Access to Justice - Who Pays the Price?

The cost of civil justice is excessive. In claims of between £12,500 and £25,000 average costs range from 40 to 95 per cent of the claim value and in lower value claims the costs consistently represent more than 100 per cent of the claim value (1). Disproportionate costs are not only inefficient but also discriminate against those with less resources by deterring both the poor and the risk averse from litigating. Making the ability to vindicate rights dependent upon wealth undermines equality before the law. The withdrawal of Legal Aid precipitates the problem of how the price of litigation undertaken by those with limited resources is to be paid, or more accurately "underwritten" since costs are only payable on defeat.

Conditional fees are the Lord Chancellor's solution to the problem of funding access to justice (2). This essay attempts a critique of the conditional fee system, concluding that its success will depend upon the cost of litigation being reduced through separate reforms.

Under a conditional fee arrangement the lawyer only charges her client if the case is won, and when cases are won a success fee is charged. However, even with conditional fees the high costs payable in the event of a loss will continue to deter the poor and risk averse from litigating. On losing the client remains liable for all of her opponent's costs and her own disbursements. The proposal that the client insures against these costs encounters the problem that in a system of high and unpredictable costs insurance is commensurately expensive - it costs £8,000 to insure against bringing medical negligence claims to trial (3).

Introducing a conditional fee system without reducing the cost of litigation merely transfers the problem of excessive costs deterring litigation from plaintiffs to their lawyers and achieves nothing. The success fee's function is to compensate the lawyer for those cases which he loses. In our system, where costs are high relative to the claim, so any success fee recovered capped at 25 per cent of the award will be small relative to the costs incurred. If costs equal three quarters of the value of the claim then a lawyer litigating similar claims must win three quarters of cases to "break even" (4). Unless the costs of litigating are reduced or lawyers are prepared to earn less then only very strong claims will obtain access to justice. Solicitors have already been advised that "conditional fee medical negligence work should not be touched with a bargepole" (5).

The acid test for conditional fees is not whether they work in cases where the risk of non-recovery is low (and the cost in legal aid has been small) but whether they can bring claims less certain of success into the system. The bottom line is profit: the attractiveness of a case depends upon the potential fee on success balanced against the risk of non-recovery and the amount of investment necessary in bringing the claim. In the US it seems that claims where success is not guaranteed are litigated but higher damages offer greater rewards. In our system lower awards make uncertain claims less attractive, especially those for smaller sums where the costs are increasingly disproportionate. To increase damages is inefficient so to incentivize lawyers and facilitate access to justice we must decrease the cost of litigation.

The hourly rate will continue alongside conditional fees. Defence lawyers have obvious difficulties in operating conditional fee arrangements and will continue to work on hourly rates, as in the US. Further, a plaintiff's ability to come to court is fundamental to the Rule of Law and cannot be dependent upon her finding a lawyer prepared to work on a conditional fee basis. Justice is not only concerned with money, the vindication of rights has its own value. Actions where money is not claimed, for example applications for judicial review or actions to compel due administration of a trust, are less amenable to conditional fees. The costs of litigation must therefore be cut to enable those dependent on hourly fees to obtain access to justice. Conversely, only appropriate procedures must be allowed in order to prevent rich defendants gaining an unfair advantage by investing disproportionate amounts on an hourly rate while the plaintiff's lawyer is trying to work efficiently on a conditional fee basis.

The success fee compensates lawyers for representing unsuccessful plaintiffs (6), as the new price of access to justice it raises the question of who should ultimately pay it. If success fees are deducted from damages then successful plaintiffs are subsiding access to justice and the system is failing to provide full compensation and to fully protect rights. The Lord Chancellor accordingly proposes that success fees be recoverable as costs from the defendant (7).

One contrary argument is that if the plaintiff chooses to opt for a conditional fee arrangement through impecuniosity such losses are not recoverable (after The Liesbosch (8)) Another is that all costs are not recoverable under the present system, only taxed costs. Nevertheless, the Lord Chancellor's proposal is preferable: wrongs give rise to a duty to make full compensation and the plaintiff should receive this provided he acts reasonably in bringing his action. Those defendants wrongfully denying liability and forcing the plaintiff to litigate to recover his due should have to pay for the steps the plaintiff must reasonably take (see Dodds v Canterbury CC (9)). Making wrongdoers pay more also provides a greater deterrent to adhere to the norms of behaviour required by law. Further, it is better to give plaintiffs full compensation explicitly than to achieve this by distorting the law of damages to take account of irrecoverable costs, as is apparently current practice in the US.

The expansion of conditional fee arrangements is inevitable and is to be welcomed as it encourages efficiency in order to secure a reasonable return for time invested. However, conditional fees can only succeed in securing access to justice if the costs of litigation are reduced and conditional fees alone will not achieve this. Until costs are reduced many good cases will remain insufficiently attractive to be undertaken on a conditional fee basis, with the result that, where the taxpayer is unable to underwrite the price of access to justice, society will suffer the cost of individual rights and collective behavioural norms going unenforced.

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Footnotes

The following footnotes are for the purpose of reference and clarification. They are not included in the word count.

(1) From the Woolf Report (Final) p. 17
(2) Lord Chancellor's Department Consultation Paper of March 1998
(3) Exact figure is £7,956 see Underwood "No Win, No Fee No Worries - Conditional and Contingency Fees Explained" CLT Professional Publishing (1998)
(4) The economics are more complicated in reality, for example by the profit element in normal fees. But success fees remain small in comparison to costs and the risk of losing substantial investments for small gains will not encourage lawyers to take on large numbers of cases. The 25 per cent cap is that suggested by the Law Society.
(5) Underwood (ibid) at p.81
(6) See the Lord Chancellor's Consultation Paper at paragraph 2.1
(7) See the Lord Chancellor's Consultation Paper at paragraph 2.14
(8) (1933) AC 449
(9) (1980) 1 All ER 928