

Access to Justice for a New Century – The Way Forward

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Access to Justice for the Middle Class

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INTRODUCTION: THE ACCESS TO JUSTICE J-CURVE

As Professor Galanter noted in his contribution¹, the meanings associated with "access to justice" have evolved overtime, and the now varied meanings were well-reflected in the contributions to the symposium. In my comment, I will be somewhat old-fashioned and focus on "access to justice" as it was used a quarter of a century ago²: the ability to access the institutions of law in order to secure redress for wrongs. More specifically, I want to emphasize the dilemma of access to justice for the middle class.

Harry Arthurs³ observes that as one goes up the economic ladder access to justice tends to improve just as access to things generally typically improves. Many years ago I heard an old peace movement friend of mine express this phenomenon succinctly: generally, things are not made more difficult by having money. No one is surprised that those toward the bottom, or at the bottom, of the economic ladder are handicapped in many ways in a system of justice.

Let me change the metaphor slightly by using the term "slope" rather "ladder." Does the simply rising slope metaphor

work regarding access to justice? I want to posit that in certain very important ways it is not a steadily rising slope as one becomes increasingly better off economically; rather, if one were to graph access to justice (on the vertical) and economic well being (on the horizontal), one would observe a shape that resembles the letter "J"; that is, those at the very bottom of the economic hierarchy may have greater access to justice than those in the middle class. Specifically, as a result of programmes of legal aid and indigent criminal defence – albeit inadequately funded (particularly in my own country, the United States of America) and under threat for a variety of reasons in various countries around the world – those at the very bottom of the economic hierarchy often have better access to the institutions of justice than do those somewhat above them.

In fact, there are two kinds of costs that hinder accessing our systems of justice, and both of these have an impact on the "access to justice j-curve." One, the one that is common generally around the world, is the cost of one's own legal counsel, legal expertise you must purchase to successfully access the justice system. But in most countries besides my own there is also the cost, or the potential cost, the threatened cost of what happens when you lose and have to pay the other side, what I have heard some refer to as the "downside risk." The downside risk is most important for the middle class because it does not pose a risk to those with no wealth because they have nothing to pay to the other side if they lose and those with substantial wealth can afford to take risks, at least in relatively typical kinds of cases.

THE DOUBLE-WHAMMY FACED BY THE MIDDLE CLASS

Thus, if we look at three very broad groups within society, we see different kinds of situations. For the wealthy, the questions surrounding accessing the justice system become a fairly

straightforward benefit/risk kind of calculation; that is, the wealthy can afford to hire their own counsel and can afford to lose, if that should be the case. The most extreme version of these actors is the large, wealthy corporation that may engage the justice system repeatedly and be able to basically play the odds. For the poor, Canada and many other systems provide programmes of legal aid⁴, again not without problems, and those programmes of legal aid provide access to lawyers or other legal counsel. But with some exceptions the poor are also protected from the downside risk for the simple reason that if they lose, what is the other side going to take away from them?⁵

The middle class gets squeezed by both sides of the cost equation: they cannot afford really to go out and hire lawyers without depriving themselves of life's necessities, and they cannot afford the downside risk of losing if they do pursue a case with any significant risk of losing.

Twenty years ago a law professor in Toronto told me of a problem he encountered in selling a house. He had contracted to sell the house when the market in Toronto was at one of its peaks, but the closing date was sometime off. By the time the closing arrived, the market had softened, and the buyer told the seller that unless the buyer reduced the selling price by something like \$10,000, the buyer would walk away. The seller consulted with his solicitor about the possibility of suing for specific performance if the buyer did as he threatened. The solicitor advised the seller that the case was very good, but you could never be sure what would happen at trial (perhaps the buyer could come up with some other legitimate reason for failing to follow through on the purchase), and if the buyer won, the seller would be looking at something in the order of \$10,000 in party and party costs (to say nothing of what the "own solicitor" costs would be). The law professor accepted the buyer's demand to reduce the price.

In his study of small claims in Montreal, Professor Macdonald reports finding that the vast majority of the users of that system are middle class; this is not at all surprising. The

small claims court is a system that members of the middle class can use and avoid both kinds of costs. Middle class persons have enough skill to represent themselves in small claims proceedings, and in such proceedings there is no fee shifting.

PROVIDING ACCESS TO JUSTICE FOR THE MIDDLE CLASS

What mechanisms are available to provide the middle class with access to justice? I think it is important to differentiate between two broad groups of cases or kinds of cases. One consists of money damage cases, the cases in which the primary claim is money, and the other is the non-monetary damage cases, cases where people are seeking things other than money, whether it be an apology, an acknowledgement of responsibility, or any of a variety of other things that do not reduce simply to money.

MONEY DAMAGE CASES

For money damage cases, a growing means of access is some form of no-win, no-pay fee. Contingency fees have long been available in the United States⁶. Some American lawyers have described the contingency fee as the average person's "key to the court house"⁷, and it certainly does play this role. Interestingly, contingency fees have long been available in at least some provinces of Canada, going back over 100 years in Manitoba⁸. In England, where no-win, no-pay fees were long seen as an anathema⁹, a form of no-win, no-pay fee became available in 1995 and has since then become a major way of reducing the costs of civil legal aid.¹⁰ The English system is referred to as "conditional fees," and involves an "uplift" in the standard fee for successful cases in return for which solicitors agree to forego any fee in unsuccessful cases.¹¹ Recently there has been some discussion in England of the possibility of moving toward a no-win, no-pay fee that looks more like the American percentage fee.¹² No-win, no-pay fees are finally

becoming available in Ontario as a result of a combination of court decisions and legislation over the few last years.¹³ This should make it possible for persons to hire counsel when otherwise they would not feel able to do so. The major issue confronting Ontario at the moment is predicting how the new developments will play out. Many of the rules and the specifics are yet to be worked out, and I am very curious to observe how the changes affect both access to justice and legal practice.

Availability of contingency fees deals with one side of the cost equation. What about the downside risk? Even with no-win, no-pay fees available, the downside risk still serves as a major barrier, particularly for the middle class. Aside from abandoning the loser pays principle, I see two kinds of options. The one that has been developed in England – but, to my knowledge, nowhere else – is a form of "after the event" insurance (AEI), whereby you can purchase, after the event, an insurance policy against the downside risk of losing¹⁴. It is not unreasonable that insurers could come up with the actuarial calculations that would facilitate this. Thus, the reforms in England combined a no-win, no-pay fee with AEI to fully protect plaintiffs from the financial risks associated with civil claiming. In addition, the *Access to Justice Act, 1999* made the costs of AEI and the increased solicitors' fees recoverable from the opposing side, at least in principle.

In the wake of all of the various changes in England there has been substantial litigation and uncertainty as the various players try to work out a set of reasonable ground rules:¹⁵ How much of a fee "uplift" should the losing side be required to pay in costs? How much is reasonable to pay to cover the AEI premium? Are there certain kinds of "no risk" cases where no uplift or AEI premium should be paid? In fact, the uncertainty of these issues, and how their resolution might alter the system, was so great in 2002 and into 2003, that I abandoned plans for a research project that would have replicated a study of American contingency fee practice I have completed.¹⁶ Changes were happening so fast in England that any research would

vices.²⁰ Alternative providers may be more accessible to many of those, middle class and otherwise, with legal needs, and competition among providers might well bring down costs, something that did happen in England when solicitors were confronted with competition for conveyancing matters.²¹

The second mechanism for providing access for non-monetary cases, also mentioned by other contributors to this symposium, is legal expense insurance. In Germany, an estimated 80 percent of the population has some form of legal expense insurance. I have heard estimates that in England perhaps 30 percent of the population has legal expense insurance, many of them not realizing that they have this coverage because it is bundled in with what we would call homeowners' insurance.

It is worth noting that legal expense insurance works for monetary claims as well as non-monetary claims. Interestingly, in the U.S. legal expense insurance, or prepaid legal services as it is usually called, typically exclude monetary claims because such claims can be readily handled under a no-win, no-pay arrangement.

But let's say somehow we are able to resolve the cost issues. Everyone with a good or legitimate claim for justice is now able to pursue that without being constrained by costs.

GATE-KEEPING ISSUES

Under the heretofore-existing system in Ontario, the combination of the cost of one's own counsel and the downside risk have served a rationing function. Effectively, public policy was to discourage litigation.²² If the result was that persons were unable to obtain redress for injuries (broadly defined), so be it. If the system is to change to substantially increase access, the issue of rationing comes back on the table: What dimensions should be used in rationing access to justice? Who should make the rationing decisions? How should bad claims be filtered out?

There are several possibilities. Government might establish strict policies on what is in and what is out. This can be done

through no-fault compensation systems, specialized tax systems (e.g., "pay at the pump" no fault auto insurance), social welfare programs for medical costs (as already exist in Canada), generous disability benefits, etc.

One can find mechanisms to encourage potential litigants to make some rationing decisions, even without the traditional fee-for-service systems. One wants the litigant to make a cost/benefit calculation, weighing the nature/size of the dispute with the costs and risks of losing. One could imagine some sort of co-pay system that is not a full-cost system as we have now but something that at least gives a potential claimant plaintiff a moment of pause. There might be a system of making a deposit, perhaps modelled after the deposit system in elections that exists in some countries. If a plaintiff were to lose a claim, the deposit would be forfeited, subject to the court waiving the forfeiture for good cause.

Another possible approach to rationing would be to assign this function to lawyers. Under contingency fee systems, lawyers play a major, if not *the*, gate-keeping role.²³ In addition, various kinds of practice rules, such as Rule 11 of the Federal Rules of Civil Procedure in the United States, can discourage dubious cases by providing for sanctions against lawyers who file what are deemed to be frivolous claims.²⁴ There is, of course, the dilemma of determining what constitutes a frivolous claim, and it may well be the case that some types of cases are more impacted than others.²⁵

If legal expense insurance were to become widely available, one would expect to see yet another rationing and gatekeeping vehicle. Specifically, insurers would often play the gatekeeping role. Insurers would have to approve what would go forward and what would not. This is much as is the case in most legal aid programs: decisions to proceed with a case are subject to standards, review procedures, and often formal approval processes. Almost 20 years ago, I interviewed a solicitor in northern England who did work on behalf of one of the nascent legal expense insurers. He described in detail the procedures he had

to follow in handling cases that came to him under the legal expense policies, and those procedures involved very close oversight by employees of the insurer. He could go forward with a case only with the approval of the insurer. This did not differ all that much from what solicitors told me about handling civil legal aid cases: they had to seek approval before taking major steps in a case, such as issuing a writ. While one can imagine a variety of problems that could arise, these are not necessarily all that different from those that arise in the case of medical insurance where insurers have some control over what services an insured receives. More generally, if someone else is paying the bill, that someone is almost always going to want to have some say about how expenditures are made because those doing the spending have no incentive to ask whether an expenditure is worthwhile.

CONCLUSION

Much of this collection of papers focuses on broad conceptions of social justice and how to produce that justice. Social justice is crucial to the broad notions of a just social and political system. At the same time, we cannot ignore issues of what might be called everyday justice, justice in relationship with employers, neighbours, merchants, government agencies, little injustices left unresolved accumulating to social injustice. Access to everyday justice comes down to accessing legal expertise and not being fearful of the downside risks of seeking justice.

I have suggested that the ability to access justice is not a simple linear function of economic well-being. Rather, I have argued that access follows something of a j-curve with those at the bottom of the economic hierarchy finding assistance through such mechanisms as legal aid and indigent criminal defence. In this short comment, I have examined the issues of access to everyday justice for the middle class, and have sought to explicate several ways of improving that access. Some changes underway in Ontario will address issues I have raised.

Still more needs to be done, and I hope to see further changes in the coming years.

Endnotes

- ¹ 'Access to Justice as a Moving Frontier', this collection.
- ² Mauro Cappelletti, ed., *Access to Justice, 4 Volumes* (Milan: Sijthoff and Noordhoff-Alphenandenrijn, 1979).
- ³ 'More Litigation, More Justice?', this collection.
- ⁴ Francis Ryan, Alan Paterson & Tamara Goriely *et. al.*, eds., *The Transformation of Legal Aid: Comparative and Historical Studies* (New York: Oxford University Press, 1999).
- ⁵ In England, a legally-aided plaintiff is generally protected against the downside risk, as is the Legal Aid Fund, *See Hazel Genn, Hard Bargaining: Out of Court Settlement in Personal Injury Actions* (Oxford: Oxford University Press, 1988) at 90-91.
- ⁶ Randolph E. Bergstrom, *Courting Danger: Injury and Law in New York City, 1870-1910* (Ithaca, NY: Cornell University Press, 1992) at 87-95; Peter Karsten, "Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, a History to 1940" (1998) 47 DePaul L. Rev. 231.
- ⁷ Association of Trial Lawyers of America, *Keys to the Courthouse: Quick Facts on the Contingent Fee System* (Washington, DC: Association of Trial Lawyers of America, 1994), online: Civil Justice <<http://www.civiljustice.org/Pages/05-ContingentFeeSystem.html>>; Philip H. Corboy, "Contingency Fees: The Individual's Key to the Courthouse Door" (1976) 2:4 *Litigation* 27.
- ⁸ L. Minish, "The Contingency Fee: A Re-Examination" (1979) 10 *Man. L.J.* 65 at 69.
- ⁹ Law Society, *Memorandum on Maintenance and Champerty: Claims Assessors and Contingency Fees* (London: Law Society, 1970).
- ¹⁰ Richard L. Abel, "An American Hamburger Stand in St. Paul's Cathedral: Replacing Legal Aid with Conditional Fees in English Personal Injury Litigation" (2001) 51 *DePaul L. Rev.* 253; Lord Chancellor's Department, *Access to Justice with Conditional Fees* (London: Lord Chancellor's Department, 1998); Michael Zander, "The Government's Plans on Legal Aid and Conditional Fees" (1998) 61 *Mod. L. Rev.* 538.
- ¹¹ Kerry Underwood, "Conditional Fees in Practice" (1999) 143 *Solicitors Journal* 1000-1001, 1032-1033, 1066-1067, 1092-1093; Geoffrey Woodroffe, "Loser Pays and Conditional Fees - An English

- Solution" (1998) 37 Washburn Law Journal 345. For assessments of the operation of the "conditional fee" system. See Stella Yarrow, *Just Rewards? The Outcome of Conditional Fee Cases [Summary]* (London: University of Westminster, 2000); see also Stella Yarrow & Pamela Abrams, *Nothing to Lose? Clients' Experiences of Using Conditional Fees* (London: University of Westminster, School of Law, 1999); see also Stella Yarrow, *The Price of Success: Lawyers, Clients and Conditional Fees* (London: Policy Studies Institute, 1998).
- 12 Michael Zander, "If Conditional Fees, Why Not Contingency Fees?" (2002) New L.J. 797; Michael Zander, "Will the Revolution in the Funding of Civil Litigation in England Lead to Contingency Fees?" (2002) 52 DePaul L. Rev/ 259. At least for modest cases that are settled prior to filing, there is already some movement toward a system of fee computation based in part on a percentage of recovery. See Neal Rose (2003) "October Date Set for PI Fixed Fees Scheme" Law Society's Gazette.
- 13 The two key court decisions are *Raphael Partners v. Lam*, [2002] O.J. No.3605 and *McIntyre Estate v. Ontario (Attorney General)* (2001), 53 O.R. (3d) 137. Legislation is in the form of the *Justice Statute Law Amendment Act 2002*, available at: <http://www.e-laws.gov.on.ca/DBLaws/Source/Statutes/English/2002/So2024_e.htm>.
- 14 Richard Moorhead, "Conditional Fee Agreements, Legal Aid and Access to Justice" (2000) 33 U.B.C. L. Rev. 471; Robin C. A. White & Rachel Atkinson "Personal Injury Litigation, Conditional Fees and After-the-Event Insurance" (2000) 19 C.L.Q. 118.
- 15 See John Peysner, "Finding Predictable Costs" C.J.Q. [forthcoming in 2003].
- 16 See Herbert M. Kritzer, *Risks, Reputations, and Rewards: Contingency Fee Legal Practice in the United States* (Stanford: Stanford University Press, 2004).
- 17 Herbert M. Kritzer, "From Litigators of Ordinary Cases to Litigators of Extraordinary Cases: Stratification of the Plaintiffs' Bar in the Twenty-first Century" (2001) 51 DePaul L. Rev. 219 at 236-237; Mark S. Stein, "The English Rule with Client-to-Lawyer Risk Shifting: A Speculative Appraisal" (1995) 71 Chicago-Kent L. Rev. 603.
- 18 Judith Citron, *The Citizens' Advice Bureaux: For the Community by the Community* (London: Pluto Press, 1989); John Baldwin, "The Role of Citizens Advice Bureaux and Law Centres in the Provision of Legal Advice and Assistance" (1989) 8 C.J.Q. 24.
- 19 Richard Moorhead, Richard, Avrom Sherr & Alan Paterson (2003)

- "Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales." 37 *Law & Society Review* 765-808.
- ²⁰ W.A. Bogart & Neil Vidmar (1988) "Problems and Experiences with the Ontario Civil Justice System: An Empirical Assessment," pp. 1-51 in Alan Hutchinson, ed., *Access to Justice: Bridges and Barriers*. Toronto: Carswell. Commission on Nonlawyer Practice, *Nonlawyer Activity in Law-Related Situations: A Report with Recommendations* (Chicago: American Bar Association, 1995); Herbert M. Kritzer, *Legal Advocacy: Lawyers and Nonlawyers at Work* (Ann Arbor: University of Michigan Press, 1998).
- ²¹ See Simon Domberger & Avrom Sherr, "The Impact of Competition on Pricing and Quality of Legal Services" (1989) 9 *Int'l Rev. Econ.* 41.
- ²² Garry D. Watson, W.A. Bogart, Allan C. Hutchinson, *et al.*, (1991) *Civil Litigation: Cases and Materials*. (Toronto: Emond Montgomery) , at 419.
- ²³ See Stephen Daniels & Joanne Martin, "It Was the Best of Times, It Was the Worst of Times: The Precarious Nature of Plaintiff's Practice in Texas" (2002) 80 *Tex. L. Rev.* 1781 at 1789; Herbert M. Kritzer, "Contingency Fee Lawyers as Gatekeepers in the Civil Justice System" (1997) 81 *Judicature* 22; Sara Parikh, *Professionalism and Its Discontents: A Study of Social Networks in the Plaintiff's Personal Injury Bar* (Ph.D. Thesis, University of Illinois at Chicago, 2001) [unpublished] at 78.
- ²⁴ Gerald F. Hess, "Rule 11 Practice in Federal and State Court: An Empirical, Comparative View" (1992) 75 *Marq. L. Rev.* 313; Saul M. Kassin, "An Empirical Study of Rule 11 Sanctions" (Washington: Federal Judicial Center, 1985); Lawrence C. Marshall, Herbert M. Kritzer & Frances K. Zemans, "The Use and Impact of Rule 11" (1992) 86 *NW. L. Rev.* 943; Melissa Nelken, "The Impact of Federal Rule 11 on Lawyers and Judges in the Northern District of California" (1990) 74 *Judicature* 147; Elizabeth C. Wiggins, Thomas E. Willging & Donna Stienstra, "The Federal Judicial Center's Study of Rule 11" (1991) 2 *FJC Directions* 3.
- ²⁵ Herbert M. Kritzer & Frances Kahn Zemans, "Local Legal Culture and the Control of Litigation" (1993) 27 *Law & Soc'y Rev.* 535; Carl Tobias, "Civil Rights Plaintiffs and the Proposed Revision of Rule 11" (1992) 77 *Iowa L. Rev.* 1775.