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Access to Justice: who pays the price?

In *The Traveller*, Oliver Goldsmith (1728-1774) wrote that "Laws grind the poor, and rich men rule the law". It is remarkable how little public perception of the civil justice system has changed over 200 years. The Queen's speech officially unveiled the Government's Access to Justice Bill, seeking to remedy the imbalance, but at what price? Paradoxically, reform is nothing new to the system. However, in an immense overhaul, Lord Woolf is taking everyone to the litigation sales while the Lord Chancellor's Department is giving out credit cards that may never have to be paid off.

The Woolf reforms aim to make all litigation quicker, more cost-effective, and thus more accessible. The nine different ways of starting a legal action have been consolidated to one, removing the curious pig Latin known only to the chosen few. Theoretically, any reasonably educated person can understand the universal "claim form", the basis for a system "that is equal and treats all people equally"(Lord Woolf). Yet lawyers will not pay the price by being made redundant. Even most DIY small claims cases will still require legal advice, despite Woolf's utopian view that one day soon the computer screen will replace the face of the lawyer.

Woolf talks admiringly of the efficiency of those American states where a divorce is arranged by filling in the details on a street-side terminal. Eventually,

information technology will save money and time, but the immediate integration of the system is going to be expensive for everyone.

Fundamental to Woolf's reforms are the moves to excise the cancer of costs by transferring the responsibility for pre-trial management away from the parties and their lawyers to the judge. Despite the original claim that greater co-operation would avoid litigation and save costs, Lord Woolf has recently acknowledged that Judicial Case Management, although saving time, does involve the parties in more cost - one conclusion of preliminary American research. Professor Michael Zander, perhaps the most outspoken critic of the Woolf reforms, has used this US research as ammunition to explode the fallacy that cutting time necessarily cuts costs.

The dogmatic Zander observes how the higher pre-trial costs for litigants are front-loaded. Thus while the proposals encourage greater access to justice, they also provide more incentive to settle, because those who get to court under the new system will face greater front-loaded costs. Hence, the price of winning or losing a case that does not settle increases. While this may be the initial effect of the rules, time and experience should lead to greater predictability and smoother dispute resolution.

The obsession with expediency means that litigants will be punished for violations of fixed timetables imposed by the managing judges, harsh punishments for offences that may be down to the vicissitudes of litigation. Unfortunately, increased pre-trial judicial intervention leads to increased inconsistency of decisions, but nobody said that we could afford more fairness, while shopping for more access. Except Lord Woolf, that is. Nonetheless, increased access to a justice that may, at least until case management and the information technology are in full working order, be cruder and dearer than its predecessor, is a step in the right direction.

For 50 years Legal Aid has helped only the very poor, even though it now costs every taxpayer £57 a year. Keeping Legal Aid for family cases, the Government proposes to replace other civil litigation funding with "no win no fee" agreements (the credit cards). Typically, the lawyers do not pay the price, because they impose a success fee (interest) on a case so that when they do win they increase their charges to balance their risk. The cost of the lawyers' insecurity will be passed on to the consumer. According to Dan Brennan QC, Vice-Chairman of the Bar Council, the Government may have considerably underestimated the success fee likely to be charged by lawyers.

Take, for example, the winning lawyer, who charges his client double his fee (a 100% success fee is the proposed statutory limit). To deduct this from the client's financial award would deliver only partial justice. More winners thanks to the reforms, but smaller victories. Consequently, the Government have accepted Bar Council recommendations that the success fee and any insurance premiums be recoverable from the loser. So it gets more expensive to lose and the partial justice is for the loser rather than the winner. This problem is exacerbated, because the better the chances of the defence, the higher the winning lawyers success fee will be. Therefore the better your case is, the more expensive it will be to lose it. More winners, greater losses. Better to lose in straight sets than go down in the fifth.

Under the present "cab-rank" rule barristers must take on any case if they have the time, but just as lenders run credit checks, risk assessment research has shown that lawyers will only take cases with a 60% initial chance of success, even though all lawyers know that this figure can fall or rise dramatically between the all-conquering claim form and the trial. Also, at some cost to the independence of

justice, the excuse of "limited chance of success" could mask a multitude of professional qualms.

On a cynical view, the net effect on the taxpayer is minimal. Reduced contribution to Legal Aid, but as a result of losers' insurance companies picking up the bill, premiums for employers, motorists and homeowners could go up, perhaps raising the cost to the insurance payer by about £57 a year? The insurers laugh all the way to the bank. While the Government appears to cut taxes, they are simply traded for private costs. Overall, however, more people should have access to the law, just as the government claims.

William Murray, Earl of Mansfield (1705-1793) said "Consider what you think justice requires, and decide accordingly. But never give your reasons, for your judgement will probably be right, but your reasons will certainly be wrong." Given the inevitable teething problems of the reforms the Lord Chancellors Department might just be hoping that William was right.

(997 words)

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