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THE 2024 LIONEL COHEN LECTURE

Breathing Life into the Law: Achieving Access to Justice in the Modern State

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1. Introduction

The need to provide efficient access to justice has presented challenges for civilised society since such societies came into being.

In the *Torah*, in the Book of Exodus – *Sh'mot* – we are told how, one morning, Moses' father-in-law, Jethro, saw Moses sitting to judge cases brought to him by the people.[1] Jethro asks Moses, 'What is this thing that you are doing? Why do you sit alone and all the people stand by you from morning to evening?' Moses replies, 'Because the people come to me to enquire of God when they have a dispute. They come to me and I judge between one and another, and I do make them know the statutes of God and His laws'.

Jethro expresses concern that Moses will wear himself out with all this judging – I know that feeling! He suggests to Moses that rather than attempting to hear all the cases himself, it will be better for everyone if he sets up a judiciary made up of different levels of judges. Jethro tells him, if you do this, you will be able to bear up and all these people will go home in peace. Moses realises that this is sound advice; he appoints judges in a hierarchy of courts. The passage concludes: '... and they judged the people at all seasons: the hard causes they brought unto Moses, but every small matter they judged themselves'.

Fast-forward a few thousand years and we have Magna Carta – an early bill of rights that has a fair claim to being the most celebrated document in English

[1] Exodus, Chapter 18 verses 13–26.

legal history.[2] Magna Carta is a charter which was sealed on 15 June 1215 by the then King of England, King John, recording the terms and conditions he agreed with a group of noble barons in the hope of preventing a civil war. It is true that the document got off to a rocky start, being annulled by the Pope a few years later, but its main provisions were reintroduced by successive monarchs and there is no doubt that it has gained iconic status in British legal history. This is exemplified by the fact that the carved stonework over the main entrance to the Supreme Court in London includes a scene showing the figures of King John and the barons, and the image of one of the four remaining original parchments of the Charter itself is etched onto the glass doors leading to our library.

Sir Christopher Greenwood GBE CMG KC, former Judge of the International Court of Justice, examined the history of Magna Carta in his own 2015 Lionel Cohen Lecture here and concluded that the primary importance of Magna Carta lies not in what it was but what it has come to symbolise.[3] Its most famous clauses, 39 and 40, remain on the statute book and still ring powerfully today – 'No free man shall be arrested or imprisoned … except by the lawful judgment of his peers or by the law of the land' – and, key to my topic this afternoon, '[t]o no one will we sell, or deny, or delay justice or right'. Those words have come to represent a commitment to the rule of law and to fair and effective access to the courts.

Drafters of more recent bill of rights texts have invariably included similar guarantees about the right to bring one's claim before an independent and impartial judge. Article 10 of the Universal Declaration of Human Rights entitles us all to a fair and public hearing. The Sixth Amendment to the United States Constitution establishes rights to a speedy and public trial. Particularly important in the United Kingdom is Article 6 of the European Convention on Human Rights. This states that individuals are entitled to fair and public hearings in the determination of their civil rights and obligations or of any criminal charge against them. Looking at the case law of the European Court of Human Rights in Strasbourg, which interprets the Convention for the benefit of all the contracting states, Article 6 is the right that the Court finds most frequently to have been infringed.

This afternoon I am going to talk about civil rather than criminal access to justice and I want to examine three particular issues with which court systems have long been wrestling.

- First, how do you ensure that the kinds of claim which are particularly challenging for a justice system to accommodate can be brought and managed efficiently and effectively? I have in mind the very many small claims for injury or financial loss brought by individuals usually against big corporations or insurers.

[2] Lord Igor Judge, 'Magna Carta: Luck or Judgement', lecture given in Temple Church, London (UK), on the 800th anniversary of Magna Carta, 19 February 2015, in Lord Judge, *The Safest Shield* (Hart 2015).

[3] Christopher Greenwood, 'Magna Carta and the Development of Modern International Law' (2016) 49 *Israel Law Review* 435.

- Secondly, how can you ensure that cases come before a court or tribunal with the right expertise and experience to help a litigant in navigating their way through what may be a complicated area of law?
- Thirdly, in so far as access to justice includes access to a lawyer to advise and represent you in court, how have recent changes in the way in which litigation is funded in the UK helped or hindered access to justice?

2. Group actions

First, then, let me describe some recent innovations in the court system in England as to how claims are brought.

There has always been a problem with ensuring access to justice in a situation where a large number of people all suffer a relatively minor injury or a small amount of financial loss arising out of the same unlawful conduct by one particular potential defendant. Usually, the person who allegedly caused that damage is a well-resourced global corporate group which can be expected to fight the claim as hard as it can. If the justice system can facilitate all those people joining together to bring a single claim with the same lawyers, then they can share the costs. And if the claims can all be dealt with at the same time before one judge, that will help to ensure that there is consistency in the law applied and the value of the compensation awarded. It might also encourage the defendant to agree to a compromise to settle the claim, giving a quicker result for all the claimants. It is important to realise that access to justice does not always have to result in a trial in court and a long judgment; a settlement of the claim can be just as effective and cheaper for both parties in the long run.

There are various procedural mechanisms by which this can be done. The UK has not generally introduced the kind of class action that is familiar in the United States. Class actions allow a single person to bring a claim and obtain redress on behalf of a class of people who have been affected in a similar way by the alleged wrongdoing. This has long been possible in the United States and, more recently, in Canada and Australia. Whether legislation to establish a class action regime should be enacted in the UK has been much discussed. In 2009, the government rejected a recommendation from the Civil Justice Council to introduce a generic class action regime applicable to all types of claim.

Instead, we have an array of three distinct procedural mechanisms. The oldest of these in English law is a procedure called a 'representative action', which dates back many centuries. It is, in essence, very like a class action but is very limited in scope – a representative must satisfy the court that they have the 'same interest' in the claim as all their co-claimants. Importantly, it cannot be used in situations where each person in the class has suffered loss of a different value. This has proved a substantial drawback in using the procedure.

A recent attempt to combine this ancient procedure with modern privacy legislation highlights the importance of this requirement. In *Lloyd v Google*,[4]

[4] *Lloyd v Google LLC* [2021] UKSC 50, paras 4 onwards in particular.

Mr Lloyd wanted to bring a representative action against Google for allegedly misusing the data of millions of Apple iPhone users by tracking their internet use and using the data for Google's own commercial purposes. He sought to meet the high threshold for bringing a representative action by claiming that everyone with an Apple iPhone had the same interest in a claim for loss of control of their data. A uniform sum could be awarded to everyone so there was no need to inquire into or value their individual loss, and hence no impediment to him representing the whole class of Apple iPhone users.

His claim was dismissed at an early stage by the Supreme Court, which found that the privacy legislation did in fact require an individualised assessment of each person's loss. It was not permissible to quantify loss at a group level. So, not every big claim strikes the court as being a good idea.

The second mechanism is the most claimant-friendly of the three but is limited to one small area of the law. Collective proceedings in competition or anti-trust law are based on a complex legislative scheme, which provides for the relevant tribunal to certify the person who wishes to represent the class as an appropriate person to take on that role. This procedure has radically altered the established common law principle on which claims for compensation are based because the statute setting it up removes the requirement for the court to assess individual loss. If the action succeeds, then an aggregate amount of compensation will be awarded for the class as a whole and the arrangements under which the representative will share it out amongst members of the class are approved and supervised by the tribunal.[5]

The third mechanism was introduced in 2000 following Lord Woolf's highly influential report titled *Access to Justice.*[6] He concluded that the existing procedural rules in England and Wales were inadequate for the complexities of multiple claims. The result was the introduction of group litigation orders. A group of people with claims that raise common or related issues of fact or law may apply to the court for a group litigation order providing for their individual claims to be managed together.[7]

Group actions have proved popular and are an increasingly used mechanism for achieving access to justice; there have been 123 to date.[8] One early example was the group action against the Royal Bank of Scotland arising out of the 2008 financial crisis: some 9,000 shareholders brought a group claim, arguing that the bank's directors had made misleading statements about the bank's financial health to promote a rights issue. The claimants included not only large

[5] See the discussion of the regime and the collective action brought on behalf of 46.2 million class members in *Merricks v Mastercard* [2020] UKSC 51. The statutory scheme enacted for collective actions in the Competition Appeal Tribunal was a response in part to the failure of a representative action brought by importers of cut flowers against airlines which had been party to an unlawful agreement to fix rates for freight: see *Emerald Supplies Ltd v British Airways Plc* [2010] EWCA Civ 1284.

[6] Lord Harry Kenneth Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*, vol 1 (HMSO 1996).

[7] Civil Procedure Rules 1998, SI 1998/3132 (CPR), r 19.21.

[8] HM Courts and Tribunals Service, 'Transparency Data: List of Group Litigation Orders', 23 April 2024, https://www.gov.uk/government/publications/group-litigation-orders/list-of-group-litigation-orders.

institutional investors, such as pension funds, but also small individual investors with just a few shares each. They achieved a significant settlement.

Reflecting on the case, one of the senior lawyers in the firm which represented the successful claimants perceptively observed that litigation develops in parallel with society:[9]

> Go back to the 1950s, even the 1970s, and people wouldn't have dreamt of questioning the advice of their lawyers or doctors. Now, as a society, we've become much more aware of our rights and that feeds into the legal system. If someone doesn't like the way they've been treated, they will much more readily seek the courts' assistance in enforcing what they regard as their rights.

The availability of group actions in my jurisdiction helps to support England's reputation as a centre of excellence for international dispute resolution. It can be a powerful way of ensuring access to justice, particularly in environmental cases. Let me give two recent examples. The first is the claims brought by a group of 1,800 Zambian citizens who lived near the Nchanga Copper Mine. They alleged that the negligent discharge of toxic materials from the mine had damaged their health and livestock. 'What has this got to do with the English courts?', you might ask. Well, the parent company of the company that owned the copper mine was incorporated and domiciled in the United Kingdom. The claimants wanted to bring their claim against that company, together with the subsidiaries more closely involved with operating the mine, in the English courts. This raised a preliminary issue of whether they should be allowed to pursue their claim in England.

That issue went up to the Supreme Court in London in 2019.[10] The Court recognised that, considering where the alleged wrongful acts occurred and the location of witnesses and evidence, Zambia would ordinarily be the natural forum for the litigation. However, there was a real risk that the claimants would not obtain access to justice in Zambia. The claimants were described as at the poorer end of the poverty scale in one of the poorest countries of the world. They were dependent on the local water courses as their only source of water for drinking, watering their livestock and irrigating their crops. It was those watercourses which they alleged had been polluted by repeated discharges of toxic matter from the mines for over a decade or so. Their ability to bring the claim at all depended on their being able to obtain the kind of group litigation order that the English High Court can make.

At the moment, a similar claim is about to be heard by the High Court arising out of the collapse of the Mariana Dam in southeast Brazil on 5 November 2015 – Brazil's worst ever environmental disaster. It caused damage to the River Doce (pronounced *Doh-Say)* system over its entire course to the sea

[9] 'RBS Shareholder Deal Shows that the UK Is Warming to Group Litigation', *Wedlake Bell Bulletins*, 20 June 2017, https://wedlakebell.com/rbs-shareholder-deal-shows-that-the-uk-is-warming-to-group-litigation.

[10] *Vedanta Resources Plc and Another v Lungowe and Others* [2019] UKSC 20.

some 400 miles away. There are over 200,000 claimants in the group litigation, including members of indigenous communities in Brazil for whom the river plays a unique role in their spiritual traditions. The Court of Appeal upheld the making of a group litigation order in that case. The Court referred to the particular branch of the High Court dealing with the case as being well known for its ability robustly and actively to case manage complex litigation, including group litigation. The Court Guide, published to help litigants, emphasises the importance of identifying the real issues, of setting a realistic timetable, obtaining proper disclosure of documents from the defendant, managing costs and encouraging party cooperation.[11] The court must, of course, always bear in mind what we refer to as the 'overriding objective' of the court's procedural rules: that is literally Rule 1.1. of our Civil Procedural Rules and has the objective of enabling the court to deal with cases justly and at proportionate cost.

Another recent procedural innovation is the Financial Markets Test Case Scheme, which is geared particularly towards issues raised in the financial markets.[12] The scheme sets up a process where the sectoral regulator, the Financial Conduct Authority, can start proceedings asking the court to resolve an important point of law without the need for there to be any particular dispute between the parties. This scheme was used recently with great effect to determine whether businesses could claim on their insurance policies when their businesses were closed because of the Coronavirus pandemic. When lockdown was imposed across the United Kingdom in response to the pandemic, many shops and businesses looked at their insurance policies and saw that they were covered for business interruption resulting from infectious diseases. Thousands of claims were filed under such policies by businesses suffering heavy financial losses. However, many of the insurers rejected the claims and refused to pay, saying that the wording of the particular clause in their policy did not cover this particular situation.

For example, some of the clauses in the insurance policies said that losses from business interruption are covered if the loss results from the occurrence of a disease like Covid within a specified distance of the insured premises, say 25 miles. But, said the insurers, even if the business owner making the claim can show that someone within 25 miles of his shop did have Covid, you cannot say that it was *that* person's illness that caused the lockdown and hence the closure of the business. The insurers said the loss was covered by the insurance policy only if the business could show that it was because of *that* illness within the 25-mile radius that the business was interrupted.

The FCA brought the proceedings for the benefit of policyholders but without any particular policyholder having to be a party to the case at all. The approach taken was to consider a representative sample of standard form business interruption policies in the light of agreed and assumed facts. It was estimated that, in addition to the particular policies chosen for the

[11] *Municipio de Mariana v BHP Group (UK) Ltd and Others* [2022] EWCA Civ 951.

[12] Described in Practice Direction 63AA, which accompanies CPR Part 63A – Financial List, CPR r 63AA(6).

test case, some 700 types of policy across over 60 different insurers and some 370,000 policyholders were potentially affected by the outcome of this litigation.

The proceedings were started on 9 June 2020. The trial took place online over eight days just over a month later in mid-July 2020. A judgment from the High Court running to 580 paragraphs was handed down about a month and a half after that on 15 September 2020. The case was appealed straight to the Supreme Court, bypassing the Court of Appeal, and was heard in November 2020. Judgment was handed down on 15 January 2021, a few days short of a year after the World Health Organization declared that Covid was an international pandemic.[13] By the way, the Supreme Court held that as long as the business could show that there was one Covid sufferer within the 25-mile radius, then it could claim on its insurance: the lockdown was caused equally by all the Covid cases and the business did not have to show that the particular sick person had caused the closure of its particular business.

Now this was not a case where money to fight it was in short supply. When the case came to the Supreme Court there were nine parties, a total of 31 barristers instructed of whom 13 were Queen's Counsel. But still, perhaps none of those small businesses would have had the courage to take on the power of the insurance industry if the Test Case Scheme had not enabled them to have the interpretation of their contracts dealt with so quickly and at the highest level.

3. Online dispute resolution

Let me now turn to how the digitisation of dispute resolution procedures can help people in gaining access to justice. The situation I am addressing here is not the situation where there are thousands of similar small claims arising from the same unlawful act but where a single claim arises out of a particular road accident, or a faulty item bought in a shop, or bad workmanship by a builder or other service provider.

Let me take road accidents as an example. One of the most difficult challenges for any justice system is how to resolve the vast number of claims each of which is for a few thousand pounds brought by people who are injured in a minor car accident. These people undoubtedly have a claim, and most countries insist that every motorist is insured to cover paying compensation to someone who is injured by the negligent driving of the insured. Usually there is not much scope for argument about who is to blame. Still, it is important to set up a system whereby the compensation due for the pain suffered and for any loss of earnings if the claimant had to be off work can be claimed. It is also important to do this without the claimant having to incur legal fees that will eat away at the value of the claim.

The English court system has tackled this by setting up a specially designed online platform on which any accident claimant can apply quickly and efficiently. The would-be claimant enters the necessary details, the date and

[13] *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1.

time of the accident, information about themselves and about the injuries they suffered and any financial loss they incurred. They can enter the details they obtained at the scene of the accident as to which insurer covers him. The online platform then automatically notifies the defendant's insurer. The platform guides the parties on how to decide whether the other driver was indeed liable and, once liability is agreed, it guides them through the process of sorting out the value of the claim. It explains how to obtain and upload a medical report and gives guidance on the appropriate sum for compensation for the particular injury suffered.

The online platform has proved a great success, and in the vast majority of cases the parties reach agreement on the amount to be paid without the claim ever having to go before a judge.

The success of that platform has been matched by the online process – the Online Civil Money Claims (OCMC) service – which is available more generally to bring claims that are not for injuries but for small amounts of money – for breach of contract, for example.[14] The limit when the service was introduced was £10,000 – about NIS 46,500. It is designed specifically to be usable by litigants who do not have legal representation but was recently extended to allow claims which are brought by legal representatives up to a value of £25,000 – about NIS 116,000. The platform is accessed through the OCMC website and allows submission of claims and responses online. On average, settlement is reached 24 days from the day on which the claim is issued.[15] A potential claimant can simply search online for 'small money claim UK' and go to the gov.uk website. The website will guide the user through a series of questions to check whether the claim is eligible and, if it is, the website will invite them to set up an account – and away they go.

According to the government fact sheet published in February this year, the Online Civil Money Claims service has issued more than 470,000 claims from clients who are not legally represented since it was introduced in March 2018. It has achieved an average user satisfaction rating of 95 per cent for claimants and, interestingly, 66 per cent for defendants using the service – I wonder how many law firms could boast of similar statistics!

The recent legislation, the Judicial Review and Courts Act 2022, provides for a special rule-making body to devise the Online Procedure Rules. This has the ambitious aim of connecting up the many existing bodies, including charities, online mediation services and arbitration portals, as well as the courts, to provide a one-stop shop for litigants.[16]

At the UK Supreme Court, we are currently in the middle of our own modernisation programme. This autumn we hope to launch an online case

[14] The Online Civil Money Claims is a pilot scheme under CPR Practice Direction PD51R. It aims to replace the existing Money Claim Online system.

[15] HM Courts and Tribunals Service, 'Fact Sheet: Online Civil Money Claims', 27 February 2024, s 3, https://www.gov.uk/government/publications/hmcts-reform-civil-fact-sheets/fact-sheet-online-civil-money-claims.

[16] Geoffrey Vos, 'Speech by the Master of the Rolls: The Future of the Courts', given at University College London, Bentham House, 'The Future of Courts: Expert Panel and Discussion', 14 May 2024, https://www.judiciary.uk/speech-by-the-master-of-the-rolls-the-future-of-courts.

management system, known as the portal. Rather than parties filing written applications, the portal will guide litigants through a series of questions and allow them to manage their case online. The hope is that it will make case filing and management more intuitive and efficient. All the language and digital forms on the portal have been designed to be accessible and have been tested with various user groups.

4. Judicial independence and expertise

I will now turn briefly to another aspect of access to justice, which is the right to have one's case heard by an impartial and expert tribunal. Other colleagues who have had the privilege of giving this lecture in previous years have talked about the independence and integrity of the judiciary and the importance of those for the rule of law, which is of course a key element of access to justice.[17]

I am going to talk about something different, which is the expansion of the tribunal service in the United Kingdom. The tribunal service operates alongside the court service. Each tribunal is set up by statute as the exclusive forum to hear appeals, usually against a particular kind of decision taken by a government official. They have two key features. First, they deal only with one specific area of the law. For example, there is a tribunal for appeals brought by people whose claim for a social security benefit payment or financial child support has been refused. There is the Mental Health Tribunal, which hears appeals about whether a person who has been compulsorily detained in a mental hospital has recovered sufficiently from their illness to justify being released without posing a danger to themselves or to other people. There is the Immigration Tribunal, which hears appeals from people who have been refused asylum or leave to remain in the UK.

The second key feature is that a tribunal will often include on the panel a judge who is not legally qualified but has different qualification or relevant experience that they bring to the adjudication process.

This is particularly important in legal areas where there are likely to be a large number of litigants without legal representation. Such people would struggle to instruct and pay for a lawyer to act for them. It helps them to obtain access to justice if the burden of explaining the law or other aspects of the case is taken off their shoulders because the judges on the panel specialise in that area of law or are experts in another discipline.

If I may draw on my own experience: my first judicial role was as a judge on the Competition Appeal Tribunal, which deals mainly with anti-trust and complex regulatory matters. In each case I sat with two others – some of whom had no legal qualification or prior experience. There were professors of economics, or people who had spent many years working as company executives in the retail sector or the telecommunications sector, or as accountants.

I also sat on the Environment Tribunal, which put together panels to handle a particular set of appeals in which the success of the challenge to a series of

[17] Lord Burnett of Maldon, 'Institutional Independence and Accountability of the Judiciary' (2022) 55 *Israel Law Review* 360.

decisions by the Department for the Environment turned on having someone on the panel who could look at a map and work out which way rainwater would run down hills. I sat on those appeals with a qualified hydrologist. Other panels have, for example, a lawyer and a doctor to hear appeals in the Mental Health Tribunal, and qualified surveyors expert in valuing buildings or land can sit in cases concerning disputes over land valuation.

5. Legal representation

However, access to justice is not just about small claims. Even someone with a large claim might struggle to find the money for a lawyer and might be put off asserting their rights for fear of losing and having to pay the costs of their opponent. In our system the general rule is that the party who loses the case has to pay the legal costs of the person who wins. That creates a large financial risk for anyone thinking of bringing a claim, even for quite a lot of money. Nowadays most people would recognise that if a person needs access to justice for a complicated case, they will have a better chance of obtaining the result they want if they can have a qualified lawyer in their corner. How can we ensure that access to justice is available to everyone – not just the very rich?

We used to have a generous system in England and Wales of legal aid in civil litigation in addition to criminal trials; this system was set up at the same time as the other core parts of our welfare state, such as the National Health Service, were established.[18] In the days of legal aid, a litigant could instruct a solicitor and barrister, who would send their invoice to the government which would pay it, though the government fixed the rates at a lower hourly rate than private clients would be charged. That system has now largely been abolished in England and Wales except for limited eligible categories of legal work.[19]

However, the desire of the state to save money by removing legal aid has been accompanied by a complete turnaround in attitudes towards two things. The first is attitudes to what arrangements are appropriate and ethical for lawyers to enter into with their clients about the amount and the payment of their fees. The second is whether a third party who is neither the claimant or the defendant can provide funding for the lawyers to fight the case – usually in return for a share of any compensation that the claimant wins at the end of the trial. A common model is a combination of those two.

Until quite recently such arrangements were illegal. It was illegal for a lawyer to agree with his or her client that the payment of their fees was dependent on winning the case, and it was certainly illegal to agree that the amount of the fee would be calculated as a share of any damages received from the other side if the lawyer's work was successful. The ancient criminal offences

[18] Legal Aid and Advice Act 1949.

[19] Legal Aid, Sentencing and Punishment of Offenders Act 2012, Sch 1. The remaining eligible categories include claims relating to the protection of children, mental health and special educational needs.

of champerty and maintenance date back to the thirteenth century. Champerty – an agreement under which a third person would be paid a share of the compensation received – was regarded as particularly pernicious. It was thought that the purchase of a share in litigation presented an obvious temptation for the suborning of justices and witnesses, and the exploitation of worthless claims which the defendant lacked the resources and influence to withstand.[20]

Those criminal offences survived long after the medieval rationale had fallen away, but it was not until the late 1960s that litigation funding was decriminalised. Even then, the common law continued to consider such agreements as contrary to public policy and therefore still unenforceable, even though not a criminal offence. However, a combination of liberalising legislation and a series of important court decisions has dramatically changed the landscape.

These kinds of arrangement are now commonplace. Now a typical conditional fee agreement between a client and their lawyer will contain four elements:

- First, the lawyer will agree that she will only be paid her fees if the client wins; if the case is lost, the lawyer will have worked for nothing.
- Secondly, the lawyer will usually agree to wait until the end of the case before collecting any fees rather than being paid as she goes along.
- Thirdly, to compensate her for the risk, if the lawyer wins she receives not only her fees but also an uplift – an additional amount usually expressed as a percentage of the fees earned as a success fee.
- Fourthly, the client will take out an insurance policy because if he loses, although he will not have to pay his own lawyer, he is likely to be ordered to pay the costs of the other side.

As for third-party funders, global businesses have sprung up which treat large-scale litigation claims brought in our courts as an investment vehicle, gathering contributions in from a wide range of sources to finance the lawyers and expert witnesses in exchange for a share of any winnings, which are then distributed among the investors to give them a profit on the money they put in, just like interest on a loan or a dividend on shares. Here, those taking the risk of losing their money are not the lawyers because they will always get paid as normal. It is the third-party funder who puts up the funds for the lawyers' fees who will lose all that money if the case is lost.

Many judges have mixed feelings about these developments. On the one hand, there is no doubt that this funding has enabled many thousands of litigants to have access to justice, which they certainly would not have had if they had had to find the money to pay lawyers from the start of the case, and if they had had to take the risk of having to pay the opposing party's fees if they lost. Supporters of the arrangements say that lawyers and third-party funders will act in a case on this basis only if they are confident that it has strong merit. The system should therefore weed out bad claims, which no one would want

[20] *Giles v Thompson* [1994] 1 AC 142, per Lord Mustill.

to fund or to risk working on for nothing. The kinds of dispute that have benefited from this kind of arrangement are hugely varied. They range from Spanish fishermen challenging the ban imposed by the UK government to stop them fishing in UK seas,[21] to the ex-wife of a very wealthy Russian businessman trying to enforce her divorce award of over £430 million against his yacht and works of art,[22] to the recent case brought by Mr Bates against the Post Office about the Horizon computer system scandal.[23]

On the other hand, some lawyers feel uncomfortable at the idea that a piece of litigation can be regarded in the same way as a hedge fund or a portfolio of stocks and shares for use by people looking to invest their money for a profit. They also say that defendants faced with a claimant who is not taking any risk with their own money may well agree to compromise by paying damages, even if the claim has little merit, rather than face the prospect of years of litigation.

To mitigate these potential problems, the freeing up of methods of litigation funding have been controlled by both government regulation and by codes of conduct imposed by industry bodies.

For third-party funders, there is now an organisation called the Association of Litigation Funders of England and Wales, which has published a Code of Conduct for third-party funders as to what they should and should not include in their contracts. For example, the Code of Conduct requires the funder to ensure that the client who is to be party to the litigation has received independent advice before entering into the agreement. The funder must also promise not to try to influence or control in any way how the lawyers conduct the case.

Conditional fee agreements between clients and their lawyers are closely regulated by the state to ensure that litigants are not exploited. There are now regulations in place that stipulate that any arrangement (i) must be in writing; (ii) must state the percentage amount of the success fee uplift; and (iii) that uplift percentage must not exceed 100 per cent.[24]

The importance for the lawyer of making sure the agreement is drafted to comply with the regulations was dramatically illustrated by a recent case in which an international law firm racked up $3 million in legal fees representing a client in a major arbitration.[25] The client won an arbitral award measured in the billions and the firm asked for its fees. Far from being grateful for all the hard work the lawyers had put in on its behalf, the client refused to pay. Unfortunately for the law firm, its terms of engagement did not expressly state the success fee percentage, and the formula set out in the agreement, applied to the facts of the case, would result in a success fee in excess of 100%. The agreement was therefore unenforceable. Not only was the firm

[21] *R (Factortame Ltd and Others) v Secretary of State for Transport, Local Government and the Regions (No 8)* [2002] EWCA Civ 932, [2003] QB 381.

[22] *Akhmedova v Akhmedov and Others* [2020] Costs LR 901.

[23] The procedure followed in this protracted litigation and the various judgments delivered are described by the trial judge Fraser J in the Introduction section of his judgment in *Bates and Others v The Post Office Ltd (No 6: Horizon Issues) (Rev 1)* [2019] EWHC 3408 (QB).

[24] Courts and Legal Services Act 1990, s 58.

[25] *Volterra Fietta (a Firm) v Diag Human SE and Josef Stava* [2023] EWCA Civ 1107.

prevented from claiming additional fees but – to add insult to injury – the court said it had to pay back the fees that the client had already paid. The public policy was clear, the court said. Although it could operate harshly in some cases, it was not difficult for law firms to draft their agreements so as to comply, and it should be something they think about carefully before signing up any particular client.

Alongside these fundamental changes to how lawyers can be paid there has been a huge increase in the amount of pro bono work, where the lawyers agree to work for nothing as a public service.

I would like to mention briefly one commendable initiative from which I certainly benefited as a High Court judge. A scheme set up in the Chancery Division of the High Court provides 'on the day' advice and representation to litigants who would otherwise be unrepresented when bringing or responding to urgent applications.[26] Barristers volunteer to make themselves available for the day and help whoever comes through the door to attend before the judge who is handling a list of cases, each of which is only going to take an hour or so to argue.

The Chancery Court scheme is a four-way win. First, it gives junior advocates the opportunity to argue a case in a senior court. This is especially valuable because this court is involved with areas of law where there are few small cases, so junior advocates do not often get the chance to appear in a case without a more senior colleague, who actually presents the argument. Secondly, it gives the litigant the chance to obtain some free legal advice and someone to help to focus the case on the best argument they have. Thirdly, the judge is relieved of having to try to extract the basic facts from a nervous litigant, who is probably standing before a judge for the first time. Fourthly, the court system wins because the advocate will often sift out the hopeless cases and speed up the good ones, so making the process more efficient.

It would not be right, however, to suggest that these methods of mitigating the impact of the withdrawal of legal aid have entirely plugged the gap. The Law Society, which represents the solicitors' profession in England and Wales, recently published a report on legal aid in civil (rather than criminal) cases. It points out that fees paid for civil legal aid in those areas of legal work where it is still available have not risen for 28 years, and the numbers of law firms prepared to provide advice at those rates in important areas of the law is patchy across the country. Those areas are also areas of legal work which are not suitable for the kind of funding arrangements I have described. For example, a claimant in a housing or immigration case may be successful, but the result is not a pot of money which can then be used to pay the lawyers or the funders but the provision of a home or the right of entry to the UK.

The National Audit Office is a national body – independent of Parliament and of the government – which investigates whether public spending is providing good value for the taxpayer. It recently investigated the government's

[26] Courts and Tribunals Judiciary, 'Chancery Litigant in Person Support Scheme', January 2014, https://www.judiciary.uk/courts-and-tribunals/business-and-property-courts/chancery-division/litigating-in-the-chancery-division/clips.

management of legal aid. It reported that the changes to legal aid have indeed led to a substantial reduction in spending on legal aid itself.[27] However, it also reported that the Ministry of Justice has made less progress in analysing whether these are real savings in public finances or whether they are offset by expenses elsewhere in the system. Yes, there may be less money spent on lawyers but, the report points out, that may mean that a person cannot afford to obtain advice and so is not told at an early stage that their claim is hopeless. This means that more cases end up getting to court. Cases may also take up more court time and resources where the judge in effect has to do some of the work that the lawyer would otherwise have done in sorting through the documents, trying to get at the facts, and trying to find and absorb the relevant statutory provisions which the litigant does not understand. Contrary to public perception, lawyers working together with judges and the court staff tend to be good at resolving disputes efficiently.

6. Legal development

Finally, I would like to focus on why providing access to justice matters not just to the litigants themselves but for the development of the law.

Anyone who wants to understand what access to justice is and why it is important in society would be well advised to read the judgment of Lord Reed – now the President of the Supreme Court – in the landmark ruling about the introduction of fees for claimants who want to bring a case in the Employment Tribunal.[28] These tribunals are the first port of call for claims by people claiming they have been unfairly dismissed from their work or have been unlawfully discriminated against in their work. Until recently, claims could be brought without having to pay a fee. The government brought in a new regime of fees for lodging such claims. A challenge to the legality of the fees was brought by a trade union that represents some of the lowest-paid workers in our society. The fees imposed would in many cases be much higher than the value of the case.

The government's justification for imposing fees where none had been imposed before was this. It costs money to run the tribunal service to pay the judges and provide the premises. If there are no fees for bringing the claim then all that expense is being paid for by taxpayers generally. However, the government said, the only people who benefit from the system are the few people who use it. The government's case therefore was based on the assumption that there are what it called 'no positive externalities for society from the consumption of tribunal services by litigants'. In other words, the government said, the use of Employment Tribunals – or presumably any court – does not lead to any gain to society beyond the gains that are enjoyed by the consumers who use the tribunals and the people who are paid to provide the tribunal services.

[27] National Audit Office, 'Government's Management of Legal Aid', 9 February 2024, https://www.nao.org.uk/reports/governments-management-of-legal-aid.

[28] *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51.

The Supreme Court disagreed. As Lord Reed said, access to the courts is not of value only to the particular individuals involved. 'The administration of justice is not merely a public service like any other and courts and tribunals are not just providers of services to "users" who appear before them'.[29] There are wider benefits to society, the most of which is that cases establish a general principle of law, which then governs how the law applies for the future. Lord Reed said:[30]

> Every day in the courts and tribunals of this country, the names of people who brought cases in the past live on as shorthand for the legal rules and principles which their cases established.

Lord Reed pointed out in his judgment that the written submissions lodged by the government prior to the hearing in that very appeal cited over 60 cases, each of which bore the name of the individual involved, and each of which was relied on as establishing a legal proposition. The government's own use of these materials refuted the idea that taxpayers derive no benefit from cases brought by other people.

Further, cases decided by the courts also form the basis of the advice given to those whose cases are now before the courts, or who need to be advised as to the basis on which their claim might fairly be settled, or who need to be advised that their case is hopeless.

There is also a wider benefit to society in businesses and individuals knowing that they can enforce their legal rights if they have to do so – and that they face a real risk of being sued if they infringe someone else's rights. The ultimate threat of court action, he said, underpins 'everyday economic and social relations'. In other words, what makes people in general stick to their contracts and take care not to act negligently is the knowledge that those harmed by their conduct will have access to a court to enforce their rights.

The cases Lord Reed cited in his judgment included perhaps the most famous case in English law, which every law student learns in the first week of their studies: *Donoghue v Stevenson*,[31] the case about the claimant who became ill from a decomposed snail in a bottle of ginger beer. One of the great benefits to society of access to justice, particularly for small cases, is that it is from apparently trivial facts that great legal principles can emerge – principles that are passed down through the generations and from which everyone in society can benefit.

Let me close with two such cases, separated by over three hundred years. The first relates to an all too familiar modern experience, a cancelled flight. A case came before the Supreme Court earlier this year concerning Mr and Mrs Lipton's claim for £220 compensation after their flight from Milan to London was cancelled.[32] The airline argued that as the cancellation was caused

[29] ibid para 66.
[30] ibid para 70.
[31] *Donoghue v Stevenson* [1932] AC 562.
[32] *Lipton and Another v BA Cityflyer Ltd* [2024] UKSC 24.

by a pilot falling ill, it could rely on the defence of 'extraordinary circumstances' provided by the relevant European Union (EU) law – hardly the stuff out of which grand decisions are made.

As it turned out, the case more than justified the Supreme Court's attention. First, tens of thousands of claims are made under the legislation every year in the UK. Precisely because the compensation amounts are small, it is crucial that the rules are stated clearly. Secondly, between the date of the cancelled flight and the date of the court hearing, the UK left the EU. The case therefore raises the important question of how, under the legislation which brought about Brexit, causes of action that accrued before Brexit should be approached by a court hearing the case now. The same question will arise in respect of all former EU law and urgently requires an answer. Again, the significance of the Court's decision will extend far beyond the immediate parties to the case.

Looking further back, the point is equally well illustrated by the old case of *Armory v Delamirie*.[33] The case was heard before Sir John Pratt, who was Chief Justice of England between 1718 and 1725. The judgment therefore dates back to 1722, and is one of my favourite cases. By way of background, I should say that in the eighteenth century and through much of the nineteenth, there were many chimney sweeps working in London – like Bert in *Mary Poppins*. It was customary for chimney sweeps to employ little boys to climb up inside chimneys to push down the soot when an adult chimney sweep was engaged to clean the chimneys in a house (though I am sure that Bert never did anything so cruel). The report from 1722 says:

> The plaintiff, being a chimney sweeper's boy, found a jewel and carried it to the defendant's shop (who was a goldsmith) to know what it was, and delivered it into the hands of the apprentice who, under pretence of weighing it, took out the stones, and calling to the master to let him know it came to three halfpence, the master offered the boy the money, who refused to take it, and insisted to have the thing again; whereupon the apprentice delivered him back the socket without the precious stones.

One can picture the scene of the ragged little sweep appearing in the grand surroundings of the Chief Justice's court, but, because he could achieve access to justice, we have this case which for many years has stood for three important legal propositions. The first arises from the fact that it was not the goldsmith himself who took the jewel but his apprentice who was behind the shop counter at the time the sweep came in. So the case is authority for the fact that the goldsmith could be legally liable for the actions of his employee – an important point on which many claims are brought against employers today. The second principle is that the goldsmith argued in his defence that

[33] *Armory v Delamirie* [1722] EWHC J94. See the discussion in Robin Hickey, 'Armory v Delamirie (1722): Possession, Obligation and the Evolution of Relative Title to Goods' in Simon Douglas, Robin Hickey and Emma Waring, *Landmark Cases in Property Law* (Hart 2015) 131; Gideon Parchomovsky and Alex Stein 'Reconceptualizing Trespass' 103 (2009) *Northwestern University Law Review* 1823.

the sweep's boy could not prove that he was the legal owner of the jewel. That did not matter, said the Chief Justice – as long as the little sweep has more right to the jewel than the goldsmith has, he can claim damages for its loss, using the old cause of action in trover.

The third point is one for which it is often cited even today. The goldsmith's other line of defence was that because the little sweep could not produce the jewel to the Court he could not prove whether it was a valuable jewel – a jewel of the finest water (or, as we would say now, a jewel of the greatest clarity) – or not. The law report records how the Chief Justice dealt with this:

> As to the value of the jewel, several of the trade were examined to prove what a jewel of the finest water that would fit the socket would be worth; and the Chief Justice directed the jury, that unless the [goldsmith] did produce the jewel, and shew it not to be of the finest water, they should presume the strongest case against him, and make the value of the best jewels the measure of their damages: which they accordingly did.

The case therefore establishes that if the defendant has put it out of the claimant's power to prove the value of the item being claimed, the judge must presume that it has the highest possible value. I am not the only person to feel that this short and intriguing law report leaves so much unsaid – in particular, how was it that the Chief Justice came to preside over this little claim brought to the Court by the little sweep. The American novelist A M Watson published a fictional account of the life of the claimant in this case.[34]

7. Conclusion

Much has changed since Lionel Cohen of Walmer sat as a Lord of Appeal in the House of Lords – which was then our Supreme Court – in the 1950s. On the whole, I would say things have changed for the better. Certain values, though, have remained broadly constant. The fundamentals of what we mean by access to justice have remained the same: ready and affordable mechanisms of redress through which individuals can enforce their legal rights. What has changed is the society and economy in which that goal is now pursued.

Just as many of the challenges we have surveyed this afternoon are distinctively modern, so too are the solutions. Many of the claims I have described would have been unthinkable 70 years ago; so would the idea of making and resolving a claim entirely through the computer. The challenge we face is making the most of these new technologies and practices without losing sight of what worked in the past. Like Moses and Jethro, we must innovate without impairing the quality of the justice being dispensed. It is surely possible for us to modernise our justice system and, at the same time, keep hold of the hard-won accomplishments of our ancestors. It is, I would suggest, that blend of creativity and conservatism that will be the best way of achieving access to justice in the modern state.

[34] AM Watson, *Infants of the Brush: A Chimney Sweep's Story* (Red Acre Press 2017).

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