

Known unknowns? (aka: legal issues ahead)

LUG Conference – Cambridge, 11th September 2012

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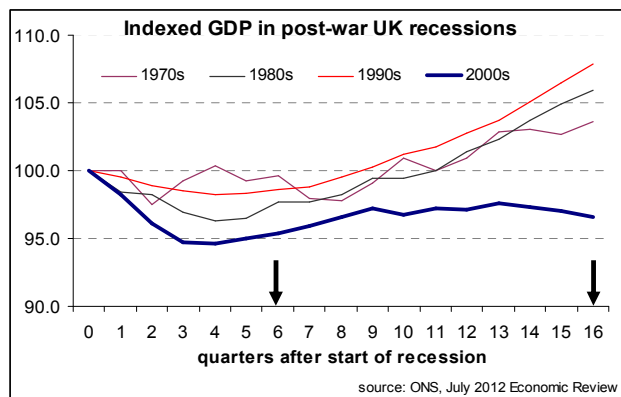


construction & property corporate risks healthcare insurance & indemnity leisure public sector retail technology, media & telecoms transport

"It's the economy, Stupid!"

"... the most urgent task facing this coalition is to tackle our record debts, because without sound finances, none of our ambitions will be deliverable ... Tackling the deficit is essential ..."

Coalition Agreement
May 2010



Relevant legislation & reforms arising from this?

- “Review of Civil Litigation Costs” (aka: Jackson), leading to *Legal Aid, Sentencing & Punishment of Offenders Act 2012*
- “Solving Disputes in the County Court”
- *Damages Act 1996: The Discount Rate - how should it be set?*

- Health and Safety legislation & regulations
- Fee For Intervention
- Law Commission reform of insurance contract law?



“Jackson” review and “Solving Disputes”

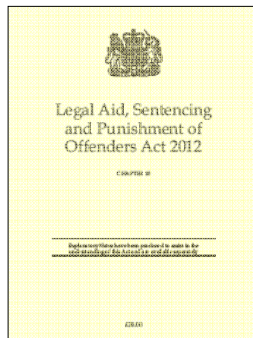


“Review of Civil Litigation Costs” (aka Jackson)

- “a coherent package of interlocking reforms, designed to control costs”
- the main no win, no fee reforms are found in part 2 LASPO Act 2012
- implementation from **1st April 2013** – not retrospective (?)
- mesothelioma claims temporarily exempted (i.e. additional liabilities still recoverable)
- remember the ban on referral fees
- need for clarity on the non-legislative aspects of the changes?

“Solving Disputes” (RTA scheme extension)

- political angle – speaks to compensation culture – on Prime Minister’s agenda & part of Downing St insurance summits Feb and May 2012
- MoJ consulted on some procedural & costs detail late spring 2012
- but details of EL & PL extension up to £25,000 not at all clear
- staged fixed costs likely to be **lowered** (ban on referrals)
- implementation also for **April 2013** - ambitious?
- what of new Ministers’ priorities?



Primary legislation - LASPO Act 2012

- repeal of recoverability of CFA uplifts
- repeal of recoverability of ATE premiums (& TU)
- contingency fees (DBAs)
- ban on referral fees
- part 36 additional sanction at 10% (enabling)

Other measures (non legislative)

- 10% increase in general damages
- Qualified One-way Costs Shifting (QOCS)
- new proportionality test
- fixed costs across the fast track ...

minus *success fees no longer paid plus ATE premiums no longer paid*
(10% general damages uplift plus winning costs foregone under QOCS)
 = ?

Citizen Space - Extension of the Road Traffic Accident scheme to include employers' and public - Windows Internet Explorer pro

https://consult.justice.gov.uk/digital-communications/extension-rt-a-scheme

File Edit View Favorites Tools Help

Home on BLM Law Intranet ...

Citizen Space - Extension of the Road Traffic Accident...

justice

Consultation Hub Find Consultations

Extension of the Road Traffic Accident scheme to include employers' and public liability claims up to the value of £25,000

Overview

The Prime Minister announced on 5 January that the current RTA scheme would be extended. Following publication of the responses to the 'Solving disputes in the county courts' consultation paper, the Government plans to extend the existing RTA PI Protocol to cover claims up to the value of £25,000 and to include employers' and public liability accident claims.

We will also be reviewing the fixed recoverable costs in the RTA scheme.

We welcome your views and evidence as to what is an appropriate level of revised costs would be and how the current scheme needs to be amended to cover public and employer liability.

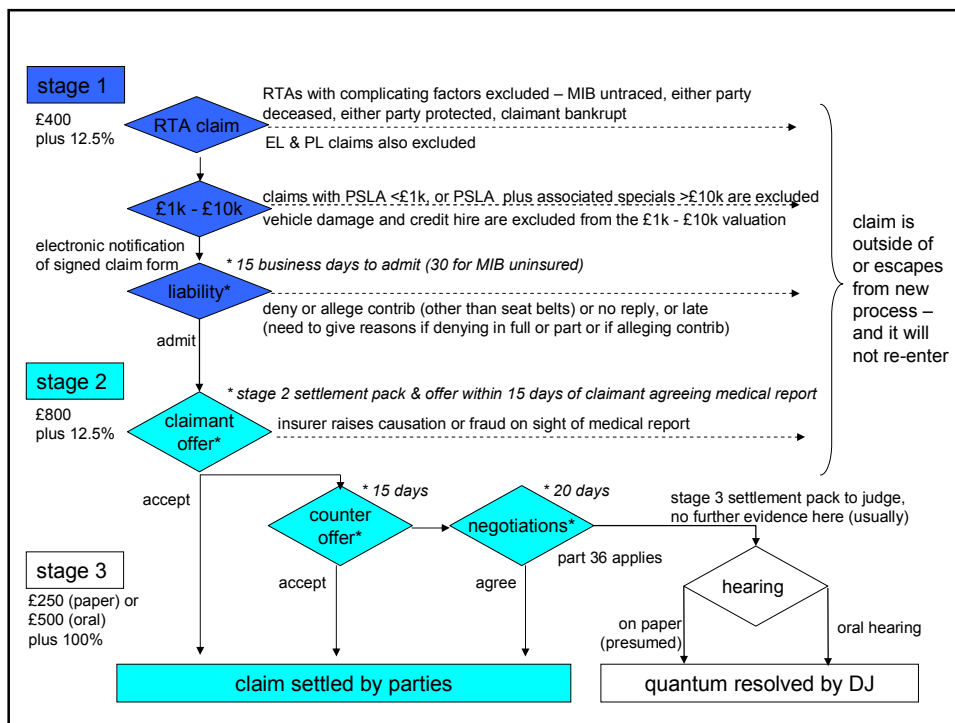
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Dates

Consultation is Closed
 Ran from 28 Feb 2012 to 25 May 2012

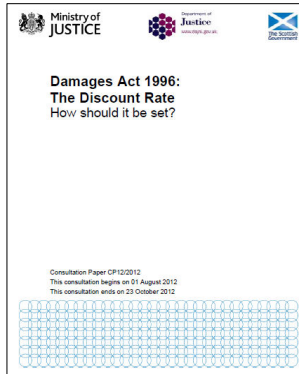
Other Information



So what are some of the main practical challenges here?

- Cutting current RTA costs as a knock-on from the referral fee ban. How? When? On what evidential basis?
- **Do case numbers justify going from £10,000 - £25,000 in motor claims?**
- Are disease claims included or excluded?
- **What will be the prescribed time for admitting liability at stage 1 in EL and or PL claims?**
- Should there be different stage 1 costs by type of case? (RTA, EL, PL)
- **Resource implications of admitting EL & PL quickly? Can defendants really achieve better compliance?**
- Anticipating spikes in claims notifications just before the reforms come in, as claimants seek to secure costs on the present basis.
- Should costs at stages 2 and 3 be the same for any type of claim? Isn't the work done valuing and negotiating a liability-admitted injury claim is the same regardless of type?
- **The absence of 'predictable' costs for EL and PL claims. Extending the RTA scheme may capture a high % of EL and PL cases, but there is nothing between scheme costs and unrestricted hourly rates.**
- How to deal with e.g. contributory negligence, breach, causation etc in EL & PL claims? These issues are not relevant to the same extent in motor claims.
- **Existence of ELTO** may facilitate development of a claims portal, but many in the market are very cautious. And what of PL?
- **Where are any broader proposals to review guideline hourly rates more systematically?**

Re(setting) the discount rate



... the discount rate is the rate of return to be expected from the investment of a lump sum award of damages for future loss. The methodology to be used in setting the rate will, in effect, define the types of investments by reference to whose yields, subject to appropriate adjustments, the discount rate is to be set ... Two broad options are considered: (a) to use an ILGS-based methodology ... and (b) **to move from an ILGS based calculation to one based on a mixed portfolio of appropriate investments** ...

MoJ consultation paper 12/2012, 1 August 2012

- but this current CP 12/2102 is only part 1 of 2 and

*“You may also be interested to know that the Ministry of Justice intends to issue a separate consultation in the autumn to **review the present legal basis** for the setting of the rate in England and Wales and to seek views on **whether the restrictions imposed by the present law on the factors that can be taken into account in the setting of the rate are still appropriate.**”*

MoJ's covering e-mail to stakeholders dated 1st August 2012, subsequently confirmed in a WMS on 4th September 2012

Some more known unknowns

- Safety Health and Environment
- Law Commission consultation on business insurance

In the beginning ...

Common Sense Common Safety

A report by Lord Young of Graffham to the Prime Minister
following a Whitehall-wide review of the operation of health
and safety laws and the growth of the compensation culture

 HM Government



and Young began ...

Reclaiming health
and safety for all:
An independent review of
health and safety legislation

Professor Ragnar E Löfstedt
November 2011



HSE: known knowns and unknowns



Corporate Manslaughter and
Corporate Homicide Act 2007

 HSE

Health and Safety
Executive

Guidance on the application of
Fee for Intervention (FFI)

HSE: unknown unknowns



Proceeds of Crime Act 2002



Law Commission



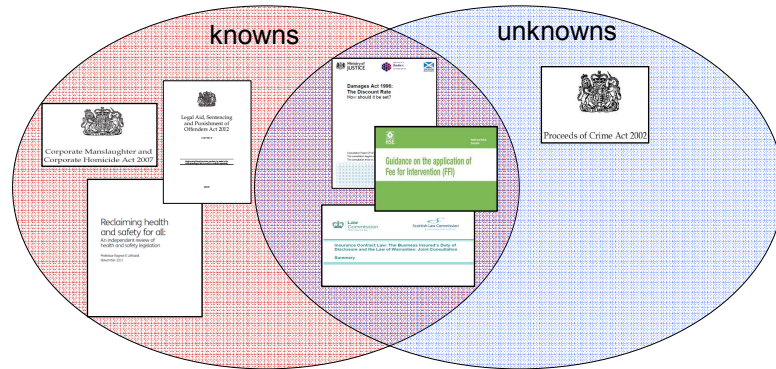
Insurance Contract Law: The Business Insured's Duty of Disclosure and the Law of Warranties: Joint Consultation

Summary

- Consultation ends - 26 September 2012
- Report and draft Bill - end of 2013
- Election - 2015

Conclusion: Rumsfeld returns?

“...there are also unknown unknowns - the ones we don't know we don't know ...”



... but what else don't we know we don't know?

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