



Access to Justice

Balancing the Risks

By Anthony Barton

Executive Summary

The Government is presently conducting a major spending review:

"...every part of government and every spending programme will have to answer a series of probing questions. Is the activity essential to meet Government priorities? Do the Government need to fund that activity? Does the activity provide substantial economic value? Can the activity be targeted to those most in need? How can the activity be provided at a lower cost? How can the activity be provided more effectively? Can the activity be provided by a non-state provider or by citizens, wholly or in partnership? Can non-state providers be paid to carry out the activity according to the results that they achieve? And can local bodies as opposed to central Government provide the activity? The answers to those questions will inform a fundamental reassessment of the way in which government works..." (George Osborne; House of Commons, 8 June 2010)

The time is right for a fundamental review of the funding of access to civil justice. Ten years ago the Adam Smith Institute published *Privatizing Access to Justice* when the Access to Justice Act 1999 was passed. The Act proposed the reduction of legal aid funding for civil claims and the expansion of conditional fee agreements, popularly known as "no win, no fee", effectively replacing state funding of access to civil justice by private funding, particularly in personal injury litigation. Since then:

- The conditional fee system overall has been successful in providing access to justice, but...
- The balance of litigation risk between claimant and defendant has been distorted in favour of

claimants so that defendant costs can be excessive and disproportionate. Claimants can enjoy risk free litigation. The excessive and disproportionate costs of civil litigation are bringing the law into disrepute.

- Lord Justice Jackson has prepared a *Review of Civil Litigation Costs*. The key proposals require primary legislation: they are impractical and unfair; they have not been adequately costed.
- Civil legal aid continues to fail; it does not ensure access to justice and provides dubious value for money. Legal aid is unfair; it lacks independence and accountability. Civil legal aid should be abolished for most compensation claims.
- The solution is to correct the risk imbalance between claimant and defendant within the framework of the existing conditional fee system - to devise a system of funding access to justice that is simple, robust, fair, accessible, affordable, and with costs proportionate to the damages at stake.
- This briefing paper proposes that the level of additional costs – specifically success fees and after the event (ATE) insurance – recoverable from unsuccessful defendants should be capped. This would stop claimants from bringing weak cases with no risk to themselves, while preserving access to justice in the absence of civil legal aid.

Introduction

Legal rights are only meaningful if they can be asserted. Litigation is expensive; most people cannot afford to go to law, and require external funding. The challenge is to devise a system of funding access to civil justice that is simple, robust, fair, accessible, affordable, and with costs proportionate to the damages at stake.

The Economics of Civil Litigation

Litigation is risky. The general rule is that the loser pays the winner's costs (legal costs and disbursements such as experts' fees); this rule is known as the "loser pays" rule or "costs follow the event". The Court of Appeal has commented on this rule:

"The principle was of fundamental importance in deterring plaintiffs from bringing and defendants from defending actions they were likely to lose."
(Sir Thomas Bingham MR, *Roache v News Group Newspapers Ltd* [1998] EMLR 161)

and:

"The party who substantially loses the case is ordinarily obliged to pay the legal costs necessarily incurred by the winner. Thus hopeless claims and defences are discouraged, a willingness to compromise is induced and the winner keeps most of the fruits of victory. But the position is different where one or both parties to the case are legally aided..." (Sir Thomas Bingham MR, *Ridehalgh v Horsefield* [1994] Ch 205 at 225)

The two main components of costs are:

- Claimant's own legal costs
- Liability for the opponent's costs

Access to justice is concerned not only funding the individual's own legal costs but dealing with his risk of meeting his opponent's costs if the case is lost. The challenge is to apportion the risks of litigation fairly between the parties.

Legal Aid

Legal aid was introduced after World War II as part of state funded services for those of modest means. Legal aid is granted where stringent financial eligibility criteria are satisfied and the case considered to have reasonable prospects of success based on advice of the claimant's lawyer. Civil legal aid for compensation claims is confined to certain types of action such as clinical negligence, and group actions where there is a wider public interest. There is an overriding discretion to grant. The legally aided claimant enjoys costs protection: the loser pays rule does not generally apply.

Our legal aid system is the most generous in the world; the recent rate of increase in expenditure is no longer sustainable. Legal aid has been subject to political scrutiny:

"Legal aid does not ensure access to justice for deserving cases, as most people are not eligible. Instead, it provides access to lawyers for an eligible minority. Legal aid lacks independence. Funding is granted on the advice of the applicant's lawyer, so there is a clear conflict of interest that may encourage over-optimistic advice, to put it kindly, or speculative litigation, putting it less kindly. Legal aid lacks fairness. Successful defendants cannot recover legal costs. Legal aid puts the claimant in a no-lose position and the health service defendant in a no-win position. It may be cheaper to settle a claim regardless of merit, to avoid irrecoverable legal costs—a practice known as legal aid blackmail..."

Legal aid lacks accountability. Funding decisions involving public money are privileged and confidential, and are not subject to public scrutiny. As a Member of Parliament, I have sought to question some of the decisions made by the Legal Services Commission about the people to whom they grant legal aid. Frankly, that is an impenetrable question. The fact that it has met and made a decision is regarded by the Legal Services Commission as justification enough..."

Legal aid has brought relief to many people, but it is a popular misconception to equate legal aid with access to justice. Access to justice is not best delivered by the legal aid system. There is a better way to do that..." (Andrew Lansley, House of Commons, 5 June 2006)

The courts have also been critical of legal aid:

"...the effective immunity against adverse costs orders enjoyed by legally-aided claimants was always recognised to place an unfair burden on a privately-funded defendant resisting a legally-aided claim, since he would be liable for both sides' costs if he lost and his own even if he won. Most seriously of all, the cost to the public purse of providing civil legal aid had risen sharply, without however showing an increase in the number of cases funded or evidence that legal aid was directed to cases which most clearly justified the expenditure"

of public money.” (emphasis added; Lord Bingham, Callery v Gray [2002] UKHL 28, at paragraph 1)

The legal aid system has fundamental flaws:

- Does not ensure access to justice; provides access to lawyers for eligible minority
- Conflict of interest: advice on prospects of success provided by claimant lawyers
- Perverse incentives for over-optimistic advice (low success rates of cases)
- Costs protection inherently unfair: risks of litigation borne only by defendant
- Claimant in no lose position, defendant in no win position
- Demand led open ended funding promotes risk-free speculative litigation
- Legal aid “blackmail”; cases settled by defendant to avoid irrecoverable legal costs
- Finding decisions privileged and confidential; no public scrutiny of public spending
- Financial control of overall cost of legal aid by budget and “salami-slicing”; does not address fundamental flaws

The economic and political reality is that alternative systems of funding need to be developed without resort to state money. The time has come for abolishing legal aid for most compensation claims.

Conditional Fee Agreements

Conditional fee agreements (“CFAs” popularly known as “no win, no fee”) were introduced in 1995 for MINELAs (middle income not eligible for legal aid) to plug the gap in access to justice – many people who could afford to pay taxes were priced out of civil justice.

The concept of conditional fees is based on uplifted legal fees in the event of success, not a proportion of the damages award. The claimant’s lawyer can charge an additional success fee up to 100% of the legal costs if the

case wins and nothing if the case loses. The loser pays rule applies; there is liability for costs if case loses. However, after the event (ATE) insurance is available to meet exposure to such risk of costs liability as well as the costs of own disbursements (like expert fees or other expenses). The success fee and the ATE insurance premium are known as additional costs. The level of the success fee, the choice of insurance product and the price of the insurance premium are determined by the claimant.

The costs of the success fee and the ATE insurance premium are now borne by the unsuccessful defendant (in addition to the usual claimant’s legal base costs) under the Access to Justice Act 1999. The ATE insurance premium is in practice not met by the unsuccessful claimant – it is either self-insured or waived when a claim fails.

The CFA system ought to operate as a robust, independent, self-funding, system with appropriate incentives imposing commercial discipline. The CFA system has strengths:

- No eligibility criteria; available to all
- Payment by result imposing commercial incentive
- Loser pays costs rule applies imposing commercial discipline
- Privatised access to justice, no direct cost to state

The politically acceptable operation of CFAs depends on balancing fairly the risks between the claimant and defendant. If the balance is too favourable to defendants (as where success fees and ATE insurance were wholly borne by the successful claimant prior to the Access to Justice Act 1999 – paid out of damages) this may limit access to justice so that meritorious cases may not be advanced. If the balance is too favourable to claimants (as now, where success fees and ATE insurance premium are borne by the unsuccessful defendant) it may promote speculative litigation.

In practice CFAs exacerbate and distort the risks of litigation. The system now provides effectively risk free litigation for claimants – the risks are borne by the claimant lawyers and the ATE insurers who accordingly pass on the costs to the unsuccessful defendant. The CFA system thus has weaknesses:

- Claimant sets price of ATE insurance premium which is only ever paid by defendant; no price incentive
- Claimant sets level of success fee which is only ever paid by defendant; no cost incentive

There is widespread concern that the balance of risk is not right, that there is over-generous recovery of success fees and ATE insurance premiums. The Court of Appeal has commented thus:

“It is highly desirable in the interests of justice that an effective and transparent market should develop in ATE insurance. If the litigant is not at risk as to the premium ... it is less easy for a competitive market to develop. Nonetheless, we consider that the solicitor advising the client should be in a position to assist him in selecting ATE insurance cover that caters for his needs on reasonable terms.... We would ... hope that before long the exercise of choice will result in competition for ATE business which establishes transparent market rates.” (Lord Phillips MR at paragraph 15, Callery v Gray (no 2) [2001] EWCA Civ 1246)

This hope has not been realised. The Court of Appeal commented in greater detail:

“When the government of the day abolished legal aid for most personal injury actions and brought in the provisions of the Access to Justice Act 1999, my understanding was that it was intended that all claimants would have as good a means of access to the courts as a litigant who could afford to fund his claim from his own resources. This was to be achieved through CFAs and ATE...

However, I do not think it was the intention of Parliament that would-be claimants should be able to litigate weak cases without any risk whatsoever to themselves. But it seems to me that this is what is happening. ATE premiums are set on the basis of a high expected failure rate at trial. Even cases that are assessed at a prospect of success of only 51% receive ATE insurance. Thus the premiums have to be significantly higher than they would be if a more rigorous standard were applied. Often no premium has to be paid upfront. If the case is lost the premium is rarely paid. That practice inevitably increases the premiums even further. If the case is won, the premium is in principle recoverable from the liability insurer and, as this court has held in the instant case, if it was necessary for the claimant to take out ATE insurance and the solicitor has acted reasonably, the whole premium will be recovered...

...There is very little incentive for solicitors to look for the best value in ATE insurance.” (Lady Justice Smith at paragraphs 126 to 128, Rogers v Merthyr Tydfil County Borough Council [2006] EWCA Civ 1134)

These concerns apply especially to clinical negligence and defamation cases.

Lord Justice Jackson’s report: Review of Civil Litigation Costs

The review was set up by a previous Master of the Rolls; it was not requested by Parliament and it does not appear to be part of any legislative programme. Lord Justice Jackson states in his foreword:

“In some areas of civil litigation costs are disproportionate and impede access to justice. I therefore propose a coherent package of interlocking reforms, designed to control costs and promote access to justice.”

Civil legal aid is not considered by the report. The report is mainly concerned with the operation of CFAs in personal injury, clinical negligence and defamation cases. It rightly identifies the two main drivers of disproportionate and excess costs as (1) excessive success fees; and, (2) excessive ATE insurance premiums. Lord Justice Jackson sets out three central proposals:

1. Abolish recoverability of the success fee so it is borne by the claimant; this requires primary legislation.
2. Abolish recoverability of the ATE insurance premium so it is borne by the claimant; this requires primary legislation.
3. Introduce one-way costs shifting (costs payable by unsuccessful defendant but not by unsuccessful claimant) so that the claimant is protected for costs; removes the need for ATE insurance and the ATE insurance premium.

These proposals are based on shifting the additional cost onto the claimant – however, the burden of the ATE insurance premium is considered too onerous and so is removed by abolishing the need for insurance at all through one-way costs shifting. These proposals introduce price incentive in respect of success fees. However, one-way cost shifting goes beyond addressing the problems of excessive premium; it changes the whole economic balance of civil litigation.

Comment and Opinion

In the late 1990s the Labour Government was proposing the privatisation of access to justice by removing legal aid for compensation claims and promoting CFAs. The legal professions were campaigning to protect their vested interests in legal aid; *The Times* on 16 October 1997 published an article “No win, no fee justice will be a rip-off, says Bar chairman”. How right he was. The item reported his warning of the public being “ripped off” by lawyers. The passing of the Access to Justice Act 1999 led to lawyers earning vast sums.

Lawyers are very good at maximising income, working within the rules of whatever system. Any attempt to reform costs and rationalise legal incomes is characterised as an attack on justice. There have been too many expensive and protracted legal aid fiascos in which lawyers have been the only beneficiaries. Similarly access to justice is overpriced by the excesses of the CFA system. Michael Gove recognised years ago “The real impediment to justice is the high level of legal fees” (*The Times*, 4 May 1999).

The problems of CFAs concern the high cost of success fees and ATE insurance premiums. These should be tackled directly (see below) by limiting, not abolishing their recoverability.

Lord Justice Jackson’s proposals are wide-ranging and could have massive unintended consequences; they are unworkable, and overcomplicated. The proposed one-way costs shifting is unfair; it threatens to open the floodgates to risk free speculative litigation – the health service could be swamped with spurious claims that it would need investigate and defend at huge cost, or simply buy off to avoid irrecoverable costs – “costs blackmail”. Why should any health service defendant spend say £12,000 in irrecoverable costs to defend successfully a speculative claim when it could be settled early for say £6,000? The million or so clinical adverse outcomes could be the subject of claims, instead of the several thousand negligence claims at present. This could represent *de facto* no fault compensation by the back door. The present system with all its excesses and imperfections does provide some control mechanism. Moreover, the proposed effective abolition of ATE insurance would mean that the expense of the claimant’s own disbursements would not be insured if the case were unsuccessful.

The proposed “shifting” of the additional costs liabilities requires primary legislation, repealing parts of the Access to Justice Act 1999. It would revert to the pre-1999 Act position where the additional liabilities were borne by the claimant; this situation was previously considered unsatisfactory, leading to the passing of the 1999 Act. However, Lord Justice Jackson proposes to deal with this by imposing one-way costs, making a bad situation even worse.

The requirement for primary legislation is cumbersome and lacks flexibility. If Lord Justice Jackson’s proposals are implemented and fail, even further primary legislation may be required.

Lord Justice Jackson’s proposals do not accord with political reality or economic feasibility. They conflict with legal dicta; they do not reflect Government thinking.

A Solution

A simple and elegant solution is to apportion the liability for additional costs between the parties (a sort of half-way house between the pre and post Access to Justice Act 1999 positions): this can be achieved by costs capping so that a proportion is recoverable from the defendant and the remainder has to be borne by the claimant. The additional costs liabilities to be borne by the successful claimant can be partly paid for by a modest uplift in general damages awards. This risk-sharing would impose some incentive on the claimant to ensure that success fees and ATE insurance premiums are not excessive – it is the claimant who sets the level of the success fee and the ATE insurance premium. The costs capping approach can probably be achieved by secondary legislation or rules of court.

The avoidance of primary legislation allows for flexibility for any necessary future adjustment. Indeed, the previous Government proposed capping in respect of the success fee in defamation cases.

Conclusion

Both the legal aid and the CFA systems are flawed in that they give rise to situations which are not economically sustainable or politically acceptable.

There is no prospect of expansion of civil legal aid – the indications are that there will be wide ranging public sector cutbacks.

The present CFA system allows overgenerous recovery of success fees and ATE insurance premium against defendants; this can be readily reformed. The risks of litigation can be apportioned fairly between the parties by capping the level of the success fee and the ATE insurance premium recoverable from the defendant; the claimant will have price incentives. A capping of additional costs liabilities can be probably achieved by secondary legislation and/or rules of court. Lord Justice Jackson's proposed shifting of additional costs liabilities is impractical and requires primary legislation.

These cost capping proposals will go some way to provide a system of funding access to justice that is simple, robust, fair, accessible, affordable and proportionate.

The Government's proposed review of legal aid is part of a bigger scheme of public funding cuts. Accordingly it is crucial that any reform of civil costs regime in CFAs provides appropriate practical solutions. There should be an integrated review of funding access to civil justice which combines review of legal aid, reform of costs in CFAs and response to Lord Justice Jackson's *Review of Civil Litigation Costs*, and which addresses Lord Young's review of the operation of health and safety laws and the growth of the compensation culture.

About the Author

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