



## **Privatizing access to justice**

**By Anthony Barton**

*The government is presently undertaking a major and long-overdue reform of the civil legal aid system in accordance with the Access to Justice Act 1999. Reforms enacted on 1 April 2000 abolish legal aid for most civil claims.*

*Up to now, access to justice has been the privilege of the wealthy and of the minority who are sufficiently poor to qualify for civil legal aid. Most other people have had no access to civil justice, a factor which has brought the civil justice system into disrepute.*

*Instead, it is expected that cases will be funded by the conditional fee system — popularly known as “no win, no fee”. In this system the lawyer agrees with his client to charge an additional success fee if the claim is successful, but may charge nothing if the claim fails. It is a good example of payment by result.*

- These reforms effectively represent the privatization of access to justice. Instead of people having to scramble for support from over-stretched public budgets, the civil courts will become increasingly accessible to anyone with a meritorious claim.
- However, the reforms do not go far enough. They leave part of the system unchanged, and there is need for further reform of access to justice.
- State funding for all claims for damages should be progressively removed as the conditional fee system, supported by insurance, continues to develop.
- The inherently unfair costs protection that is enjoyed by state-funded litigants should be abolished.
- Where state support remains, it should focus on the investigative cost of expert reports and on insurance premiums.

## Access to justice

Justice is a fundamental human right: access to justice and the rule of law are the hallmarks of a civilised society. However, legal rights are only meaningful if they can be exercised. Most people require some form of professional legal help to enforce their rights because of the complexity of the law. Furthermore, litigation is inherently risky and cannot be undertaken lightly; both parties must assess the risks of losing against the benefits of winning.

Usually the loser has to pay the winner his damages and legal costs (as well as the loser's own legal costs). This "loser pays" costs rule (which applies here but not in America) works to promote the resolution of cases according to their merits; weak cases are abandoned and strong cases are settled. It adds to the risks of legal action, but it discourages speculative litigation, and safeguards us from the extravagances of American-style litigation.

The high costs and risks of civil litigation have meant that only the wealthy and those who qualify for legal aid have had access to lawyers; moreover, legal aid has been costing ever more and becoming ever less available. Vast sectors of society have been denied access to justice; they are characterised by the acronym MINELAs (middle income not eligible for legal aid). They tend to be law-abiding taxpayers. They have become disenfranchised, having no stake in civil justice. Fortunately, this government has recognised the seriousness of the situation and has effected a programme of urgent and radical reform.

## Legal aid

The aims and ideals of legal aid were laudable. It was introduced after the war as part of a massive expansion of state-funded professional services for those of modest means. Accordingly, a number of statutory criteria have to be fulfilled before civil legal aid can be granted. Strict financial eligibility criteria must be satisfied. There is a sliding scale of contributions according to income and capital. The applicant must then satisfy the legal merits test: his claim must have a reasonable prospect of success. The lawyer is paid irrespective of the outcome of the case (see Figure 1). The unsuccessful legally aided

litigant is generally not liable for his successful opponent's legal costs (see Figure 2).

Legal aid and conditional fee arrangements have been mutually exclusive schemes. Any combination of legal aid funding and conditional fees has been expressly prohibited.

It has been a demand-led system, without budgetary control. Recent years have seen massive growth in the costs of legal aid at an unsustainable rate outstripping inflation — coinciding with the loss of the solicitors' monopoly to carry out conveyancing work. Successive governments have attempted to exert control by making the eligibility criteria increasingly stringent; but this strategy only made legal aid less available without addressing its inherent flaws. The result was a legal aid system costing more and delivering less, from which those prosperous enough to pay taxes were largely excluded. Legal aid came to mean merely access to lawyers for a privileged minority, not access to justice.

Legal aid has two inherent weaknesses. First, it is usually granted on the advice of the applicant's lawyer. Such advice is not independent, since the lawyer has a direct financial interest in advancing the case. Where there is a financial interest there is a presumption of bias and a clear conflict of interest.

Second, legal aid is inherently unfair since a successful defendant cannot obtain costs against an unsuccessful legal-aided claimant, contrary to the usual "loser pays" rule. The mutuality of the risk of litigation is removed: the legal-aided party cannot lose and the non-legal-aided opponent cannot win. The operation of the legal aid system thus depends on the conduct and ethics of lawyers but the lack of independence and accountability in the system has led to abuse. Hopeless cases are advanced by lawyers for the benefit of lawyers. Settlements may be extorted from blameless defendants who wish to avoid irrecoverable legal costs (a practice described as "legal aid blackmail" in Parliament and by the Bar Council).

These are the problems of inappropriate incentives where the state ends up funding lawyers rather than access to justice. The example of clinical negligence litigation shows how scarce funds intended for patient care are

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diverted to lawyers' pockets. The overall success rate of clinical negligence cases is only 17%; in 83% of cases the only beneficiaries of legal aid are the lawyers and so-called experts. Instead of empowering patients, legal aid has impoverished the health service and enriched lawyers. The success rate in clinical negligence for claims which proceed beyond initial investigation is only 41% (despite the operation of legal aid blackmail). The success rate for pharmaceutical product liability litigation is negligible.

### **Conditional fees — "no win, no fee"**

Conditional fee arrangements have been permissible since 1995. They are now available for all civil money claims. They are not permitted in criminal cases or civil proceedings involving matrimonial, family, children or adoption matters.

Conditional fees represent an exception to the ancient prohibition against maintenance and champerty. Maintenance and champerty involve outsiders to the litigation funding the action — and, in the case of champerty, receiving a share of the spoils. For public policy reasons, the law has traditionally discouraged intermeddling in the legal proceedings of others. Other established exceptions to the prohibition against maintenance include legal aid itself, trade union funding, legal expenses insurance, professional indemnity and *pro bono* work. However, public policy evolves to reflect social needs; it now recognises the desirability of widening access to justice by relaxing the prohibition against maintenance and champerty.

Conditional fees are also an exception to the professional rule that lawyers' fees must not be related to the outcome of litigation. It has been considered undesirable for a lawyer to have a financial interest in the outcome of litigation; but modern policy recognises the desirability of lawyers at least having an incentive to enhance their professional performance.

In a conditional fee arrangement, a solicitor and client agree that in the event of a successful outcome the solicitor may charge an enhanced fee, up to 100% of his basic fee, and nothing in the event of failure. This operates as

"double or quits" providing the lawyer with a bonus if the claim succeeds (see Figure 1). The solicitor has to assess the prospects of success of the case and decide whether or not to take it on; his reward for assuming the risk is the increased fee. He assesses the level of the success fee according to the prospects of success. The risk of funding the litigation is underwritten by the lawyer. The conditional fee uplift is a proportional enhancement of the basic fee; not (as in the American "contingency fee" system) a percentage share in any damages awarded.

Conditional fee agreements provide access to legal representation; however, there is exposure to costs liability should the case fail (see Figure 2). Under the costs rule in this country, an unsuccessful litigant must pay his opponent's legal costs. After-event insurance to protect against such liability is available; and the after-event insurers also undertake careful assessment of the prospects of success of the case in deciding whether to underwrite the risk and where to set the level of premium. The combination of conditional fees supported by after-event insurance provides access to justice; the risks of litigation (funding and costs liability) are shared by the lawyer and the insurer.

In this system, it is probably the availability of insurance provided by the insurer, rather than legal representation provided by the legal profession, which most directly determines access to justice. So it is essential that there is consumer choice arising out of competition between insurance providers. But recent years have seen the development of an increasing range of insurance products in response to consumer needs and demand.

There are new insurance products being developed where payment of the premium is deferred and charged only in the event of success.

Conditional fees impose a commercial discipline to ensure that the prospects of success of a case are properly investigated. Competence is rewarded and incompetence is penalised. There are appropriate inbuilt incentives to ensure quality control and to deter abuse. There is an identity of interest between the client, the lawyer, and the after-event insurer: all want the claim to succeed. This is illustrated by the success rate of over

90% in clinical negligence funded by conditional fees supported by after-event insurance (the comparable figure for legally aided clinical negligence claims is only 41%).

By contrast, the legal aid system promotes incompetence since it does not impose commercial discipline. This is amply borne out by the depressingly low success rates of legally aided litigation, which still rewards lawyers regardless of outcome.

The legal aid system is underwritten by the taxpayer. Under the conditional fee system, access to justice is available to anyone with a meritorious case. It is not determined by wealth or by the availability of legal aid.

The operation of conditional fees may give rise to conflicts of interest; for example, the solicitor may be tempted not to disclose a damaging document which undermines the case since he has a financial interest in its outcome. Other examples include settlement at an undervalue so that the solicitor is certain to secure his fee, and of overcharging on success fees. However, conflicts of interest occur in many professional situations. It is a profession's ability to address such conflict that defines it as a profession. In law, the overriding duty to the court and the duty to serve the client's interest provide the safeguard. The suggestion, propagated by opponents of the government's reforms, that conflict of interest somehow arises exclusively and specifically in conditional fee agreements is misconceived.

### **Access to Justice Act 1999**

The Access to Justice Act 1999 represents the culmination of several years of consultation on the reform of state funding for legal services. It was passed on 27 July 1999 despite massive opposition from within the Law Society, the Bar Council and other vested interests. There was also some remarkably ill-informed opposition in both Houses of Parliament. The implementation of the Act is piecemeal; important provisions took effect on 1 April 2000.

The intention of the Act is to remove civil legal aid and replace it with the conditional fee system where appropriate. State funding for most negligence claims (including personal

injury) is to be removed; ironically, it is to be preserved for clinical negligence and pharmaceutical claims, two areas where abuse of the system has been greatest. A new and more stringent code for funding is to be established.

The Act introduces the concept of control by budget — namely, rationing. The state no longer purports to provide unlimited legal services in response to demand. Instead, funding is to be focused on areas defined to have high priority, such as cases involving personal liberty, children, family, social welfare and housing. State-funded legal services are to be provided by supposed specialists under block contracting (franchising) schemes.

The Act largely preserves the inherently unfair rule which generally prevents successful litigants recovering legal costs against a legal-aided person; however, the Act proposes to reduce this injustice by enlarging the circumstances where costs may be recovered.

Conditional fee arrangements are now promoted by allowing the success fee and the insurance premium to be recoverable against the unsuccessful opponent; previously they were paid out of damages. This reform will do much to encourage conditional fee arrangements in areas where the premium and success may be substantial. In medical negligence, for example, the cost of the insurance premium may be considerable, impeding access to justice, but allowing recovery of the premium for a successful claimant will overcome this hurdle.

The new law supposes that there may be areas of litigation which are not suitable for complete privatization — because they are large-scale and expensive, high risk, or predominantly affect public interests rather than individual interests. It is likely that hugely expensive multiparty actions involving product liability or toxic pollution will continue to receive state funding.

Recent years have seen the failure of most of these cases; some have demonstrated the worst excesses and wanton extravagance of state funding. For example, the benzodiazepine litigation involved thousands of legal-aided claimants, wasting £40 million of taxpayers' money without a single claimant

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receiving a penny. (It is ironic that the sort of litigation which provides the most pressing reasons for the reform of civil legal aid should continue to be supported under it). By contrast, the tobacco multiparty litigation received only limited legal aid and was funded largely by conditional fees. It collapsed relatively quickly instead of dragging on for years: it seems that the doubtful merit of the case meant that it was not sustainable by private funding.

The Act proposes state funding and conditional fees to be combined in some circumstances; this represents a relaxation of the previous inflexible rule which prohibited mixing of state funding and conditional fees. In expensive cases the investigation of the merits of the case may be state-funded ("investigative help") and the case may then be transferred to the conditional fee system. There may be top-up state funding ("litigation support") where legal costs are high. Indeed, there are exciting possibilities where the commercial discipline of conditional fees is applied to state funding. It envisages a partnership of private and public money where the risks of litigation are shared by the state, the legal profession and the insurance industry, producing a system of access to justice that is worthy of the name.

### **Future reforms of access to justice**

The Access to Justice Act has done much to address the failings of the civil justice system. However, it does not go far enough and there is need for further reform of access to justice:

1. ***State funding of all claims for damages should be progressively removed as the conditional fee system supported by insurance continues to develop.*** Such claims include clinical negligence and (eventually) claims involving brain-damaged babies, plus multiparty product liability and toxic pollution claims.
2. In any event, ***the inherently unfair costs protection that is enjoyed by state-funded parties should be abolished.*** It has little basis in jurisprudence. This protection promotes speculative litigation; it depletes the funds of institutional
3. State support might still be considered for conditional fee arrangements where complete privatization may not be feasible. Such areas of litigation are likely to include product liability multiparty actions and perhaps some types of clinical negligence cases. But ***state support should be directed at the investigative cost of expert reports and insurance premiums.*** There should be no costs protection. Such a hybrid system would combine the incentives of the private sector with limited state funding to secure access to justice for meritorious cases.

defendants (such as the health service); scarce funds are spent on irrecoverable legal fees instead of being directed at their primary intended purpose. There is no reason why the state should not indemnify successful defendants where it has supported unmeritorious cases against them. Alternatively, costs protection can be obtained through after-event insurance, whether purchased by the state or the individual. It could even be provided by an insurer on the basis of deferred payment and charged only in the event of success.



### **Lessons for other state services**

For much of its 50-year history, legal aid was perceived as a cornerstone of state-funded services. But recent years have seen the collapse of public confidence in civil legal aid. It has failed to fulfil its role as a guarantor of people's rights. Increasing demands were made of taxpayers who were seeing ever less in return. Cynical exploitation and abuse of the system by lawyers did nothing to enhance the reputations of both lawyers and legal aid. Eventually the government was forced to act: legal aid had become economically unsustainable and politically unacceptable.

This government has acted with imagination and boldness to reform a part of the welfare system that has become discredited and degenerate. It has produced a new system which acknowledges the limitations of state funding and encourages the private system to deliver the needed services. Most importantly, there may be partnerships of public and

private sectors. With privatization comes quality control and appropriate incentives. The success of these reforms in how we fund access to justice should provide models of more general application. There must be lessons for other areas of state provision such as health, education, housing and transport.

**Conclusion**

The Access to Justice Act 1999 largely abolishes civil legal aid and promotes its replacement with conditional fees; it privatises

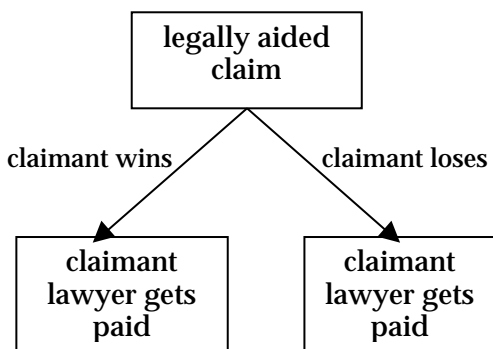
access to civil justice. It promotes an identity of interest between the client, the lawyer, and the insurer. Through which there is inbuilt quality control. The legislation encourages conditional fees by permitting recovery of the success fee and the insurance premium by a successful litigant; it promotes access to justice for everyone with a meritorious claim.

These reforms are long overdue and are to be welcomed by all. Much has been achieved thus far; there is yet more that needs to be done.

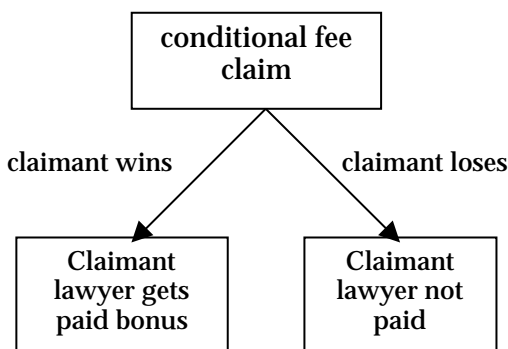
**Figure 1.**

**Payment by result: legal aid and conditional fees compared (simplified)**

**Legal aid**



**Conditional fee**

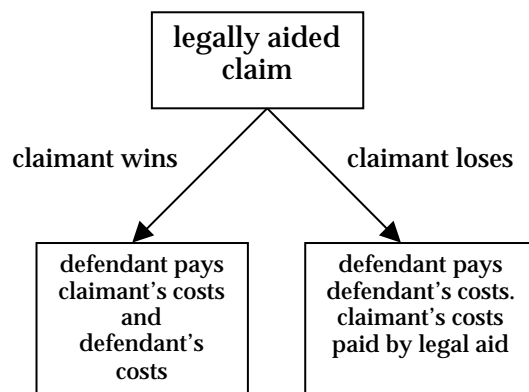


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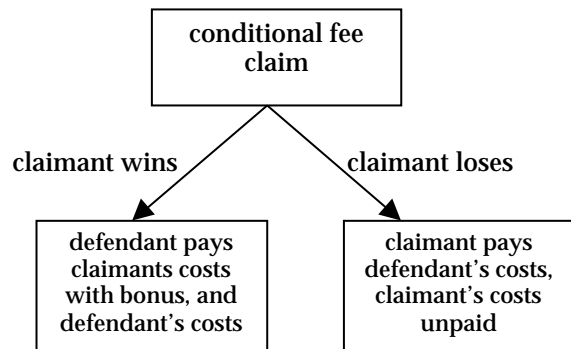
**Figure 2.**

**Legal costs: Legal aid and conditional fees compared (simplified)**

**Legal aid**



**Conditional fee**



**Further information**  
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