

Access to justice: who pays the price?

Legal action in this country is notoriously complex, slow and prohibitively expensive. Access to justice demands the payment of fees and the assistance of a professional lawyer. It has long been acknowledged that for equality to exist before the law all citizens must be able to assert and protect their rights, irrespective of means. Concern over the financial barrier to justice has as you would expect traditionally focused on the poor, however today it is more true to say that while "the great break through and the little creep through, the middle-sized are alone entangled in the net".

As part of the Leviathan of legal reform being considered, the Lord Chancellor committed himself to removing these barriers in his White Paper: "Modernising Justice?". The aim is to bring meaningful access to justice to middle income Britain who are presently disqualified from legal aid yet deterred by the size of the potential cost of legal action. Taxpayers' resources that fund legal advice and representation for those who cannot pay can be more constructively deployed than ploughing them into the legal aid scheme without question.

Legal aid expenditure has risen to an unsustainable level while the number of people eligible for assistance has reduced. As The Times commented "No one can say a word in favour of retaining unchanged the present system which unites with curious felicity opposite defects. It encourages litigants who deserve no countenance and it shuts out those who really need aid". That was in 1912 but holds true today. Legal aid is often granted to undeserving cases which no well-advised client would have financed from his own resources. And furthermore the immunity of those legally-aided from paying costs encourages unjustified litigation and debilitates a non-assisted person who might only be marginally better off.

The Woolf reforms are extremely helpful in this respect and are welcomed outside the demi-monde of Professor Zander's Xanadu. Making costs proportionate to the value of the claim and therefore predictable for the purposes of insurance and restricting the adversarial nature, which is so often the cause of delay, by imposing strong judicial control on the progress of cases all have virtuous effects on access to justice.

The nub of the debate is the proposal to extend conditional fee agreements (CFA) and abolish legal aid in damages and money recovery claims. For some lawyers CFAs merely exchange present inequalities with fresh injustices. Others go as far as to argue that they will reduce rather than increase access to justice.

The starting point for the government's argument is that at least 45,000 personal injury cases have already been funded by conditional fee agreements, many in all likelihood would not have been brought but for the existence of conditional fees. For "no win no fee" work the lawyer can in addition to her ordinary fee charge an uplift success fee of up to 100pc of her normal fee depending on the risk involved. Cases which are weak, protracted or require an unusual amount of research will inevitably be at the steeper end of the uplift scale. The client will pay the lawyer only if he wins and this personal stake, it is argued, will mean a more cost-efficient service and fewer unmeritorious cases wasting court time. If he loses he will remain liable for his opponent's costs, a risk against which most claimants can now insure.

Opponents of the reforms argue that the government is wrong to place reliance on a report which indicates that in personal injury cases CFAs have operated fairly and in the client's interest. In a personal injury action arising from a road traffic accident, it is relatively easy for a solicitor to predict where liability will lie. This readily calculable risk presents no problem to solicitors or insurance companies. Contrast this to areas where the outcome is less easy to predict and even once a claimant has found a solicitor willing to shoulder the risk, he is still confronted by the problem of obtaining affordable insurance.

The Bar is sceptical of the Govt's confidence that insurance cover is likely to become widely available at a reasonable cost and argue that widening CFAs should not be done at the same time as withdrawing civil legal aid. However the full range of insurance schemes cannot emerge while legal aid still exists in the market-place. It is equally for this reason that the Bar's proposal of a Conditional Legal Aid Fund will be unlikely to be able to function alongside individual CFAs.

The Bar in its negativity is fixated on preserving the shreds of its monopoly and its 19th century "Bleak House" image. Look at the "no win no fee" debate from a different perspective for a moment. Imagine conditional fees had always existed. Would one now think it made sense to abandon them and introduce fees over which one had no control and no limit. Would that be to fulfil our obligation under Article 6 to guarantee the individual the right to a fair hearing? No, it would clearly be seen as a money-spinner for lawyers.

CFA's incompatibility with Human Rights law or encouragement of unethical practices such as ambulance chasing and withholding evidence are stirring arguments designed to appeal to the emotions, but cannot hold up to reasoned scrutiny. Criticisms and speculation as to how these agreements will work in practice, such as whether the success fee should be recoverable from the unsuccessful defendant or come out of the claimant's damages and maintain an element of risk, or what defines "public interest", cancel each other out. The result is stasis but the status quo is not an option. This argument will be determined by emotion: as lawyers do we embrace the "brave new world" or cloister ourselves away and wait for the backlash.

Consumers are not tied to the present forms of legal service. The legal system must adapt to meet the need and expectations of the citizens of the next millennium, not the lawyers of the last. A community legal service made up of "kitemarked" quality controlled

specialists delivering a service for a contract price makes sense. For most people today grass roots initiatives the Citizens Advice Bureaux, law centres and advice agencies represent the only part of our legal system actually meeting people's needs. Reason rather than sentiment should decide the day.

Sarah Palin



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