ACCESS TO JUSTICE: WHO PAYS THE PRICE?

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When a Labour Government in 1949 introduced the Legal Aid System, it was intended to open the door to civil justice for all income groups who could not afford it before. What it achieved was that the poor got in next to the very rich while the middle-income earners fell one step short of Lord Devlin's Rolls: too well off to qualify for the scheme and too poor to afford major litigation. This is especially so since the 1993 cuts. The curiosity is that only after letting this group enjoy their situation for nearly half a century, did the government begin to worry about their fate and started to consider conditional fees. And even more curious is that the government gets worried at the very moment when civil Legal Aid costs rocket despite swingeing cuts and a considerable fall in the number of recipients. Could it be that the real concern is loss of control over costs and system abuse by the lawyers? Whichever the answer to this question, it is of little importance as long as the final outcome proves to be a solution to both problems: curving the Legal Aid spending and providing legal services for all those under the jurisdiction of the system in conformity with the Rule of Law.

Introduced by section 58 of the Courts and Legal Services Act 1990, the conditional fees allow a lawyer to agree to take a civil case on the understanding that if the case is lost, he will not charge his client for the work he has done. If, however the case is won, the lawyer is entitled to a success fee proportional to the risk he has run of not being paid. The current tendency is to extend the right of conditional fees arrangements from personal injury and insolvency cases to the whole range. One can easily foresee the impacts of this reform on the day-to-day work of the lawyers. Hence it is understandable the scepticism with which the proposals were met both by the public and the representatives of the legal profession, and also by a third category: the insurance companies.

Overall and in the light of its American extraction, the 'no win no fee' system is seen as a two-edged sword. On one hand, it has its advantages: people with no appropriate resources will be able to enforce their legal rights, the sharing of risk in a case will result in a somewhat closer relationship between client and lawyer, weak cases which clogged the Legal Aid bill will be eliminated and the list does not end here.[1] However, access to civil justice is not entirely free. Someone somewhere pays a price and for efficiency considerations it is necessary to find out who it is before actually implementing the reform proposals.

On the face of it, the one who pays is the losing party. Britain is desperately trying to keep as far away as possible from the American source of inspiration by maintaining the indemnity rule. Thus, by contrast to the 'fast buck' incentive, the 'ambulance chasing' and a culture of litigiousness, the British legal system keeps to the Rule of Law and makes the loser incur all the costs for the winner including success fee and insurance premiums. This new system apparently makes 'fortune's foes' out of whoever loses although they are exempt from paying their own fees. There is no need however to feel too sorry for the

[1] For reference, see the Lord Chancellor's Department Consultation Paper from March 1998 on Access to Justice with Conditional Fees.

unpaid law firms. The success fees under the new system will be thus evaluated to cover the costs of losses-what is known as the cross subsidisation of cases. However, the whole issue is more complicated than this.

It could happen that the new scheme would have a negative impact on the very group it was meant to help in the first place. In removing the cost barrier, it leaves an empty space for another type of barrier on the way to justice: restrictive case selection. With risk assessment in mind, the lawyers will take on some cases and turn down others, which fail to meet this time, a risk test.

There will also be costs in terms of justice. It is possible that we shall see a shift of focus from justice to winning the case and special attention paid to technicalities such as in the OJ Simpson's trial. There will be pressures on early out -of- court settlements on clients from lawyers who want to minimise the costs of losing while they can. Laudable to a certain extent for saving precious court time for litigation, this shift of focus from court room to back room can equally mean that the quality of justice will suffer, sacrificing thoroughness to ready-made justice.

The cost to law firms is primarily financial, as they will have to change the whole system they operate in. It is similar with the EU firms changing their software in the run up to the Euro. Coupled with the extension of rights of audience, the conditional fees mean that the firms will need to be more competent, to invest more in training and face competition. This costs money. They will not be able to refuse hard cases forever especially with the incentive of a success fee proportional to the degree of risk. The discretion on fixing the success fee may mean costs in terms of the lawyers' integrity incurred by the hurt ego of the British gentleman and on a more tragic note by the most unfortunate losing party.

The only ones that seem to come out unscathed are the taxpayers. In the light of conditional fees seen as an alternative to Legal Aid for certain types of cases, their money

will now go to the worthy cause of education, health and the like of those needy areas that justice had to compete against up to now.

However, solutions exist for the forecasted problems, such as confidential monitoring of conditional fee agreements by an independent body or an increase of the insurance policies against legal costs. Lord Chancellor's Department invited responses to the March Consultation Paper which have arrived, been summarised and will be taken into account. The reforms will be introduced by April 1999 or so says Lord Irvine. The best scenario is that they will improve access to justice where it already existed and create it where there was none. The worst will see lawyers take on only cases with high success rate and charge disproportionate fees. The overall gain is a cut in unnecessary delays. The question remains one of choice between new rough-and -ready justice for the many and the old Rolls-Royce system for the few. This question should be considered in the light of the present situation where the Legal Aid system is almost bankrupt whereas Conditional Fees are thriving across the Atlantic. Also, one has to bear in mind that while consultation is taking place, there are people waiting, unable to obtain help with their legal problems and they are not few. Therefore, it would only make sense to go for the change.