

## **IMPLEMENTATION OF THE JACKSON PROPOSALS – Redefining Access to Justice?**

### **Comment**

#### **SUMMARY**

A White Paper has been introduced into Parliament seeking implementation of the Jackson proposals with scarcely any change. This is accompanied by proposals to withdraw Legal Aid in all but a few narrow categories of civil claims and to reduce the obligations upon occupiers and some employers in respect of Health and Safety procedures.

The outline proposals of the White Paper are set out and discussed in the March/April PIMLU and include:

- the abolition of the ATE and BTE premiums
- the abolition of the recovery of ‘success fees’ from Defendants in CFA funded claims.
- the recovery of success fees from successful Claimants with the proportion of any damages that can be taken by lawyers being capped at 25%.
- an increase in General Damages by 10% to assist with this contribution by Claimants who are encouraged to take responsibility for and invest in their own litigation.

These changes are likely to be accompanied by an increase in the small claims limit from £5,000 to £15,000 with automatic referral of small claims to mediation rather than the Court and raising the minimum value of a case that could be taken before the High Court to £100,000.

#### **DISCUSSION**

As any personal injury lawyer knows, the obvious difficulty with the headline-catching proposal of a 10% increase in general damages awards to meet success fees, is that general damages are never set in stone: there is always a range or spectrum of awards which are an appropriate reflection of damages for pain, suffering and loss of amenity. In these days where settlement and mediation is the encouraged route for disposal of these claims, an award for general damages in, for example, in an Erb’s Palsy claim, could equally be £70,000 or £77,000. In such circumstances where the latter figure has been agreed what lawyer will then turn round to an injured child and require the £7,000 to be contributed towards the success fee? This is simply not going to happen and the insouciance of these proposals is that the Lord Chancellor and the Ministry of Justice must realise that the majority of lawyers will not allow this to happen.

On the other hand, neither will competent lawyers take on high risk claims: a vocational profession should not be equated with voluntary work. Other professionals, including architects, doctors, accountants, surveyors and politicians, are not expected to provide their undoubtedly skilled services *gratis*. Yet, successive governments have sought to persuade

the general public that lawyers apologise for their very existence by not charging for the provision of legal services.

More significantly, in all the hubris surrounding conditional fees, it is conveniently forgotten that the role of a lawyer is not primarily to 'win' a case although it is always nice to do so: the principal objective is to provide skilled and measured advice. Often that advice will be that a claim cannot succeed and advising discontinuance of a claim is usually more taxing and time-consuming than one where the case appears a clear 'winner'. A client rightly expects professional objectivity even if the resultant advice is not necessarily what they want to hear. This essential objectivity has been progressively eroded through encouragement of the use of first names and 'feedback' on the quality of the coffee and biscuits in the assessment of advocacy skills and social interaction by the lawyer with the lay client. 'All that glitters is not gold' – better to have an apparently grumpy but skilled advocate than an affable mediocrity.

Behind the marketing façade, the client needs to know that advice is objectively given irrespective of fee: how then are they to believe this if a lawyer has a vested interest in trying to win the claim and thus secure a fee or else be out of pocket. And make no doubt about it – despite what Mr Clarke would have people believe – lawyers will be out of pocket as all cases incur overheads whether or not they are successful and the Bar perhaps will suffer most as they tend to be consulted on the more challenging claims which cannot be dealt with within the solicitors' firm by a junior or paralegal: it is axiomatic that the ratio of cases which are lost will be higher in such circumstances.

Statistics are used to justify the proposed changes with the oft quoted widely reported data that in 2008/9 the NHS paid out £312 million in damages but £456 million in costs). This ignores two fundamental issues: even assuming a few settlements of unmeritorious claim on purely commercial grounds, the overwhelming majority of the £312 million damages was paid because of negligence (inexcusable incompetence) by NHS employed healthworkers. That is not the fault of the injured patient or his lawyers. Further the £456 million in costs includes those costs paid to lawyers acting on behalf of the NHS: attend a clinical negligence trial and see which side has the most expensive and personalised presentation files to see how those costs are spent.

A system introduced to provide access to justice has been the victim of its own success: irrespective of uplifts, cases have been won on their merits and insurers and the NHSLA do not like this. The solution? Remove the funding, make injured vulnerable claimant's assume the risk and increase the profits of insurance company shareholders, many of which include corporate concerns which contributed to the very banking crisis which led to the austerity measures and the almost unseemly haste with which the Jackson proposals have been welcomed with open arms by the government. This is despite reasoned and measured responses by the Bar Council, the Law Society, the professional Bar associations (PIBA and PNBA) and Claimant organisations such as LAG. The only observations which seem to have found a listening ear are those of Defendant bodies such as FOIL, the ABI and the NHSLA

It is axiomatic that the proposed reforms will come as welcome news to many banks, insurers and other financial institutions that have been on the receiving end of claims. It does not however mean that all or any of these claims lacked merit and were unjustifiably brought. Whilst therefore these reforms will "strike at the heart of the "compensation culture"" they will also strike at the heart of a system of justice and fairness that has evolved over 1000 years and which, until recently, was the envy of other legal jurisdictions throughout the western world. Anyone can reduce costs by denying justice but the real cost of this is the impact upon the weakest and most vulnerable in society. Like Oscar Wilde's cynic, Mr Clarke indeed appears to know the cost of everything but the value of nothing.

## CONCLUSION

It is disconcerting to read the reviews of these proposals by those predominantly concerned with the defence of personal injury and clinical negligence claims. Almost without exception they accept the existence of the “compensation culture” despite empirical research which has demonstrated that this does not exist save where fanned by unqualified Claims farmers. It is also suggested that without exception, those acting for claimants in the area of personal injury and clinical negligence have used CFAs as “a gravy train which has since been hurtling through the civil litigation landscape at breakneck speed. The system has been viewed by some as a lawyers’ licence to routinely double fees. Others say it has led to a culture of conveyor belt litigation, where claims are ATE backed, routinely subject to a 100% success fee, and in our experience, issued without any genuine assessment of legal merit; the claimant solicitors also have a clear vested financial interest in the outcome of every claim” (LEXOLOGY 8<sup>th</sup> April 2011).

It is perhaps time therefore to remind these gleeful commentators that without exception both the Law Society and the Bar Council opposed the introduction of CFAs as did organisations such as APIL. In the writer’s experience, even in the most complex of clinical negligence claims which have literally been taken to the eve of trial or even the court door, a 100% success fee has not been recovered. Moreover, most ATE and BTE insurers require a confident assessment of the prospects of success of at least 60%, usually 65% before they will grant or extend funding. The ‘cherry-picking’ has not necessarily been by the lawyers but by the very insurers who now join in the vilification of those lawyers. In many cases the merits of the case are quite clear from the outset but BTE insurers are keen for the funding to become CFA based so that their risk is minimised. The risk then becomes that of the claimant lawyer alone and this will be particularly the case under the proposed reforms. Furthermore, many insurers, and the NHSLA in particular, have insisted on the formal issue of proceedings in meritorious claims, having previously rejected the claim in the formal protocol letter of response, thereby driving a coach and four through the spirit of the Civil Procedure Rules and Lord Woolf’s vision of a streamlined, cost effective system of ‘Access to Justice’.

It could be argued that the fear of a significant costs bill leads them thereafter to capitulate and in a few cases this may be so. In the overwhelming majority however, the bluff of the big organisation versus the injured individual has been called and the NHSLA and insurers face up to the inevitable – the need to settle a claim to which there is no reasonable defence. Let there be no doubt about this: this is not blackmail through a hiked costs bill but justice being done. Times of austerity often tend to punish those who have neither the financial resources nor the physical or emotional strength to resist: the parallel is bullying in schools or the workplace where the bullied person is blamed for the resultant bad atmosphere whereas the bullies – if only because they have the upper hand - are left alone.

Certainly, the income of many personal injury lawyers will now be reduced, in cases where there has been abuse of the CFA system, this is entirely right: it only takes a few rotten apples to corrupt an entire barrel. Lawyers of integrity will however be disinclined to take on cases which have a high risk of failure because the reality is that in those cases which win there will be no attempt to recoup a ‘success fee’ from an injured Claimant and attempts to do so will almost certainly be resisted and reviled by the claimants themselves and other organisations: this is already the situation in legally aided claims in relation to Legal Aid costs not recoverable *inter partes*. In 37 years at the bar the writer has only known 2 cases where a firm of solicitors has sought to recoup those costs from the claimant’s damages: in the overwhelming majority of these cases, it is the accepted convention that these costs (often quite significant) are non-recoverable as an inherent *pro bono* element of such litigation.

Furthermore, the increase in general damages awards by 10% will be viewed by claimant

organisations as a long overdue reform of derisory general damages awards heralded by the Court of Appeal decision in *Heil v Rankin* [2001] QB 272 CA (Civ Div) but not thereafter implemented (again because of successful lobbying by insurance companies and defendant organisations). The proposal that this increase should be used in order to assist claimants in paying their legal fees is disingenuous and will be almost universally rejected. Claimants will shop around for lawyers who are prepared to accept the entirety of the risk for advancing a claim.

Ironically, these are likely to be large City firms anxious to garner social awareness credentials. The likelihood however, is that this work will be delegated to trainees and paralegals, lacking the skill, knowledge and training to handle the more complex claims but who will conduct claims under the ostensible supervision of a partner or associate solicitor. The ultimate irony is that when in appropriately handled claims result in professional negligence actions any losses will almost certainly be written off against tax.

These proposals march in tandem with the drastic cuts in public funding and the Legal Services Board's draft Business Plan for 2011/2012. The Bar Council has provided a robust and uncompromising response to this Plan which is also reviewed in the March/April 2011 PIMLU.

It does not require the Delphic Oracle to predict that this well-reasoned analysis would fall upon the proverbial stony ground. Indeed, the likelihood is that the final proof of the White Paper had already been sent to the printers before this response was received. This is evident from the fanfare and smug satisfaction with which the White Paper was introduced into Parliament by Sir Kenneth Clarke on \*. This update is not the appropriate forum to rehearse the 'recommendations': suffice it to say that the combination of the recommendations for the full implementation of:

- i. the Jackson proposals
- ii. the Young report on relaxing the controls of Health and Safety legislation
- iii. the withdrawal of legal aid from virtually all civil claims
- iii. proposals to extend the powers of the LSB

have at one stroke set aside the established legal principles. The Government is to be congratulated on the lessons of spin learnt from the last administration: at a stroke 'access to justice is denied'; the courts clogged to breaking point with litigants in person; the trumpeting of significant savings in public expenditure (principally to the benefit of such bodies as the NHS and Local Councils who are so often legitimate defendants in personal injury claims); and complete blame for the inevitable adverse fallout, being placed upon legal practitioners who are far removed from the stellar incomes of city lawyers which provide a convenient platform for carefully manipulated media contempt for those who practice in the area of publicly funded litigation for the weakest and most vulnerable in society.

The Court of Appeal has already been citing sections of Sir Rupert Jackson's report in support of adverse findings on CFA costs appeals and the LSB is increasingly requiring claimants to 'show cause' why funding should not be withdrawn, following letters from defendants to the LSB informing them that there is no case. Funding for trial is being withdrawn despite entirely proper assessments of reasonable prospects of success). The Green paper/White paper consultations are already deemed by the LSB and others to have the force of law and become self-fulfilling prophecies and thus 800 years of jurisprudence with a well-measured sprinkling of moral probity and compassion, can be dispensed with at a stroke of a ministerial pen based on spurious spin of a 'compensation culture'

In Robert Bolt's 'A Man for all Seasons' Sir Thomas More's daughter Alice and son-in-law, Will Roper are urging him to arrest Richard Rich before he betrays More:

*"Alice: While you talk, he's gone!*

*Sir Thomas More: And go he should if he was the Devil himself until he broke the law!*

*Roper: So now you'd give the Devil benefit of the law?*

*More: Yes, what would you do? Cut a great road through the law to get after the Devil?*

*Roper: I'd cut down every law in England to do that!*

*More: Oh? And when the last law was down, and the Devil turned round on you - where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast--man's laws, not God's--and if you cut them down--and you're just the man to do it--d'you think you could stand upright in the winds that would blow then?*

Under the current proposals, the last law will be 'cut down'.

There must always be a balance: some cases undoubtedly have been advanced in the hope that defendants with an eye on increasing ATE premiums and significant success fees' will fold and make commercial settlements where the justice of the case would be for the issues to be tried and for the defendant to succeed. Nonetheless, the price of such levelling being exacted by the government, is too high and those justifying the turning of the tide against personal injury litigants do not address the Government's conflict of interest in making changes to funding which will also defend them against claims from injured individual members of society.

The apparent willingness to condemn a system of funding based on occasional extreme cases is distressing. The reality is that where the substantive law requires only proof on the balance of probability, if the system for public funding makes the practical threshold for civil litigation higher than that standard – which is the current proposal - something is clearly wrong. This will inevitably result in significant injustice to those who will be left without representation: local authorities and other government bodies will be able to act with impunity and health workers will be absolved from any duty of care. What winds will blow then?

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