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The British Legal Aid System

*Albert Utton†*

Our nation has just begun to debate the feasibility of effective legal representation for the poor. There is much to be learned from Great Britain’s fifteen years of experience with a truly comprehensive legal aid system.

The legal aid in civil matters which Britain extends to its poor includes representation by solicitors and, if necessary, barristers, in the preparation and hearing of a case in all courts except the magistrates’ courts (which deal mainly with criminal matters) and the highest appellate court, the House of Lords.¹ In addition, the coverage of the scheme was extended in 1959 to include legal advice and again in 1960 to include legal aid to contest or support claims where eventual court proceedings are improbable.²

Under the Act, lawyers, through the Law Society, rather than government authorities administer the system. The drafters sought to avoid possible conflicts of interest which might arise if government agencies were called upon to aid suits against other agencies. In addition, they believed that a closer and more confidential lawyer-client relationship would exist if the attorney were not a state employee.³ The Lord Chancellor has general supervisory power but no authority over the detailed administration of the plan.

As soon as any dispute or question arises, a poor client may get legal advice by simply contacting any lawyer who has placed his name on a legal aid list. Since nearly all barristers and firms of solicitors participate,⁴ a poor client has substantially as much freedom of choice as any other client.⁵ Officials never choose lawyers for clients, nor is there any rotation system by which lawyers are assigned a case in turn.

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1. See Legal Aid and Advice Act, 1949, 12, 13 & 14 Geo. 6, c. 51.
2. Legal Aid Act, 1960, 8 & 9 Eliz. 2, c. 28.
5. One is tempted to use the word citizen, but to qualify under the plan one does not have to be a citizen. See Bezzi v. Bezzi, [1955] 3 All E.R. 785 (P.D.A.). In this case both parties to divorce proceedings were foreigners (Italian) and both were legally assisted.
But lawyers may limit their participation to specified categories of legal service that usually comprise their practice. If the lawyer, after conferring with the client, believes that advice alone is not sufficient, and that further legal action is necessary, he applies to a local certifying committee.

The facts of the case are then placed before a subcommittee of four practicing solicitors and a barrister who attend meetings in rotation. If the applicant is financially eligible, the certifying committee must satisfy itself that he has a prima facie case in law on his own showing, and that it is reasonable under the particular circumstances of the particular case for the applicant to receive legal aid.6 The test of reasonableness is whether "a man of moderate means (sufficient to afford the costs of litigation but not in a position to waste money) would embark on litigation relying upon his own means; whether, in effect, it would be 'reasonable business' to take action." For example, aid would not be given where the applicant would usually be aided by some other organization or person, such as a trade association or trade union, or where the applicant wants to take an action with the aid of public funds which a person of moderate means would not as a rule take unless others helped to finance the proceedings.8

If a local committee rejects an application, the decision can be appealed to the area committee.9 In cases of urgency, emergency application can be approved by the chairman, vice chairman, or secretary of the local committee without reference to the certifying committee; as soon as practicable, the holder of an emergency certificate must supply the information required for an ordinary certificate.10 When an application has been granted, the chosen lawyer serves the client just as he would any other client, and funds are available for all usual expenses such as investigations and expert witnesses.11 The lawyer receives 90% of his usual fee for his services.

7. SACHS, LEGAL AID, 82 (1951).
8. An application would probably also be denied where the action is of a trumpery nature, such as some trespass or assault in the case of a backyard quarrel, where the expenses entailed in securing judgment would be disproportionate to the benefit which would be reaped, or where litigation is already pending which will decide the issue with which the applicant is concerned: in such a case, however, legal aid may be granted limited, for instance, to the issue of the writ. See, SACHS, LEGAL AID 81-82 (1951).
9. General Regulations, para. 10 (l).
11. For example, see Ullah v. Hall Line Ltd., [1960] 3 All E.R. 488 (Q.B.D.) where fees were paid to an eminent doctor and a consulting engineer.
Financial Obligations of Assisted Persons

The British plan benefits not only paupers, but also those who are financially able to pay part of the cost of legal services. Each applicant must contribute to the cost of his action in proportion to his means; this substantially reduces the amount of public funds necessary to carry out the Act. In fact in over one-half of the cases the assisted party pays part of the costs. The amount of the applicant's contribution is calculated from a formula based on the applicant's "disposable income" and "disposable capital." The certifying committee then sets the "actual contribution—estimated probable costs—as contrasted with the "maximum contribution," the legal upper limit, derived from the means formula, that the assisted party can be required to pay. The committee also decides how the contribution will be made—in a lump sum, installments, or a combination of the two. Where the actual contribution set is less than the "maximum contribution," but the costs later exceed the "actual contribution" figure, the area committee may raise the contribution. And if the client's financial circumstances change, the "maximum contribution" can be increased or decreased.

Assisted Persons' Responsibility for Adversary Costs

The government's legal aid fund is entitled to any sums recovered by way of an order or agreement for costs when the applicant-litigant is successful. These sums are substantial since costs under the English system generally include the lawyer's fees. The fund can often recover more than it spends, since the order for costs will be 100% of the taxable costs, including lawyer's fees, whereas the fund has to pay only 90%
of the fee of the lawyer of the assisted party under the plan.\textsuperscript{19} When an assisted person receives a judgment or an order for costs, the fund is first reimbursed for its contribution,\textsuperscript{20} and the successful litigant receives a refund for his contribution out of the residue. On the other hand, if the assisted party loses his case, he is liable to pay only a “reasonable” portion of his opponent’s costs, having regard to all the circumstances, including the means of the parties and their conduct in connection with the dispute.\textsuperscript{21} In practice, since the court considers the means of the parties,\textsuperscript{22} the assisted litigant, if unsuccessful, is seldom ordered to pay the costs of the successful, unassisted, opposing party.\textsuperscript{23} Whether successful or not the assisted party pays no more than the means-based “maximum contribution” which does not include the opposing party’s costs. Thus, until 1964, the unassisted but successful party to a law suit often found himself at a disadvantage when the other party was assisted by legal aid. If the unassisted party won, he usually would receive only a fraction of his costs; if he had lost, he would have to pay all of the tax-able costs of his assisted adversary. Although his taxes helped support the legal aid fund, he could be forced to defend a claim financed by that same fund and yet, if he was successful in vindicating his position, he had no recourse to the fund he helped support. Now, under the Legal Aid Act of 1964, the successful unassisted litigant can recover costs

\begin{align*}
19. \text{Thus, for example —} \\
\text{Total contribution of assisted person £100} & \quad \$280.00 \\
\text{General costs recovered against opponent £140} & \quad 392.00 \\
\hline & \quad 672.00 \\
\text{General costs expended by Legal Aid Fund £130} & \quad 364.00 \\
\text{Refund for assisted person £100} & \quad 280.00 \\
\hline & \quad 28.00 \\
\text{judgment of £500, and the Law Society was allowed to recover its costs of £134 14s. 9d.} \\
\text{In Law Society v. Rushman, [1955] 2 All E.R. 544 (C.A.), the plaintiff won a judgment} \\
\text{of £125 and the costs to the Legal Aid Fund for the suit were £167 10s; the Legal Aid} \\
\text{Fund was entitled to the entire £125 judgment. In Rolph v. Marston Valley Brick Co.,} \\
\text{[1956] 2 All E.R. 50 (Q.B.D.), the plaintiff child was injured when knocked down by a} \\
\text{truck. The plaintiff was granted a legal aid certificate and his contribution was assessed} \\
\text{at £22 10s. The plaintiff won a judgment of £1475 with costs, which became subject to} \\
\text{the charge of the Law Society to recoup the full amount they had expended for the} \\
\text{assisted party.} \\
21. \text{Legal Aid and Advice Act, 1949, supra note 1, at § 2(2)(c); Crystall v. Crystall,} \\
\text{[1963] 2 All E.R. 330 (C.A. 1962).} \\
22. \text{Legal Aid and Advice Act, 1949, supra note 1, at § 2(4); General Regulations} \\
\text{18(2)(a).} \\
23. \text{Dworkin, The Progress and Future of Legal Aid in Civil Litigation, 28 Modern} \\
\text{L. Rev. 432, 437 (1965). For examples of not allowing costs against assisted parties, see} \\
\text{(C.A. 1963); Herbert v. Herbert, [1964] 1 All E.R. 915 (P.D.A. 1963); Dugan v. Williamson,} \\
\text{[1963] 3 All E.R. 25 (C.A.).} \\
\end{align*}
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from the fund whenever his opponent initiated the proceedings, the court is satisfied that he would otherwise suffer severe financial hardship, and it is "just and equitable in all the circumstances that provision for those costs should be made out of public funds."\(^\text{24}\)

Although some people claim that it is just and equitable to grant costs from the fund to any successful unassisted defendant sued by an aided plaintiff, the Act intended only to ameliorate the worst cases, and was more interested in protecting the solvency of the fund than in aiding all the successful unassisted defendants.\(^\text{25}\) Even if the proceedings are long and costly, costs are not allowed a wealthy defendant. Only defendants may take advantage of the 1964 Act, because an unassisted plaintiff always has the option of not suing at all. But if the unassisted plaintiff is made to defend a counterclaim, the counterclaim can be treated as a separate proceeding so that he could obtain an order for costs from the fund.\(^\text{26}\)

Legal Advice

Anyone, no matter what his means, is eligible for oral legal advice from the participating solicitor of his choice. If the person is receiving National Assistance (welfare), he is entitled to the advice free of charge; if he has a limited income the charge is 2 shillings 6 pence (thirty-five cents). All others, regardless of means, can receive the advice for £1 (§2.80) per half hour. The advice is given in the offices of the solicitors who agree to participate in this program.

By reducing litigation, legal advice can save money for both the individuals concerned and the Legal Aid Fund.\(^\text{27}\) The government has therefore been concerned with the recent slight decline in use of legal advice and has recommended more intensive advertising for the service.\(^\text{28}\)

To find out whether British lawyers considered their Legal Aid system a success, I sent a questionnaire to a random sampling of barristers and solicitors throughout the United Kingdom. In response to the question: "Is the service to those in need of legal aid satisfactory in regard to speed and efficiency?" 100% of those responding replied "yes," although a few replies were qualified or reflected understated


\(^{\text{25}}\) It was estimated that the cost under the 1964 Act would not exceed £25,000 per annum, whereas if costs were ordered for all successful unassisted persons, the cost to the fund would be £340,000 per annum. The Times (London), Nov. 15, 1963, p. 9, col. 1; 685 H.L. Deb. 1596 (1963). But see Dworkin, supra note 23, at 442.


\(^{\text{27}}\) Law Society, Legal Aid and Advice 53 (Fifteenth Report 1964-65).

\(^{\text{28}}\) Ibid.
criticism: "the speed and efficiency is dependent upon the personnel who administer it. The system is good," said one Portsmouth firm. And the Lord Chancellor's Committee recently observed, "our conclusion on the administration of the scheme is that it is now a smooth running machine."\textsuperscript{29}

Experience also shows that the system can identify those cases in which it is reasonable to grant legal assistance. From the inception of the scheme assisted persons have been successful in 87\% of the cases.\textsuperscript{30} Perhaps the high rate of success really demonstrates a serious shortcoming of the scheme—overly conservative administration. However, the Council of the Law Society contends that it is "misleading to attach much significance to the overall percentage of successes" since undefended divorce and separation cases artificially raise the percentage.

The legal profession has responded well to the scheme in quantity, quality, and spirit; virtually all practicing barristers and solicitors have voluntarily placed their names on the panels;\textsuperscript{31} and assisted clients get the same consideration and service as any other client. The volume of litigation has increased substantially since the scheme came into operation,\textsuperscript{32} and one-half of all cases brought before the courts are legally assisted,\textsuperscript{33} but this has not created insuperable problems of judicial administration. Some of my informants suggest that "firms are handling more cases than their staff can cope with and so the work is not as efficiently and speedily done as it once was."\textsuperscript{34} However, this problem has not reached serious proportions. Ninety-six per cent of the practitioners who responded to the questionnaire thought that the fees allowed under the plan are adequate, even though the solicitor or barrister is paid only 90\% of what his fee would be for an unassisted client.\textsuperscript{35} A Liverpool solicitor, for example, reported that "because of the increased flow of work, the legal profession has, on the whole, benefited." And the fact that nearly all practicing members of the profession have voluntarily participated testifies to the attractiveness of prompt and certain, if somewhat diminished, remuneration. A few of the lawyers, however, complained about the deduction or observed that "the remuneration is at the lowest tolerable level."

\textsuperscript{29} Id. at 52.
\textsuperscript{30} Id. at 8.
\textsuperscript{31} LAW SOCIETY, LEGAL AID AND ADVICE 2 (Thirteenth Report 1962-63); see also Matthews, supra note 4, at 73.
\textsuperscript{32} LAW SOCIETY, LEGAL AID AND ADVICE 58 (Twelfth Report 1961-62).
\textsuperscript{33} Matthews, supra note 4, at 72.
\textsuperscript{34} Also the Lord Chancellor's Committee recognized that "there is a nation wide shortage of legal staff." LAW SOCIETY, LEGAL AID AND ADVICE 52 (Fifteenth Report 1964-65).
\textsuperscript{35} In 1960 this was increased from the former 85\% figure. Legal Aid (General) Regulations (Amendment No. 4), [1960]. STAT. INSTR. 1961 (No. 2369).
The cost to the taxpayer has been entirely reasonable. Nearly half a million cases were closed in the first fifteen years; 82,971 of them in 1964-65. The total cost for the year was about £8.5 million ($24,000, 000). However, nearly 40% of the cost was recovered from sources such as costs recovered in successful litigation, and contributions from those aided. Over the last three years the average gross cost of litigation per case has been $174.24, but the net cost to the government was only $92.00. The additional cost of administration has averaged $49.63 per case, so the total cost per case was $223.87, and the expense of administration, which has declined for each of the last five years, was only 22% of the total (compared to the overhead of an American law firm which may average from 35 to 40% of gross income).

Could It Happen Here?

Unlike the British system, the American approach to legal aid has up to now concentrated almost exclusively on neighborhood centers and established municipal legal aid bureaus. Private American law firms play practically no role in assisting indigents in civil cases, nor has the bar shown interest in administering legal aid. Our system has many advantages for us. In this country, because of its size and the heterogeneity of its population, it is desirable to have neighborhood legal centers where the needy can also get the assistance of a social worker, employment officer, family counselor, doctor and psychologist. And a neighborhood office is much more convenient, for urban and rural poor alike, than a lawyer's office located "downtown." In addition, neighborhood centers can provide basic education in preventive law. Center lawyers can warn their clients of exploitive devices in leases, installment contracts and interest rates in order to avoid the crises of eviction, repossession, wage garnishment, and attachment. But we need

37. Some higher figures are sometimes given such as "almost . . . one-third of the government expenditure is required for the administration of the scheme." Address, Junius L. Allison, Director National Legal Aid and Defender Ass'n., Southwest Regional Conference on Legal Services to the Poor, Austin, Texas, March 25, 1966. However, in appraising such statements, one must realize that "governmental expenditures" do not account for all of the financial support of the scheme. It is more accurate to speak of the percentage of the total cost per case than the percentage of "governmental expenditures."
39. Clinton Bamberger, Jr., former Director of the Legal Services Program of the Office of Economic Opportunity has stated that the OEO will approve only "a very limited number" of programs patterned after the English system and "I am certain that there is little likelihood that applications [using the English system] will be approved." American Bar News, March 15, 1968, p. 7. This "limited number" of approved programs includes one in New Haven, Connecticut; one in North Carolina, one in Wisconsin and one in California.
not rely exclusively on such centers. Integration of private practitioners into our legal aid system would provide us with some of the most striking advantages of the British plan, notably the opportunity to choose one's lawyer, just as a medicare recipient can choose his doctor. And private practitioners could extend legal aid to Americans who could afford to pay only part of the costs; these people are most cut off from legal advice in civil matters today, since they are not eligible for traditional legal aid. The British plan need not be transplanted in its entirety, but some of its features could usefully be adapted for the American legal system.

40. Mr. Bamberger states that "The last estimate is that existing free legal assistance for indigents reaches only 10% of the need." Address, Southwest Regional Conference on Legal Services to the Poor, Austin, Texas, March 25, 1966. Even this assessment understates need by neglecting those who cannot afford to pay more than a part of legal fees and costs.
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