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Book Review

Legal Aid — The First Twenty-Five Years. By Seton Pollock. LONDON: Oyez Publishing Ltd., 1975. Pp. xiii, 194. £4.50.

To mark the twenty-fifth anniversary of the introduction of the civil legal aid scheme[1] in England and Wales, Seton Pollock has written a comprehensive and lucid account of England's program of legal assistance for the poor. No man could have been better equipped for this task. Mr. Pollock has been involved with the legal aid plan from its beginning in 1950, and during the past decade he has served as the plan's chief executive in his role as Secretary of the Law Society for Legal Aid.[2] In other hands this topic could have produced a dull history, a dry recital of structure, and a list of the statistical and organizational victories that any administrative unit is likely to accumulate over a period of twenty-five years. Instead the book is tightly written, fair in its presentation of opposing views, and, above all, laced with English wit and understatement in refreshing contrast to the heavy stuff that many American legal writers impose on that vanishing breed, the American legal reader.

Mr. Pollock begins with a chapter on "The Basic Principles of Legal Aid." The fundamental principle of British Legal Aid, that no person should be denied his rights at law for lack of means, is a considerably narrower objective than that of our own Economic Opportunity Act of 1964.[3] The English system differs from ours in two other important respects: (1) the person aided has the right to choose his legal advisor from among those in general practice in the locality; and, (2) the person aided has a duty to contribute what he can reasonably afford toward the cost of the services.

In the second and third chapters the history of legal aid and the activity leading up to the Legal Aid and Advice Act of 1949 are set out. We discover that the first English legal aid act was enacted in 1495 and introduced the *in forma pauperis* procedure. It did not take long for the English to discover that any charitable scheme can be abused, for under the English practice that imposes on the losing party in a civil action the duty of paying the winning party's costs (including legal fees), the 1495 act gave no protection to the opponent of a poor person when the poor

1. The word "scheme" means in England a "fully formulated plan" and does not have the unsavory connotation it has in the United States. POLLOCK at 27.

2. The Law Society, England's equivalent of the American Bar Association, is a voluntary association of solicitors. The Legal Aid and Advice Act of 1949 gave the Society the responsibility for operating with public funds the legal aid plan on behalf of the government.

3. *See* text accompanying notes 13–20 *supra*.

person lost his case. This was "solved" in 1531 by an act which provided that the unsuccessful poor plaintiff could be punished with "whipping and the pillory."[4] The 1949 reform act had its immediate genesis in the Divorce Department that the Law Society had set up in 1942 to provide legal aid for servicemen and their wives. This program recognized for the first time that, at least in some cases, legal aid ought to be available as a right and that it should be handled, not as a charitable duty of the profession, but by solicitors compensated by public funds.

The next three chapters describe the 1949 act, the organizational structure adopted, and the procedures used. In essence England has a "Judicare" type of operation. A poor person goes directly to a solicitor of his choice or, more commonly, is referred to a solicitor by his union or by a community organization, such as one of the Citizen Advice Bureau offices scattered throughout the country. With the solicitor's help, he files an application for legal aid with the Local Committee.[5] The Local Committee then decides whether to grant a legal aid certificate authorizing the solicitor to proceed with the matter and assuring him remuneration to the extent of eighty-five percent of the standard fee. The applicant must satisfy a financial test that involves both a "disposable" income test and a capital test, and has the duty to make a financial contribution to the cost if these measures indicate that such a contribution is feasible. On the merits, the applicant must show that a "hypothetical paying client" in the same circumstances would have engaged a solicitor. More specifically, the act denies public funding for the legal services unless the client has "reasonable grounds for taking, defending or being party to [the proceedings]."[6] Also, aid will be refused "if it appears unreasonable that he should receive it in the particular circumstances of the case."[7] This second test, for example, would not be met if the applicant instituted an action for damages against an opponent so poor that he could not meet the judgment or the costs involved. In commenting on this second test, the author pungently observes: "Though people with money are entitled to act foolishly at their own expense, it is not reasonable that a person should so act at the expense of the taxpayer."[8] He also observes that some social injuries are uneconomical to litigate. Mr. Pollock cites as an example a suit brought by a consumer who had purchased a tea kettle with a defective handle; the cost of the action for damages would exceed the cost of more than fifty such kettles. Such a case is considered inappropriate for legal aid. Also, the "test case" solely to achieve a reform in the law is deemed beyond the scope of the English Legal Aid Act.

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4. POLLOCK at 12.

5. The Legal Aid Committee of the Law Society organized twelve Area Committees which, in turn, appointed Local Committees in each community to act upon applications for legal aid.

6. POLLOCK at 40.

7. *Id.*

8. *Id.* at 42.

Mr. Pollock next covers the growing pains experienced by the Legal Aid Scheme during its first decade (1950–60), and the years of its expansion (1959–69) following the Legal Aid Act of 1960 which liberalized the financial eligibility levels. A large part of the workload had been marital problems, and an early criticism deplored spending public money to end marriages.[9] One happy result of this influx of public money in the divorce area was a dramatic simplification of divorce law and procedure, a response to the pressure to save public funds in legal aid assisted cases. A similar result may be brewing in personal injury cases, more than half of which involve plaintiffs who are being assisted under the Legal Aid Act.[10] "No fault" has been getting a good deal of attention as one way to reduce adjudication costs in these cases.[11]

In response to criticism of the high costs of legal aid, Mr. Pollock points to a study by the Lord Chancellor's Advisory Committee. This study concluded that although the overall cost of the Scheme rose at a rate of one million pounds per annum, the administrative cost in real terms declined by one quarter, and the average cost per case remained steady. Thus, "[t]he growth in expenditure was . . . seen to be related purely to the volume of work being handled."[12]

In the final three chapters, Mr. Pollock covers the issues of most interest to those on this side of the Atlantic. In chapter eight, appropriately entitled "The Wind of Change,"[13] he discusses the impact of the 1964 Economic Opportunity Act in America. Before 1964 legal aid in America was largely funded by Community Chest, supplemented by volunteer services of members of the Bar. By that time the English legal aid plan was well established and, within its limited objectives, relatively effective. The 1964 initiative in America went far beyond England's objectives, including in its broad attack on the problems of the poor, coordinated social service efforts, projects for the economic development of ghetto areas, community organization of poor people into groups to bring political and economic pressure, and law reform through test cases and legislative advocacy.[14] The OEO program, in its recruitment of staff, sought lawyers equipped to play these diverse roles. In contrast to the single-minded purpose of the English Legal Aid Scheme, the achievement of "equality under the law" by providing poor people with advice and legal assistance,[15]

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9. *Id.* at 69.

10. Personal injury and workmen's compensation cases are not covered by our legal aid services offices because the contingent fee has made such cases economically attractive to the private bar. In England, however, a contingent fee is unethical. Moreover, the schedule of permissible fees in such cases is considered low by many solicitors. Personal injury litigation is, therefore, one of the least popular types of practice in England.

11. *See, e.g.*, P. ATIYAH, ACCIDENTS, COMPENSATION AND THE LAW (1970).

12. POLLOCK at 85–86.

13. *Id.* at 87–102.

14. *Id.* at 131.

15. *Id.* at 129.

the new American concept of "legal services" was "conceived in terms of an attack upon poverty itself as the overriding objective."[16] Not unnaturally then, Mr. Pollock is a little sensitive to comparisons of the current American approach to "legal services" and the English "Legal Aid Scheme." He points out not only the difference in the basic objectives of the two nations, but also "the marked difference in the nature of the soil out of which the two systems have developed their present features."[17] Mr. Pollock cites as the principal differences between the two countries on this point: (1) the American lawyer traditionally provides a wider range of services to clients than does the English solicitor and barrister (for example, the American lawyer often performs services as a legislative lobbyist and as a general business adviser for his clients);[18] (2) class actions and test cases are peculiarly American mechanisms and do not have English counterparts;[19] (3) in America it is possible for the courts to negate statutory law on appeals to the natural justice embodied in the written constitution;[20] and, (4) the limited legal aid that existed in America prior to 1964 was by use of salaried lawyers paid by charitable funds, while in England legal aid had always been by use of solicitors in private practice.[21]

Although to date England has refused to change directions to follow the American pattern, the American experience has its supporters in England[22] and has inspired some experiments with neighborhood legal centers and some high-level reappraisals of the English Scheme. Currently there are fourteen Legal Aid Centres, twelve of them in disadvantaged districts of London.[23] In 1972, the English Scheme expanded beyond coverage of matters involving litigation or potential litigation by authorizing up to twenty-five pounds worth of office advice by a solicitor.[24] In addition, an Advisory Liaison Service was authorized. When adequately financed, it will provide a salaried task force to help mobilize solicitors and existing social services in order to provide a more complete legal aid coverage and to encourage greater use of the services available by educating the public.

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16. *Id.* at 131.
17. *Id.* at 134.
18. *Id.* at 88.
19. *Id.* at 89, 134–36.
20. *Id.* at 89.
21. *Id.* at 88.
22. Mr. Pollock has reacted warmly to some of this criticism:

> The crusading zeal of the American attorneys, who became involved in what was soon to be called the "Legal Services Program," inspired many English lawyers and particularly the younger members of the profession. It seemed to them infinitely more worthwhile to be able to take part in a rescue operation for the poor than to spend their days dealing with the problems of the poor within the ambit of the orthodox practice of the typical solicitor.

Id. at 90.

23. *Id.* at 98.
24. *Id.* at 97.

The current battle in England appears to be between the Law Society which proposes to implement this Advisory Liaison Service, and those who prefer neighborhood law centers, financed by public funds and operated independently of the Law Society.[25] Whether or not the Law Society (the English "legal establishment") will win in this fight for control over the future of legal aid in England is a prediction that would be rash for an American to make, but after reading his book I would feel encouraged if I had a man of Mr. Pollock's caliber in my corner.

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25. *Id.* at 143–48.

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