty

However, significant inroads into this strict common law rule were recently introduced in England to permit conditional fee agreements (CFAs) under specified conditions. First, there was the Green Paper on Contingency Fees in 1989, which ultimately led to the enactment of section 58 of the Courts and Legal Services Act 1990. Under section 58, CFAs stipulating for a percentage uplift in the costs in the event of success are permitted subject to the requirements of the section and to the validation by the Lord Chancellor. The first set of CFAs were validated by the Lord Chancellor in 1995. At that time, the losing party would only be required to pay the winning party's normal costs on taxation while the percentage uplift under the CFA would be absorbed by the winning party. In 1999, the New Labour Government came up with a core principle that where the market could provide, then State subsidy should be removed. In the area of legal services, this core principle led to the proposal to extend the use of CFAs in return for the abolition of legal aid for almost all personal injury litigation. When objection was raised on the ground that people originally eligible for legal aid would suffer under the CFAs as they would need to absorb the success fee, the Government answered with a proposal that the losing party be required to pay also the success fee. This eventually led to the enactment of section 27 of the Access to Justice Act 1999 to replace section 58 of the 1990 Act. The next proposed move by the UK Government is to abolish legal aid for clinical negligence cases, actions against the police, judicial review, housing disrepair case by further extending the coverage of CFAs.

These legislative changes in England have naturally affected the court's view on the modern public policy in this area of law. As stated by Steyn L J in Giles v Thompson: 's 58 of the 1990 Act] represents at least a concession to the view that the abuses associated with champerty are not the inevitable result of all variants of contingency fee agreements. And there is, of course, no more cogent evidence of a change of public policy than the expression of the will of Parliament.'

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Footnotes:
39 Cm 571 (1999).
40 [1993] 3 All ER 321 at 331.
But these legislative changes have not been introduced in Hong Kong. Hence, one must be careful in reading English cases decided after 1990 to discern to what extent such cases were decided upon a public policy altered or influenced by these legislative changes, rather than upon a modern public policy developed by the common law in the light of changed values or circumstances applicable to Hong Kong.

Notwithstanding that in England it is now accepted that the public policy no longer demands condemnation of all types of arrangements whereby lawyers may have financial interests in the outcome of a litigation, it is submitted that the Hong Kong courts should not be astute to relax the public policy against champertous arrangements as between solicitor and client in the absence of legislation. 41 In particular, the legislative changes in England on CFAs are not so much a reflection of any consensus in the modern world that there is nothing wrong in principle with permitting lawyers' to have financial interests in the outcome of the litigation, but must be regarded in the context of attempts in England to reduce the overall government funding on legal aid and to increase ways in which members of the public might have access to the courts without becoming a burden on the taxpayer. As explained by May LJ in Awad v Geraghty & Co (a firm): “I accept the general thesis in the judgment of Millett LJ in the Thai Trading case that modern perception of what kinds of lawyers' fee arrangements are acceptable is changing. But it is a subject upon which there are sharply divergent opinions and where I should hesitate to suppose that my opinion, or that of any individual judge, could readily or convincingly be regarded as representing a consensus sufficient to sustain a public policy.”

To conclude, it is submitted that in Hong Kong any agreement whereby the client's obligation to pay his lawyer's fee is contingent upon the outcome in the litigation should be condemned as champertous under the common law. This includes any agreement whereby the lawyer agrees

41 The Hong Kong Law Reform Commission is currently looking into the subject of conditional fee arrangements.
to charge no fee or a reduced fee\(^2\) in case the claim fails, but if the claim is
successful, to charge (a) a percentage of the sum recovered, (b) an
uplift from the normal fee, or (c) just the normal fee.\(^3\) All such agree-
ments used to be called contingency fee agreements, but in the light of
the statutory reform in England, (b) and (c) are now more commonly
called conditional fee agreements so as to distinguish them from the
contingency fee agreement under (a) which is commonly practiced in
the United States.

A lawyer in Hong Kong must therefore be careful not to enter into
any form of contingency or conditional fee agreements with his client.
As explained by Steyn LJ in the Court of Appeal in Giles and
Thompson\(^4\): “This rule of public policy has many implications for
solicitors. The following are important: (i) “Contingency fee” agree-
ments are unlawful ... (ii) A solicitor cannot recover from professional
indemnity insurers loss arising from his having entered into an agree-
ment in fact champertous ... (iii) A solicitor who has made, or
knowingly participates in the furtherance of, a champertous agreement
is not entitled to enforce a claim for costs ... (iv) A solicitor who is
conducting his client’s litigation on a champertous basis may find him-
self ordered by the court to pay the other side’s costs.” In the Hong
Kong context, added to this list is the consequence of the solicitor
having committed a common law offence of champerty, which has not
been abolished here.

The discussions above should have helped one answer the query raised
in daily practice scenario (1) mentioned earlier in this article.

\(^2\) *Aratra Potatoes Co Ltd and another v Teasly Igoe, Garrett (a firm) [1995] 4 All ER 685*, where
Garland J held that an agreement whereby the solicitors agreed to a 20% reduction in their fee
if they lost the case was champertous and unenforceable, as the champertous rule was not
confined to a direct or indirect share of the spoils but included a differential fee dependent on
the outcome of the litigation. While this case was purportedly overruled by the Court of
Appeal in *Thai Trading Co (a firm) v Taylor [1998] QB 71*, [1998] 3 All ER 65, the Thai
Trading decision was regarded as being made per annum and not followed in a subsequent
Court of Appeal decision in *Awanal v Geraghty & Co (a firm) [2001] QB 572*, [2000] 1 All ER
608. So it is submitted that the Aratra case still stands as good law.

\(^3\) Awanal v Geraghty & Co (a firm) op cit.

\(^4\) *Awanal v Geraghty & Co (a firm) op cit.*
Assignment of a bare right to litigate

Another important species of champerty having living presence in the modern commercial world is the assignment of a bare right to litigate. In earlier times, fear of “trafficking in litigation” led to such assignments being viewed with general disapproval. Strictly speaking, an outright transfer of the whole benefit of a cause of action is not champertous, as it does not involve supporting another’s litigation or the division of the spoils (campi partitio). The assignee pursues the litigation in his own name and takes all the proceeds. However, suspicion of the common abuses entertained in cases of maintenance and champerty led equity to refuse lending its assistance to such assignments, because they “savoured of maintenance and champerty”.

It was once said in 1835: “a chose in action\(^\text{13}\) is not assignable ... No case can be found which decides that such a right can be the subject of assignment, either at law or in equity.”\(^\text{14}\) Even with the passing of the Supreme Court of Judicature Act 1973 and subsequently section 136 of the Law of Property Act 1925 allowing the assignments of choses in action, the ancient doctrine of champerty still rendered the assignment of a bare right to litigate invalid. However, if the chose of action is attached to an assignment of some property, then such incidental assignment is acceptable.\(^\text{15}\) While assignments of choses in action have become more and more common in genuine commercial transactions, “trafficking in litigation” is still very much regarded as against the public policy. In the circumstances, the courts have been struggling hard to find a principled and logical way to differentiate between acceptable and unacceptable assignments.

In 1980, bold attempts were made by the Court of Appeal in Trendtex Trading Corporation v Credit Suisse\(^\text{16}\) to modernise this species of champerty by effectively doing away with the concept of a “bare right to

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\(^{13}\) A chose of action is a right recognised by law but incapable of physical possession, which includes a debt or other legal obligation.

\(^{14}\) Prosser v Edmunds (1835) 1 Y & C Ex. 481, 499.


litigate" and to make it in line with other forms of champerty. As Lord Denning MR put it: “The old saying that you cannot assign a 'bare right to litigate' is gone. The correct proposition is that you cannot assign a personal right to litigate, that is, which is in its nature personal to you yourself. But you can assign an impersonal right to litigate, that is, which is in its nature, a proprietary right: provided that the circumstances are such as reasonably to warrant it.” Oliver LJ said: “I question whether, in the year 1980, our jurisprudence ought still to have room for distinctions, which owe more to sophistry than to logic, between choses in action and what are described as 'bare' rights of action or between strictly proprietary and purely commercial or financial interests.”

However, the bold statement of Lord Denning MR was not endorsed by the House of Lords on appeal. In the leading judgment given by Lord Roskill, His Lordship said: “I am afraid that, with respect, I cannot agree with the learned Master of the Rolls ... when he said in the instant case that 'The old saying that you cannot assign a 'bare right to litigate' is gone.' I venture to think that that still remains a fundamental principle of our law.” On the other hand, the House of Lords did effectively do away with the artificial and hair-splitting distinctions mentioned by Oliver LJ and modernise the law on this subject. When Lord Mustill mentioned in *Giles v. Thompson* that there have evolved crystallised policies under the common law on this subject, His Lordship actually referred to the modern authoritative statement given by Lord Roskill in *Trendex Trading*. There Lord Roskill explained: “... just as the law became more liberal in its approach to what was lawful maintenance, so it became more liberal in its approach to the circumstances in which it would recognise the validity of an assignment of a cause of action and not strike down such an assignment as one only of a bare cause of action ... The court should look at the totality of the transaction. If the assignment is of a property right or interest and the cause of action is ancillary to that right or interest, or if the assignee had a genuine interest in taking the assignment and enforcing it for his own benefit, I see no reason why the assignment should be struck down as an assignment of a bare cause of action or as savouring of maintenance.” In other words, the validity of the assignment no longer depends only on the cause of action being ancillary to the transfer of a property right or interest. Instead, the prohibition against assigning a bare right to litigate should be confined
to cases where there is no genuine commercial interest and for this purpose the court needs to look at the totality of the transaction.

In that case, Trendtex Trading owed substantial money to its banker, Credit Suisse. It had a huge claim for damages against a Nigerian bank, CBN, amounting to US$14 million, but it had no money to finance the litigation. It therefore assigned to Credit Suisse its cause of action against CBN, with an agreement that Credit Suisse could sell the right to a third party (with a recital in the agreement of an offer made by a third party). Credit Suisse then promptly reassigned the cause of action to an anonymous third party for US$1.1 million, who then settled the claim with CBN for US$8 million. Trendtex Trading was shocked to discover that the claim was settled at such a sum, which was ten times greater than it, at the time of the original assignment, thought the claim was in practice worth. It therefore took action to challenge the validity of the assignment as champertous. The House of Lords held that but for the contemplated reassignment to the third party, the assignment of the cause of action to Credit Suisse was valid as the bank had a genuine commercial interest in the claim for recouping its loans to Trendtex Trading. However, the introduction of the contemplated sale to the third party rendered the assignment champertous since it was a step towards the sale of a bare cause of action to one having no genuine interest. But this was not the end of the case. The House of Lords eventually found in favour of Credit Suisse on its application to stay Trendtex Trading’s action because of the exclusive jurisdiction clause for the Swiss Court and the governing law clause for Swiss law. The House of Lords held that these jurisdiction and governing law clauses remained valid even if part of the agreement was void under English law for champerty. One could therefore find useful hints from Trendtex Trading as to what the lawyer should do in the circumstances outlined in daily practice scenario (2) mentioned earlier in this article.

In Hong Kong, there are only a few modern cases on this subject. The most updated decision of the Court of Appeal was given in 1991 in Low Chun Song v Kah Wah Bank Ltd. Kempster JA, giving the leading

judgment, followed Trendtex Trading but preferred to adopt the following summary given by Lloyd LJ in Brown Ltd v Edward Moore Inhucan:

“(i) Maintenance is justified, inter alia, if the maintainer has a genuine commercial interest in the result of the transaction.

(ii) There is no difference between the interest required to justify maintenance of action and the interest required to justify the taking of a share in the proceeds, or the interest required to support an out-and-out assignment.

(iii) A bare right to litigate, the assignment of which is still prohibited, is a cause of action, whether in tort or a contract, in the outcome of which the assignee has no genuine commercial interest.

(iv) In judging whether the assignee has a genuine commercial interest for the purpose of (i) to (iii) above, you must look at the transaction as a whole.

(v) If the assignee has a genuine commercial interest enforcing the cause of action, it is not fatal that the assignee may make a profit after the assignment.

(vi) It is open to question whether, if the assignee does make such a profit, he is answerable to the assignor for the differences.”

In a recent CFI decision in Siegfried Adalbert Unruh v Hans-Joerg Seeberger, Deputy High Court Judge Saunders apparently took the view that such a summary represented a binding decision of the Court of Appeal. With respect, while most parts of the summary did represent an

[1983] 3 All ER 499.

Note however that if, looking at the agreement and the circumstances in which it was made, there is an obvious disproportionality between what the funder lost and what he is bargaining to receive, the court may conclude that the agreement savours of champerty, and the more striking the disproportionality, the greater the likelihood of the court doing so: Advanced Technology Structures Ltd v Gray Valley Products Ltd, Pratt v Gray Valley Products Ltd [1993] BCLC 723.


[53] See para 146: “The most recent statement by the Court of Appeal, by whose decisions I am bound, on maintenance and champerty is that in Loke Choon Song v Koh Wah Bank Ltd [1991] 1 HKC 241. I adopt the following passage from the judgment of Kempster JA, at p 246, as correctly stating the present law in Hong Kong.”
accurate reflection of the ratio in *Trendtex Trading*, one needs to avoid elevating the status of such a summary to a binding ratio dealing with the doctrine of maintenance in general. One should note that the House of Lords in *Trendtex Trading* was dealing only with a special species of champerty on assignment of a right to litigate, and nowhere in His Lordships’ speeches attempted to lay down general principles applicable to other forms of champerty.

Moreover, the summary at (ii) is unwarranted from the decision in *Trendtex Trading* and is contrary to other decisions. In particular, the statement that there is no difference between the interest required to justify maintenance of action and the interest required to justify the taking of a share in the proceeds contradicted an early decision in *Cole v Booker*.[54] In that case, Bailhache J held that although the maintaining of the action was lawful as it came within one of the recognised exceptions (being that of charity), it was champertous as the maintainer stipulated for a share of the damages awarded. Another example is that while it is acceptable for a solicitor to maintain another person’s litigation by giving free legal services, he would fall foul of champerty if he stipulates for a fee upon success of the action. As Millet [kJ] observed recently in *Thai Trading Co (a firm) v Taylor*: “There can be no champerty if there is no maintenance, but there can still be champerty even if the maintenance is not unlawful.”

As stated by Lord Mustill in *Giles v Thompson*: “But the tests there laid down [in *Trendtex Trading*] were addressed to transactions of the kind then before the House; they are not to be understood as if they had statutory force; and I see no reason to impose the procedure thus evolved on situations which are entirely different.” Hence, it is submitted that the Hong Kong courts should follow the *Giles v Thompson* approach in dealing with maintenance and champerty in situations other than involving an assignment of a right to litigation and solicitors’ contingency fees.

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[54] (1913) TLR 295.
Maintenance and Champerty

Claims Recovery Agents

In Hong Kong, there has been a growth in recent years in the activities of claims recovery agents which assist and finance victims of personal injuries to claim compensation. These recovery agents canvass for business at various places to which accident victims usually go (eg hospitals). They also distribute leaflets and advertise through the Internet and public media. The agreement between the recovery agent and the accident victim usually does not involve any outright assignment of the cause of action, but the sharing of 20 to 30 per cent of the sum recovered as the success fee. In return, the recovery agent will fund all legal costs and disbursements and provide other “administrative” assistance. The agreement usually stipulates for the appointment by the victim of the recovery agent as his sole agent with full authority to claim and settle on behalf of the victim, who also has to sign an irrevocable power of attorney authorising the appointed lawyer to pay the success fee direct out of the recovered sum. There is no express right for the victim to terminate the agreement, but that the victim is contractually bound to pay the success fee even if he settles the case direct with the defendant. The victim is asked to sign a pro forma written confirmation that advice has been given to him on his entitlement to legal aid, though it is doubtful if any such advice is actually given in practice (or if given, whether the advice is an informed and accurate one).

The recovery agent’s agreement outlined above bears the hallmark of typical unlawful champerty. It is akin to what Danckwerts J condemned as champertous in *Martell v Consort Iron Co Ltd* the “former false ‘legal aid societies’, usually consisting of one man, that supplied legal aid and advice for a percentage of the sum recovered.” In *Re Tropic Mines*, the Court of Appeal declared champertous the agreement between P and a third party T for financing P’s appeal against the rejection of his proof in liquidation in return for 25 per cent of any sum recovered. In *Fraser v Buckle*,53 the Irish Supreme Court held as recently as 1996 that the contracts of “heir-locators”, who agree to help beneficiaries to prove their entitlement to the estates of deceased persons in return for a share of the proceeds, are champertous and unenforceable.

53 [1996] 2 ILRM 34 (Sup Ct (Irl)).
If one is to ask the single question framed by Fletcher Moulton LJ and adopted by Lord Mustill in Giles v Thompson, the answers given by Lord Mustill in respect of the car-hire company would have been completely opposite when applied to the recovery agent: "Is it wantonly or officiously interfering in the litigation; is it doing so in order to share in the profits? Clearly so. The recovery agent is a complete stranger to the accident victim and has no pre-existing interest in the claim. It officiously interferes in the litigation by financial the costs in order to share in the profits. It makes its profits from the litigation, not from any other things external to the litigation. It does not rely on the fruits of the litigation as a source from which the victim can satisfy his or her liability for the provision of a genuine service external to the litigation, but seeks to divide the spoils."

It may however be noted that in a recent English Court of Appeal case in Factorname v Secretary of State (No 2)," the company with financial problems instructed accountants to prepare and submit claim for damages against the Government in return for a 8 per cent success fee. It was held that it is necessary to look at the particular agreement to see whether it tended to conflict with the existing public policy, which was directed to protecting the due administration of justice with particular regard to the interests of the opposing party. On the facts the Court of Appeal held that the success fee arrangement was not champertous. Similarly, in Paperata Traders Co Ltd v Hyundai Merchant Marine Co Ltd the insurer instructed maritime claims and recovery agents on a contingency fee basis to provide services relating to the conduct of litigation by the claimants' solicitors. Cresswell J upheld the validity of such a contingency fee agreement with the recovery agents on the ground that upon analysis of the facts of the particular case it did not conflict with the existing public policy directed to protecting the due administration of justice.

However, it is submitted that these two cases must not be blindly followed in Hong Kong. As explained in the section on solicitors' contingency fees above, one must be careful to discern that some of the

56 [2002] 4 All ER 97.
policy arguments adopted by the English courts in these two cases reflected views changed or influenced by the legislative changes in England in the context of the reduction in legal aid provisions and the promotion of alternative funding models for litigation. In any event, these two cases are distinguishable on facts, as many of the positive factors identified therein are simply not present in the recovery agent’s agreement in Hong Kong.

Another distinguishing feature between the English and Hong Kong systems relates to the court’s power to award costs against a non-party. In England, the House of Lords in Aiden Shipping Co. Ltd v Interbulk Ltd,58 overruling previous decisions to the contrary, held that because of the broad words of section 51(1) of the Supreme Court Act 1981, the English courts have the jurisdiction to order costs against any non-party. However, in Hong Kong we have an additional provision in section 52A(2) of the High Court Ordinance which expressly provides that “nothing” in the general provision on costs (which is similar to section 51(1) of the Supreme Court Act 1981) “shall authorise an award of costs against a person who is not a party to the relevant proceedings”. It was thus held by Deputy Judge P Cheung (as he then was) in The CR Prince Noire59 that the courts in Hong Kong have no jurisdiction to order costs against someone who was not a party to the proceedings. In that case, it was the insurance company which funded the impoverished plaintiff’s proceedings and which would have taken the benefit of the proceedings in the event that the proceedings were successful. Upon a successful striking out of the plaintiff’s action, the defendant sought to recover its costs from the insurance company. Although the court considered that it would have been just and fair to award costs against the insurance company, it reluctantly declined to do so for want of jurisdiction.

The more liberal attitude towards lawful maintenance was expressly stated by Lord Denning MR in Hill v Archbold to be subject to the following proviso: “provided always that the one who supports the litigation, if it fails, pays the costs of the other side.” Recent cases show that the

English courts would normally order the professional funder, though a non-party, to pay the costs of any failed action financed by it. For example, in McFarlane v EE Caledonia Ltd (No 2) a Scottish company was formed to support personal injury claims on a contingency basis and had done so in relation to an unsuccessful claim for personal injury that had been brought in the English court. Its policy was not to accept liability for a successful adverse party’s costs. Longmore J made an order for costs against the company. Dymocks Franchise Systems (NSW) Pty Ltd v Todd was an appeal to the Privy Council from the Court of Appeal of New Zealand. The Privy Council held that there was no difference of approach on the part of the courts of England, New Zealand and, indeed, Australia when considering whether to make an award of costs against a non-party. In general the court should not order costs against “pure funders” (ie “those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course”). On the other hand, said Lord Brown in giving the advice of the Board: “Where, however, the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party’s costs.”

Given that the Hong Kong courts would have no jurisdiction to order costs against the recovery agent who funds an action of an impoverished accident victim in return for a division of its spoils, it seems that the only legal remedies for a successful defendant to recover his huge legal costs are by way of a civil claim for damages based on the tort of maintenance and champerty. This is an added reason why the Hong Kong courts should not be asute to relax the champerty rule against the contingency fee agreement with the recovery agent.

One may also take into account the following concerns raised by the Law Society: “… such recovery agents are not professionally qualified or subject to any code of professional conduct; there is no compulsory insurance covering any claims directed at them and they are of unknown

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62 If the accident victim is legally aided, then the costs of the successful defendant will be borne by the Director of Legal Aid under s 16C of the Legal Aid Ordinance (Cap 91).
financial hacking. Moreover, the majority of accident victims probably quality for Legal Aid, which renders it unnecessary for a third party to finance their claims. Since accident compensation in Hong Kong is assessed on the basis of actual loss, the victims will not be adequately compensated if part of their compensation has to be paid over to recovery agents. The more seriously injured victims may not have sufficient means to maintain their livelihood.6

It is therefore submitted that the recovery agent's contingency fee agreement is champertous. It then follows that: (a) the recovery agent may be guilty of the common law crime of champerty. (b) the agreement is unenforceable so that the accident victim has no liability to pay the agreed success fee or any other charges incurred by the agent. (c) the unsuccessful defendant who is ordered to pay costs may escape liability for costs on the basis of the indemnity principle64 (ie as it is the recovery agent who agrees to fund the litigation and that the plaintiff has no liability to pay the costs of his solicitors, he would not be in a position to claim to be indemnified by the defendant). (d) a successful defendant who cannot recover costs from the plaintiff may sue the recovery agent for committing the tort of champerty and recover costs as damages (see daily practice scenario (3) mentioned earlier in this article).

But can a solicitor accept instructions to act for the accident victim financed by the recovery agent? (See daily practice scenario (4) mentioned earlier in this article.) The Law Society has already highlighted in its recent Circular the likelihood of misconduct and the ensuing disciplinary proceedings if solicitors are to act for victims financed by recovery agents. On the civil side, it was held in Re Trepca Mines that when a solicitor is retained to conduct litigation on the ordinary and accustomed terms, he is not debarred from acting in that litigation simply because he knows, or gets to know, that his client has made a champertous agreement to share the proceeds with another. However, if he is a party to the champertous agreement or participates by voluntarily doing a positive act to assist to implement the unlawful agreement, then he cannot recover his costs because by his participation he aids and abets and is himself guilty of the offence of champerty.

64 Lam Lei Waih Susanna v Pacific Century Insurance Co Ltd [2003] 2 HKC 528 (CA).
In Re Trepca Mines, the Court of Appeal held against the solicitor for stepping beyond the line by taking into account the following factors: (a) the solicitor instructed counsel to help draw up an agreement to protect the interest of the champertous maintainer T; (b) under the agreement the proceeds of the claim received had to be paid to the solicitor so that he could pay the success fee direct to T; and (c) though the solicitor’s client was P, his paymaster was T. Factors (b) and (c) will likely be present in the arrangement with the recovery agent in Hong Kong and the court may well find that even in the absence of factor (a), the solicitor has gone beyond his ordinary retainer and become an active participant of the champerty.

Even if the solicitor is not guilty of aiding and abetting the champerty, his knowledge of the champerty may render him under a duty to advise his victim client that the champertous agreement with the recovery agent is unenforceable so that his client is under no obligation to pay the agreed success fee. Failure to give such an advice may render the solicitor liable in negligence for the success fee paid over to the recovery agent.

Conclusion

As can be seen above, the doctrines of maintenance and champerty, though of ancient and obscure origins, can have important consequences for modern commercial transactions and daily legal practices. The law of maintenance and champerty at the same time provides a striking example of how the scope of the common law can be altered to reflect changes in the notions of public policy. It is therefore interesting to see whether and how our judges will proceed to further develop these ancient doctrines to keep up with modern public policy in Hong Kong.