Access to Justice and the Assignment of Rights to Litigate

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Abstract

In England and Wales the funding of litigation by a third party is now a reasonably well established feature of the administration of civil justice. Doubts about its validity emanating from the ancient principles of maintenance and champerty have been overcome. Third party funding remains largely the preserve of high value commercial claims and any wider contribution to increasing access to justice awaits development. This article considers whether, as an alternative to the direct funding of a claim, a litigant might be able to acquire a measure of access to justice by assigning the claim to a third party. Assignment is not the identical thing to direct funding so it is necessary to examine how maintenance and champerty might apply to a transaction like this. The argument below is that there needs to be a re-focus of assignment law away from the legitimate interests of the assignee in taking an assignment, towards the legitimate interests of the assignor in making one. If this is done then assignment could become a useful tool leading to the expansion of litigation support to a broader range of cases.

Introduction

The purpose of this article is to consider the extent to which a party with a right to sue should be entitled to assign that right to another in exchange for payment of a sum calculated by reference to the estimated value and prospects for success of the right to claim. The social context in which this question may arise is access to justice and third-party litigation funding. The right of A to finance a claim for monetary relief by B against C in exchange for a portion of any damages B ultimately recovers is already well established in England and Wales and several other common law jurisdictions.

1 Thanks are due especially to Heather Conway, Mark Hanna and Tony Sebok, who individually offered comment on an earlier version of this article. Attendees surviving the blistering heat at the international Remedies symposium at Universite Paris-Dauphine in June 2019 also offered helpful comment, as well as the anonymous reviewers for the journal. The author remains responsible for any deficiencies.


For New Zealand see Waterhouse v Contractors Bonding Ltd [2013] NZSC 89. On the USA and other jurisdictions see N. Dietsch, ‘Litigation Financing in the US, the UK, and Australia: How the Industry has Evolved in Three Countries’ (2011) 38 Northern Kentucky L. Rev. 687; J. Kalajdzic, P. Cashman, and A. Longmoore, ‘Justice for
ancient common law principles of maintenance and champerty are now much reduced in significance throughout most of the common law world, except for Ireland.\(^3\) The current position can be confidently stated as follows. So long as A’s financing of B’s claim does not involve any corruption of justice maintenance and champerty will not constitute an automatic bar to third-party litigation support. The courts have recognised that the inability of many litigants to pay for a legal claim and the potentially crippling effect of also being liable to pay a successful defendant’s costs in the event that the claim fails necessitates a more accommodating approach than was exhibited in the past. Legal aid and other forms of public support for litigation no longer cover the proportion of the population they once did. The ability of lawyers to support their clients’ claims through contingency fees, conditional fees, and charging no fee if the case is lost, cannot realistically plug the ‘black hole’ that exists in funding attempts to secure legal redress for a wrong.

The question which this article addresses is whether, as an alternative to A financing B’s claim against C, could B assign the claim to A by way of sale? Realistically the sale price would have to be discounted to take account of the risk that the case A takes on may fail and A becomes liable to pay costs to C. There would also have to be a profit margin for A factored into the setting of the price. As it is already the case that the proportion of B’s damages which litigation funders are currently taking is high,\(^4\) in practical terms B may not receive much less and A may not acquire much more through assignment than in more conventional third-party funding situations. Assignment may enable B to obtain a guaranteed payment for the claim and get this much sooner than if the case proceeded to settlement or judgment in the normal way. Sometimes, however, the assignment contract may not provide B with ‘money up front’. The price may be paid in stages and may be conditional upon B’s co-operation in prosecuting the claim or a successful outcome. But even where B’s receipt of payment is conditional in any of these ways B will no longer be liable for costs if the case fails. From B’s access to justice perspective assignment could be an attractive option.

From A’s perspective the advantage of assignment over more conventional third-party funding may be somewhat uncertain. In a conventional third-party funding case A will know that if there is a successful outcome it will get a certain percentage of damages recovered. But both success and the quantum of damages will be uncertain. If A pays B an up-front sum to purchase the claim it would have a clearer idea in prosecuting that claim what amount in terms of settlement or judgment it needs to obtain to turn a profit. It will have to pay costs for an unsuccessful claim but third-party costs orders against commercial funders are standard enough in unsuccessful cases supported by a funder. The successful prosecution of a claim by an assignee may require the assignor’s co-operation in making witness statements, giving evidence, and providing discovery, problems that would not arise where B remained the claimant. But as against that A can employ its own legal team and make all the key decisions relating to the management and settlement of the claim.

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\(^4\) Sometimes up to 40%. See Capper, ibid, at 212.
The principal reasons why assignment should be given serious consideration are as follows. In England and Wales, the jurisdiction which is the main focus of this article, litigation funding is still at a nascent stage of development. It still seems to be the case that it is mainly used in high value commercial claims. If litigation funding is to be extended beyond this sort of claim, to the point where it can make a much greater contribution to meeting litigants’ access to justice needs, it will surely be necessary to think of alternative ways of providing the service. Litigants with lower value claims may find the up-front payment much more attractive than a longer haul road to trial or settlement, to the point perhaps where the claim may be abandoned if the latter is the only viable way of proceeding. Funders may find it makes more economic sense to purchase a raft of modest value claims rather than fund each one individually for a share of any recovery obtained. Assignment was favoured as the way to manage a large number of low value consumer claims in *Casehub Ltd v Wolf Cola Ltd.* The relatively recent introduction of a class action scheme for competition law claims in England and Wales may prove to be another area where the assignment of claims is an effective way of prosecuting them.

It is not, however, the principal objective of this article, to make the case for funders and funded as to whether they should prefer assignment over conventional third-party funding. However, providing these parties with a choice of different ways of financing litigation is likely to be better than a one size fits all model. With that in mind this article conducts a doctrinal legal analysis of the extent to which the assignment of a right to sue is possible. To the extent that the current law does not make it possible, the article indicates what needs to change so that it becomes possible. The ancient doctrines of maintenance and champerty present the principal obstacles to assigning rights to sue, just like they did for the third-party funding of claims. However the penultimate section of this article will articulate an argument that assignment could be used effectively in one class of case frequently coming before the civil courts, a claim for damages for personal injury sustained as a result of the defendant’s negligence.

In Ireland third party litigation funding was declared to be illegal in *Persona Digital Telephony Ltd v Minister for Public Enterprise.* Hence the Supreme Court’s rejection of any kind of commercial assignment of a claim in *SPV Osus Ltd v HSBC Institutional Trust Services (Ireland) Ltd* as savouring of maintenance and champerty hardly came as a surprise. For those jurisdictions that have embraced third party litigation funding the assumption should not be made, however, that assignment is to be viewed as precisely on the same footing. Assignment changes the claimant, and this means that different legal issues arise.

The article proceeds as follows. In the next section the law on assignment of rights to litigate will be stated as clearly and accurately as possible. This will be with a view to assessing to what extent the law at present might allow the assignment of a claim by B to A in

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5 C. Hodges, J. Peyesner and A. Nurse, *Litigation Funding: Status and Issues, Research Report* (Centre for Socio-Legal Studies, Oxford; University of Lincoln Law School, 2012), p. 7. The authors found that the minimum sum for which third-party litigation funding would be offered was realistically speaking £1 million.

6 [2017] EWHC 1169 (Ch), [2017] 5 Costs LR 835.


8 [2017] IESC 27.

9 [2018] IESC 44.

circumstances similar to those posited above. A critique of that law will be offered as the explanation and discussion enfolds. It will be argued that the current law is uncertain in some respects and unsatisfactory in its overall focus. It requires reform, or at least re-orientation, so that it focuses upon the essential corruption of justice issue that should determine whether a legal claim may be assigned. A rule that allows some defined categories of claim to be assigned and disallows others simply fails to focus upon the key policy driver in this area. This is that litigants should in general be permitted to assign their rights to seek legal redress unless the defendant can show that there is real cause for concern that this will result in either unfairness to a party affected by the litigation or some wider corruption of the civil justice system. Having made the case that the ancient principles of maintenance and champerty should not present grounds for preventing the assignment of a legal claim the final substantive section of the article will address some further arguments for and against the assignment of rights to sue. In order to give some concreteness to the article’s principal recommendation, that assignment is a legitimate access to justice tool, an argument will then be presented that assignment could be used effectively for this purpose in personal injury litigation.

Assigning Rights to Litigate – the Law

Introduction

In England and Wales, a right to sue is a “debt or other legal thing in action” potentially assignable under section 136 of the Law of Property Act 1925. To say ‘potentially’ assignable is to acknowledge the vestiges of the historic fear of maintenance and champerty which prevented both the assignment of rights to sue and the financial support of litigation in medieval times. Two seminal accounts of the law of maintenance and champerty published in the early twentieth century explain the historic ban on assignment and litigation funding in terms of the disorderly state of the country in medieval times. Powerful men of property would buy up or otherwise support the litigation of others as ways of harassing enemies and acquiring additional property and influence. It seems that these individuals were able to bribe royal officials and judges to ensure favourable results. The law’s response was to ban assignment and financial support for litigation. These accounts root maintenance and champerty and its effect upon assignment and litigation support squarely in concerns about the corruption of justice. Assignment and litigation support had a tendency to corrupt justice at that time and in that way, but they do not intrinsically corrupt justice. As Winfield and Holdsworth went on to explain, changing social conditions much reduced the corruption of justice that came this way, and the prohibitions on the assignment of choses in action were relaxed over the succeeding centuries so that today all that remains is the rule that a ‘bare cause of action’ cannot be assigned. This section of the article will try to explain how the courts have set bare causes of action apart from other choses in action. It will be shown both

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that the distinction between bare causes of action and other choses is unclear and that only a very weak justification exists for treating bare causes as non-assignable. Other common law jurisdictions, such as the United States, are familiar with maintenance and champerty as part of their common law inheritance, but as they did not experience corruption of justice in the same way as medieval England, they have found it easier to accept assignments of the right to sue.\(^\text{13}\) It is significant too that the law on assignment of choses in action liberalised long before the law on direct funding of another’s litigation.

**Rights to sue and rights of property**

It is established law that rights to litigate that may be considered essential to the enjoyment of property may be assigned. Thus, in *Williams v Protheroe*\(^\text{14}\) the purchaser of a landed estate was entitled to take over claims for rent arrears and dilapidations against an existing tenant. In *Dawson v Great Northern and City Railway Co*\(^\text{15}\) the claimant’s right to seek compensation under section 68 of the Lands Clauses Consolidation Act 1845 for damage sustained by property before she acquired the freehold in it was held to be validly assigned along with the freehold.\(^\text{16}\) An insurer may take an assignment of the insured’s right to sue as an enhancement of its existing right of subrogation. It can then sue in its own name instead of in the insured’s name.\(^\text{17}\) This is the least problematic of all assignments of the right to litigate.

**Debts**

In this context a debt should be understood as a sum certain or liquidated amount. If the debt is undisputed there is no problem about its assignment. It is a recognised species of property and the assignment by way of charge of a company’s ‘book debts’ is a well-established kind of secured business lending.

It is when the debt is disputed that matters become complex. Clearly it would make no sense if the debtor could block the assignment of the debt by inventing a dispute as to liability or amount that was wholly without foundation. But at the time the assignment is taken it may be impossible to tell if the defence being raised is without foundation, honest but lacking in merit, or seriously arguable. Litigation may be necessary and the dividing line between this and the assignment of a bare right to litigate can be unclear to say the least.

A still troubling case is *Laurent v Sales & Co.*\(^\text{18}\) A claim for payment against a finance house was assigned three years after the finance house had acknowledged its liability to pay against the delivery of copper wire. The assignee was to pay the assignor a quarter of any recovery made from the debtor. When the debtor refused to pay the assignee the latter instituted

\(^\text{14}\) (1829) 3 Y & J 129, 148 ER 1122 (Best CJ).
\(^\text{15}\) [1905] 1 KB 260 (CA).
\(^\text{16}\) See also *Ellis v Torrington* [1920] 1 KB 399 (CA).
\(^\text{18}\) [1963] 1 WLR 829 (QBD).
proceedings and Megaw J tried a preliminary issue as to whether the assignment was champertous. It was held that the assignee’s knowledge that the claim would likely have to be litigated rendered it champertous. While there was good reason to suspect that the claim in this case was of doubtful merit Megaw J’s reasoning makes it too easy for debtors to avoid payment by inventing spurious excuses. The dispute as to liability should have gone to trial where the debtor’s refusal to pay could have been properly tested.\(^{19}\) The true, but not clearly expressed reason for this decision, was that the assignor was paid nothing up-front for the claim, only 25% of any recoveries. As these were uncertain this was trafficking in litigation, which the case law discussed below exhibits hostility to. Whether it should have will be discussed along with the cases.\(^{20}\)

In *Camdex International Ltd v Bank of Zambia*\(^{21}\) the claimant took an assignment of bank deposits made with the Bank of Zambia. Zambia was in negotiations with the international community about the re-scheduling of its foreign debt and the bank was unable to repay the deposit. The Court of Appeal held that the debt could be assigned even though the assignee knew that legal proceedings would most likely be required to recover it. A genuine and arguable defence would be required to invalidate the assignment and there was none here. So far, this account is tolerably clear but the same cannot be said of Hobhouse LJ’s attempt to explain *Laurent v Sale*. This was, his lordship claimed, a case about litigation support, not assignment.\(^{22}\) While developments in the law of maintenance and champerty since this decision may mean there were better prospects of invalidating litigation support in the mid-1990s than today, and certainly better prospects than when *Laurent v Sale* was decided in the early 1960s, this account of *Laurent v Sale* cannot be made to fit the facts. Neill LJ’s description of it as an unusual case is true so far as it goes but uninformative.\(^{23}\) In *SPV Osus Ltd v HSBC Institutional Trust Services (Ireland) Ltd*\(^{24}\) O’Donnell J suggested that in his judgment in the Court of Appeal’s decision in *Trendtex Trading Corporation v Credit Suisse*\(^{25}\) Lord Denning MR thought *Laurent v Sale* was a case of champerty because an assignment giving the assignor only a quarter of any recovery was not made for good and sufficient consideration. With respect, this is clutching at straws.

The law on the assignment of debts is in an unsatisfactory condition. Not only is there uncertainty about when a disputed claim may be assigned, but there is no coherent explanation of why a debt which requires genuinely contested litigation to recover it should be non-assignable. The reason for prohibiting assignments of rights to litigate was the risk of corrupting justice, which is not an intrinsic risk in all cases of disputed debts.

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\(^{19}\) In *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679 (HL), at 695 Lord Wilberforce, without much elaboration, opined that *Laurent v Sale* was correctly decided.

\(^{20}\) I am grateful to Tony Sebok for this observation on *Laurent v Sale*.

\(^{21}\) [1998] QB 22 (CA).

\(^{22}\) [1998] QB 22 (CA), 36-37.

\(^{23}\) [1998] QB 22 (CA), 41E-F.

\(^{24}\) [2018] IESC 44, [56].

Closely connected to claims for payment of a debt are claims for breach of contract. Contractual rights are assignable because they are property rights and do not necessarily involve litigation. When they become the subject of litigation the modern law to be applied to assignments was restated by the Court of Appeal and House of Lords in *Trendtex Trading Corporation v Credit Suisse*.

Trendtex sold cement to a Nigerian company. Trendtex's acquisition of the cement was financed by a letter of credit issued by Credit Suisse. Trendtex was to be paid by a letter of credit issued on the buyers' behalf by the Central Bank of Nigeria (CBN). The latter defaulted and Trendtex issued a claim against it for $14 million. Credit Suisse took an assignment of that claim as its successful prosecution was its only realistic hope of being paid for the cement it enabled Trendtex to acquire. Trendtex was paid $800,000 for its claim against CBN, the money coming from a third party, and Credit Suisse arranged for all of Trendtex’s other creditors to be paid. Credit Suisse sold the CBN claim on for $1.1m and the buyer in turn settled the claim with CBN for $8 million. At this point Trendtex issued proceedings against Credit Suisse challenging the assignment on several grounds, maintenance and champerty being the one that concerns us.

The Court of Appeal and House of Lords were agreed that the test to be applied by the court in determining the validity of an assignment of a claim for breach of contract was whether the assignee had a legitimate interest in the assignor’s claim to justify taking the assignment. There was no disagreement as to the legitimate interest of Credit Suisse in taking the assignment. There was no other likelihood of reimbursement for funding Trendtex’s acquisition of the cement. Differing from the Court of Appeal the House of Lords declared the assignment invalid as there was no evidence as to the legitimate interest of the third party to whom Trendtex’s claim was traded. This was improper trafficking in litigation. The judgments and speeches discussed the legitimacy of assigning claims other than breach of contract and these will be discussed below. In this connection claims which were considered to be ‘personal’ in the sense that the underlying legal obligation was owed to the assignor only were not regarded as assignable by the Court of Appeal. So far as breach of contract is concerned this essentially means contracts for personal services. The House of Lords passed no comment on these claims but there seems no reason to suspect any difference in view from the Court of Appeal on this issue. The judgment of Lord Denning MR in the Court of Appeal advanced the theory that the prohibition on assigning a bare right to litigate had gone, but this drew no support from Oliver LJ and Bridge LJ or from the House of Lords. The assignee’s possession of a legitimate interest is what saves the assignment from invalidity on the ground of being a bare right to litigate. It would seem to follow that if Credit Suisse had a legitimate interest in prosecuting Trendtex’s claim against CBN but the third party to whom the claim was ‘trafficked’ did not, then only interests which pre-exist the assignment can be ‘legitimate’.

The nature of the legitimate interest needed to support the assignment of a contract remedial right has been the subject of several cases since *Trendtex*. In *Bourne v Colodense Ltd* the claimant had undertaken an unsuccessful tort action against his employer with the financial

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support of his trade union. Faced with the prospect of an irrecoverable costs order against the claimant the defendants applied for the appointment of a receiver over the claimant’s contractual right to an indemnity against the union. The Court of Appeal held that the defendants had a sufficient interest in this claim as otherwise there would have been no effective means of recovering their costs and the judge had made the costs order against the claimant in the expectation that the union would cover it.

In *Brownton Ltd v Edward Moore Incubon Ltd* 29 MAN engaged the services of EMR to advise about the installation of a computer system. Another company (C) supplied the system which proved to be completely unsuitable. MAN initially sued EMR in both contract and tort, afterwards joining C as a second defendant whom it sued in contract only. EMR paid £302,000 into court to cover all MAN’s losses and then sought to take an assignment of MAN’s claim against C to recover contribution from it. 30 The Court of Appeal considered that as all relevant claims arose out of the same commercial transaction EMR’s attempt to take an assignment of MAN’s contract claim against C was supported by a legitimate commercial interest. There were some differences between the two substantive judgments in this case in relation to secondary issues to which we will return below. Sir John Megaw thought that an assignee taking excessive profit from the assignment might not be able to demonstrate a legitimate interest, but Lloyd LJ rejected this on the grounds of uncertainty and the need for the legitimacy of the interest to be judged at the time of the assignment. Continuing with this theme of excessive profit, in *Circuit Systems Ltd v Zuken-ReDec Ltd* 31 Simon Brown LJ inclined to the view that the benefit derived from the assignment should be proportionate to the assignee’s interest. In *Massai Aviation Services v Attorney General of Bahamas* 32 a company sold its business but retained a very valuable commercial claim. This was then assigned for $10 to another company that owned all the shares in the assignor company. In delivering the judgment of the Board Lady Hale observed that had the claim been sold to a minority shareholder for this price there might have been an issue, but this was a perfectly sensible business arrangement. Returning to *Brownton* Lloyd LJ also stated that there was no difference in the interest needed to maintain an action and that needed to support an assignment, a point doubted above. 33 He also said that a legitimate interest had to pre-exist the assignment, which it did in this case in the form of the assignee’s contingent liability it took steps to reduce by taking the assignment.

*Jeb Recoveries LLP v Binstock* 34 was another case like *Massai Aviation Services* where an assignment was made to a corporate entity closely connected to the assignor. Three personal claimants against the same defendant assigned their claims to a limited liability partnership between the three of them for £1. The objective was in part to protect the personal claimants from liability for costs in the event that the claim failed. The judge, HHJ Simon Barker QC, rejected the defendant’s challenge to this assignment. It was a sensible way of furthering the

29 [1985] 3 All ER 499 (CA).
30 The reason for taking this roundabout and complex route to apportioning liability amongst the defendants was that the Civil Liability (Contribution) Act 1978, which would have allowed for ‘just and equitable’ apportionment, was not in force at the time of the assignment and the Law Reform (Married Women and Tortfeasors) Act 1935 only applied to claims in tort and MAN’s claim against C was in contract.
31 [1997] 1 WLR 721, 734E-F.
33 See n. 9 and text.
34 [2015] EWHC 1063 (Ch).
personal claimants’ access to justice rights but also treated the defendant entirely fairly because he was in a better position to seek security for costs against the LLP. Had the assignment been to an entity without capital and no way of protecting the defendant against an unenforceable costs order been available the assignment might have been illegitimate.\textsuperscript{35} The assignee had no pre-existing interest in the claims as it was only brought into existence to prosecute the personal claimants’ litigation rights against the defendant, but the common interests between the personal claimants and the LLP, together with the protection available to the defendant, ensured there was no corruption of justice.

The case of \textit{Casehub Ltd v Wolf Cola Ltd}\textsuperscript{36} involved the assignment of a large number of small claims in restitution to a commercial aggregator which agreed to pay consumers an agreed portion or amount from any recovery made. Stuart Isaacs QC, sitting as a deputy High Court judge, held that the assignee had a legitimate commercial interest in taking these assignments. There was a strong public interest in enabling consumers to pursue these small claims which without this kind of claims management system they would probably be disinclined to pursue. Like \textit{Jeb Recoveries v Binstock} there were costs advantages for the assignors in processing the claims in this way, and injustice to the defendant was avoided by making it easier for security for costs to be obtained. It was accepted that if the services provided by the claimant had been legal services section 13 of the Legal Services Act 2007 would not have permitted this arrangement. The approach in this case is very much to be welcomed despite the absence of any obvious legitimate interest for the claimant in taking an assignment of these claims. There was certainly no pre-existing interest of the assignee and the only interest it possessed was the ability to process the claims and earn its share of the recovery. But neither was there any corruption of justice, indeed justice was enhanced so far as the consumers were enabled to receive something for their claims and the defendant did not escape liability that could not seriously be disputed. The significance of the \textit{Casehub} decision lies in the fact that it seems to be the first case where the court approved an assignment to a true third party whose only interest in the assignment was a means to earning profit from the assignor’s underlying claim. The assignments in \textit{Massai} and \textit{Jeb Recoveries} were assignments to corporate third parties almost inseparable from the assignors themselves. The court focused on the legitimate access to justice rights of the assignor and approved the assignment because there was no issue about the corruption of justice. This argument, which will be developed below, is that the focus should shift in assignment cases from the interest of the assignee to that of the assignor and the implications the assignment presents for the purity of justice.

\textit{Claims in tort}

Rights of action in tort are often, but not invariably, of a purely personal character. Examples include claims for personal injury damages caused by a breach of a duty of care, claims in assault and battery, and violations of dignitary interests such as defamation and invasion of privacy. Rightly or wrongly there has been a long-standing unease about allowing such rights to be assigned. The perception has been that if the assignor is unwilling to assert her rights

\textsuperscript{35} [2015] EWHC 1063 (Ch), [51].
\textsuperscript{36} [2017] EWHC 1169 (Ch), [2017] 5 Costs LR 835.
another person should not be permitted to profit from this.\textsuperscript{37} This sense of unease was also expressed in \textit{Trendtex},\textsuperscript{38} although the House of Lords’ decision in that case should probably be understood as subjecting the assignment of these claims to the legitimate interest test discussed above in the context of breach of contract claims. It seems likely that an assignee of a ‘personal tort’ claim will often struggle to show a legitimate interest.

The assignment of a personal tort claim was the subject of the important Court of Appeal decision in \textit{Simpson v Norfolk and Norwich University Hospital NHS Trust}.	extsuperscript{39} Mrs Simpson’s husband contracted MRSA while being treated for cancer in the defendant’s hospital. His death was not caused by MRSA but his last days were made more uncomfortable than they would have been otherwise because of the infection. Mrs Simpson compromised a negligence action she took against the defendant on behalf of her late husband’s estate but appears to have been dissatisfied that she was unable to expose the deficiencies in the defendant’s infection control through a public hearing in court. So, for £1 she took an assignment of another patient’s negligence action against the defendant arising out of his contracting MRSA, in the process amending the amount claimed from £5,000 to £15,000. The Court of Appeal acknowledged that the personal injury claim was a ‘legal thing in action’ within the meaning of section 136 of the Law of Property Act 1925 but barred Mrs Simpson from proceeding with the claim on the ground that she had taken the assignment of a ‘bare cause of action’. Her public-spirited campaign to expose the deficiencies of the defendant’s infection control was not a legitimate interest. Moore-Bick LJ acknowledged that the concept of ‘legitimate interest’ was developing so it was not possible to state definitively what would constitute this interest. It was not in the public interest to encourage litigation that was not brought to seek a legal remedy for a wrong. This could expose the defendant to unfairness in so far as the claimant may be unwilling to settle or mediate because her pursuit of the case was distorted by matters not concerned with the litigation.\textsuperscript{40} Had this case been about the assignor’s access to justice rights Mrs Simpson could have put him in funds to pursue it.\textsuperscript{41} Assignment could conceivably have achieved that objective but a price rather higher than £1 would have been needed in that event.

In agreement with Professor Tettenborn it is accepted that this is an assignment that should not have been allowed to proceed.\textsuperscript{42} A better basis, however, would have been that the assignment was an abuse of process. People may bring their own cases for public spirited reasons, but this is not a sufficient reason for buying up another’s claim. Abuse of process would be a preferable approach because it starts from the position that the assignor can do what he wants with his right to sue unless this can be shown to be irregular. It appears that one member of the Court of Appeal in the \textit{Simpson} case, Dame Janet Smith, has extra-judicially envisaged a case where a litigant in urgent need of money sold a claim valued at potentially £100,000 for £50,000 immediately received. Why should the assignor’s ability to do this depend on whether the assignee can show a legitimate interest in taking the

\textsuperscript{38} [1980] 1 QB 629, 656F (Lord Denning MR), and 663F (Oliver LJ).
\textsuperscript{40} [2011] EWCA Civ 1149, [24].
\textsuperscript{41} [2011] EWCA Civ 1149, [22].
Two decisions of Commonwealth courts provide examples of legitimate interests in taking assignments of tort claims. First in time was *Fredrikson v Insurance Corporation of British Columbia*. N obtained a jury verdict against F for injuries sustained in a road traffic accident. F’s insurers settled damages at $1.2 million but the limit of F’s cover was $500,000. F commenced an action against his insurers for negligence in the settlement of the jury verdict. F then assigned this claim to N and the issue arose as to the validity of the assignment. McLachlin JA, as she then was, delivered the judgment of the British Columbia Court of Appeal, holding that N had a legitimate interest in taking this assignment as F was without means to pay the outstanding $700,000 of the settlement. Several features of this case should be pointed out. First, this was a non-personal tort, F’s claim against his insurers for mismanaging the settlement of his liability arising under the jury verdict. Secondly, N’s interest in the claim assigned pre-dated the assignment and arose out of her negligence action against F determined in her favour by the jury verdict. Thirdly, in taking the assignment N was seeking to obtain no more than she was legally entitled to. McLachlin JA also stated that the exceptions to the non-assignment rule were not closed. “In each case the court must ask itself whether the assignment can fairly be seen as prompted by a desire to advance the cause of justice rather than as intermeddling for some collateral reason...”

Second was *Workcover Queensland v AMACA Pty Ltd*. The claimant had paid the assignor $550,000 compensation for mesothelioma under a statutory scheme. After the assignor’s death his widow assigned his common law negligence action against the defendant to the plaintiff on terms that required any recovery from the defendant exceeding $550,000 to be held on trust for the assignor’s estate. The Queensland Court of Appeal upheld this assignment. Although the claimant had no legal right to be subrogated to the assignor’s negligence action it did have a genuine pre-existing commercial interest in recouping what it had paid to the assignor should it be shown that the defendant was responsible for the injury. In agreeing to hold any recovery exceeding $550,000 on trust for the assignor’s estate the claimant was not seeking to profit from the assignment.

A significant case of non-personal tort where the assignment was declared invalid was *Body Corporate 160361 (Fleetwood Apartments) v BC 2004 Ltd and BC 2009 Ltd*. The claimants were the owners of 40 apartments in the Central Business District of Auckland. They instituted proceedings against the defendants claiming damages for ‘leaky building syndrome’. The first defendants were a building consultancy who designed and supervised the remedial works. The second defendants were a construction company that carried out

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43 Julian Fulbrook, case comment on *Simpson v Norfolk and Norwich University Hospital NHS Trust* (2012) JPI C96.
44 (1986) 3 BCLR (2d) 145 (BCCA). This decision was affirmed by the Supreme Court of Canada for the reasons given by the Court of Appeal. [1988] 1 SCR 1089.
45 (1986) 3 BCLR (2d) 145, [23].
the building works. The third defendants were Auckland City Council which was responsible for the regulation of the building works. Before trial the claimants and the third defendants settled. Under the settlement agreement the third defendant paid the claimants $1.5 million and took an assignment of the claimants’ claims against the first and second defendants. There were further terms of the settlement agreement under which the third defendants were to make further payments to the claimants from any recovery made pursuing their claims against the other defendants. It will be apparent that there were clear similarities between this case and the case of *Brownton Ltd v Edward Moore Incubom Ltd*[^48] considered above. There was also one highly significant difference, in that the settlement appeared likely to produce a different allocation of liability between the parties than would have followed from application of the statutory contribution and indemnity scheme under the Law Reform Act 1936 section 17. It will be recalled that there was no applicable statutory scheme in *Brownton* so this could not have been an issue there. The third defendants, the initiators of the settlement, had a legitimate commercial interest in promoting settlement, but not in obtaining for themselves a reduction on the amount they would have had to pay under section 17 if this came at the expense of other parties. There was understandable concern too that the third defendants might pursue settlement negotiations with the other defendants with their own interests in mind rather than those of first-time litigants like the claimants. The judge, Fogarty J, made two salient comments about the assignment of rights to litigate. First, a pre-existing commercial interest was not a requirement of a valid assignment, but it was a consideration in favour of the legitimacy of the assignment.[^49] Secondly, causes of action, unless there were special reasons, should be brought by the persons to whom the law affords the accompanying rights and remedies; assignments have to be justified.[^50]

Again, it is accepted that the outcome of this decision is correct but that a better approach would have been to view the third defendant’s assignment as irregular on the basis that it involved unfairness to other parties and a potential abuse of process. Rather than beginning, as Fogarty J suggested, with the presumption that assignments require specific justification, there should be a presumption that an assignor is entitled to deal with the cause of action as he or she sees fit unless another party can point to some reason why this should not be permitted.

Claims in tort, like actions for breach of contract, should be generally assignable. There is no conceptual or inherent reason why not. There may be some cases, such as were discussed above, where an assignment may cause injustice or adversely affect the administration of justice. In those circumstances the assignment may be barred as an abuse of process.

**Assignment of the proceeds of litigation**

It seems to be well established that the proceeds of a pending lawsuit may be assigned even if the action itself could not. This is on the basis that the assignee is not interfering in the running of the litigation and there is unlikely to be any corruption of justice. In *Glegg v...*[^48] [1985] 3 All ER 499 (CA).[^49] [2014] NZHC 1514, [142].[^50] [2014] NZHC 1514, [145].
Bromley\textsuperscript{51} a wife assigned the proceeds of a slander action she was bringing to her husband as payment for certain debts she owed him. The Court of Appeal held that the action could not be assigned but the proceeds could. In \textit{Trendtex}\textsuperscript{52} Oliver LJ opined that this distinction confused form with substance, but in \textit{SPV Osus Ltd v HSBC Institutional Trust Services (Ireland) Ltd}\textsuperscript{53} O’Donnell J stated that it was crucial as without it \textit{Glegg v Bromley} would have been wrongly decided as permitting the assignment of a purely personal claim. This article supports the assignment of the proceeds on the basis that there should be no inherent invalidity in the assignment of an action for defamation.

\textit{SPV Osus v HSBC}

This decision by the Supreme Court of Ireland\textsuperscript{54} is the most in-depth treatment of the subject of assigning rights to litigate by the apex court of a common law jurisdiction in recent times. Even though it hails from a legal jurisdiction that has to date rejected third party litigation funding, it merits a sub-section of its own.

The facts of this case are extremely complex but may be reduced to the following summary to bring out the essential issue. Optimal Strategic (OS) was an investment fund that had invested heavily in the now bankrupt Madoff empire. A total of about $2.9 billion had been invested, $1.5 billion secured and the remainder unsecured. The Irish based defendants in this case were the custodians of the investment fund. As it was not practically possible for individual investors in OS to realise their investments, a scheme was approved by the United States Bankruptcy Court for the Southern District of New York whereby OS’s claims were assigned to a special purpose vehicle, SPV Osus (SPV). The way this scheme worked was that investors in OS could exchange their shares for more easily tradable shares in SPV. Trading in the shares of SPV resulted in distressed debt investors acquiring 93% of the value of those shares. These distressed debt investors looked to see what further money they could earn by litigating the unsecured claims that were originally located in OS. The claims the subject of these proceedings were brought in Ireland against the defendants alleging that they had caused loss to the investors through breach of contract, misrepresentation, breach of fiduciary duty and on other grounds.

The principal judgment of the Supreme Court, dismissing the claimants’ case, was delivered by O’Donnell J. The judgment contains an extremely valuable analysis of existing case law from England and other common law jurisdictions about assigning rights to litigate. The key principle remained the one laid down by the House of Lords in \textit{Trendtex}. The assignee of a right to sue had to have a genuine and legitimate interest in that claim to make the assignment valid. What undermined the assignment in this case was that the initial exchange of shares in OS for shares in SPV was in the expectation that shares in SPV would be sold on to speculative investors on financial markets. The shares sold were not just ordinary corporate securities; they carried with them the right to sue for damages which the distressed

\textsuperscript{51} [1912] 3 KB 474 (CA).
\textsuperscript{52} [1980] 1 QB 629, 670D-E.
\textsuperscript{53} [2018] IESC 44, [55].
\textsuperscript{54} [2018] IESC 44. For comment see Glen Rogers, ‘Litigation Funding, Assignment of Actions and Access to Justice’ (2019) 18 Hibernian LJ 93.
debt investors in SPV were now trying to assert with a view to acquiring further profit. They had no legitimate interest in these claims, certainly not one that pre-dated the assignment, a feature of a valid assignment which the law had hitherto regarded as necessary.\(^{55}\) The plaintiffs argued that the scheme approved by the US Bankruptcy Court anticipated realisation of investors’ interests in precisely this way and that this conferred a legitimate interest in the assignment.\(^{56}\) But the Supreme Court was hostile to the notion that the legal process could be used to enable parties to make money by asserting legal claims they had acquired from others. Courts existed to vindicate the rights of claimants, not to serve as vehicles for the making of commercial profit.\(^{57}\) In O’Donnell J’s words “[i]t would be foolish not to recognise that the practice of law is a business, but the administration of justice is not.”\(^{58}\) The argument that the court should look at the circumstances of the case to see if there was any risk of abuse of process was rejected as too uncertain.\(^{59}\) Champerty was prohibited not because abuse was inevitable but because of the risk.\(^{60}\)

There is in this judgment a deep-seated hostility to litigation trafficking without explaining what is so objectionable about it. It was acknowledged that the assignment in this case was acceptable in New York.\(^{61}\) But this was attributed to the different legal culture prevailing in the United States, illustrated by the common usage of contingency fees in American litigation. With respect this is not a very persuasive argument. Like Wall Street and the City of London Ireland is a major international financial services centre that should be comfortable with financial securities like these. After Brexit it is the only common law jurisdiction in Western Europe and if it wants to exploit this to the full it is going to have to become comfortable with litigation funding in all its aspects. Like Clarke CJ\(^{62}\) O’Donnell J preferred a legislative scheme to regulate assignment and third-party litigation funding.\(^{63}\)

O’Donnell J also expressed the view,\(^{64}\) echoed to an extent by Clarke CJ,\(^{65}\) that assignment might be more offensive to public policy than third party litigation funding. This seems to be because there is a new claimant and this presents difficulty for the defendant in terms of getting discovery. Too much should not be made of this because if the new claimant is unable to provide the discovery to which the defendant is entitled the action should not be allowed to proceed. Difficulties for the new claimant in marshalling evidence without the assignor’s co-operation are the assignee’s problem and not a reason to bar assignment. The assertion that if it is possible to assign claims it would be possible to make collateral agreements about giving evidence\(^{66}\) does not highlight a problem likely to be more severe where a claim is assigned than in other litigation. Professor Tan remarked that an assignee invokes less

\(^{55}\) [2018] IESC 44, [97].
\(^{56}\) [2018] IESC 44, [82].
\(^{57}\) [2018] IESC 44, [86-87].
\(^{58}\) [2018] IESC 44, [93].
\(^{59}\) [2018] IESC 44, [82].
\(^{60}\) [2018] IESC 44, [19], [82].
\(^{61}\) In Trendtex Oliver LJ expressed unhappiness that the transaction in issue in that case appeared to be enforceable in Switzerland. [1980] 1 QB 629, 663.
\(^{62}\) [2018] IESC 44, [2.2].
\(^{63}\) [2018] IESC 44, [71].
\(^{64}\) [2018] IESC 44, [15], [84], and [93].
\(^{65}\) [2018] IESC 44, [2.1-2.3].
\(^{66}\) [2018] IESC 44, [93].
sympathy than one who helps another to sue but this is about as far as the distinction between these two providers of litigation support should be taken.\footnote{Y.L. Tan, ‘Champertous Contracts and Assignments’ (1990) 106 LQR 656, 661.}

Ultimately O’Donnell J was correct to observe that if public policy is against third party litigation funding it must also be against assignment.\footnote{[2018] IESC 44, [83].} But there is little acknowledgement of the access to justice context in O’Donnell J’s judgment. There was some with the recognition\footnote{[2018] IESC 44, [84].} that the assignor may prefer the fixed recovery of assignment to the uncertain outcome of a third party providing financial support. As Professor Biehler has pointed out,\footnote{Hilary Biehler, ‘Maintenance and Champerty and Access to Justice – the Saga Continues’ (2018) Irish Jurist 130, 142, citing Baragwanath J in Saunders v Houghton [2010] 3 NZLR 331 (CA), 351.} Trendtex, on which the Supreme Court was heavily reliant, was decided at a time when the unavailability of access to justice without litigation funding was not so appreciated as it is today. Clarke CJ seemed a little more conscious of this wider context but preferred a legislative scheme. There was little sense that the law in England may have moved on since Trendtex. True, there is not a lot of direct indication other than Casehub Ltd v Wolf Cola Ltd\footnote{[2017] EWHC 1169 (Ch), [2017] 5 Costs LR 835.} that it has done so in relation to assignment of claims, but it has in relation to third party funding and that is all about access to justice.

\textit{The insolvency exception}

A well-established exception to the rule barring the assignment of a bare right to litigate exists in the insolvency context where the office holder\footnote{Insolvency Act 1986 section 314(1)(b) (trustee-in-bankruptcy); section 167(1)(b) (liquidator); section 42(1) (administrative receiver).} may assign all individual assets of the insolvent, including bare causes of action. Lord Hoffmann explained the rationale for this exception in Norglen Ltd v Reeds Rain Prudential Ltd as follows:-

“\textit{The law is traditionally hostile to the assignment of causes of action in return for a share of the proceeds ... The position of liquidators and trustees in bankruptcy is however quite different. The courts have recognised that they often have no assets with which to fund litigation and that in such cases the only practical way in which they can turn a cause of action into money is to sell it, either for a fixed sum or a share of the proceeds to someone who is willing to take the proceedings in his own name. In this respect they are of course no different from many other people. But because trustees and liquidators act on behalf of creditors, the courts have for the past century construed their statutory powers as placing them in a privileged position.”}\footnote{[1999] 2 AC 1 (HL), 11F. To similar effect see Seevar v Lawson (1880) 15 Ch.D 426 (CA), 433 (Sir George Jessel MR); Guy v Churchill (1888) 40 Ch.D 481 (Ch.D), 490 (Chitty J).}

In Guy v Churchill\footnote{(1888) 40 Ch.D 481 (Ch.D).} it was no objection that the creditors to whom the trustee-in-bankruptcy assigned the claim were being allowed to recover more than they would have recovered in the bankruptcy. To incentivise a creditor to take on an action an offer like this may have to
be made. There is authority that the sale of part of a claim falls outside the office holder’s power so that the law of maintenance and champerty has full force in that context. In Circuit Systems Ltd v Zuken-Redac (UK) Ltd it was held to be immaterial whether the assignee had a legitimate commercial interest in the claim or whether the proceeds recoverable were proportionate to that interest. In Trendtex Oliver LJ expressed difficulty understanding why a trustee-in-bankruptcy could assign a claim but the debtor pre-bankruptcy, perhaps in an attempt to avoid bankruptcy, could not.

The insolvency exception justifies the assignment of a claim in terms of the legitimate interests of the assignor and its creditors. This should be the perspective from which all assignments are viewed.

Summary and conclusion

Maintenance and champerty entered the common law because of the chaos and turmoil of medieval England. It has taken root and obstructed third party litigation funding and the assignment of rights to litigate. By looking to the rationale for maintenance and champerty, the abuse it was designed to counteract, and by appreciating that corruption of justice is not an inherent feature of involvement in another’s legal disputes, but a risk born of medieval social conditions, the courts have largely freed third party litigation funding from the shackles of those ancient common law doctrines. It is less clear whether the same can be said of assignments of rights to litigate. As O’Donnell J remarked in SPV Osus Ltd v HSBC Institutional Trust Services (Ireland) Ltd champerty is prohibited because of the risk of abuse, not because it is inevitable. In Body Corporate 160361 (Fleetwood Apartments) v BC 2004 Ltd and BC 2009 Ltd Fogarty J said that assignments require justification.

The approach adopted by the courts to the justification of assignments does exhibit some signs of liberalisation as the analysis of case law above shows. But puzzling distinctions remain and there is an absence of a coherent overall rationale. Debts may be assigned if the creditor does not really have to sue, in the sense that there is no genuine dispute about the claim. This reasoning is circular because it comes to saying that a right to sue in debt may be assigned only when the creditor does not need to exercise the right. Trendtex liberalised the law on assigning claims for breach of contract and tort. However, uncertainty remains about ‘personal’ claims and whether the assignee’s legitimate interest must pre-exist the assignment. Cases where assignments have not been permitted would be better understood as abuses of process. The law in this area has not engaged with the access to justice challenge that the law on third party litigation funding has addressed. The right of a litigant to sell a claim to obtain something from it should be permitted unless there is good reason why not. Reason to bar the assignment of a claim is unlikely to be found in identifying categories of case that cannot be assigned. The specific circumstances of the case must be examined. Finally, there is the long standing insolvency exception where assignments are viewed from

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75 Grovewood Holdings Plc v James Capel and Co Ltd [1995] Ch 80 (Ch.D).
76 [1997] 1 WLR 721 (CA).
77 [1980] 1 QB 629, 671G.
78 [2018] IESC 44, [19].
79 [2014] NZHC 1514, [145].
the assignor’s perspective, as an exercise in recovering assets for distribution to an insolvent’s creditors, as opposed to the assignee’s legitimate interest. This is the way that assignments should be viewed in general. The question that the court should address is whether the assignor is genuinely trying to recover something from a lawsuit by selling it to another. The realities of modern litigation, its costs and stresses, should be borne in mind and courts ought not to dismiss assignments as cases where the assignor is unwilling to assert his or her rights.

The next section of this article will articulate more fully why a party with a potential claim should be allowed to assign it for some portion of its value as a legitimate means of obtaining access to justice.

**Why Rights to Litigate Should be Assignable**

Up to now the case that has been made for allowing a party with a right to sue to assign that right to a third party has essentially been that the ancient principles of maintenance and champerty do not provide convincing reasons why this right should not be assignable. Now it is time to make the positive case for why this right should be assignable.

The starting point is that a right to sue is a property right\(^{80}\) and the owner ought presumptively to be permitted to deal with it however they wish unless this involves some unfairness to another or abuse of process. Especially where the claimant cannot afford to sue there is no justification for preventing her from trying to get something for the claim by selling it to another.\(^{81}\) It is no answer to this that direct third-party funding should be used because nobody may be willing to fund the claim. Even that option were available why should the litigant not sell for a guaranteed and potentially earlier payment if she can get one? Why should she not sell at a discount and get relief from the stress of litigation with the risk of having to pay costs if the claim fails?\(^{82}\) It is not inconceivable that the claimant may need money and need it soon.\(^{83}\) Access to justice has been recognised as a fundamental right of the citizen and litigation funding could offer a way of providing it to a wider range of persons.\(^{84}\) It should not be assumed that if litigation funding were to expand beyond high value commercial claims that only one method of providing financial support, the direct funding of the claimant’s case, would be needed. Assignment may prove to be the better way in many cases.

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84 The constitutional nature of the right to access to justice was recognised by the Supreme Court of Ireland in both Persona Digital Telephony v Minister for Public Enterprise [2017] IESC 27 and SPV Osus Ltd v HSBC Institutional Trust Services (Ireland) Ltd [2018] IESC 44.
A wide variety of objections have been posited about assigning rights to litigate. Many of these issues can be more directly and satisfactorily dealt with by using the variety of abuse of process tools the law has at its disposal.\(^85\) These can halt abuses of process in the circumstances of particular cases instead of blocking all assignments because of the perceived risk that an abuse may occur. One objection arises out of a concern that an impecunious assignor might be exploited.\(^86\) Again there are better tools in the form of legal doctrines addressing potential unconscionability in a transaction.\(^87\) Time and again the objection to trafficking in litigation is made. As Lady Hale pointed out in *Massai Aviation Services v Attorney General*\(^88\) trafficking is not wrong in itself; it depends on what is being trafficked. Why should, as Professor Tettenborn has observed, there be a problem with speculation and profit making out of litigation, when there is speculative dealing in corporate debt or securitised mortgages?\(^89\)

The need for the assignor’s co-operation in giving evidence and providing discovery has already been flagged. The starting point in answering this objection is that all assignments are subject to equities in the defendant’s favour.\(^90\) Defences, rights of set off and other limitations on the extent of the assignor’s claim against the defendant are binding on the assignee. So, when it comes to the assignee proving the case in court the burden is on it to ensure that the assignor provides the discovery, witness statements and evidence needed. There is no oppression of the defendant if the proofs do not materialise and if the defendant does not get the discovery to which it is entitled the court can stop the case from proceeding. It has been said that the assignee may be aggressive and less willing to settle or mediate but there is not much in this fear either. A commercial funder taking an assignment is actually likely to be more business-like in its approach to the claim.\(^91\) Certainly it is likely to be a more effective litigator than the one shot claimant but there is no unfairness in that.\(^92\) Assignees with improper motives can be dealt with through actions for malicious prosecution or abuse of process.\(^93\) It is utterly implausible that assignment would expose defendants to a host of frivolous or unmeritorious claims that assignors off load to other persons to pursue.\(^94\) Commercial funders are not known for buying up weak claims that are unlikely to produce damages awards.

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\(^{86}\) Y.L. Tan, ‘Champertous Contracts and Assignments’ (1990) 106 LQR 656, at 674-75.


\(^{88}\) [2007] UKPC 12, at [19].


Finally, there are several objections that can conveniently be grouped together under the general heading of what Professor Anthony Sebok has labelled ‘The Inauthentic Claim’.\(^{95}\) The claim is inauthentic because it is not brought by the person who sustained the damage the remedy is sought for. To the general argument that claims should only be brought by those who suffer the injury against those who cause it, Sebok and Abramowicz point out that a great many claims are brought by and against insurers.\(^{96}\) Next it is objected that assigning claims cannot be squared with corrective justice theory.\(^{97}\) Even if the assumption is made that corrective justice provides the essential theoretical underpinning of private law, assignment is consistent with it. Abramowicz maintains that corrective justice just requires that the victim be compensated. The compensation need not come from the defendant, it comes from an insurer in many cases regardless, and if the law insisted it came from the defendant that would be retribution.\(^{98}\) Sebok maintains that assignment is consistent with corrective justice because it is encompassed within the wider power to seek a remedy. The remedy is more valuable because it can be assigned, and the claimant is not required to prosecute the claim herself when she may lack the resources to do so.\(^{99}\) It has been said that assignment deprives the victim of her day in court.\(^{100}\) But if having a day in court matters more to the litigant than accepting an offer of compensation, she can refuse the offer. Lastly Abramowicz considers an argument that assignment may place lawyers handling the case for the assignee on weak ethical ground. This is because they are just assisting a client who did not suffer an injury to make money instead of serving a client who is seeking redress for a wrong.\(^{101}\) This overlooks the way in which the civil justice system allows victims of wrong who cannot afford the burden of litigation to get compensation by assigning the claim to someone well practiced in legal proceedings.

In conclusion to this part, it may be said that the victim of a legal wrong who seeks compensation by assigning their claim to another is using their property in a perfectly legitimate way. Indeed, this may be the only practicable means of getting redress for that wrong. The law should not ask what interest the assignee has in receiving the assignment but what interest the assignor has in making it. There are and will continue to be some assignments that should not be permitted. The way to deal with these is to bar the assignment only if the defendant or some other party can show unfairness to it consequent upon the assignment or that there is real ground for concern that an abuse of process may be caused. The approach should be pro-assignment unless this should be prevented. There should be no blanket rule based on perceived risk that if a party is bringing a claim that truly belongs to another that this is something to be prevented unless a special case can be made for it.

\(^{95}\) Anthony J. Sebok, ‘The Inauthentic Claim’ (2011) 64 Vanderbilt L. Rev. 61.
\(^{97}\) The literature on this is immense but the best-known exponent of corrective justice is Professor Ernest Weinrib. See Ernest Weinrib, The Idea of Private Law (OUP, 2012), and Corrective Justice (OUP, 2012).
In What Kind of Case Could Assignment be Used?

In order to make the case for the assignment of rights to sue as an access to justice tool it is helpful at least to explain the kind of case in which it might be used. At present litigation funding is used mainly in high value commercial claims, and it has also been shown how low value consumer claims could be aggregated into a group action to be presented by a litigation funder.\textsuperscript{102} The former is conventional litigation funding by A of B’s claim against C, and the latter operates by way of assignment. Claims for damages for personal injury have been chosen as a case type that could in future be supported by litigation funders. If high value claims are the stock in trade of litigation funding at present extension would have to be towards claims of lower value but also of sufficient ubiquity to catch the eye of the funding industry. Personal injury cases seem to answer to these descriptors. As the financial awards for funders would be significantly less than in high value commercial claims another case type would have to be one that does not make excessive due diligence demands. In most personal injury cases, medical negligence being one definite exception here, it is possible to make a reasonably accurate assessment of whether there is a claim worth pursuing without too much investigation. So this is an area where litigation funding might go. Assignment may be the preferred funding vehicle for reasons of convenience. There might not be enough at stake and the litigation might not be sufficiently complex to make funding a claim brought by a litigation team of the claimant’s choosing a particularly sensible way of proceeding. It would be better to purchase the claim outright and assume full control.

From the claimant’s perspective the attraction of assigning the claim to a funder is twofold. First the claimant will likely receive some guaranteed payment for the claim, which is never the case in any claim no matter how strong the prospects may appear at the outset of litigation. Secondly the claimant will probably receive payment much sooner than would be the case with a claim that proceeds to settlement or trial. Assignments may be conditional upon success in the litigation but it is not thought likely that any claimant would be prepared to assign a claim for a conditional payment like this. There may be conditions about giving evidence, providing discovery, and generally co-operating with the presentation of the case but these conditions are sufficiently within the control of the assignor that they probably would not be serious obstacles to an assignment.

The likelihood is that the claimant assignor would receive significantly less for the claim by way of assignment than would be the case if the claimant simply waited the process out until settlement or trial. But the assumption here is that the claim will be settled in the claimant’s favour or that the case will be won at trial. This does not always happen and when it does it may take quite a long time. As the American literature discussed in the previous section makes clear some claimants are in immediate need of money and have to sell their claim to meet that financial pressure.\textsuperscript{103} One reason for needing money now may be to pay medical

\textsuperscript{102} Casehub Ltd v Wolf Cola Ltd [2017] EWHC 1169 (Ch), [2017] 5 Costs LR 835.
bills, less of a problem in the United Kingdom due to its National Health Service. But the claimant may be unable to work and be entitled to nothing more than statutory sick pay from their employer. The claimant may also be experiencing the very common problem of being in debt with creditors applying serious pressure to be paid. Even when these pressures are absent there is nothing wrong with just preferring to get something now than waiting for an unascertainable period on an uncertain outcome.

Claimant lawyers may be somewhat resistant to the assignment of claims from which they make money by navigating them through the court system. But if this is what the client wants the lawyer has no business resisting. The lawyer will still be paid a fee for initial investigatory work ascertaining whether there is sufficient merit in the claim that a funder might be interested in buying it. The sum might not be large but the investment of time and effort may not be huge either. The relationship between the lawyer for the assignor claimant and the assignee funder needs some consideration here. Funders might find the bulk buying of personal injury claims from a law firm an attractive proposition. This should be resisted because there would be an unacceptable risk that the assignor’s lawyer gets too closely associated with the funder and does not provide the assignor with the independent legal advice that party needs. The assignor’s lawyer must advise the client whether the price being offered to take an assignment of the claim is reasonable. Assignee funders will already have access to professional advice about prospects of success and the value of the claim. What we are looking at here is likely just the assignment of individual claims with modest profits only being made by the funder. But if this kind of business were to grow it is conceivable that some better cash flow could be generated for funders than is the case with the investment of very large sums in a few high value cases that take a very long time to turn a profit.

It is appreciated that the discussion above is inherently speculative. This article makes the case for allowing claimants in civil cases to assign their claims for money. Whether anyone would want to sell or anyone want to buy the item for sale is a question for the market. Having made the case that the law needs re-focusing to look at the access to justice rights of the assignor in selling instead of the assignee’s legitimate interests in taking an assignment, it is important to imagine where this might go, what might happen, and specifically what area of litigation might see this tool being used.

Conclusion

Direct third-party funding of litigation has made huge strides over the last two decades. Despite this the industry is still at a relatively nascent stage. Most cases where it is used are high value commercial claims. If the industry expands, and the need for financial support for dispute resolution is real enough to make expansion a serious possibility at least, that will require the development of a wider range of tools suitable for the needs of different clients with different kinds of claims. The assignment of the right to litigate should be available as one of those tools. Maintenance and champerty represent a potential obstacle to any


104 See Steven Friel, The Law and Business of Litigation Finance (Bloomsbury Professional, 2020).
development in this direction. *SPV Osus Ltd v HSBC Institutional Trust Services (Ireland) Ltd*, the one apex court decision from common law jurisdictions on the subject in recent years, certainly is discouraging but, given Ireland’s attitude to direct funding of litigation, it should not be regarded as representing the law in England and Wales or anywhere else. There has been some discussion of whether the interest needed to support the maintenance of a cause of action is the same as for the assignment of a claim. As assignment substitutes a new claimant it may be unwise to assume that the two forms of litigation support would necessarily be treated in the same way.

The last word draws upon an argument of Professor Tettenborn’s, whose 2006 article about assigning rights to compensation, strongly supported a litigant’s right to assign their claim. Tettenborn argued that maintenance and champerty did not provide a coherent theory for limitations on the right to assign rights to litigate or other choses in action. The proper limits on assignment are matters of substantive right, whereas maintenance and champerty are concerned with abuse of process. If the implications of this argument were taken to their logical conclusion this might mean either confining maintenance and champerty to direct funding of litigation, or the final abolition of the doctrines of maintenance and champerty altogether. Where either option to be pursued some principle would be needed to block those assignments of rights to litigate which should not be allowed to proceed. They cannot be categorised but there are bound to be times when assigning a right to litigate would be an abuse of process. So Tettenborn’s argument, for all its theoretical merit, probably fails as a matter of practice. Whether it is called maintenance and champerty or abuse of process something will be needed to stop assignments that should not be allowed to proceed. One change in approach is surely called for, and that is the abolition of the need for assignments to be justified. Instead, the starting point should be that a litigant may assign his or her right to sue unless the defendant or some other person affected by the assignment can show unfairness to their own legitimate interests or an abuse of process. This would satisfactorily balance the claimant’s access to justice rights with the defendant’s right to be protected against unfair treatment or abuse of process.

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105 [2018] IESC 44.
