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Key aspects of the Jackson review and related reforms - progress update as at 3rd September 2012

In brief

Lord Justice Jackson's key task was to address disproportionate costs in civil litigation – i.e. to make it cheaper and more efficient. His final report was issued in December 2009. His foreword read as follows:

"In some areas of civil litigation costs are disproportionate and impede access to justice. I therefore propose a coherent package of interlocking reforms, designed to control costs and promote access to justice."

Those of his recommendations requiring primary legislation were taken forward in part 2 of the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012. The Act received Royal Assent in May 2012 and is to be implemented in April 2013. Many other recommendations will be implemented by changes to the Civil Procedure Rules.

1. No win, no fee / CFAs / ATE insurance

The legislation will make additional liabilities – success fee uplifts, ATE insurance premiums and costs protection provided by membership organisations (i.e. trades unions) – no longer recoverable from paying parties (i.e. losing defendants). The intention is that claimants pay for these themselves, as had been the case before the Access to Justice Act 1999.

It should be noted that claims for mesothelioma have, for the time being at least, been entirely exempted from these changes to the recoverability of additional liabilities.

To balance the repeal of recoverability of uplifts and ATE insurance premiums other measures are proposed by Government, i.e.

- a one-off ten percent uplift on general damages (GDs) for pain and suffering, so as to provide claimants with some funds to pay their success fees themselves
- the introduction of *"Qualified One-way Costs Shifting"* (QOCS), so that losing claimants do not generally have to pay adverse costs, which obviates the need for ATE.

These two *"interlocking reforms"* are not in the Bill and although QOCS will be introduced via civil procedure rules and/or practice directions (the outline of which is on the following page), the mechanism for effecting the uplift of general damages was reserved to judiciary and remained opaque until the Court of Appeal case of *Simmons v Castle* in which judgment was given on 26th July 2012.

a. the ten per cent uplift on general damages

In *Simmons*, a very strong Court of Appeal (comprising the Lord Chief Justice, the Master of the Rolls, and the Vice-President) held that the ten per cent uplift on general damages should *"apply to all cases where judgment is given after 1 April 2013."* This is as expected, but the decision raises a number of further issues, including the following matters.

- It raises the possibility of a retrospective increase in general damages, in that there may well be pressure from claimants seeking to apply *Simmons* to claims resolved (whether by judgment or settlement) before next April.

- It may admit recovery of two different uplifts in the same case, i.e. of a success fee uplift and a 10% general damages uplift. This could happen in cases in which a CFA is signed before April 2013 but which are resolved after that date. This is arguably against the pure Jackson principles of either a recoverable success fee (as now) or a general damages uplift (after reform), but not both. It may be an unintended consequence of the methods by which these changes have been made.
- The need for clarity as to how the *Simmons* uplift will play out as against current and future offers made under CPR Part 36.

The Court of Appeal's decision in July has not therefore ended the debate on the general damages increase. ***After*** the judgment was delivered, the ABI sought to intervene in the *Simmons* case. On 22nd August 2012, counsel for ABI appeared before the Master of the Rolls who ordered:

- that ABI and claimant groups should make written representations to the Court on the point, and
- that the substance of the application (and the representations) would be dealt with at a hearing listed for 25th September 2012.

b. qualified one-way costs shifting

The principles underpinning the rules on QOCS were set out by the Ministry of Justice in a Written Ministerial Statement (WMS) first issued on 10th July 2012 (and reissued on 17th July) and noted below.

(i) *QOCS will apply to all claimants whatever their means; there is to be no financial test to determine eligibility*

(ii) *Subject to the provisions below, claimants who lose will not have to contribute towards defendants' costs (there is to be no minimum payment by a losing claimant);*

(iii) *QOCS protection would be lost if*

  a. the claim is found to be fraudulent on the balance of probabilities;
  b. the claimant has failed to beat a defendant's 'Part 36' offer to settle; or
  c. the case has been struck out where the claim discloses no reasonable cause of action or where it is otherwise an abuse of the court's process (or is otherwise likely to obstruct the just disposal of the proceedings).

(iv) *The principles set out in Part 36 of the Civil Procedure Rules override QOCS, but only up to the level of damages recovered by the claimant;*

(v) *QOCS protection would apply in relation to claims that are discontinued during proceedings (subject to iii(a) above); and*

(vi) *QOCS protection would be allowed for all appeal proceedings as the requirement for permission to appeal controls unmeritorious appeals.*

2. Contingency fees

The LASPO Act provides that contingency fees – which it styles as *"damages-based agreements"* or DBAs – shall be generally be permissible in civil claims in England and Wales.

Regulations will be made to flesh out the detail of the DBA regime. It should be noted that the MoJ's policy as regards DBAs is that they should co-exist within the overall loser-pays costs regime. This will mean that base costs will still be recoverable from losing defendants but that the contingency element would be recoverable from the claimant (this borrows from the approach adopted Ontario).The intention was set out in the MoJ's 2011 response paper:

DBAs will provide a useful additional form of funding for claimants, for example in commercial claims. Successful claimants will recover their base costs (the lawyer's hourly rate fee and disbursements) from defendants as for claims, whether funded under a CFA or otherwise, but in the case of a DBA, the costs recovered from the losing side would be set off against the DBA fee, reducing the amount payable by the claimant to any shortfall between the costs recovered and the DBA fee.

The Government intends, in so far as it is practicable, to have similar costs regulations for DBAs and for CFAs. The aim is to avoid arbitrage between the two models.

3. Referral fees

These are to be banned in personal injury claims. Under the LASPO Act, the payment and receipt of referral fees will be a regulatory (rather than criminal) offence. Note that there is not a blanket ban on referral fees, despite the Office of Fair Trading investigating referral arrangements in credit hire and vehicle repairs (in respect of private motor insurance).

The MoJ has very recently indicated that the proposed ban on referral fees will not catch legitimate marketing spend by solicitors operating in collective marketing schemes.

The MoJ intends, at the same time as bringing in the referral fee ban, to reduce the claimant's costs recoverable within the current low value RTA injury claims scheme (see 7 below).

There is some concern generally that alternative business structure firms delivering legal services might be organised so as to circumvent the ban on referral fees.

4. Part 36 additional sanction

To incentivise claimant offers, Jackson LJ suggested an additional sanction of an amount equivalent to 10% of all monetary damages. This would attach if a defendant refused a claimant's offer and subsequently failed to beat it.

The LASPO Act provides an enabling power for this to be introduced via procedure rules.

The MoJ's WMS of 10th (& 17th) July (mentioned above) also confirms that there will be tapering and a cap here, i.e. 10% of damages up to £½m, plus 5% £½m excess £½m – so a maximum of £75,000 for this additional sanction.

5. Proportionality

Jackson recommended a new technical test for proportionality of costs. It should help achieve better judicial control of overall costs in non-fast track claims.

6. Fixed costs in fast track injury claims

As Lord Woolf had done in the mid 1990s, so Jackson LJ also recommended fixed costs across all fast track injury claims. As with the Woolf recommendation, the Jackson recommendation is not being taken forward.

So for the time being at least, this proposal remains simply that: a proposal. There is no plan to implement fixed costs across all fast track injury claims in the short to medium term. It appears that extending fixed recoverable costs, see immediately below, will instead take precedence.

7. Extending the low value injury claims process (MoJ RTA scheme / process)

Jackson LJ reported in December 2009. The streamlined claims process for handling road traffic accident (RTA) injury claims of low value (between £1,000 and £10,000) was implemented from April 2010. Hence ***extending the RTA process is not, strictly speaking, part of Jackson***, but its aims of quicker resolution of claims at lower cost are obviously very similar to Jackson LJ's terms of reference.

The current RTA scheme features electronic notification of claims via a market-wide "portal", with quick decision times for insurers/compensators (e.g. 15 workings to admit) and fixed recoverable legal costs at its three stages (admission, negotiation, and hearing). It has been widely regarded as improving claims lifecycles and controlling costs. An independent analysis of a sample of the first year's claims, published in mid-July 2012, suggests that the efficiencies and savings may not be as great as had been anticipated[1].

Extending the RTA scheme is part of the MoJ's *"Solving Disputes"* programme. The core idea is to build from the positive experience to date in the RTA scheme, and to extend it vertically to RTA claims up to £25,000 and horizontally to EL & PL claims (with the probable exception of most disease cases) up to £25,000.

The most recent consultation on the detail of extending the scheme closed on 25th May 2012 and the MoJ is expected to set out its preferred way forward in the autumn of 2012.

As already noted above, the Government wants to reduce the current fixed costs within the RTA process (presently £400 for admission at stage 1 and £800 for settlement at stage 2). It sees this as a natural consequence of the ban on referral fees.

MoJ has stated that it intends to extend the RTA scheme from April 2013. There is much detail which needs to be examined in the interim. The following may be among some of the key questions.

- The extent to which the scheme might be identical for all types of claim?
- The existence and functionality of any electronic portal to support claims notifications and decisions in EL & PL claims (note should be taken of the ELTO register/database).
- What the period(s) should be for admitting liability at stage 1 in EL & PL claims and thereby keeping the claim in the process?
- How if at all to deal with contributory negligence within the extended scheme?
- Whether the staged recoverable costs should be the same at each stage for each type of claim?
- Similarly, whether the procedural rules (and associated pre-action protocols) should be the same at each stage for each type of claim?
- The need for an intermediate costs regime to sit between scheme costs and hourly rates (as with so-called *"predictable costs"* under CPR 45.9 in RTA cases)?
- Whether any claims for occupational disease should be included within the extended scheme?

[1] The summary of the report states that: *"Small but statistically significant reductions in mean general damages, mean costs and mean speed of settlement in low-value RTA claims were found. The evidence suggests around a 6% reduction in mean general damages, a fall of around 3–4% in average costs, and a reduction of around 5–7% in the average delay to settlement."*

8. Comment / discussion

- All things being equal, the Jackson reforms should save legal costs for insurers / compensators if:

  success fees + ATEs no longer paid
  > 10% GDs uplift + winning costs foregone under QOCS

- However, all things are not equal (!) and there are some real uncertainties around the detail of QOCS and possible adverse behaviours. QOCS might cause more 'try-on' claims to be made, because there is no general adverse costs liability and (probably) no pre-claim scrutiny by an ATE insurer.

- Public sector defendants and their insurers may be worried that QOCS means foregoing costs recovery in successful defences and in discontinuances.

- There will be changes in the behaviours of all parties in respect of the economics of settlement decisions. The existence of QOCS protection and of the new sanction for the claimant's Part 36 offer are likely significantly to alter how and when parties make their own offers and consider those made by opponents.

- Any shortened period for admitting liability in EL & PL claims at stage 1 of the new / extended RTA scheme will need to balance speed of response with quality of decision making. Record keeping, access to documents and claims notifications (if any) by insureds are very different in EL and PL claims than in simple motor cases. There are resourcing implications for insureds and insurers in order to make the extended scheme work successfully.

- There may also be serious operational barriers to building a new electronic 'portal' for April 2013. Ideally, the procedural rules would come first and the portal second, but things may not necessarily develop in that order.

- Fixed recoverable costs in the RTA process, as extended, should be beneficial (if set at a fair level for all stakeholders). There also needs to be an intermediate costs regime (noted above) along the lines of *"predictable"* costs for cases outside of the extended scheme (or which fall out of it), so that there are no perverse incentives for claimant lawyers to cause claims to exit from the scheme as quickly as possible (in order to secure greater remuneration via hourly rates).

- There is other Government activity aimed at tackling the so-called whiplash epidemic. That is related to the ban on referral fees and the consequent reduction in fixed costs in the RTA process. It may also include ideas for new evidential standards and/or changes to the small claims limit for injury claims.

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