

## **Access to justice: who pays the price?**

Just as cows being herded into an abattoir have no idea of what lays in wait, most of us are unaware that the present system of civil justice is about to be overhauled. The justification is that the legal aid budget is too big. It is tempting to argue that justice is so fundamental that a government who fails to bear the risk of litigation for all has got its priorities wrong. This is as short sighted as it is idealistic: the truth is that every pound the government spends on justice is a pound less spent on hospitals or schools. The many worthy calls on government money draw us to the conclusion that it is litigants not the taxpayer who should pay for civil justice.

The question is how?

One of our intuitions is that whoever is in the wrong should pay. If I violate your legal rights, then not only should I compensate you for the violation but also for your having to prove it in court. Similarly, if I wrongly accuse you, I should compensate you for having to prove you did nothing wrong. This matches our basic ideas of fairness; it is also reflected in the practice that judges order the loser to pay the winner's costs.

However, that is not our only intuition. We also recognise that deciding whether to litigate is often like deciding on this week's lottery numbers. Lawyers' careers are based on uncertainty about the law and facts. Consequently, litigants are not in a position to know who is in the right - if they were the case would settle - so fairness requires that plaintiffs who have a good case but lose should be protected against having to pay costs. However, it also must be right that plaintiffs make some contribution towards this protection. This can be achieved in two ways.

First, all plaintiffs who can afford to make a contribution before litigation starts should do so; not an open-ended contribution, but a flat fee, which is not recoverable from the

defendant as a cost of bringing the proceedings. Second, a proportion of the damages awarded to a successful plaintiff should be paid to whoever bears the risk of the costs; our intuition that whoever is in the wrong should pay would be satisfied if this deduction was recoverable from the defendant. How does this square with the government's proposals?

The core of the reforms is that legal aid is cut back and the hole filled with 'no win, no fee'. Under these arrangements the plaintiff's lawyer does not get paid if the case is lost, but is paid a bonus if the plaintiff wins. There is no reason why the bonus cannot be paid by the defendant as part of the plaintiff's costs, so our intuition that those in the wrong should fund civil justice is satisfied.

However, unlike ~~the situation~~ under legal aid, a plaintiff who loses is not protected against paying the defendant's costs. Consequently, only the foolhardy plaintiff will litigate under 'no win, no fee' without insuring against losing. This might seem fair, since it is the plaintiff who both bears the risk and protects against it. But this is hasty. Under 'no win, no fee' poor plaintiffs will get no government help to pay the insurance premium. Justice will therefore be opened up for middle income Britain and blocked off for the poor. 'No win, no fee' will therefore lead to social exclusion, and those excluded will be the most vulnerable.

The second flaw in the government's reforms is that under 'no win, no fee' lawyers must bear part of the risk of litigation. It is true that a lawyer for a plaintiff who wins will be paid a bonus, which can be used ease the lawyer's cash flow when a case is lost. Nevertheless, it is inevitable that lawyers will turn down work that is too risky, especially were the issues are particularly complex and time-consuming. Therefore, potential plaintiffs will be denied justice if they are unable to find a lawyer to take the case on a 'no win, no fee' basis. At the very least, the best lawyers will cherry pick the safest cases. Moreover, there is a particular problem at the Bar. Under the present 'cab rank' rule a barrister must accept a case if it is in his or her

field of practice. This guarantees that any litigant has access to the best advice the Bar has to offer. However, the Lord Chancellor has acknowledged that under 'no win, no fee' the 'cab rank' rule must be abolished. This means that those clients with the safest cases will get the best advice, while those with the weakest cases will be represented by the inexperienced and the unaccomplished./

How can all this be avoided? One answer is for the risk of litigation to be spread between the parties across different cases. The contributions made by unsuccessful defendants and those plaintiffs who fail the means test could be paid into a central fund. Of course, government money would be needed to set up a fund in the first place, but in time the fund would become self-financing. Only those plaintiffs with a sufficiently good case would be allowed to participate. If the plaintiff wins, both sides' costs are paid by the defendant. If the plaintiff loses, the costs of both sides are met by the fund. Thus, the adverse consequences of lawyers bearing some of the risk of litigation are avoided. Moreover, the poor will not be excluded, because the reserves in the fund mean that the participation fee can be waived for those who satisfy the means test.

Similar schemes have been suggested by both the Bar and the Law Society. More instructively, support has also come from consumer groups. The government should rethink its reforms: not because they are opposed by lawyers, but because they are unfair.

Alastair Ladkin

---