

COMMON SENSE COMMON SAFETY

Lord Young of Graffham

REPORT 15TH OCTOBER 2010

Summary and Overview

SUMMARY

Lord Young was asked to report following a Whitehall-wide review of the operation of health and safety laws and the growth of the (alleged) compensation culture. His report was published on 15th October 2010 and the Terms of Reference are set out in Appendix Aⁱ;

This report follows four months of investigation and research including consultation with a number of stakeholders which are listed at Appendix B. A summary of their responses is set out at Appendix C.

Lord Young's views and recommendations should be considered in tandem with the final report of Sir Rupert Jackson's Civil Litigation Costs Reviewⁱⁱ.

The focus of the Young report is the impact of health and safety legislation on business and personal freedom and recommendations are made in respect of: the UK's compensation culture; low hazard workplaces; the professionalization (*sic*) of health and safety consultants; insurance; education; local authorities; the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 1995; and combining food safety and health and safety inspections. He also uses the report as an opportunity to reinforce criticism of CFAs and success fees in all personal injury cases and extends the ambit of his disapproval to clinical negligence claims.

The specific recommendations are summarized at pages 15 to 17 of the report and include:

Compensation Culture

- a simplified claims procedure for personal injury claims similar to that for road traffic accidents under £10,000 on a fixed cost basis¹ up to £10,000 with consideration to be given to extending this to low value medical (*sic*) negligence claims;

¹ Low Value PI Claims in Road Traffic Accidents introduced on 30th April 2010

- extending the upper limit for road traffic accident personal injury claims to £25,000²;
- introducing the recommendations in Lord Justice Jackson's review of civil litigation costs;
- restricting the operation of referral agencies and personal injuries lawyers and controlling the volume and type of advertising;
- clarifying that people will not be held liable for any consequences due to well-intentioned voluntary acts on their part.

Low hazard workplace

- simplification of risk assessment procedures for low hazard workplaces such as offices, classrooms and shops (and barristers' chambers?) with interactive assessments, checklists and video demonstrations of best practice for such workplaces available on the HSE website

Raising standards

- professionalization of health and safety consultants
- establish a web based directory of accredited health and safety consultants

Insurance

- removal of insurance company requirements for such businesses to employ health and safety consultants to carry out risk assessments
- where H and S consultants are required they should be drawn from those on the web based directory
- consultation to ensure that worthwhile activities are not unnecessarily curtailed on health and safety grounds
- insurance companies to draw up a code of practice on health and safety for businesses; alternatively legislation

Education

- simplify the process for school trips with a single consent form covering all activities that a child might undertake at school
- a simplified risk assessment for all classrooms
- shift from a system of risk assessment to one of risk-benefit assessment
- consider reviewing the HSWA 1974 to separate out play and leisure from workplace contexts

² This refers to the Small Claims scheme where the current upper limit is £1,000. This remained unchanged following the MOJ response in July 2008: "**Case track limits and the claims process for personal injury claims**" MOJ response July 2008: <http://www.justice.gov.uk/docs/case-track-limits-response.pdf>. Jackson LJ also considered increasing the upper limit but did not do so (page 183, Chapter 18, paragraph 3.1 - "I acknowledge the strength of feeling about this issue on all sides. I do not think that now is the right time to review that limit.") The recommendations in his final report however include the introduction of fixed costs for 'Fast Track' accident claims up to £25,000 with a matrix of figures for all personal injury accident cases (p.538) with a commitment to extend this to employers' liability disease cases.

Local Authorities

- reasons for banning events on health and safety grounds should be put in writing
- a route for redress by citizens who wish to challenge local officials' decisions
- internal review of all refusals on the grounds of health and safety
- referral of unfair decisions to the Ombudsman with a fast track process to allow overturning of decisions within 2 weeks and the ability of the Ombudsman to award damages if it is not possible to reinstate an event

Health and Safety Legislation

- HSE to produce separate guidance under a Code of Practice focused on small and medium businesses engaged in lower risk activities
- The current raft of health and safety regulations should be consolidated into a single set of accessible regulations
- UK should take a lead in cooperating with other member states to ensure that EU health and safety rules for low risk businesses are not overly prescriptive, are proportionate and do not attempt to achieve the elimination of all risk

Police and fire services

- No risk of investigation or prosecution under health and safety legislation of police officers and firefighters when engaged in the course of their duties if they have put themselves at risk as a result of committing a heroic act.

Other recommendations apply to the *Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 1995*, working with larger companies and combining food safety and health and safety inspections.

Annex L provides a helpful example of a downloadable risk assessment form

Annex M sets out the timetable for the proposed Implementation Milestones and includes the following:

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| - Autumn 2010 | - Launch of the consultation for reform of civil litigation |
| - April 2011 | - Introduction of priority measures on Conduct rules for claims management companies |
| - June 2011 | - HSE to produce clear separate guidance under the Code of Practice for small and medium sized businesses engaged in lower risk activities |
| - April 2012 | - Introduction of system to allow the Local Government Ombudsman to award financial compensation where local authority officials have made an incorrect decision on the grounds of health and safety and it is not possible to reinstate the event |
| - April 2012 | - Introduction of extended RTA Scheme to include personal injury and low value clinical negligence claims (subject to consultation) as part of wider civil justice reforms |

OVERVIEW

Lest there be any doubt that Lord Young has approached this report with other than an open mind in which the interests of vulnerable injured people were at the heart of his brief, attention is drawn to the following extract from the second paragraph in the first column on the second page of his Foreword (page 8) and in particular the measured words in the last phrase of that extract:

“Clearly, it is right that people who have suffered an injustice through someone else’s negligence should be able to claim redress. It a basic tenet of law and one on which we all rely. What is not right is that some people should be led to believe that they can absolve themselves from any personal responsibility for their actions, that financial recompense can make good any injury, or that compensation should be a cash cow for lawyers and referral agencies.”

In the second column he goes on to say that the UK’s compensation system (*sic*) should not be:

“ ... fuelling expectations that injury means automatic compensation regardless of the circumstances and that the aim is to free businesses from unnecessary bureaucratic burdens and the fear of having to pay out unjustified damages claims and legal fees. Above all it means applying common sense not just to compensation, but to everyday decisions once again.”³

In Chapter 19 entitled “*Compensation Culture*” Lord Young prefaces the details of his recommendations with the following observation:

“If there is one law that Parliament cannot repeal it is the law of unintended consequences, and it is the unintended consequences of well meaning legislation that are at the root of our problems today. The Access to Justice Act 1999 brought about three major changes in the compensation landscape. These were the introduction of conditional fee agreements (CFAs), the growth of after the event (ATE) insurance and the proliferation of claims management companies. The shift towards increased fears of litigation can be seen to have its roots in these changes.”

Nowhere does he acknowledge that these changes were largely opposed with well-reasoned analysis by the Law Society and the Bar.

In a report which contains many sensible recommendations, it is unfortunate that the absence of objectivity in the terms of reference and approach – as demonstrated in the very heading: ‘*Compensation Culture*’ – reflects an apparent dislike and distrust of the legal profession, labelling all as no better than ‘ambulance chasers’⁴ waiting to ‘pounce’⁵ on vulnerable people and who are:

“ ... incentivised to rack up high fees secure in the knowledge that they will be charged to the losing party”⁶.

This may (or may not) be apposite in relation to claims management companies but not in respect of the legal profession as a whole; such an approach is neither reasoned, helpful nor informed.

The law serves to ensure adequate compensation where this is justified under well-respected legal principles that have evolved through common law, statute and case law This law however also operates as a valuable and valued check on unacceptable practices within such ‘businesses’. This is so whether the subject-matter is health and safety, road

³ also highlighted in the box on page 11 of the report

⁴ Prime Minister’s address to the Policy Exchange think-tank in December 2009

⁵ Foreword to the report by the Prime Minister (page 5)

⁶ Foreword to the report by Lord Young (page 7)

safety, medicine or other areas where 'regulation' has often evolved in response to legal precedent. This may be seen from the effect of the original Factories Act and Asbestos Regulations on hitherto persistent and blatantly unsafe practices which resulted in serious injury and death. In his Executive Summary on page 11 Lord Young refers to the fact that the UK has *"the lowest number of non-fatal accidents and the second lowest number of fatal accidents at work in Europe"* but does not stop to analyse why this is: he nowhere appears to acknowledge or appreciate that this is in large part owing to the evolution of Health and Safety Law and the enforcement through the courts, *inter alia*, by compensating those who are injured through breaches of these laws.

This fundamental synergy between regulation and legal enforcement is recognized by those who work in the fields that Lord Young seeks to protect such as teachers and the fire service (see September 2010 PIMLU where the responses to the consultation of the NASUWT and the FBU are discussed).

There is no doubt that some of the recommendations are welcome and long-overdue:

These include the constraints on advertising and clarification of the status of the Good Samaritan 'volunteer'. Likewise the recommendations in low hazard workplaces are long overdue as are those in respect of children's play areas where Lord Young rightly observes at page 37 that misinterpretations of the HSAWA are leading to the creation of uninspiring play spaces that do not enable children to experience risk. He adds that such play is vital for a child's development and should not be sacrificed to the cause of overzealous and disproportionate risk assessments. There is also a very helpful example of a downloadable risk assessment form at Annex L on pages 59 and 60 of the report.

Unfortunately in many respects the report appears to pose as many problems as it seeks to resolve:

- How will *"worthwhile activities"* be defined/resolved – ironically, expect satellite litigation on this issue!
- Will the simplified risk assessment for teachers take account of the risk to teachers from attack/intimidation by unruly/violent pupils?
- In separating out play and leisure from work activities is it proposed the fundamental common law principle of a duty of care can be excluded by contract (express or implied) or by statute thereby overturning 600 years of jurisprudence?
- What standard (if not a legal benchmark) should be applied in drawing up the proposed separate health and safety rules for low risk businesses so that these are *"not overly prescriptive, are proportionate and do not attempt to achieve the elimination of all risk"*?
- In relation to Police Officers and Firefighters, what will constitute being *"engaged in the course of their duties"* or *"a heroic act"*? What if they are off-duty at the time and their actions could be considered those of a meddling bystander?

CFA's and the Jackson Report

Lord Young 'warmly' welcomes the consultation into the Jackson report; he expresses the hope that the proposals are adopted as soon as possible and factors the implementation of these proposals in the 'Milestones' timetable at Annex M. He regrets however that the adoption of the Jackson proposals will not substantially shorten the process by which 'medical' negligence cases are resolved (even though the 'front-loading' of the investigation process was resisted by clinical negligence lawyers and other stake-holders).

On page 19 (Compensation Culture) Lord Young observes:

“ ... in 2009/10 the NHS Litigation Authority (NHSLA) paid out nearly £297 million in damages on claims closed in that period. On the same claims, the NHSLA spent a total of £163.7 million on legal costs, of which 74% went to claimants’ lawyers and 26% to its own lawyers. Some of this money could be better spent on healthcare”.

A cynic might be forgiven for commenting that had there been an appropriate standard of healthcare in the first place, the claims would not have been brought. However the conflation by Lord Young of these observations with his views and recommendations on unwarranted Health and Safety claims gives rise to the not too subtle inference that a significant majority of clinical negligence claims on which the NHSLA are paying out damages and costs are also unmeritorious. If so, perhaps they should look to the plank in their own eye (their case managers) rather than blaming those whom they have harmed through negligent acts or omissions.

Lord Young’s proposal to extend the RTA Personal Injury Scheme with an online-procedure which he describes as “*a clear and user friendly scheme*” indicates little understanding of the law which applies to clinical negligence claims or the complexities of investigation that can arise irrespective of the severity of the injury. He adds a *non sequitur* that this proposed scheme would minimise the amount of time people spend off work and in receipt of benefits while awaiting payment of damages. Again, this assumes that the only reason for being off work is because the claimant is waiting with cupped hands for the munificence of the NHSLA and not because of the severity of the injury and resultant disability; secondly, Lord Young would appear to be unaware of the CRU scheme whereby such benefits are largely recouped. More significantly, whilst claims under £10,000 are conducted on a fixed-costs basis under the existing Road Traffic Accident Personal Injury Scheme, there appears to be a lack of awareness that the RTA Low Value PI Claim ‘on-line’ scheme applies only to those claims where liability is not in dispute⁷.

COMMENT

Lord Young’s commences the Foreword to his report with the following statement:

“It may seem unusual to commence a review of health and safety with the state of litigation in the country but I believe that a ‘compensation culture’ driven by litigation is at the heart of the problems that so beset health and safety today. Last year over 800,000 compensation claims were made in the UK while stories of individuals suing their employers for disproportionately large sums of money for personal injury claims, often for the most trivial of reasons, are a regular feature in our newspapers.”

It does therefore seem a little unkind that no-one has apparently instructed Lord Young in the basic tenets of tort law, including contributory negligence, which in Health and Safety cases already addresses the issue of an individual taking some responsibility for his own safety. He is also seemingly unaware of the *Bolam/Bolitho* test in clinical negligence claims and has but a shaky grasp of the principles of the quantification of damages in personal injury claims. Yet he returns to the latter subject time and again in his report: “*disproportionately large sums of money ..*” (see above); “*handsome rewards*”; “*The aim*

⁷ and moreover has received a muted if not outright hostile reaction from practitioners, particularly insurers with the electronic portal designed to allow practitioners to share information quickly being described by one solicitor as “*the portal of doom*” and the wry observation that a ‘simplified’ process has generated 80 pages of rules, practice directions and forms. interestingly in his final report Jackson LJ expressed concern as to whether this new process would genuinely simplify the process and not lead to satellite litigation

*is to free businesses from unnecessary bureaucratic burdens and the fear of having to pay out unjustified damages claims and legal fees*⁸.

On the other hand, one should never let the inconvenience of truth get in the way of a good story: the reality is that government in general is determined through unsustainable fee levels to exclude lawyers from acting in these cases to ensure proper compensation for those injured through the negligence of others. The 'spin' is to maintain the pretence that fundamental principles of justice and fairness are observed, and that any dissatisfaction or unfairness arises through personal injury and clinical negligence lawyers exploiting these areas of law as a cash cow for grossly inflated fees instead of acting as professionals in the best interests of their client be this a claimant or defendant.

It was therefore indeed prescient that prior to publication of this report in an interview with Frances Gibb (*The Times*) published on 7th October 2010, Lord Phillips was reported to have expressed concern over the impact of Government cuts, warning that severe cuts would damage the administration of justice and noting that two thirds of the Court's costs are fixed, so there are limits to the cuts that can be made.

Two days earlier (13th October 2010) the Law Society published their response to the Jackson reviewⁱⁱⁱ. Whilst sharing his views and concerns regarding the costs of the system, caution was urged in that many of the recommendations required careful scrutiny and significant impact assessments before being implemented. The Society's principal responses to the report were:

- proportionality is an important objective but it must not override the need to ensure that people are able to pursue legitimate redress
- the best way to address this is to streamline some court processes and for changes to be properly piloted
- proposals to abolish recoverability of success fees and ATE premiums are likely to significantly reduce access to justice
- the proposed Qualified One Way Costs Shifting Rule may result in satellite litigation and a further disincentive to bring claims
- the Society is committed to the principal that injured claimants receive 100% of their claim (view shared by the specialist Bar Associations [PNBA and PIBA])
- the role of the judiciary will be pivotal and the need for judicial specialists and training in case management is essential
- piecemeal implementation of the reforms may generate unintended consequences.

The overriding message – which is recited but never properly addressed in Lord Young's report - is that:

“individuals have a right to seek the redress of grievances or be able to right wrongs through an impartial and independent legal system” ... “People need competent, independent advice on the issues affecting them and strong representation in court – in this time of economic uncertainty, this has never been more important” ... “In a just society anyone harmed by the negligence of others should be entitled to compensation”

These cautionary words have resonance with the concerns that are likely to result from Lord Young's recommendations – at least in relation to the 'Compensation Culture'. By way of example, Lord Young addressed proportionality but only in the context that the damages and costs paid out by the NHS LA were disproportionate. There was no

⁸ Lord Young Foreword to the report (page 8)

discussion as the legitimacy of the cases in which these damages payments were made and costs incurred; neither was the source of the raw data identified upon which the meta-analysis giving rise to these statistics was carried out.

It is perhaps a cautionary tale that when announcing Lord Young's review in July 2010, the Prime Minister criticised the '*rise of the compensation culture over the last ten years*' and called for a '*sensible new approach*' that does not '*overwhelm businesses with red tape*'.

In his forward to the Report the Prime Minister becomes even harsher in his views of personal injury lawyers:

A damaging compensation culture has arisen, as if people can absolve themselves from any personal responsibility for their own actions, with the spectre of lawyers only too willing to pounce with a claim for damages on the slightest pretext.

Those looking for an objective, mature introduction informed by dispassionate analysis of the desired balance between individual access to justice and commercial considerations may be disappointed. This somewhat intemperate response is in marked contrast to the Prime Minister's stance when in opposition where in his speech to the Policy Exchange think-tank in December 2009, Mr Cameron said:

"The term 'compensation culture' is a toxic one in our country – and it is not entirely fair. Personal injury claims have actually remained largely static since the turn of the century. What is more, the problem is the perception we have allowed to develop that in Britain today, behind every accident there is someone who is personally culpable... someone who must pay. We see it in those adverts on television, which say that if you've suffered some fall or mishap, you can take legal action without much cost. We see it in the commercialising of lawyers' incentives to generate litigation, through the system of enhanced success fees and referral fees which has led to a growth in 'ambulance chasing'. We see it in the rising premiums and concerns of the insurance industry."

It is right to say that Lord Young acknowledges that the 'Compensation Culture' is a perception rather than a reality. He significantly reduces the reality and impact of this acknowledgement however through applying the heading '*The Compensation Culture*' to the relevant analysis and recommendations. Of greater significance he appears to use this public misconception as a stepping-stone and justification for reduced access to justice. In so doing he disregards the understandable informed concerns and caution urged by those whose opinion should command some acknowledgement, if not respect. Instead their wise words of caution have fallen on stony ground or certainly deaf ears. The overwhelming concern that shines through Lord Young's report, is not for the vulnerable, injured individual but the convenience of 'businesses', profit and negligent healthcare professionals and to protect them from unscrupulous lawyers waiting to 'pounce'.

Sadly, the only disproportion seems to be in the rhetoric, not in the subject-matter and conduct examined.

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18th October 2010

Postscript On 21st October 2011, eleven Private Member's Bills implementing the principal recommendations in the Young Report received their 1st Reading in the House of Commons, with a provisional timetable laid down for the 2nd Readings. Details of these Bills are set out in Appendix A to this paper.

Please note that this Summary and Overview is intended to provide a summary and comment of the subject matter covered. It represents the writer's own views and is not intended to be comprehensive or to provide legal or other professional advice.

Appendix A:

In accordance with the recommendations in the YOUNG REPORT (15.10.2010), the following Private Members' Bills were introduced in the House of Commons and received their 1st reading on 21 October 2010:

TITLE OF BILL	HC Bill No.	SUMMARY	PROVISIONAL DATE FOR 2 ND READING
Reporting of Injuries, Diseases and Dangerous Occurrences Regulation Bill (HC Bill No.84)	84	A Bill to reduce the duties on employers to report matters under the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 1995.	17/12/2010
Compensation (Limitation) Bill	85	A Bill to prevent conditional fee agreement success fees and after the event insurance premiums being recoverable from the losing party in civil litigation; to facilitate damages-based agreements for contingency fees in respect of successful litigants; and for connected purposes	18/3/2011
Local Government Ombudsman (Amendment) Bill	86	A Bill to extend the powers of the Local Government Ombudsman to provide redress against local authorities which unreasonably ban events on the grounds of health and safety.	18/3/2011
Low Hazard Workplaces (Risk Assessment Exemption) Bill 2010	87	A Bill to exempt employers from the requirement to produce a written risk assessment in respect of low hazard workplaces and the premises of those working from their own home with low hazard equipment	24/06/2011

Self-Employment (Risk Assessment Exemption) Bill 2010	88	A Bill to exempt self-employed persons engaged in low hazard activity from the requirement to produce a written risk assessment	01/07/2011
Health and Safety Consultants (Qualifications) Bill	89	A Bill to introduce qualification requirements for health and safety consultants; to provide accreditation for such consultants; and for connected purposes.	08/07/2011
Activity Centres (Young Persons' Safety) (Amendment) Bill	91	A Bill to abolish the Adventure Activities Licensing Authority; and for connected purposes	20/05/2011
Health and Safety at Work (Amendment) Bill	92	A Bill to amend the Health and Safety at Work etc Act 1974 in respect of systems of risk assessment; to make provision for separate requirements for play, leisure and work-based activities; to introduce simplified risk assessments for schools; and for connected purposes.	15/07/2011
Provisional date for 2nd Reading 15/7/2011	94	A Bill to make provision to promote volunteering; to enable potential volunteers to obtain a fit and proper person certificate for their activities; and for connected purposes	10/06/2011
Road Traffic Accident (Personal Injury) (Amendment) Bill 2010	95	A Bill to raise to GBP 25,000 the upper limit for awards for road traffic accident personal injury claims introduced under the simplified claims procedure	11/03/2011

A Bill to raise to GBP 25,000 the upper limit for awards for road traffic accident personal injury claims introduced under the simplified claims procedure	96	A Bill to amend the NHS Redress Act 2006 to facilitate faster resolution of claims and reduce costs; and for connected purposes.	09/09/2011
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ⁱ http://www.number10.gov.uk/wp-content/uploads/402906_CommonSense_acc.pdf

ⁱⁱ <http://www.judiciary.gov.uk/NR/rdonlyres/8EB9F3F3-9C4A-4139-8A93-56F09672EB6A/0/jacksonfinalreport140110.pdf>

ⁱⁱⁱ http://www.lasocietymedia.org.uk/site.php?s=1&content=35&press_release_id=1360&mt=34