Contingency plan

Andrew Hogan explains why we need a new solution to achieve access to justice

At the time of writing, the citizens of this country are still watching with a mixture of glee, horror and apathy as the consequences of the Brexit referendum unfold, with the resignation of the prime minister, the implosion of the Labour leadership, the political assassination of Boris Johnson and the resignation of Nigel Farage all following in 10 days.

Whether the Ministry of Justice is currently taking calls at the moment is unclear, but it is a reasonable expectation that many of the putative reforms to costs and civil justice have now gone, in Mr Obama's memorable phrase, 'to the back of the queue'.

This is a great pity, as hard questions of access to justice in this country are now unlikely to be posed – and if they are posed unlikely to be answered – while the political classes concentrate on the fallout from the referendum. Yet the questions are pressing and will not go away.

LESSONS FROM THE HEALTH SECTOR

The median income in the UK is about £26,000. Most people do not have savings of any magnitude, and many do not have savings at all. If a medical disaster strikes, medical treatment can be extremely costly. Even non-acute interventions such as a knee replacement operation to ease the pains of old age, might cost £9,500 or more.

Yet the costs of these treatments are for the most part not paid for by the recipient. In this country, one of its most treasured arrangements is the National Health Service. It delivers medical care free at the point of delivery: not free care, because it is not free – but rather ensures that the costs of those in need are spread throughout the general population and paid for by taxation.

Despite periodic criticisms and reforms, the scheme works rather well, is accepted by the public, and represents a logical way for the needs of the unfortunate few to be paid for by the many, without undue strain.

It represents a collective approach to funding sophisticated and costly professional services, which are of benefit to private individuals, but also form a type of public good.

There is a clear analogy to be drawn with the provision of legal services. These services too are costly, and while they are of benefit to private individuals, the provision of legal advice and representation to ensure access to justice is also a type of public good. After all, along with defence of the realm and a sound currency, one of the most basic functions of the state is the administration of law and order – possibly even more so than the provision of funded health care.

It is as unreasonable in the 21st century to expect an individual with median income and no savings to expose themselves to £10,000 of legal costs, as it is to expect them to fund their surgical operations.

THE STATE'S OBLIGATION

It could also be pointed out that there is a constitutional aspect to facilitating access to justice: it is all very well for parliament, through legislation, to provide its citizens with rights and causes of action – whether in respect of employment rights, housing rights, or freedom from discrimination – yet it is the lawyers who bear the brunt in ensuring the practical aspect of enforcing those rights.

But over the last few decades, sight has been lost of this key concept: that in a sophisticated, post-industrial society with a complex body of legal rules, there needs to be collective funding of legal services to make the system work.

Successive governments have in fact, largely destroyed the legal aid system, so that large parts of the country are a legal aid 'desert', and large numbers of cases do not qualify for public funding assistance.

Yet none of the ad hoc alternatives for funding of legal costs meet this need for the collective funding of legal services, spreading the costs across a large pool. Conditional fee agreements depend on the willingness of solicitors to enter into them; before the event insurance is limited, lacking in range and often of inadequate scope; third-party funding is largely limited to big commercial claims; and the thorny consequential issue of liability for adverse costs, outside personal injury claims, is ignored.

I would ascribe this problem to a failure in vision and a failure in courage. There are some things the state does do best, and a properly resourced and comprehensive legal aid scheme would not be in my judgment be an unnecessary luxury for our country. But post-23 June 2016, this is not going to happen any time soon.

A CONTINGENCY SCHEME

Accordingly, one of the more interesting proposals put forward this year by Lord Justice Jackson was to actually take forward a Contingency Legal Aid Fund (CLAF) – some 40 years after it was first proposed. It was announced last month that a working group has been set up by the Law Society, Bar Council and Chartered Institute of Legal Executives to do so.

A CLAF in its purest form is a funding body which backs cases, paying a claimant's costs win or lose. It can be a private venture. A CLAF need not be backed or established or funded by the state at all, though that would be one option.

If the claimant succeeds in their case, the costs funded by the CLAF are recovered from the losing party to the litigation and in addition, the claimant pays over to the fund a proportion of the compensation recovered from the losing party. The fund is self-financing, funding the costs and its own overheads out of the recoveries made in successful cases. It is not a panacea: claimants necessarily lose part of their compensation as part of the terms of the funding, and it can only apply to money claims.

Of critical importance is what provision is made in respect of adverse costs, should a funded claim be lost. Unless a CLAF is established on a statutory footing, with similar provision for qualified one-way costs shifting such as legally aided litigants have under the Access to Justice Act 1999, or personally injury claimants, through the QOCS scheme established under part 44 CPR, then a claimant who proceeds with the backing of the fund will necessarily face the prospect of adverse costs orders in the usual way.

Because it would be unsatisfactory for individual claimants to face potentially ruinous claims for costs, and indeed render the whole notion of access to justice through litigation illusory – as such claimants would drop their cases rather than shoulder such a risk – the fund itself would need to pay any adverse costs, either through self-insurance, or through the purchase of after-the-event insurance cover. In effect, this would be reinsurance and catastrophe level insurance.

That is the broad model of a CLAF. Variations of it can be proposed, so that, for example, the fund might only fund disbursements, or disbursements and adverse costs, and require lawyers to work on the basis of a CFA.

In such a case, the fund would work as funder of last resort, providing the necessary level of capital investment, but also ensuring that an added layer of robustness is brought to the decision making, by

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aligning its interests with those of the lawyers.

Although the concept of such a scheme has been lauded, with various proposals put forward in 1978, 1997 and 2011, the scheme has never been taken forward, because it would represent a poor relation to CFAs with recoverable success fees and ATE insurance with recoverable premiums. In a post-LASPO 2012 world, such considerations have faded away: there is now a real and measurable funding gap, and proper cases affecting individuals are failing to come forward.

If, for example, you have a meritorious claim for disability discrimination in respect of the provision of goods or services under the Equality Act 2010 to litigate in the County Court, you may, just may, be able to find a lawyer willing to take your case under a CFA. But it is most unlikely that you will find any ATE insurer willing to back the case. If you do, it will be at a ruinous premium, and if for example substantial disbursements such as expert fees are also required, the case in all probability is going nowhere.

Varieties of CLAFs have been established in countries such as Hong Kong and Australia. In Australia, with its various states, South Australia and Western Australia have different criteria and fund different elements of litigation, with Victoria, Tasmania and the Northern Territory all having more limited schemes which fund disbursements only.

In his keynote address at the Solicitors Costs Conference on 2 February 2016 'The Case for a CLAF' Jackson LJ postulated that the Law Society, CiLEX, and the Bar Council could promote the establishment of a CLAF as a not-for-profit third-party funder: in effect, a third-party funder that does not concentrate on big ticket commercial litigation, or jury actions in the USA, but rather supports the individual claims of citizens and consumers.

It would have professional administration, and its own secretariat of lawyers to assess which cases were suitable for funding. The actual funding itself, he suggests, could come from government (very unlikely) the National Lottery (unlikely) or indeed from the lawyers! If individual barristers or solicitors bought bonds, which carried a coupon, then funding could be raised that way.

In fact, the funding options are perhaps rather wider than Jackson LJ suggests. There is little doubt that if people are prepared to crowd fund litigation, solar panels, and carbon credits, then there may well be an appetite for an investment of this nature.

Moreover, as the fund would only be concerned with damages actions where recovery of costs is made, it could require – as so many BTE insurance companies do – that the lawyers work on a CFA, aligning their interests with the fund, and spreading its funds further, by concentrating on funding disbursements such as expert fees, and acting as insurer of last resort for adverse costs. It is this latter point which I identify as the real barrier to access to justice, which such a fund could address.

Given that we are now moving towards a 0% interest rate world, if you have a spare few thousand quid to invest, there could be worse investments to place it in.

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