

Legal Expenses Insurance and the Future of Effective Litigation Funding

John Sorabji*

Abstract

For nearly forty years, from the end of the 1940s, the primary form of litigation funding in England and Wales was civil legal aid. From the start of the 1980s, however, there has been a steady withdrawal from that model. Successive governments have reduced the amount of public funds committed to civil legal aid, while also removing significant areas of law from its scope. In tandem with the winnowing away of legal aid has been the promotion of a number of forms of private litigation funding through statutory reform and common law developments. One form of funding has not, however, been subject to promotion by either the government or the judiciary: before-the-event legal expenses insurance. This article looks at the potential role that such legal expenses insurance could have as the primary form of litigation funding in the future.

Keywords: litigation funding, legal expenses insurance, mandatory insurance.

1 Introduction

Litigation funding in England and Wales is at a crossroads. Since the 1940s the primary means by which individuals, who could not afford to litigate, were able to secure effective access to justice was, broadly, through being able to draw on a publicly funded civil legal aid scheme.¹ Public funding was the paradigm. By 2016, that paradigm was no longer in place. As Smith put it, that post-War system was ‘*bust*’;² both political support for civil legal aid had declined substantially and financial provision by the state to the scheme had been reduced to the lowest possible level. In effect, civil legal aid had been cut to ‘*the lowest level of service that [would] comply with [the UK’s] minimum obligations under the European Convention on Human Rights at the least possible cost*’.³

This had been achieved by UK governments from the 1990s successively reducing the level of legal aid funding available, while promoting its replacement by private funding mechanisms.⁴ The one such area where there has, however, been no real development in terms of litigation funding is the use of before-the-event (BTE) legal expenses insurance, that is to say, insurance taken out before an individual suffers the insured harm. The only significant attempt to consider the issue was carried out by the Civil Justice Council in 2017.⁵ It, however, did no more than carry out an evidential study on the limited extent to which BTE insurance was currently in use as a means of litigation funding in England.⁶ It made no significant reform recommendations.⁷ BTE insurance is in contrast to after-the-event legal expenses insurance or ATE insurance, which is taken out after an individual has suffered the relevant harm as a means, in the context of litigation, to provide cover for any adverse legal costs that may accrue further to the litigation. This article focuses on BTE insurance.

Notwithstanding these various reforms, which have focused on private funding mechanisms, no comprehensive reappraisal of the state’s approach to litigation funding has been carried out. While the Bach Commission recommended the reinvigoration of legal aid in 2017,⁸ there appears little prospect at present that that

4 See J. Peysner, *Access to Justice: A Critical Analysis of Recoverable Conditional Fees and No Win No Fee Funding*, (2012).

5 Civil Justice Council, *The Law and Practicalities of Before-The-Event (BTE) Insurance – An Information Study* (2017) www.judiciary.uk/wp-content/uploads/2017/11/cjc-bte-report.pdf. Some limited consideration had been given to the broader issue of BTE insurance in R. Jackson, *Review of Civil Litigation Costs: Preliminary Report* (May 2009) (The Jackson Costs Review) Vol. I, chapter 13. It yielded no real reform recommendation in the *Final Report* (December 2009), chapter 8.

6 Civil Justice Council, *ibid.*, at 90 and following, provides details concerning the extent to which BTE legal expenses insurance is currently available in England. Typical examples of its availability are through mandatory car insurance policies or through home contents insurance policies. Such policies typical cover, for instance, legal expenses concerning road traffic accident claims, home insurance claims and employment law disputes.

7 An examination of how BTE legal expenses insurance could be developed in respect of personal injury litigation was, however, set out after the Jackson Costs Review; see R. Lewis, ‘Litigation Costs and Before-The-Event Insurance: The Key to Access to Justice?’, 74(2) *Modern Law Review* 272 (2011).

8 The Bach Commission on Access to Justice, *The Crisis in the Justice System in England and Wales – Final Report* (Fabian Society) (2017). The Bach Commission was established by the Fabian Society at the request of Jeremy Corbyn, MP, then leader of the Labour Party, and Lord Falconer, then shadow Lord Chancellor in 2015. It was to undertake a review of the legal aid system. Its principal recommendation was that a ‘Right to Justice Act’ be

* John Sorabji, DPhil, is a Lecturer at the Faculty of Law, University College London.

1 The introduction of legal aid schemes across the world as a means to secure practical and effective access to justice, and equality before the law for all citizens, is properly noted to form the first wave of the post-1945 ‘Access to Justice Movement’. See, for instance, B. Garth & M. Cappelletti, *Access to Justice, the Newest Wave in the Worldwide Movement to Make Rights Effective*, 27 *Buffalo Law Review* 181 (1978).

2 R. Smith, *Evidence to the Access to Justice Commission* (31 March 2016).

3 R. Smith, ‘After the Act: What Future for Legal Aid?’, *Justice Tom Sargant Annual Lecture 2012* at 2 (2012) www.justice.org.uk/data/files/resources/332/After-the-Act-what-future-for-legal-aid.pdf.

will come to pass. The trend does seem to be, as Smith indicated, that the age of legal aid has passed. This article is based on that assumption being correct. It takes it as a given that the UK government will not undo the reforms of the last thirty years and reinstate a comprehensive legal aid scheme (not that the provision of civil legal aid was ever fully comprehensive). It takes as its starting point that there is a need to reconsider how the state makes provision for litigation funding. Its focus is that the state could put in place a comprehensive litigation funding scheme available to all its citizens: one that is therefore more comprehensive in scope than the provision of civil legal aid was from its inception up to 2013.

The basis of such a scheme would be mandatory BTE legal expenses insurance. This article outlines the scheme and the building blocks necessary to give effect to it. As such, it first situates the proposal in the context of the move from legal aid to private litigation funding mechanisms in England and Wales. It then elaborates the nature and scope of the scheme. Having done so, it considers what is necessary to put such a scheme in place: the introduction of fixed recoverable costs and the abolition of costs-shifting. It concludes by looking at the final building block of such an approach: the introduction of mandatory alternative dispute resolution (ADR). The aim is to provide a template for the introduction of a litigation funding scheme to secure effective access to justice for individuals in England and Wales that is based on state regulation, individual responsibility and state assistance where necessary.

2 The Background to Reform

England and Wales has a long tradition of providing some degree of assistance to the impecunious to enable them to litigate and thus achieve a degree of access to justice. Until the 1940s the main method through which this was achieved was known as the *in forma pauperis* procedure.⁹ This was a limited power that enabled courts to direct, by order, that individuals who could not afford to hire lawyers could be represented free of charge. It also provided for the remission of court fees. It was most famously relied on in the case of *Donoghue v. Stevenson* [1932] AC 562,¹⁰ which is the foundational basis for the modern tort of negligence in the UK. Apart from that specific instance of its use, it did not provide anything

introduced, which would enshrine a legal right to reasonable and affordable legal assistance. While this was to be achieved through reform to civil legal aid, it did not recommend that that reform render access to civil legal aid universal or that it should apply to all civil causes of action. It was, in essence, a recommendation to recreate, with some enhancements, civil legal aid as it was before 2013: see the *Final Report*, at 7-9.

9 *Brunt v. Wardle* 133 Eng. Rep. 1254, 1257; 11 Hen. VII, c.12 (1494); 23 Hen. VIII, c.15 (1531). For a discussion of the process, see R. Egerton, *Legal Aid* (1998).

10 As noted in E. Ryder, *Slaying The Sixth Giant: The Denial Of Justice* (November 2019), at [4] www.judiciary.uk/wp-content/uploads/2019/12/2019_17_12_-SPT-Speech-Bolton.pdf.

approaching a comprehensive approach to litigation funding. It was, for instance, subject to a £25 means-test in terms of the litigant's capital, an earnings means-test, and the need to obtain an opinion from Counsel that their claim or defence had merit. If these criteria were satisfied the applicant needed to find a solicitor willing to act free of charge, and they remained liable to pay for disbursements, e.g. the cost of, for instance, experts' reports. Moreover, it required an applicant to characterise themselves publicly as a 'pauper', which, as Goriely notes, carried with it such a degree of social stigma that it acted as a disincentive to resort to the procedure. Given these factors, individuals rarely resorted to it.¹¹ With the development of the UK's welfare state in the 1940s, this process was, following recommendations by the Rushcliffe Committee, replaced by a publicly funded legal aid scheme: the Legal Aid and Advice Act 1949.¹² From then until the early 1990s, legal aid was the main form by which the state provided legal assistance to individuals who had meritorious civil (and criminal and family) claims with litigation funding.

While the scope of application of civil legal aid was never fully comprehensive, i.e., it never applied to all causes of action, it was significant. As the Bach Commission noted in 2016, '*In the 1980s, around 80 per cent of households were eligible to civil legal aid...*'¹³ That was, however, its zenith. From that point onwards, successive governments have pursued a common objective: the reduction of civil legal aid and its replacement by privately funded forms of litigation funding. Put broadly, the main reasons for this shift from public to private funding were the following: concerns that legal aid, and particularly criminal legal aid, was an increasing burden on public expenditure;¹⁴ a political shift away from the welfare state, as evidenced by the privatisation of nationalised industries during and after the 1980s; and, as Hynes and Robins put it, it is an issue that does not attract the attention or concern of the public and can thus more easily form the focus of governmental budget reductions.¹⁵ Moreover, as Genn has argued cogently, the view was taken by successive governments that the civil justice system simply provided the means to confer private benefits, i.e., consumer benefits, on individuals rather than as a means by which the state gave effect to the rule of law through rights-vindication.¹⁶ This view made the necessity of financial assistance by the state difficult to justify. These various shifts in perspective saw the reduction of legal aid matched by the legalisation of previ-

11 T. Goriely, 'Gratuitous Assistance to the "ill-dressed": Debating Civil Legal aid in England and Wales from 1914 to 1939', 13(1) *International Journal of the Legal Profession* 41, at 42-3 (2006).

12 See, W. Jowitt, 'Legal Aid in England', 24 *New York University Law Quarterly Review* 757 (1949); A. Elson, 'The Rushcliffe Report', 13(2) *University of Chicago Law Review* 131 (1946).

13 The Bach Commission on Access to Justice, *The Crisis in the Justice System in England and Wales - Interim Report* (Fabian Society) (2016), at 8.

14 For a detailed outline of the expansion and retreat of legal aid, see Sir Henry Brooke, *The History of Legal Aid - 1945 to 2010* (2016) https://sirhenrybrooke.me/2016/07/16/the-history-of-legal-aid-1945-to-2010/#_ftn1.

15 J. Hynes & S. Robins, *The Justice Gap* (2009), at 22.

16 H. Genn, *Judging Civil Justice* (Hamlyn Lectures) (2010).

ously prohibited forms of litigation funding. In 1990, a form of contingency fee agreement, the conditional fee agreement or CFA,¹⁷ was introduced by the Courts and Legal Services Act 1990¹⁸. CFAs were subject to expansion in 1999¹⁹ and were, at that time, to be supplemented by the legalisation of statutorily regulated third party litigation funding.²⁰ The latter statutory scheme was not, however, introduced. The courts, eventually, in 2004, developed the common law to permit the use of third party litigation funding on the ground that it promoted access to justice.²¹

In 2013, as part of a series of reforms intended to reduce the cost of civil litigation, this trend reached its own zenith via the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO): CFAs were subject to statutory reform, a further form of a contingency fee agreement was introduced, the damages-based agreement or DBA,²² and civil legal aid was subject to a final round of swingeing reductions.²³ The upshot of this was that civil legal aid was available to less than a third of the population and, that too, in a limited number of areas. As the Bach Commission explained it,

LASPO has accelerated a longstanding crisis in the numbers of people entitled to legal aid. In the 1980s, around 80 per cent of households were eligible to civil legal aid, but by 2008 that figure had dropped to 29 per cent. LASPO has further worsened the situation

by removing most cases involving housing, welfare, debt, immigration, employment and medical negligence law from scope. Hundreds of thousands are now going without the legal aid they require. The number of litigants in person is rising, and the number of 'acts of assistance' granted through legal aid has been falling consistently since 2009/10. While a figure that does not differentiate between assisting with simpler and more complex cases, it nevertheless provides an indication of the overall decline in levels of legal aid assistance.²⁴,

Civil legal aid's reduction in scope may, arguably, have been mitigated if the private funding mechanisms did provide an effective replacement for it. That, however, has not been the case. If it had been, there would not, for instance, have been a growth in the number of individuals who have had to litigate without legal assistance (litigants-in-person), as the Bach Commission noted.²⁵ That ought to be unsurprising. CFAs and DBAs operate effectively, in so far as they do, where a claimant is likely to receive significant damages and thus be able to use those funds to reimburse any sums due to their lawyers from them. Third party funding operates effectively only in particularly high value claims, such as to justify a commercial third party funder providing the resources to enable individuals to litigate.

The background, then, from 1990 has been one of a sharp reduction of civil legal aid and its attempted replacement with private funding mechanisms. The upshot, however, has been the growth of litigants-in-person and, in many cases, individuals not litigating at all. In both cases we see a reduction in access to justice. Notwithstanding the Bach Commission and its recommendation to reinvigorate the provision of legal aid, there is no apparent government appetite to do so. Even if there were, it is not necessarily the case that a legal aid scheme consistent with the one in place prior to 1990 would present an optimal approach to the provision of financial assistance to impecunious litigants. Rather than reinvigorate civil legal aid, a better approach may be to reform the provision of legal expenses insurance.

17 CFAs, as originally introduced, enabled litigants to instruct lawyers on the basis that they would become responsible for paying them only in the event that their claims succeeded. In the event that they lost no payment was due. If, however, they succeeded, the lawyer became entitled to their normal fee and an additional success fee. Their client was responsible for paying both aspects of their lawyer's fees.

18 Courts and Legal Services Act 1990, s.58.

19 Access to Justice Act 1999, s.27. The expansion was intended to make reliance on them more attractive. This was to be achieved by providing that the success fee (as well as insurance premiums payable by litigants for policies that covered their potential liability for adverse costs awards) could be recovered from, i.e., paid for by, the losing party to litigation. The consequences of this reform were to result in an era of satellite costs litigation in which losing defendants sought to avoid liability for such additional payments. The upshot was, ultimately, the reform, following on from the Jackson Costs Review, of the abolition of success fee recovery via LASPO. For an overview of the adverse consequences of this reform see, for instance, S. Kalish, 'The English Costs War, 2000-2003, and a Moment of Repose', 83 *Nebraska Law Review* 114 (2004); D. Marshall, 'A Short History of the Costs Wars', 20(4) *APIL Focus* 24 (2010).

20 Access to Justice Act 1999, s.28.

21 *Gulf Azov Shipping Co Ltd v. Idisi* [2004] EWCA Civ 92 at [54].

22 DBAs were a product of the Jackson Costs Review introduced by LASPO, s.45. They are intended to operate, as with a CFA, on a contingency basis. In this case a client agrees to pay their lawyer a percentage of any damages they recover in the event of success in litigation. The percentage is over and above the lawyer's normal hourly billed fees, which are recoverable, in principle, via the normal cost-shifting rule from the losing party. The success fee is not recoverable from the losing party. In the event that they do not succeed, no fee becomes due. This form of contingency fee has, in England and Wales, been little utilised owing to defects in the legislation that introduced it. See, further, *The Damages-Based Agreements Reform Project* www.qmul.ac.uk/law/research/impact/dbarp/.

23 Legal Aid, Sentencing and Punishment of Offenders Act 2012, Part 2 and Schedule 1 (list of areas not covered by public funding). For a summary of the developments in litigation funding from 1990 to 2021, see A. Zuckerman, *Zuckerman on Civil Procedure - Principles of Practice* (2020) at 1495 and following, and 1557.

24 The Bach Commission on Access to Justice, *The Crisis in the Justice System in England and Wales - Interim Report* (2016), at 8. Further criticisms of the approach taken to reduce civil legal aid by LASPO were made by the National Audit Office in its consideration of those reforms: National Audit Office, *Implementing Reforms to Civil Legal Aid* (HC 784 SESSION 2014-15 20 November 2014) www.nao.org.uk/wp-content/uploads/2014/11/Implementing-reforms-to-civil-legal-aid1.pdf; and see, N. Byrom, 'Cuts to Civil Legal Aid and the Identity Crisis in Lawyering: Lessons from the Experience of England and Wales', in A. Flynn & J. Hodgson (eds.), *Access to Justice and Legal Aid* (2017).

25 *Ibid.*, at 8 and following.

3 The Scope of the Proposed Legal Expenses Insurance Scheme

Having set out the background and raised the issue of the replacement of civil legal aid and its privately funded alternatives by a reinvigorated BTE legal expenses insurance scheme, the question is, what characteristics should such a scheme have. Particularly, what characteristics should it have that would make it an improvement on civil legal aid.

The starting point is to take account of the fact that civil legal aid was based on the proposition that no one should be denied access to justice, and equality of arms in litigation, on grounds of impecuniosity. It helped to transform those aspects of the right to fair trial from being mere theoretical commitments into real and practical ones.²⁶ It did so in classic welfare state terms by providing, via general taxation, a fund on which individuals could draw to finance civil litigation if their claim passed a merits test. Access to civil legal aid was not available to all cases irrespective of their merit. Only those claims that were, and are, assessed to pass a merits test were eligible for the scheme. Equally, those who could draw on the scheme had to demonstrate need, i.e., a specific degree of impecuniosity was and is required.²⁷ If we are to replace civil legal aid with a funding regime that is better than it, the starting point must be that it provides equal or better provision.

It was previously noted that civil legal aid was never fully comprehensive in terms of its scope. Nor did it ever apply to all citizens in England and Wales. It was not, unlike the National Health Service (in principle at least), universal. One clear way in which a reinvigorated legal expenses insurance scheme could improve on civil legal aid, and its privately funded alternatives, is to ensure that it is universal. It ought, therefore, to be available to all forms of civil claim; i.e., its substantive scope ought to be wider than that available now or at any time under the legal aid scheme. In addition, it ought to be available to all citizens, should they choose to use it. It should thus be universal both in scope and in coverage. As an insurance scheme that is to secure universal coverage, membership will need to be mandatory. A permissive scheme, which individuals could join if they chose to do so, would be unlikely to ever approach universality. Many individuals are, as where healthcare provision is concerned, likely to adopt the attitude that they are unlikely to ever need such insurance cover. They are thus unlikely to join the scheme. Moreover, an optional scheme is also one, as is the case in Germany, where before-the-event legal expenses insurance is optional, that is likely to attract those with higher incomes rather than those with lower incomes; i.e., it will do little if anything to secure effective access to justice for all, par-

ticularly the impecunious.²⁸ Failure to join the scheme, in the absence of viable funding mechanisms, would thus leave many citizens when, and if, the need arose for their rights to be vindicated, unable to secure effective access to justice. A mandatory scheme would overcome this problem. It would ensure that it was available whenever necessary to any citizen.

Ensuring that the scheme was mandatory would have another advantage. As has been argued before in the context of both mandatory health insurance schemes and mandatory publicly funded legal expenses insurance schemes, the mandatory nature of such a scheme ensures that the insurance premiums are kept as low as possible. As Choudhry, Trebilcock and James have argued, where legal expenses insurance is mandatory across society, a diverse risk pool is created.²⁹ It will ensure that individuals who are at low risk of having to call on the fund are part of the scheme, just as those who are at higher risk are part of it. It will thus remove the possibility that those who are low risk refuse to take part in the scheme, thus leaving those who are at higher risk seeking entry to the scheme. Should that happen, and the scheme be one that only those with a high risk of having to draw on the legal expenses insurance contributing to it, individual insurance premiums are likely to be high. High premiums are likely to price the impecunious out of the scheme. A mandatory universal scheme would thus help to promote lower insurance premiums for all members of the scheme, thus enabling its price to be within the range of the majority of society. This links to two further features of the scheme.

First, it helps address the question of how premiums are to be funded for those who are unemployed, who are in receipt of some form of welfare benefit or who are children. In order to ensure that the scheme is universal, such individuals must come within the scheme. The general principle underpinning payment of premiums ought to be, as Butler argued in respect of mandatory health insurance, that it is primarily the responsibility of individuals to put in place adequate provision to enable them to vindicate their rights: to ‘*avoid placing demands on society by protecting*’ themselves.³⁰ Linked to that, however, is the principle, as he puts it, that society is under a moral obligation to ensure that its members do not suffer from the absence of effective access to justice.³¹ Consistently with these points, those who can afford the price of premiums ought to be responsible for their payment; i.e., mandatory membership of the scheme is married with the mandatory requirement to pay the premiums. However, consistently with the second point, society ought to take responsibility for paying (through general taxation) the premiums of those individuals who cannot afford to do so for the reasons

26 *Airey v. Ireland* (1979) 2 EHRR 305.

27 As discussed in Zuckerman, above n. 23, at 1558.

28 As noted in S. Choudhry et al., ‘Growing Legal Aid in Ontario into the Middle Class: A Proposal for Public Legal Expenses Insurance’, in M. Trebilcock et al. (eds.), *Middle Income Access to Justice* (2012), at 396.

29 *Ibid.*

30 S. Butler, *Assuring Affordable Healthcare for All Americans*, The Heritage Lectures (2018), at 6.

31 *Ibid.*, makes the same point, but for the ‘*unavailability of health care*’.

noted previously, i.e., they are unemployed, they are social welfare recipients, or they are children whose parents are unable to pay their premiums for the foregoing two reasons.³²

Secondly, the mandatory scheme would provide a mandatory minimum level of provision. A mandatory universal scheme ought to provide the basis for a low premium scheme because low-risk scheme members should outnumber the high-risk members. Given a low premium structure, the possibility of citizen choice and competition between legal expenses insurance providers could be stimulated. Both arise from the possibility that different levels of insurance cover could be developed above the mandatory minimum level of cover. Higher premiums could be charged for additional levels of coverage, e.g., for a higher coverage ceiling, which could enable the insured to instruct a wider range of lawyers. The range of lawyers would then be determined by their charging rates and the amount of cover the insured has obtained. It could thus help to promote not only effective access to justice but also a wider range of choice for individuals over their legal representative.

It is important to note here that the proposal does not envisage, as has been suggested by Choudhry, Trebilcock and James, for instance, that such a mandatory scheme be operated by the state.³³ They raise the question, in respect of their proposal for the creation in Canada of a mandatory BTE legal expenses insurance scheme, whether it should be operated by a public body or not. The main advantage of a single, state-run body, being responsible for the scheme would undoubtedly be that it would maximise diversity across the risk profile of insured members of the public. It would thus help to promote a low level of premium. If a number of competing private insurers operated in the market owing to their numbers they may not have a sufficient risk profile among their insured to enable them to provide as low a level of premium. That advantage could, however, be overcome through the fact of competition in the insurance market. A number of private insurers competing for insureds could lead to them offering a range of policies and premiums that are targeted to maximise individuals taking out their policy with them. Competition could produce better results in terms of premium prices than a monopoly or single dominant state-run insurance provided.

There are further problems with the single-state run insurance provider option. First, as with other monopolies or near monopolies, it could stifle innovation in the insurance marketplace. On its own a single-state-run insurer would have little incentive to innovate in its provision of insurance policies. Equally, if it were the domi-

nant player in the market, it would have little incentive to innovate. Secondly, a single-state-run insurer could lead to private sector insurers exiting the market or choosing not to enter it. This would particularly be the case if the means by which individuals were required to take out their policies was achieved through auto-enrolment in a basic policy provided by the state body.³⁴ If auto-enrolment operated in that way, there would likely be a real problem in terms of individual insureds moving to other insurers after they had been auto-enrolled in the default policy. If private insurers offered equivalent default policies, the insured would have no incentive to move provider. If they offered different and better policies, they would still have to overcome the incumbency effect that would favour insureds remaining with the state-run insurer. In both situations, in addition to a reduction in innovation, the reduction in competition could harm the development of a BTE insurance market that offered a range of policies at a range of prices, and through competition helped to keep insurance premiums low to the benefit of insureds and the state itself.

Secondly, and looking wider than the insurance market, if a single entity, state-owned or run or otherwise, were responsible for all of the BTE insurance policies that would transform it into the monopoly or near monopoly supplier of instructions to law firms, it would make those law firms dependent on the state for their work. In principle, such a consequence is difficult to reconcile with the principle, implicit in the constitutional commitment to the rule of law, of independence of the legal profession from the state.³⁵ It is because financial dependence on the state could be used to influence both how the legal profession is structured – it could be used to promote consolidation of the profession and thus reduce competition, which in turn could result in a loss of client choice and a reduction in standards of service and innovation in the legal services market – and how it deals with types of cases. In the latter respect, such influence could be brought to bear on decisions relating to the management of claims and decisions concerning when and on what basis to settle. No doubt, regulatory measures could be put in place to limit the possibility that adverse practical consequences might flow from a single state-run BTE provider acting as a monopoly supplier of instructions and funding to law firms. Such measures would not, however, overcome the principled objection that no single entity should be in such a position as to render the legal profession dependent on it. Regulatory measures might mitigate the possibility that such a monopoly position might be abused, but it is doubtful that they could properly limit the more subtle influence that it could have on lawyer behaviour.

32 Choudhry et al., above n. 28, raise the concern that state-funded premiums may be more expensive than previous legal aid schemes. A mandatory national scheme ought, however, to produce sufficiently low premium levels such that that result is not realised, particularly where the civil justice system is, as now, subject to significant digitisation reforms to reduce its cost and which also promote effective pre-action dispute resolution such as that noted later regarding multi-tier dispute resolution.

33 Choudhry et al., above n. 28.

34 The use of a default option would arise through auto-enrolment. In order to ensure that everyone was brought within the scheme, i.e. to ensure that it was a mandatory scheme, there would be a need to ensure that policies were taken out each year. This could be done, as it is done through the auto-enrolment scheme for workplace pensions (see www.gov.uk/workplace-pensions), through auto-enrolment with a single insurance provider.

35 Constitutional Reform Act 2005, s.1; Legal Services Act 2007, s.1(1)(b) and (f).

The better approach to developing the provision of a mandatory scheme would be to provide for its administration by as wide a range of private sector insurers as possible, subject to regulatory oversight, as is the case for the insurance industry generally.³⁶ Auto-enrolment into the baseline scheme could be achieved through the creation of a central insurance exchange with which each member of the public was to be registered, which would automatically allocate those individuals who did not choose their provider with one of the insurers randomly. Such random allocation would, however, need to be calibrated so that it maintained diversity in the risk pool for each insurer. Such exchanges could also provide information from each of the insurers in the market as to the other policies they offered over and above the baseline and the premiums applicable to them. Thus, it could facilitate more effective competition in the market in terms of policy and price. Such an approach would also not raise the problem of a single insurer securing a position vis-a-vis law firms such that they became dependent on it, and thus susceptible to influence from it. It would thus also help to maintain a healthy, independent, legal sector.

The proposed approach to litigation funding would thus see the state mandate every individual in England and Wales to take out BTE legal expenses insurance to cover all civil legal claims with a private sector insurance provider. They would have to take out a minimum level of insurance, although they could opt for higher levels of cover. Where an individual could not afford to pay the premium either because of unemployment or because they were in receipt of welfare benefits, the state would provide them with the means to pay. Thereby, the scheme would be universal in scope and applicability. It would be such as could attract lower premiums than if it was an optional scheme. It would give primacy to individual responsibility to secure effective access to justice, while minimising their need to draw on the state for support. And, importantly, it would ensure that society also fulfilled its duty not only to provide an effective framework to secure access but also to assist those who could not otherwise afford the premiums. It should also be noted that the introduction of such a scheme ought to be without prejudice to the continued development of other forms of private litigation funding. As with any other insurance policy, there ought to be no requirement to draw on it. Individuals ought to continue to be able to choose whether to utilise one of the other forms of litigation funding. Having outlined the nature of the proposed mandatory scheme, the question arises as to what needs to be put in place within the structure of the civil justice system to facilitate its creation. This is examined next.

36 Regulation is carried out by, for instance, the Prudential Regulatory Authority. Regulation of mandatory BTE legal expenses insurance policies could come within its remit. Equally, it could come with an expanded remit for the Legal Services Board, the oversight regulator for the legal profession in tandem with the Prudential Regulatory Authority.

4 The Search for Predictability

The main structural difficulty within the civil justice system that the introduction of a comprehensive mandatory insurance scheme faces is the unpredictability of litigation costs. As is well known, the default position in England and Wales is that the loser-pays rule applies: the losing party in litigation is required to indemnify the successful party in respect of the costs they incurred as a result of having to litigate. Losing parties are thus required to pay their own legal expenses as well as those, as assessed by the court as reasonable and proportionate,³⁷ incurred by their opponent. While litigants have the ability to control their own costs, they have little ability to control the costs incurred by their opponent. This poses a problem for the development of an effective mandatory BTE legal expenses insurance scheme. As Peysner has argued, a precondition for the development of such schemes is predictability. Absent predictability such schemes cannot develop.

the basic problem is that you can't inject BTE insurance into an environment where costs remain uncertain.³⁸

Peysner has cogently set out how this point is borne out by the evidence from jurisdictions where there are healthy, voluntary, BTE legal expenses insurance markets.³⁹ In Germany, for instance, where there is a well-established fixed recoverable costs regime for civil litigation, there is a well-developed BTE legal expenses insurance market, which, as Peysner has argued, is an underpinning of its development.⁴⁰ Predictability in terms of potential costs risk enables insurance providers to assess and price risk effectively. Unpredictability provides for the opposite, and where it is difficult to assess risk insurance premiums are likely to be high if insurance is available at all.

If a mandatory BTE legal expenses insurance scheme is to be capable of effective introduction in England and Wales, costs predictability is likely to be required. To a certain extent reforms over the last eight years have moved significantly towards improving costs predictability. At the same time as LASPO was introduced, changes were made to the Civil Procedure Rules to introduce prospective costs management.⁴¹ This requires parties to litigation to seek to agree an overall budget

37 CPR r.44.3.

38 J. Peysner cited in J. Robins, 'Legal Insurance – Will Britain Buy It', *The Guardian* (28 May 2010) www.theguardian.com/law/2010/may/28/legal-insurance-uk-germany.

39 Also see B. Hess & R. Hubner, 'Germany – National Report', in C. Hodges, S. Vogenauer & M. Tulibacka (eds.), *The Costs and Funding of Civil Litigation – A Comparative Perspective* (2010), at 348-49; Lewis, above n. 7, at 278.

40 As Peysner notes, Germany's fixed recoverability regime has been in place since the 19th century. It has thus been in place for as long as Germany has promoted the use of BTE legal expenses insurance and is one of the bases on which it has developed. And see J. Peysner, *Costs in Personal Injury Cases: Searching for Predictable Costs*, *Journal of Personal Injury Law*, (2002) (2/2) 166.

41 CPR Pt 3, Section II.

for the litigation at the start of proceedings, which is then subject to court approval. Variations to the budget are intended to be allowed rarely. The approved budget provides the basis for cost recovery at the conclusion of proceedings. This, in principle, imposes greater discipline on parties in terms of work done during the litigation and thus provides greater clarity and predictability as to the overall potential costs of litigation. Equally, there has been an expansion of fixed recoverable cost regimes. The CPR, when it was introduced, operated two fixed recoverable costs regimes, one on the small claims track and the other on the fast track.⁴² Those regimes have been bolstered by the expansion of fixed recoverable costs regimes for a number of specific types of claim, e.g. personal injury claims arising from road traffic accidents, employers' liability and public liability claims, low-value intellectual property claims, and certain claims involving HM Customs and Revenue.⁴³ In September 2021, after thirty years of attempted reform to introduce a general fixed recoverable cost regime, the UK government announced that it would introduce such a regime for civil claims up to a value of £100,000.⁴⁴ In all likelihood, by the end of 2022 England and Wales will have not only a generally applicable fixed recoverable cost regime but also, where that does not apply, an established costs management regime. Both ought to play an important part in giving English and Welsh litigation a similar degree of costs predictability to that in place in Germany through the operation of its fixed recoverability regime. The problem identified by Peysner as lying behind the lack of a well-developed legal expenses insurance market would thus have been resolved.

While the introduction of fixed recoverability ought to put England and Wales in a position to develop such an insurance market, it may not be sufficient to provide a basis for a viable mandatory BTE legal expenses insurance scheme. For that something more may be necessary. Fixed recoverability's expansion may provide predictability, but it may not necessarily produce a level of fee recoverability that would enable a mandatory scheme to operate effectively. This may be the case owing to the fact of recoverability. The possibility of costs liability, even at a fixed and predictable rate, may result in insurance premiums for a mandatory scheme to be set at a level that would make the scheme politically problematic and less acceptable to the public. If the state is to mandate payment of insurance premiums, it ought reasonably to take such steps as are necessary to minimise the likely cost of such premiums for individuals and for the taxpayer; the latter of whom is to be responsible for payment of the premiums of individuals, noted before, who are unable to pay them.

In order to minimise the likely cost of litigation rather than a scheme of fixed recoverability, it may be necessary to abolish the English cost-shifting rule. In other words, rather than continue with the current scheme of fixed recoverability, it may be necessary to move to a fixed fee regime where there is no possibility of costs recoverability. In that way, insurance premiums could be set at a lower level than would otherwise be the case as each insured would only have to bear their own, predictable, fixed litigation costs. Such an approach would be far more transparent, as Zuckerman notes, than the current approach even within a system of fixed recoverability.⁴⁵ Equally, it would have the important advantage of completely eliminating from English and Welsh litigation satellite litigation over costs.⁴⁶ On its own, fixed recoverability would not completely eliminate such litigation. As such, the possibility of such costs, and their potential extent, would need to be factored into any assessment of the level at which a mandatory insurance premium were to be set.

Currently, it is, however, likely that an argument to abolish cost recoverability would be resisted. It was a matter not, for instance, considered to any real degree by the last significant reform of civil litigation costs, even though the issue was clearly within those reforms' terms of reference.⁴⁷ It has recently been said to be an 'unrealistic' prospect.⁴⁸ Such resistance should, however, be contextualised. It stems from the status quo. It does not take account of any consideration of reform in the broader context of a significant shift in the approach taken to litigation funding. Viewed as a reform to be carried out separately from any reform to litigation funding, it is reasonable to accept that the abolition of cost-shifting is unrealistic. As part of a coherent package to reform litigation funding, the prospect of its abolition may not be so unrealistic. On the contrary, if understood to be an essential element of those reforms, its abolition could be entirely realistic and reasonable. Of course, whether that is the case depends on a broad political acceptance of the case for giving effect to the right of access to justice through a mandatory BTE insurance scheme. That case has not yet been made; it is not yet an issue that has been raised in the UK.

What can be said at this stage is that the advent of fixed recoverability, as noted by representatives of the insurance industry in 2017,⁴⁹ is already anticipated to reduce the level of existing voluntary BTE legal expenses insurance premiums. Increasing the level of certainty in costs further by abolishing cost-shifting, while lowering potential costs by eliminating the possibility of costs liti-

42 CPR Pt 27 and Pt 28.

43 For a discussion see Zuckerman, above n. 23, at 1490 and following.

44 For a discussion of the history of this approach, see: J. Sorabji, 'The Long Struggle for Fixed Cost Reform', in A. Higgins (ed.), *The Civil Procedure Rules (2020)*, at 20. And see Ministry of Justice, *Extending Fixed Recoverable Costs in Civil Cases: The Government Response* (September 2021).

45 Zuckerman, above n. 23, at 1563.

46 Ibid.

47 Ibid., noting Jackson, above n. 5, Vol. I, Chapter 46. As Lord Clarke MR, who set the terms of reference for the Review, noted, it was to 'address the indemnity rule. [And would] do so with an open mind ...'; see Lord Clarke, *The Woolf reforms: A singular event or an ongoing process*, in D. Dwyer, *The Civil Procedure Rules Ten years On* (2009), at 48.

48 As noted in Zuckerman, above n. 23, at 1564.

49 As reported in Civil Justice Council, *The Law and Practicalities of Before-The-Event (BTE) Insurance – An Information Study* (November 2017), at 147.

gation, ought to lead further down that road, as should making such a scheme mandatory for the reasons noted previously. If these steps were taken there is every prospect that the cost of a mandatory scheme would be viable for individuals required to pay its premiums, and for the state. This raises a potential problem. A successful mandatory BTE scheme, facilitated through a fixed costs regime and the abolition of cost-shifting, might provide the basis for the rapid expansion of litigation. The reserve army of disputes that currently go unlitigated for financial reasons might now be litigated. Such an eventuality might pose resource problems for the civil courts in having to manage those claims. It may also have broader societal problems; it could fuel the creation of a genuinely more litigious culture. To mitigate those potential drawbacks the creation of a mandatory BTE scheme would need to have one further element to it. It is to that which I now turn.

5 The Introduction of Mandatory Alternative Dispute Resolution

The central aim underpinning the introduction of a mandatory BTE legal expenses insurance scheme would be to increase access to justice. It ought not, however, to necessarily increase access to courts, i.e. access to litigation. Such an outcome would be inconsistent with the promotion of alternative forms of dispute resolution in England and Wales since the introduction of the Woolf reforms in 1999.⁵⁰ It would also fail to take proper account of more recent developments arising from the digitisation of the civil courts and their processes. Those developments are based on the incorporation of online forms of dispute resolution into English and Welsh procedure, which followed on from the Briggs *Civil Courts Structure Review* and the HMCTS digitisation court reform programme.⁵¹ More recently, it has been announced that the intention is to go further than that. Present proposals are that the civil courts, through the development of an online portal, should be able to provide access to a wide range of dispute resolution methods, including complaints schemes and Ombudsman schemes, before they initiate formal legal proceedings.⁵² A mandatory BTE legal expenses insurance scheme would

need to be integrated into these reforms, which implicitly expand the concept of ‘access to justice’ beyond access to the court.⁵³ More importantly, there are distinct advantages to such a scheme from integration with these developments.

The most obvious advantage of taking an integrated approach would be that of consistency across government and judicial policy.⁵⁴ With both advocating the promotion and incorporation of ADR into civil court procedures, any proposal to create a mandatory BTE insurance scheme would have little prospect of success if it tended to subvert that general policy. If it simply focused on providing individuals with access to litigation before courts it would inevitably do so. Linking it, then, with the wider general policy of promoting the use of a variety of dispute resolution methods, both formal and informal, would tend to have the opposite effect. It would promote its prospects of successful implementation. Equally, it would promote the prospects of successful implementation of the wider goal of promoting ADR processes. If individuals were required through, for instance, a mandatory multi-tiered dispute resolution clause⁵⁵ in their BTE insurance policies to engage constructively and in good faith with other forms of dispute resolution before they were able to access ‘litigation’ funding, there would necessarily be an increased uptake in complaints schemes, in Ombudsman schemes, lawyer-led negotiation, mediation and other forms of ADR and ODR. It could thus help to embed the shift away from litigation. Promotion of the shift towards using ADR rather than necessarily resorting to litigation could, in this way, have further advantages.

For the state it could help to promote the principle of proportionality, which has been the overarching principle of English civil procedure since the Woolf reforms were introduced.⁵⁶ Promoting the use of a variety of ADR and ODR methods would help ensure that should there be, as might be expected, an increase in the number of individuals who are able to take steps to vindicate their rights, that increase would not overwhelm the courts’ resources. It would help to ensure that an increase in claiming did not result in an increase in the number of claims issued and the demand for adjudication. On the contrary, by requiring those taking advantage of their

adjudication www.judiciary.uk/wp-content/uploads/2021/03/MoR-Hull-260321.pdf.

50 See, for instance, B. Billingsley and M. Ahmed, ‘Evolution, Revolution and Culture Shift: A Critical Analysis of Compulsory ADR in England and Canada’, 45(2-3) *Common Law World Review* (June/September 2016), 186.

51 See, for instance, M. Briggs, *Civil Courts Structure Review – Interim Report* (December 2015); M. Briggs, *Civil Courts Structure Review – Final Report* (July 2016); Joint Statement of Lord Chief Justice, Senior President of Tribunals and the Lord Chancellor, *Reforming HM Courts and Tribunals Service* (25 July 2013).

52 See, for instance, Sir Geoffrey Vos MR, *The Relationship between Formal and Informal Justice* (2021) on the intended approach, which will use the online court portal to provide a means to direct potential litigants to other forms of dispute resolution as well as the intention for the civil justice system to focus on resolution in a broad sense rather than, necessarily,

53 As Sir Terence Etherton put it, the approach to access to justice would expand under the digitisation reforms of English and Welsh civil justice to include various forms of ADR and ODR, *The Civil Court of the Future*, at [20] and following www.judiciary.uk/wp-content/uploads/2017/06/slynn-lecture-mr-civil-court-of-the-future-20170615.pdf.

54 See Ministry of Justice, *Dispute Resolution in England and Wales – A Call for Evidence* (2021), at 4-9, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1014647/dispute-resolution-cfe.pdf.

55 The growth of which is generally supported in England and Wales. See, for instance, *Emirates Trading Agency LLC v. Prime Mineral Exports Private Ltd* [2014] EWHC 2104 (Comm); *Ophen Operations UK Ltd v. Invesco Fund Managers Ltd* [2019] EWHC 2246; *HC Trading Malta Ltd v. Savannah Cement Ltd* [2020] EWHC 2144; *Taylor Wimpey UK v. Harron Homes Ltd* [2020] EWHC 1190 (TCC).

56 See CPR r.1.1.

insurance to first seek to resolve their disputes in ways other than via litigation, the insurance scheme could help maintain the CPR's aim of ensuring that only those disputes that cannot be resolved consensually should result in litigation and adjudication. An increase in claiming would not necessarily then result in an increased call by litigants on the courts' resources.

For individuals the benefits of this approach could accrue in two ways. First, at a general level, a requirement to engage in various forms of ADR and ODR before moving to litigation could help to ensure that insurance premiums were set at a low rate. By promoting early settlement, the mandatory BTE insurance scheme could help to ensure that those individuals who drew on it incurred limited expenditure. By reducing the prospect that large numbers of individuals would draw down their full financial entitlement under their insurance policy, it might then be possible for insurers to set the premiums at a lower rate than they would have to if all those who drew on their insurance used it to litigate claims to judgment. Such a consequence would also provide a wider benefit to the state and the public generally: lower premiums would result in a lower call on general taxation to fund the premiums payable by the state for those individuals who are unable to pay their own premiums. Secondly, at an individual level, this approach would help them to gain the benefit of engagement with ADR. One continuing problem that ADR's promotion has had over the last twenty years has been to fully embed it within dispute resolution so that its benefits, e.g., early resolution or the availability of forms of resolution that could not be provided by a court judgment, were available generally. Requiring its use as part of a scheme to fund litigation would achieve that end. Done this way, those benefits would not come at the expense of an individual's ability to litigate and seek to resolve their dispute via a court judgment. By enabling individuals to litigate through a court process after having engaged in ADR, the mandatory BTE insurance scheme would overcome any possible complaint that it acted as a fetter on the right of access to justice qua access to a court and judgment. On the contrary, the scheme would both promote ADR and facilitate access to court and judgment. On the face of it, requiring mandatory BTE legal expenses insurance to incorporate a form of multi-tiered dispute resolution clause might seem to contradict the very aim of such insurance: to promote effective access to justice. Looked at more broadly, such a clause can, however, be seen to go beyond promoting the prospects that such a form of litigation funding could be introduced by integrating it with wider current reforms. As importantly, it ought to provide a means to enable the scheme to operate more effectively by promoting lower insurance premiums, while securing the achievement of wider societal and individual benefits. It ought, therefore, to form part of the design of any such scheme.

6 Conclusion

The introduction of civil legal aid in England and Wales in the 1940s was a product of the general creation at the time of the Welfare State. The Rushcliffe Report, which gave birth to it, was consistent in aim and approach to that of the Beveridge Committee, which provided the blueprint for the UK's Welfare State. The extent to which legal aid was available was never, however, such as to cover the entire population of the UK. Nor did it ever cover all types of legal dispute. Its scope may have waxed and waned from its inception, but it could not properly be said to have ever been a fully comprehensive scheme in the way that the National Health Service was intended to be accessible to all members of the public. As with the provision of healthcare, the UK model was one among many.⁵⁷ Since the 1990s successive UK governments have moved away from the 1940s model. In doing so, and in promoting the use of various private litigation funding mechanisms, there has been no detailed consideration of whether, and if so how, those mechanisms could provide a fully comprehensive litigation funding regime.

Public policy may have shifted away from a welfarist model to a more market-centred one through the promotion of CFAs, DBAs and – through court initiative rather than government action – third party litigation funding, yet what has been lacking has been any attempt to fashion not only a replacement for civil legal aid but one that was more comprehensive than its predecessor. This article accepts the premise that the age of civil legal aid is over. It rejects, however, the idea that the inevitable consequence of that is the present position in England and Wales: a patchwork of private funding mechanisms that neither fully replace civil legal aid provision nor, as a necessary consequence, improve on it. On the contrary, it suggests that there is a way in which it is possible to build on the introduction of fixed recoverable fees and the broader redesign of the civil justice system to create a system that secures more effective and universal litigation funding for all citizens. That system is one of mandatory BTE legal expenses insurance. If such an approach were adopted it would contextualise the last thirty years of litigation funding as a brief interregnum between the age of civil legal aid and the age of comprehensive litigation insurance.

57 See, for instance, K. Niemitz, *Universal Healthcare without the NHS: Towards a Patient Centred Health System* (2016) and J. Bartholomew, *The Welfare of Nations* (2015) for a comparison of different approaches to healthcare delivery.