

THE SEARCH FOR JUSTICE - A CASE FOR REFORM TO THE CIVIL JUSTICE SYSTEM IN BRITAIN

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I. THE BRITISH SYSTEM

It can be said without fear of contradiction, that there is a need, both perceived and real, for reform of the British civil justice system. Although different, I draw no distinction between Scotland's and England's justice systems. However, to the extent that any distinction could be drawn, perhaps it would suggest that the case for reform is stronger in Scotland. The tension between the disenfranchisement of the middle classes from the British judicial system and the impossible demands placed upon a publicly funded Legal Aid system have, in part, been recognized through legislation in Scotland. Specifically, the laws of Scotland allow enhanced fees in cases where solicitors take instructions on a speculative basis, "no win - no fee," and there are proposals pending in England for similar reforms. To the extent that one measure of a civilized society is its system of law, we must be concerned when a system fails to provide access to justice for all and where all do not stand equal before the law.

There is also the problem of failing public confidence in a system which can, on the one hand, deliver what are perceived to be large verdicts in defamation and libel cases, and modest, inadequate compensation for those who have suffered devastating personal injury, or have seen their loved ones killed through the negligence of others, such as the recent thalidomide victims. I pause to reflect that parents who have suffered the tragic and immeasurable loss of their child might find such a death in Scotland valued at about £3000. It has been said that reform of the law is far too serious a matter to be left to the legal profession. Instead, I submit that the responsibility for correcting such matters must lie with us all. The law must reflect the society it serves. It must change and develop if it is to continue to be relevant rather than becoming a museum

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relic preserving ideas of the past which have increasingly little relevance for today's needs. Therefore, we need to look at other legal systems. We need to experiment and find ways of delivering access to justice, and in a way which does not impose intolerable burdens on public expenditure.

In the areas of personal injury and wrongful death, there is a useful comparison to be made between the civil justice system in Britain and that in the United States which, to some extent, shares a common origin with the British system, although it has developed quite differently. If access to justice is as I suggest, a fundamental indicator of the relevance of any system of justice, then the system in Britain is in need of radical reform. Presently, only those who have been granted Legal Aid or who are very wealthy can afford the costs and the risks inherent in most litigation. Eligibility for Legal Aid has increasingly been restricted, and even those who are granted Legal Aid, subject to a contribution, often find the contribution so large in relation to their means as to make the sacrifice too great. Those who accept the offer of Legal Aid will find their freedom to instruct a solicitor restricted to those lawyers prepared to act for the fee rates paid by the Legal Board, which fall considerably short of those paid by privately instructing clients.

The law of supply and demand dictates that many of the best lawyers, whether solicitors or counsel, often prefer to act for the corporate or private client who pays "top dollar," while those who depend upon Legal Aid may be restricted to the less experienced or perhaps less able attorney. While this is a general comment subject to many exceptions, it is nonetheless true to say that the Legal Aid client is placed in a different position from those able to instruct privately. Lawyers who act for Legal Aid clients agree to provide their services at a hugely discounted rate. Many skilled and able solicitors and counsel agree to this, but many do not. It is perhaps an inevitable consequence of a system of publicly funded litigation that there will always be a need for cost control, and inevitably fees paid from the public purse will fall short of those available from the private client. I would argue not only must we achieve access to the courts for all, but the quality of representation should be determined by needs of the case rather than the wealth or poverty of the claimant. It is surely right that all should stand equal before the law and in that sense "David" is surely entitled to be equal with "Goliath."

It cannot be just that a Legal Aid litigant is advised by an inexperienced or less able lawyer working within budgetary constraints, often overloaded with cases, in an effort to compensate for an inadequate fee structure. Meanwhile, those he sues are represented by the most able in their field, fully prepared and able to apply the skill, time, and resources necessary to properly argue their client's cause. This

observation is not a criticism of solicitors and counsel who represent clients of Legal Aid, but a reflection of the uneven playing field often facing the Legal Aid litigant.

It is also clear that the present Legal Aid System is, by design, bound to fail. It is the classic dilemma of infinite demand and finite resources. Is it conceivable that we could have a system of publicly funded litigation which meets any and all demands placed upon it? Such a system would inevitably consume a disproportionate amount of public expenditure. Legitimate claimants should be able to bring their claims before the courts, and those responsible for acts of negligence or who cause injury and death, should not be able to hide behind the imperfections of a legal system which denies justice to victims.

Great Britain's Legal Aid System is also one which, by design, encourages inefficiency. Fee charging is either by the hour or by the act performed. It is said that this scheme leaves the system open to abuse. For example, unscrupulous lawyers may make up for poor rates by doing unnecessary work or allowing pointless litigation to proceed through the courts with the sole purpose of charging more fees.

In response to some of these problems, the legal profession has seen the introduction of new rules in Scotland which allow solicitors and clients to enter into special fee arrangements which in turn enable lawyers to recover enhanced fees of up to 100% if they are prepared to take on litigation speculatively; that is no win - no fee. Similar proposals are being considered in England. The new rules are subject to a number of qualifications and do not cover all the fees that a solicitor would normally charge a client. Lawyers are restricted to fees that might be recoverable from the losing party in the event of success. These fees are often much less than the actual fees and costs incurred, and there are a number of other restrictions and qualifications. These proposals remain wedded to the principle of paying lawyers on an hourly rate. It is not equivalent to the American contingency fee system with lawyers paid on a percentage of what is recovered in damages. Nonetheless, these proposals recognize a remarkable departure from one of the often voiced objections to the American system; namely, that a lawyer should not have an interest in the outcome of his client's case. It now appears that such an interest is not only permissible, but that it may in fact be a good thing to the extent that lawyers under these arrangements are unlikely to pursue pointless litigation.

It is unclear to what extent these proposals will address the problem of access to justice, or ensure that the choice of lawyer is governed by the needs of the case rather than the means of the client. Nor is it clear whether this new approach can or will generate sufficient

additional fees to compensate solicitors for the risk of taking a case on a speculative basis. Such speculative arrangements impose a considerable risk, particularly for solicitors in smaller practices. Resources and manpower in pursuing litigation can be considerable and the failure to recover a fee can cause considerable financial problems for the solicitor. In the American system, where lawyers are paid a percentage of damages recovered, usually between twenty-five to forty percent, depending on the type of case and the risk involved, the sums recovered are often sufficient to provide a "cushion" for cases which do not succeed. It is not clear whether the current proposals would achieve figures sufficient to compensate for the risk involved. There is also the difficulty that litigants in Britain, even in a speculatively funded action, continue to face perhaps the biggest disincentive to pursue their rights; namely, the "expenses rule" where the loser pays expenses. The very persons which the new proposals seek to help, those who cannot afford to instruct lawyers privately and who by definition are not wealthy, are asked to take the risk of paying expenses if they lose. Expenses can be huge and sufficient enough to overwhelm the resources of most middle income earners.

In England there is a proposal for litigants to buy insurance to cover expenses. It is not clear to what extent this system will work. No equivalent system is in place in Scotland and those wishing to pursue an action are at a considerable disadvantage. Corporate and wealthy individuals defending actions are at an advantage which often deters others pursuing litigation or, if raised, can see litigation prematurely settled at below value settlements. Every lawyer in practice in Britain is aware that the expenses rule is often used to bludgeon litigants into settlements which do not properly reflect compensation for the loss they have suffered, but reflect a compromise to avoid the expenses inherent in the judicial process.

In comparison with other systems, most notably the system in the United States, it is often said that the British system avoids the excesses of massive jury awards. One notable exception in Britain and often the subject of adverse comment, is the difference between the perceived huge awards sometimes made by juries in defamation and libel cases (principally in England) for plaintiffs who suffered hurt feelings and the more modest awards for plaintiffs who suffered devastating personal injury. This exposes a number of problems and contradictions in the British system. The adjectives used to describe some United States' jury awards presupposes they exceed what is just and, by definition, what would have been awarded in a similar case in Britain.

The difference in result in many cases is, in my view, arrived at for one very important reason. For the most part, damage awards in Britain are decided by judges whilst in the United States by juries. If the

purpose of an award of damages is to compensate victims for their loss, past, present and future, and to compensate them for their pain and suffering, who is best able to assess damages? It is true that juries are composed of ordinary people who are not experts and who may, from time to time, make mistakes. Many who criticize the system in Britain say judges are conservative in their approach, and they take into account wider concerns which are sometimes irrelevant, such as the effect large awards may have on insurance premiums, all of which have little to do with compensating the individual concerned. What is clear is that the level of damages recoverable in Britain for personal injury and wrongful death cases fall considerably short of the damages generally recoverable in the United States. Many dealing with personal injury litigation believe that the proper course is to allow juries to determine personal injury matters, to have a greater faith in the jury system, and to allow the courts to correct those awards if it can be demonstrated that juries have behaved unreasonably. As will be seen, the effect of jury awards is wider than just the proper compensation of those affected by the negligence of others. Although jury trials are sometimes available in Britain, they are not commonplace, nor are they easy to obtain. Perhaps there is reason to extend the role of juries to personal injury cases on the basis that they are as qualified as judges to assess the proper compensation deserved in a case. The appreciation of pain and suffering, and the likely impact on an individual's life and his or her ability to earn a living, are not matters which judges are any more qualified to assess than is a member of the public applying his or her life experience. Some might argue that the experience of ordinary people in such an assessment is a great deal more relevant than that of judges. The perceived failure of our system to properly compensate those who have been the victim of personal injury has led lawyers, in cases where the opportunities exist, to take litigation to other countries in order to recover higher compensation.

II. THE UNITED STATES' SYSTEM

In contrast to the British system, the system in the United States has much more of a free market feel to it. There is no equivalent system of publicly funded litigation and there is no equivalent rule about expenses. Those who wish to litigate may sue whomever they want, without fear of expenses. However, first they must find a lawyer. Those who wish to pursue litigation have a choice between retaining attorneys on an hourly rate or engaging attorneys on a contingency basis. When an attorney is engaged on a contingency fee basis, the lawyer is largely responsible for the funding and associated costs of any litigation, before taking on a case

they must be convinced of the prospects of success. All costs and fees are contingent upon success. The effect is that American attorneys will screen cases to determine the prospects of success. Those wishing to pursue hopeless and pointless litigation will not readily be able to engage attorneys, and those who initiate claims will find that their attorneys constantly monitor the prospects of success. Another effect of the contingency fee system is that it allows those with claims to choose the attorney best suited to the case rather than seek out an attorney prepared to work at discounted fee rates with the obvious risk that the best lawyer for the job is not retained.

It would now appear acceptable and perhaps even appropriate for lawyers in Britain to have an interest in the outcome of litigation. This much is implicit in the most recent proposals for Scotland and England, but what can be said of the comparison between our system and that in the United States? There is, I would suggest, greater access to justice in the United States. Almost everyone with a claim is in a position to retain attorneys on a contingency fee basis. The system involves no public expenditure and therefore imposes no burden on the public purse. The system does deliver larger awards for personal injury and wrongful death cases. It is really a question of which system delivers best in the widest sense. Those against contingency fee systems argue that it has led to an explosion in litigation, log jammed the American court system, and negatively affected business. Another argument against the contingency fee system blames large jury awards for increased insurance premiums, driving the United States medical system to the point where many doctors cannot afford the insurance premiums. When examined, most of these observations are found to be largely anecdotal and have little basis in fact.

Litigation is certainly popular in the United States. However, there is little evidence that its popularity has been fueled by speculative litigation. Much of the litigation is raised by the government seeking to recover student loans and other debts, and viewed in another way the courts are being used for precisely the purpose they are designed. That purpose is to regulate disputes and to settle claims. Equally, there is little evidence to suggest that litigation harms the competitiveness of American firms or that there is any link between insurance costs and the performance of business. So far as the medical profession is concerned, it is important not to exaggerate what is happening in the United States. Most doctors do very well despite insurance premiums. The reality is that very few medical malpractice cases succeed. Fifty percent of those filed result in no awards at all and whilst insurance premiums for doctors doubled in the years 1976 to 1984, this did not equal the rise in average earnings for that period. In fact, as a percentage of earnings, premiums fell. There appears

to be little evidence to suggest that larger jury awards in the United States have imposed an unacceptable social cost by penalizing business or the medical profession in such a way that they are adversely affected. Indeed, *per contra*, it can be argued that in a country which does not have a national health service, or the extensive welfare system provided in Britain, such awards are necessary to properly reflect the costs of ongoing medical care, support, and loss of income for those injured through the fault of others. In Britain, where awards have been much smaller, the State, through the National Health Service and the system of State Benefits, has to some extent paid the bill for the ongoing effects of those suffering long term disability who have not been adequately compensated for the effects of their injuries. It can be argued that as pressure on public funds mount, affecting not only funding for the Legal Aid, but also the National Health Service and other State Benefits, the better way to compensate those affected by the negligence of others is to have the negligent party pay the full cost, relieving the state of responsibility for funding litigation or looking after the victim.

There is, of course, another consequence of American jury awards; what I call the "economic imperative." This describes the consequence of such awards on those who have to pay them, notably the insurance industry or large corporations. The manufacturers of defective products are, as a matter of economic necessity, more likely to react to large damage awards than to small awards. The prospect of facing multiple claims is such that corporations are likely to react to improve safety standards and correct defective products to avoid multiple large damage awards. If the death of a child were to result in an award of £3000 it will have little financial impact on a company or insurer. If the award were \$3,000,000 the equation is of necessity different. The United States has seen many improvements in safety standards which are a result of large jury awards or the threat of them. Large verdicts are more effective than the periodic promotion of higher safety standards by government departments or other bureaucratic agencies. The "economic imperative" is a stimulus to improve standards. Perhaps it comes as no surprise that corporations react more quickly when faced with multimillion dollar law suits rather than the prospect of a modest fine imposed by a criminal court after a breach of a health and safety regulation.

In summary, the American system appears to offer many advantages. Contingency fees allow all, irrespective of their personal circumstances, to retain attorneys most appropriate to the case. Those attorneys are unlikely to accept litigation where there is no prospect of success since not only do they put their fees at risk, but in most cases they risk the cost of funding actions. Jury awards are large enough to make the

contingency fee system work to the extent that prospects of a share in damages are sufficient to compensate the lawyers for the risks taken. The effect of larger awards is measured partly as the "economic imperative" to improve standards and by imposing the true costs of the negligence on a guilty party rather than the state assuming responsibility for after care and other social support. This relieves the demand on the public purse while ensuring greater access to justice for those who need it.

The American contingency fee system has been the subject of much criticism by many in Britain and is now under attack in the United States. It is unfortunate that many in Britain who criticize have been silent as an increasing proportion of the British public have become disenfranchised from a legal system, which purports to serve them, often sees just claims not pursued or victims bullied into inadequate settlement. Those in the United States who see apparent advantages in the "expenses rule" should consider with care the effect such a rule will have on access to justice.

It has been said that the contingency fee system will encourage lawyers to take shortcuts and to be unethical. The logic of this argument is difficult to follow. It presumes that the system in Britain is free of such problems or that the unscrupulous and unethical are unable to find opportunities to abuse our system, but clearly this is not the case. Those administering the British Legal Aid System are aware of many abuses within that system where pointless litigation is pursued on an hourly basis with little or no prospect of delivering any success to the claimant. The system of hourly paid fees, whether legally aided or privately funded, is always open to abuse by the unethical and unscrupulous. I am aware of no evidence to suggest that the American system or American lawyers are any more likely to produce such abuses than Great Britain. The question of ethics and standards is one quite separate from how we organize access to justice.

III. THE WAY FORWARD

I do not seek to suggest that all in the British system is wrong nor that all in the American system is correct. I would suggest, however, that we can learn from looking at other systems and looking at our own critically. It is neither appropriate nor desirable to substitute one for the other and the better course undoubtedly would be to encourage development of our own system to meet the demands of the present day. For my part, I would argue for an experiment in the area of personal injury litigation. It should not be beyond the wit of government and the profession to devise a system allowing contingency fees for certain classes

of actions or within certain parts of the court structure. I would also argue that such a system will not work unless it permits greater access to juries. In principle, there is no reason why this should impose additional costs. The option of a jury trial could result in damages sufficient to meet any additional costs. Would it be unreasonable, for example, for those who elect a jury trial to agree to pay a percentage of the sums awarded as a cost? Again, I would suggest this would be payable only on success, reflecting the philosophy of contingency based litigation and ensuring that those who were of modest means were not disadvantaged in the pursuit of their claims.

I am the first to appreciate that these proposals are imperfect, but then again, so is the current system. We are in urgent need of reform. It is a reform which, to be successful, requires everyone to contribute to ensure that we end up with a system which meets the expectations and needs of the public that it seeks to serve.