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Access to Justice: Keeping the doors open Transcript

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ACCESS TO JUSTICE: KEEPING THE DOORS OPEN

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Introduction

In this Reading I would like to explore the various doors that need to be located, and then opened, if people are to gain access to justice. Obtaining access means negotiating an opening, so it is appropriate that this evening we are gathered together at Gresham's College, described in Claire Tomalin's biography of Samuel Pepys [1] as the 'first Open University'. In 1684, when Pepys was its President, the Royal Society used to meet at Gresham's College for open discussion, studying the evidence of experiments that would prise open the doors of access to scientific knowledge.

But access to legal knowledge is very different from the formulaic precision of a scientific experiment, and those who seek access to justice need to know how to negotiate the route. It is not easy. As we all made our way here this evening along Holborn to the ancient splendour of Barnard's Inn Hall we were actually following in the footsteps of the many citizens who have trodden for centuries the footpaths and byways of Holborn, pursuing access to justice:

'London 1853. Michaelmas term lately over. Implacable November weather. As much mud in the streets as if the waters had but newly retired from the face of the earth and it would not be wonderful to meet a Megalosaurus waddling... up Holborn hill. Fog everywhere. And hard by Temple Bar in Lincoln's Inn Hall at the very heart of the fog sits the Lord High Chancellor... Never can there come fog too thick, never can there come mud and mire too deep to assort with the groping and floundering condition which this High Court of Chancery, most pestilent of hoary sinners, holds this day in the sight of heaven and earth. This is the Court of Chancery... which gives to monied might the means abundantly of wearying out the right, which so exhausts finances, patience, courage, hope, so overthrows the brain and breaks the heart, that there is not an honourable man among its practitioners who would not give - who does not often give - the warning 'suffer any wrong that can be done rather than come here!'.

Charles Dickens' portrayal in Bleak House [2] of delay and inequality of arms offered little confidence in access to justice 150 years ago.

To reflect the subject matter of my title I have divided this Reading into eight sections:

Rights, remedies and responsibilities

Since Bleak House how far has society progressed in knowledge of the law (civil law) and of how to access the justice system? The current national curriculum [3] for schools says that:

'Pupils should be taught about the legal and human rights and responsibilities underpinning society, and how they relate to citizens including the role and operation of the criminal and civil justice systems'

And the website [4] of the Public Legal Education & Support Task Force says:

Public legal education provides people with awareness, knowledge and understanding of rights and legal issues together with the confidence and skills they need to deal with disputes and gain access to justice.

Current educational initiatives to improve what is referred to today as 'legal literacy' mean that our citizens are now more likely to appreciate that the possession of rights must be balanced against the burden of responsibilities. And our modern sophisticated consumer aware society is likely to endorse the latin maxim 'ubi jus ibi remedium,' or 'where there is a right there is a remedy', a principle enshrined by Lord Chief Justice Holt in the famous right to vote case *Ashby v White* [5] in 1702. In his dissenting judgment, later upheld by the House of Lords, he said:

'If the plaintiff has a right he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy for want of right and want of remedy are reciprocal'.

Although it has been said that the reverse does not apply, at least in the field of medicine where a doctor once claimed to have invented the remedy for no known disease, in the law, where the contemporary translation of 'no right without a remedy' might be 'where there's blame there's a claim', it is hardly surprising that in 2007 the public has understandably high expectations of the accessibility of justice. A timely reminder is that this year, in its 50th anniversary manifesto for the Rule of Law [6], the organisation JUSTICE proclaims that:

'every person in the UK, however poor or disadvantaged has the right of access to justice'.

I suggest that four core component parts of access to justice are:

* access to a legal system underpinned by the rule of law and due process; * access to legal advice; * access to a Court; * and, in our jurisdiction where costs follow the event and winner takes all, access to funding which is the complex key to the most difficult door to unlock in the search for justice.

Lewis Carroll's Alice in Wonderland may not have been thinking about access to justice when she could not discover how to gain access to the beautiful garden because:

'There were doors all around the hall but they were all locked?'

and then Alice finds a key but:

'...alas either the locks were too large or the key was too small'.

although eventually Alice is successful when she:

'...tried the little golden key in the lock and to her great delight it fitted'

The keys to the door

Part of my theme is that the golden key to the access to justice door is the funding key. By that I certainly do not mean that payment of fees to lawyers is a priority, but I do mean that we cannot ignore the reality that, aside from the pro bono commitment of lawyers, our civil justice system has to provide funding mechanisms that properly enable meritorious cases to be brought.

No surprise then that three of the four access to justice demands in the JUSTICE manifesto refer to the essential provision of state funded legal aid.

No surprise either that the Civil Justice Council, in its 2005 Report [\[7\]](#) 'Access to Justice - funding options and proportionate costs' said that the delivery of access to justice is dependent upon:

* a meritorious case * the participants having at the outset access to means of funding their case * the lawyers on each side having at the outcome access to reasonable remuneration * the costs of funding and remuneration being proportionate to what is at stake and the availability of an efficient and properly resourced court system.

The fundamental availability of an accessible Court system has a long history. The book of Exodus [\[8\]](#) describes early access to a judicial process for the resolution of disputes:

'Moses' father-in-law... said what is this thing that you are doing to the people?... and Moses said... when they have a matter they come unto me and I judge between one and another and I do make them know the statutes of God and his laws... And Moses' father-in-law said... thou shalt provide out of all the people, able men who fear God, men of truth and let them judge the people at all seasons, and it shall be that every major dispute they will bring to you, but every minor dispute they themselves will judge. And they judged the people at all seasons; the difficult dispute they would bring to Moses but every minor dispute they themselves would judge.'

It may be far fetched to suggest that Moses was the architect of the first small claims court but it is not stretching it to acknowledge that the first literary confirmation of access to the due process of jury trial is found in the Greek tragedy 'Eumenides' [\[9\]](#), part of the Oresteia trilogy by Aeschylus. Orestes is on trial for murdering his mother. In charge of the proceedings is the Goddess Athena who thus proclaims her duty to ensure a fair trial:

'The affair is too grave if any mortal thinks to pass judgement thereon, nay it is not lawful even for me to decide on cases of murder which involves swift wrath. I will appoint judges of homicide bound by oath and establish a tribunal to endure for all time. Do ye call your witnesses and adduce your proofs, sworn, evidence to support your cause... The word is with you, the trial may proceed and 'tis sound law and justice both that he who doth proffer the charge shall first begin.'

In Rome in the first century BC, Cicero, addressing the jury at the trial of Cluentius describes the State's duty to uphold the law as:

'the foundation of freedom, the spring of justice' [\[10\]](#)

Five hundred years later in 534 AD the Emperor Justinian completed the legal Codex although as Gibbon's Decline & Fall [\[11\]](#) records, the twelve tables of Roman law may have been:

'the rule of right and the fountain of justice'

but eventually:

'were overwhelmed by the weight and variety of new laws which at the end of five centuries became a grievance more intolerable than the vices of the city'.

Modern legislators would do well to note that, as Gibbon also records, to discourage unnecessary and burdensome legislation the legal code of the Locrian community required that the proposer of any law:

'stood forth in the assembly of the people with a cord around his neck and if the law was rejected the innovator was instantly strangled'.

Here in England, it seems that our first law code was promulgated by King Alfred in the 880's although the first recognised statement guaranteeing justice was of course at Runnymede in June 1215 when in Magna Carta [12] King John declared that:

'To no one will we sell, to no one deny or delay right or justice',

The limitation by Magna Carta of the royal prerogative may have principally favoured the baronial and privileged classes but also made the further declaration that:

'ordinary lawsuits shall not follow the Royal Court around but shall be held in a fixed place'

Two years later then in 1217 the original 'Great Charter' was split into two parts, the larger being Magna Carta and the smaller, known as the 'Charter of the Forests' which enshrined in law the customs and traditions of the peasantry and poorer people.

For the resolution of disputes the Court of Requests was established in 1483 [13] followed by the Court of Star Chamber, effectively an appeal court in 1487 [14] but the problem of access to justice in a Court for the poor was first formally recognised by the 'in forma pauperis' statute of Henry VII in 1494 [15]. This provision of relief from court fees and access to lawyers acting pro bono was said to be available to:

'every poor person...and the Lord Chancellor shall assign... learned counsel and attorneys for the same without any reward'.

The good news that we can trace pro bono help by lawyers for more than 500 years is somewhat dampened by the 16th century method of dealing with the problem that the pro bono litigant still faces today - the risk of an adverse order of having to pay all the costs if the case is lost. However, by statute introduced by Henry VIII in 1531 [16] it was provided that an unsuccessful poor person should not be liable to pay the opponent's costs but should suffer 'other punishment as shall be thought reasonable' which typically meant being whipped or pilloried.

However, this was insufficient to deter vexatious litigants, so the provision that a poor person's case required a merits certificate from counsel was developed, and by Victorian times was included in the Rules of the

Supreme Court 1883 [17]. Interestingly, Rule 27 also provided that a lawyer acting pro bono could not recover costs even if successful in a case on behalf of a poor person. I will return to this point later in the context of the Legal Services Bill 2007.

From 'in forma pauperis' to legal aid

By the early 20th century there was a progressive move away from 'in forma pauperis', as demand grew for some form of public funding by the State. The Poor Persons Rules of 1914 [18] replaced the 'pauper' requirement with a means test threshold of £50 in assets to qualify for legal help from solicitors and barristers willing to act for free. And in November 1924 a letter to The Times [19] from the Bishop of London and 17 leading churchmen argued that the poor had a constitutional right to legal aid because:

'the state has made provision for the education and health of the poor. Practically it has made no provision for their legal needs...'

From 1926 the Law Society ran the Poor Persons Scheme but gradually pressure grew for the State to accept responsibility for funding legal representation for those who could not afford to pay.

Writing in the Law Quarterly Review in 1943 Dr E J Cohn [20] argued that:

'If all that the Poor Man's Lawyer can tell his client is that he has a good case but that owing to his financial position there can be no question of taking the case to court and that he has therefore got to forget about his right, nothing is gained. Litigation is the sanction and therefore the cornerstone of the law. It is no use to grant people rights if one does not grant them the possibility to enforce them.'

The reference to the Poor Man's Lawyer is another reminder of the history of pro bono contribution by the legal professions and has a special resonance with the extensive pro bono activity seen in many of our law schools today. Indeed, the Poor Man's Lawyer Scheme, supported by volunteer solicitors and barristers, actually originated in the Universities in the 1880's [21]. By 1925 there were 22 such schemes in London and ten outside, one notable scheme being in Liverpool [22].

But pro bono support for those who could not afford to pay for access to justice was far from adequate for Dr Cohn [23] who continued:

'Legal aid is a service which the modern state owes to its citizens as a matter of principle. It is part of that protection of the citizen's individuality which, in modern conception of the relationship between the citizen and the State can be claimed by those citizens who are too weak to protect themselves. Just as the modern state tries to protect the poorer classes against the common dangers of life such as unemployment, disease, old age, social oppression etc so it should protect them when legal difficulties arise. Indeed, the case for such protection is stronger than the case for any other form of protection. The state is not responsible for the outbreak of epidemics, for old age or economic crisis. But the state is responsible for the law. That law again is made for the protection of all citizens, poor and rich alike. It is therefore the duty of the state to make its machinery work alike for the rich and the poor.'

Although Dr Cohn's exhortation may have been valid in 1943 and perhaps influential on the State introduction of Legal Aid in 1949, it might be said that it no longer applies nearly 60 years later in the completely different society and economic environment that we live in today. I am not so sure. Nor is Chief Justice McMurtry of Ontario who said in a speech^[24] as recent as January this year that:

'The basic purpose of legal aid is to serve the public by enabling each of its members to have access to the kind of legal assistance that is essential for the understanding and assertion of our individual rights, obligations and freedom under the law... legal aid is perhaps the single most important mechanism we have to turn the dream of equal rights into a reality. Indeed, our laws and freedoms will only be as strong as the protection that they afford to the most vulnerable members of our community. In affording this protection legal aid does make a deep and essential contribution to our social fabric and indeed to our very way of life'.

These aspirations are reflected in the words of the Lord Chancellor, Lord Irvine of Lairg, introducing the second reading of the Access to Justice Bill in 1998 ^[25].

'People value their legal rights highly. They feel deeply frustrated when they cannot secure them. A major component in deciding whether a State provides a decent quality of life for its citizens is the extent to which it secures for them access to justice'.

If the removal of social exclusion and the preservation of equal rights are the legitimate and laudable components of the State's agenda for its people, the provision of public funds in support of a properly resourced legal aid scheme, including civil cases, should be accepted as a normal and expanding part of the public spending budget.

Is it acceptable then for the State to seek to restrict legal aid provision or even to say that it should be reduced, or to fail to protect the civil budget from erosion by the insatiable appetite of crime? If the funding of legal advice and representation is the crucial first doorway to access to justice, legal aid must continue to play its part, even an increasing part, in supporting the resolution of civil disputes with the help of an adequate supply of accessible lawyers. The number of solicitors' offices conducting non family civil legal aid has declined from 9,740 in 1996/7 to 4,719 in 2005/6 ^[26]. For barristers the corresponding numbers are from 7,114 to 4,991. As the availability of lawyers, including those in the not for profit sector, becomes less accessible, particularly in rural areas ^[27], access to justice is inevitably compromised.

From Legal Aid to alternative funding structures

In an analysis of methods that might expand funding options to give access to justice the Civil Justice Council entitled its second Report ^[28]'The Future Funding of Litigation - Alternative Funding Structures'. Published this month the Report lists the 5 methods of funding civil cases:

* private funding * legal aid * conditional fee (no win-no fee) agreements supported by after the event insurance * legal expenses insurance (before the event) * third party funding.

Separately these methods are individual keys to funding. Collectively they might be described as a combination lock to the access to justice doorway.

However, even in combination the five methods cannot satisfy all the funding needs of would be litigants who need legal advice. Those who wish to bring a group action or a complex case that is unsuitable for conditional fee or no win-no fee speculation face serious difficulties. The Civil Justice Council therefore recommends the establishment of a new Supplementary Legal Aid Scheme (SLAS), a species of contingency legal aid fund (CLAF). The SLAS would be run by the Legal Services Commission on the basis that in return for funding support a successful litigant would be content to sacrifice from any damages recovered a percentage sum that would be paid back to the SLAS scheme, that once established might even extend its eligibility threshold to include more people and widen the access to justice doorway. The concept of a deduction from damages to fund the costs of a case is well established in most common law jurisdictions and was an integral part of the original conditional fee system introduced in 1995 [29]. The system where it is ingrained that fees are deducted from damages is of course the United States where the contingent fee method of funding has been called 'the key to the courthouse' [30].

The Civil Justice Council Report goes further saying pragmatically that where no SLAS or other form of funding is available, for example in a group action, contingency fees should be permitted, subject to strict Court supervision as happens in Ontario. Further still, the report says that if the sustainability of the no win-no fee system is ever in doubt because it depends on the stability of the after the event insurance market, contingency fees would need to assume greater prominence as the funding method for civil cases generally.

Another alternative explored by the Civil Justice Council is the relatively new concept of third party funding. Although it might be said that the legal aid scheme has always been a third party funder, albeit not for profit, the entry into litigation as a profit seeking investment by entrepreneurial commercial third party funders backed by private equity resources has required the Courts to address crucial access to justice issues. The Court of Appeal gave cautious approval to the role of the third party funder in *Arkin v Borchard Lines Ltd 2005* [31].

In deciding that a third party funder should not be completely immune from an adverse costs order if the case is lost, Lord Philips of Worth Matravers, then Master of the Rolls said:

'Somehow or other a just solution must be devised whereby on the one hand a successful opponent is not denied all his costs while on the other hand commercial funders who provide help to those seeking access to justice which they could not otherwise afford are not deterred by the fear of disproportionate costs consequences if the litigation they are supporting does not succeed'.

He went on to add:

'If the course which we have proposed becomes generally accepted it is likely to have the following consequences. Professional funders are likely to cap funds that they provide in order to limit their exposure to a reasonable amount. This should have a salutary effect in keeping costs proportionate'.

This pragmatic judicial acceptance of the role of the third party funder was soon followed by the decision of the High Court of Australia in the case of *Fostif 2006* [32].

A firm of accountants had written to tobacco retailers seeking authority to act on their behalf in litigation to recover state based licence fees that had been held unconstitutional. They offered to fund the litigation, and to

protect the retailers from adverse costs if they lost. In return they would take one third of any recovery, plus any recovered costs. The accountants then instructed solicitors to 'front' the action with only limited access to their clients. At first instance, Einstein J, decided that the funding arrangements were contrary to public policy and stayed the proceedings.

The Court of Appeal of New South Wales disagreed and removed the stay. At the final appeal stage the High Court of Australia decided by a majority of 5:2 that the third party funding arrangements did not constitute an abuse of process and were not contrary to public policy.

For the majority Chief Justice Gleeson wrote:

'Even if the intervention of a litigation funder seeking to promote an assertion by more retailers of their rights be regarded as some form of intermeddling there is no justification for denying the existence of a matter' (Para 19).

Also for the majority, Justices Gummow, Hayne and Crennan wrote:

'The solution to that problem (if there is one) does not lie in treating actions financially supported by third parties differently from other actions'. (Para 95)

Also for the majority Justice Kirby wrote:

'To lawyers raised in the era before such multiple claims, representative actions and litigation funding, such fees and conditions may seem unconventional or horrible. However, when compared with the conditions approved by experienced judges in knowledgeable courts in comparable circumstances, they are not at all unusual. Furthermore, the alternative is that very many persons, with distinctly arguable legal claims, repeatedly vindicated in other like cases, are unable to recover upon those claims in accordance with their legal rights...' (Para 120)

And dealing with the constitutionality of the Court staying such an action Justice Kirby went on to say that:

'The reason why it is difficult to secure relief of such a kind is explained by a mixture of historical factors concerning the role of the courts; constitutional considerations concerning the duty of courts to decide the cases people bring to them; and reasons grounded in what we would now recognise as the fundamental human right to have equal access to independent courts and tribunals. These institutions should be enabled to uphold legal rights without undue impediment and without rejecting those who make such access a reality where otherwise it would be a mere pipe dream or purely theoretical...' (Para 144)

However, the minority judgment of Justices Callinan and Heydon was firm in its disapproval of third party funding, emphasising that accountants do not owe the same ethical duties as solicitors who could not advertise or charge as the accountants whose role they described as 'shadowy', not being subject to the control of the Court which finds it:

'less easy to supervise litigation, one side of which is conducted by a party, while on the other side there are only nominal parties, the true controller of that side of the case being beyond the court's direct control...'(Para

Commenting on *Fostif* in a recent interview, the Master of the Rolls, Sir Anthony Clarke said:

'I have little doubt that Fostif has pointed the way. Whether we would approach it in quite the same way, whether we would think it desirable to have more control than they had in mind, I don't quite know. But I don't see why the principle of third-party funding, subject to reasonable control, should not be accepted here. As long as [it is] willing to be transparent one can see a public interest in supporting the funder [33]'

A further example of judicial pragmatism in balancing access to justice issues is in the area of public law. In the *Cornerhouse* [34] case 2006 the Court of Appeal formulated principles for a Protective Costs Order in public interest cases so as to limit the costs liability of the applicant if it loses and to restrict to a reasonable amount the costs of the defendant if the applicant succeeds.

As Lord Justice Brooke said:

'The overriding purpose of exercising this jurisdiction is to enable the applicant to present its case to the court with a reasonably competent advocate without being exposed to such serious financial risks that would deter it from advancing a case of general public importance at all, where the court considers that it is in the public interest that an order should be made.'

This extension of access to justice in public interest cases has been examined further by the organisation Liberty in its 2006 report 'Litigating in the Public Interest' [35]. In his introduction to the report Lord Justice Kay said that:

'...there are public interest cases which merit litigation but which are excluded from the courts for reasons of costs. There are limits to the level of funding available from the Legal Services Commission and in the area of judicial review it is difficult to find insurers who will back conditional fee agreements for an affordable premium... there is still a significant amount of public interest litigation which is deterred by the operation of our traditional approach to litigation costs'.

It was the traditional approach to costs that troubled Lord Woolf so much in his Access to Justice Report 1996 [36] when he listed the cost of litigation as a central problem, leading to his emphasis on proportionality to ensure the correct balance of the cost/benefit ratio in relation to what is at stake in the case. The new Civil Procedure Rules and Lord Woolf's overriding principle that litigation should be the last resort, underpin a largely successful set of civil justice reforms [37]; but Lord Woolf was unable to implement the notion of predictable or fixed costs nor did he seek to resolve the fundamental problem of how to fund access to justice.

Sadly that problem was actually exacerbated by the Access to Justice Act 1999 [38] removing the original arrangement that in a conditional fee case the success fee for winning would be deducted from the client's damages recovered and replacing it with the arrangement that all costs including the success fee and insurance premium would be recovered from the losing party.

The ensuing battlefield of technical challenges has produced a cosmos of satellite litigation that has diverted attention from the substantive legal merits of a client's case towards the unwelcome, and increasingly complex

area of law relating to funding and costs.

Although it may be said ironically that this has highlighted awareness of the crucial importance of funding as the primary key to the access to justice door, it is nevertheless profoundly depressing that practitioners and judges should have to spend disproportionate time on technical costs issues divorced from the just outcome of the legal merits of the case^[39]. It remains to be seen whether recent Ministry of Justice proposals for a streamlined process for personal injury claims ^[40], where these technical issues usually arise, will solve the problems.

In seeking access to the Court process litigants encounter a serious deterrent when they have to find the fees payable by those who ask the Court to provide a remedy. Until the 1980's the cost of Court accommodation, judicial salaries and pensions was borne by the State. Court fees covered the rest of the running costs of the civil courts. In the early 1980's, without any debate in Parliament, it was decided that the accommodation costs should be borne by litigants and in 1992 that judicial salaries should also be included.

The policy that the full costs of the civil courts should be recovered from fee income continues and, even allowing for some exemption and remission for hardship, is a funding deterrent to would be Court users. The Civil Justice Council is not the only critic that has argued that the policy of full costs recovery is wrong in principle, that it limits access to the Courts and that it is not focussed because of cross subsidy. The latest figures reveal that in 2005/6 the income from Court fees in civil cases produced a £34million profit, not re-invested in the civil justice system from which it was generated.

I have heard it suggested that if court annexed mediation schemes are to be encouraged the fee that litigants pay to enter the Court system should include the cost of mediation. This seems a fair method of re-investing profit generated from Court fees and is very much in keeping with the recent report ^[41] by Professor Dame Hazel Genn and others for the Ministry of Justice which highlights:

'the importance of efficient and dedicated administrative support to the success of Court based mediation schemes and the need to create an environment conducive to settlement'.

The inclusion of the cost of mediation within Court fees would promote the settlement of disputes without Court and would reduce the risk of challenge that Court annexed mediation would contravene the right to fair trial guaranteed by Article 6 of the European Convention on Human Rights.

Human Rights and the Rule of Law

It is a major advance that today our Courts can consider rights guaranteed by the European Convention without litigants having to wait for example for seven years to obtain a decision from Strasbourg. ^[42]Nearly ten years after the Human Rights Act 1998 it is now being suggested that the underlying real aim of the Act is at last beginning to be realised, not by lawyers arguing finely honed compatibility points before the Courts, but by the rights based framework of the Convention permeating society with a core of common sense, common values reflected in our attitudes towards our fellow human beings and creating in the UK a culture of respect for human rights ^[43]. As Baroness Ashton said in a recent speech to the British Institute of Human Rights:

'When you talk to people about values and the way in which they believe our society should develop you

quickly come across the fundamentals of human rights. People may not think of them as being part of the Human Rights Act but they do see them as part of the principles under which our society operates. They are common sense and they are common to all of us. They reflect our understanding and our values as a society'.

If Article 6 of the European Convention guaranteeing the due process of fair trial is one of the pillars that support the door of access to justice, another pillar is the Rule of Law, now given statutory recognition in Section 1 of the Constitutional Reform Act 2005. Lord Bingham has recently described the Rule of Law [44] as having at its core the recognition:

'that all persons and authorities within the state, whether public or private should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the Courts'.

And in a more detailed analysis of his eight sub rules of the Rule of Law, which he describes as 'an all but sacred flame', Lord Bingham includes legal aid as a 'valuable guarantee of social justice' and the right of unimpeded access to a court as 'a basic right'. Commenting on the significance of the statutory affirmation of the Rule of Law in the Constitutional Reform Act, Lord Bingham gives the reassurance that the judges:

'in their role as judgment makers are not free to dismiss the rule of law as meaningless verbiage, the jurisprudential equivalent of motherhood and apple pie, even if they were inclined to do so'.

To quote Lord Woolf:

'... the role of the rule of law can never properly be assessed in watertight compartments. This is because its role is all embracing. It affects every part of society... if the economy of a country benefits from its observance of the rule of law other aspects of its society will do so as well' [45]

The debate whether we should have a Bill of Rights or a written Constitution must not threaten the rights guaranteed by the European Convention and the Human Rights Act or the rule of law. As the Attorney-General Lord Goldsmith has observed [46], the rule of law is 'not simply about rule by law'. The rule of law does not only mean law passed by Parliament, for Governments can pass laws that breach human rights and it is then for the judges to uphold the rule of law, testing parliamentary made law against principles of human rights that include the rights that combine to guarantee access to justice. There can be no more contemporary example of this relationship than the majority decision of the House of Lords today in the case of 'YL' [47] that elderly patients in private care homes are not covered by the Human Rights Act, an anomaly that only Parliament can (and hopefully will) now correct.

It is tempting, although inaccurate, to equate the rule of law with the common law which we all understand as the judge made law of precedent. To some, the new statutory defence to an accident claim arising from the pursuit of what is described as a 'desirable activity' in the Compensation Act 2006 is a controversial and unnecessary occasion of the common law being given statutory force. Although the main purpose of the Compensation Act is to regulate claims management companies Part 1 of the Act has the title 'standard of care' placing a statutory limitation on the case law of negligence. Was this really necessary? For centuries the law of negligence has been carefully and successfully developed by the courts. Since *Donoghue v Stevenson* [48], and the snail in the ginger beer bottle the judiciary has resisted floodgates arguments when a

new area of negligence law begins to develop.

One example is the law of compensation for nervous shock, or psychiatric injury, or post traumatic stress disorder as it is well known today. Giving his judgment in the 1983 case *McLoughlin v O'Brian* [49] Lord Edmund-Davies said:

'My Lords, the experiences of a long life in the law have made me very familiar with the floodgates argument. I do not of course suggest that it can invariably be discussed as lacking cogency, on the contrary it has to be weighed carefully, but I have often seen it disproved by later events. It was argued when abolition of the doctrine of common employment was being canvassed, and it raised its head again when the abolition of contributory negligence as a total bar to a claim in negligence was being argued'. I remain unconvinced that the number of claims in 'shock' cases would be substantially increased or enlarged were the respondents here held liable'.

Subsequent developments in the case law of compensation for psychiatric injury [50] have vindicated Lord Edmund-Davies's refusal to bend to the floodgates argument.

Although it must be frustrating for the Law Commission that its 1998 [51] report, proposing changes to the law of compensation for psychiatric injury, remained on the shelf for nearly ten years, it is interesting that in finally addressing the Law Commission's recommendations the Ministry of Justice's current consultation paper on damages for personal injury [52], concluded that, in relation to psychiatric injury:

'No changes to the law are proposed... as the Government considers it preferable to allow the Courts to continue to develop the law in this area'

Such support for the precedent based common law development of the law of negligence regrettably did not commend itself to the drafters of Part One of the Compensation Act.

The Legal Services Bill 2007

Some of the methods of funding civil cases described in the Civil Justice Council's second report raise an issue that also arises in the Legal Services Bill. The lawyer who advises a client in a case must be free from external control that might unreasonably influence the essential independence of legal advice.

The use of before and after the event insurance funding on either side of a piece of litigation, provided by insurers whose commercial interests properly focus on shareholders; and the use of third party funding, designed to produce a return on investment for the entrepreneur, illustrate that litigation is one sector of the legal services market of definite interest to non lawyer commercial enterprise.

Furthermore, in implementing the recommendations of Sir David Clementi's report [53] and the ensuing White Paper titled 'Putting Consumers First' [54], the Legal Services Bill will allow non lawyer external investment in legal businesses as a whole, not just in litigation cases as a third party funder.

In this new world where the provision of legal services will include new entities, described as 'alternative business structures', involving external non lawyer investment in a legal business, or even the stock market

floatation of a law firm, as has recently happened in Australia [55], the regulatory framework must ensure that these changes benefit the consumer by keeping open the doors of access to justice, and do not simply open the door to access to profit.

It is possible, even probable, that some law firms and barristers' chambers will use the opportunity to introduce external capital to strengthen their financial base so as to provide improved litigation services to their clients.

The cost of litigation and the speed of resolving disputes may even be assisted by enhanced capital investment in IT infrastructure and by consumer friendly help lines that are the modern methods of successful customer focussed business today.

In the words of Professor Stephen Mayson of the Legal Services Policy Institute:

'many process driven approaches have demonstrated how possible it is to remove qualified lawyer input quite safely and economically from some aspects of legal services [56].'

Consumer reaction to potentially major change in the delivery of legal services and even the resolution of legal disputes may be influenced by the myth of the so called compensation culture that does not exist in fact [57] but may exist in perception [58], largely because of media reports and openly advertised competition for cases.

The reality is that the spending ability of non lawyer commercial organisations allows them to advertise and capture cases that are passed to lawyers who pay referral fees at levels procured by competitive bidding at auction via the internet.

In the middle of this process is a client with a legitimate wish to obtain access to justice. Satisfaction of that wish must retain priority status as the legal services market enters a period of radical change.

Europe & collective redress

An interesting contemporary area of improved access to justice is under debate both here and in Brussels. It is described as consumer or collective redress. In a consultation paper in July 2006 [59] on representative actions the Department for Trade & Industry recognised the difficulty of consumers collectively bringing and enforcing a remedy for breaches of consumer protection legislation. It proposed that, as permitted by the Competition Act 1998, the Secretary of State should designate a body to bring a representative action on behalf of consumers who have suffered loss or damage as a result of an infringement of a competition prohibition saying that:

'Bringing a case to Court is a right not an obligation. Consumers would still be free to bring individual cases themselves or not to take part in legal action at all, even if a representative action is ongoing. This policy is not designed to change these rights but to provide additional access to justice for groups of consumers who feel unable to bring cases on their own.'

Already for cases before the Competition Appeal Tribunal the Secretary of State has designated the Consumers Association (Which?) to bring actions on behalf of consumers and Which? is currently doing so in a case concerning the alleged price fixing of replica football kit.

Following the DTI paper, the Office of Fair Trading produced a discussion paper [60] this April recognising that consumers and small to medium sized businesses face practical barriers to enforcing their rights for breaches of competition law. The OFT paper anticipates a forthcoming White Paper from the European Commission, following the Commission's earlier Green Paper in 2005 on more effective private damages actions for breach of anti trust rules. In keeping with this theme the European Commissioner for Competition Policy, Neelie Kroes in a speech this March [61] said:

'...even in member states with advanced national anti trust rules there is little evidence that consumers and business customers are fully exercising their right to damages for harm. This means that many injuries are left uncompensated with society and the economy left to absorb that loss. This situation is clearly unjust...developing private enforcement must not mean creating a system in which unmeritorious litigation can flourish... but it has to be clear that staying where we are today is not a solution'.

The Commissioner goes on to say that the Which? representative action over football shirt pricing empowers groups that truly represent the interests of consumers and is 'closer to the heart of European traditions', dismissing the notion of the US style opt-out class action but being willing to contemplate double damages as a deterrent to 'hard core cartels'.

There is strong debate about the merits of the opt in or opt out procedure when a group action is brought. However efficiently a group action is case managed by a judge using the group litigation order procedure, it is difficult to ensure that everyone affected as a potential claimant is included in the action. Is it preferable that all those who suffered harm should be included at the outset (whether they are aware of the action or not) in an opt out group, on the basis that they can later opt in, or that only those who are actually aware of the action should opt in by a stated deadline?

As Rachael Mulheron of Queen Mary University [62] has argued:

'The use of an opt in approach is unattractive... it hampers the objective of providing access to justice for claimants, it fails to provide certainty and may increase the frequency of litigation for the defendant... by contrast the opt out approach... provides innumerable advantages'.

Consumers who wish to gain access to the Courts to seek redress collectively will be encouraged by the European Commission Consumer Policy Strategy for 2007-2013 [63] which intends to:

'ensure a high level of consumer protection through a simple legal framework, improved evidence, better consultations and better representation of consumers' interests'.

The importance of the European influence on civil justice and access issues is confirmed by Dr Christopher Hodges of the Oxford University Centre for Socio-Legal Studies [64]:

'Access to justice remains a top priority for the European Union, as evidenced by the fact that the Finnish EU

Presidency in the second half of 2006 set promotion of citizens' access to justice... as one of its priorities'

Pro Bono Publico

This Reading commenced with a historical glimpse at the legal representation of the poor so it is appropriate to mention the up to date provision of clause 195 of the Legal Services Bill. Legal advice that is given *pro bono publico* has been described by Professor Andrew Boon as a 'mechanism for elevating legal professionalism' [65].

Pro bono is of course only an adjunct to and not a substitute for legal aid [66] but the modern relevance of pro bono was even included in the Government White Paper 'Putting Consumers First' [67] :

' Pro bono initiatives by the legal professions are entirely consistent with the objectives of the new regulatory system. The Government is committed to ensuring that the public continues to benefit from pro bono legal advice under the new regulatory arrangements.'

The Legal Services Bill itself now contains in clause 195 a long overdue reform to level the access to justice playing field for the pro bono assisted litigant. In our civil system where costs follow the event it is a disadvantage for one side to be denied the weapon, (for that is what it is), of the losing opponent having to pay costs.

Because of the indemnity principle and the agreement to act for free the pro bono lawyer cannot expect to seek an order for costs if the case is won. However, clause 195 of the Legal Services Bill, entitled 'payments in respect of pro bono representation' will level the costs playing field by making it possible to recover costs on behalf of a successful pro bono litigant.

Importantly those costs will go, not to the pro bono lawyer, but to a newly established single charity prescribed by the Secretary of State to redistribute the funds received so as to provide financial support

'to persons who provide or organise or facilitate the provision of legal advice or assistance (by way of representation or otherwise) which is free of charge'.

This is another small but significant step in levelling the litigation playing field that will make it easier for people to gain access to justice, in this sense without having to worry about the key to the funding door.

Conclusion

In preparing this Reading I have learned much about areas of law and civil justice where I was ignorant. And ignorance is the enemy of justice as Plato in his Republic [68] observed to Thrasymachus:

'What kind of a thing is justice when contrasted with injustice? It was asserted I imagine that injustice was more powerful and influential than justice but now, said I, if justice be both wisdom and virtue it will easily be demonstrated that it is stronger than injustice since injustice is also ignorance'.

2000 years later the same point was made by Justice Brennan of the Supreme Court of the United

States [69]:

'Nothing rankles more in the human heart than a brooding sense of injustice. Illness we can put up with, but injustice makes us want to pull things down. When only the rich can enjoy the law, as a doubtful luxury, and the poor, who need it most, cannot have it because its expense puts it beyond their reach, the threat to the existence of free democracy is not imaginary but very real, because democracy's very life depends upon making the machinery of justice so effective that every citizen shall believe in the benefit of impartiality and fairness.'

At the outset, I referred to the importance of the legal literacy programme to educate citizens in the awareness and appreciation of rights and responsibilities in society. If it is reasonable therefore to assert as Plato did that ignorance and injustice are linked, then, whatever other access to justice issues have been canvassed this evening, perhaps the agenda to expand legal literacy in order to remove ignorance of the law, could become the most important access to justice key of all; and there can be no better place to have the opportunity to convey that message than in a free public Reading here at Gresham's College, the first Open University. Thank you for the opportunity.

With thanks and acknowledgements to: Robert Musgrove, Alex Madden, Angela Lunn.

©Michael Napier, Gresham College, 14 June 2007

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