Jackson reforms

BHSEA talk – 10 June 2013

Overview of reforms

- Jackson reforms implemented 1 April 2013 and considered the biggest change to civil procedure (including claims for compensation in respect of personal injury) in England and Wales since 1999.

- Lord Justice Jackson was tasked with a review of civil litigation, specifically in relation to costs (i.e. lawyers' fees).

- The aim was to promote access to justice at proportionate cost. Proportionality is the key consideration.

- Costs need to be considered at all stages of a case – before it is commenced, throughout the progress of the case and at the end when cost orders are being considered and the lawyers are looking to recover their fees.

- Rule 1 of the Civil Procedure Rules – the "overriding objective", used to state that cases must be dealt with justly – now amended to say justly "and at proportionate cost".

- Practical example – the old Case Allocation Questionnaire has now been replaced by the Directions Questionnaire ("**DQ**"). There is a much bigger emphasis within the DQ on costs - for example, the parties must consider if expert witnesses will be required and what the likely costs of those experts will be. There is an express obligation on the parties to agree between them the details to be completed in the DQ.

- On the positive side, it is to be hoped that the reforms will eventually lead to reduced costs in litigation.

- On the negative side, the reforms will create uncertainty, which may be particularly worrying for lower-value personal injury claims where disproportionate costs can often be incurred that far outweigh the compensation being claimed. There may be inconsistency between different courts (and Judges) at first and it will take time to see how the reforms will work in practice.

Personal Injury

- Extension of fixed costs regime – Jackson LJ recommended that fixed costs should apply across the fast track (ie claims worth up to £25,000), which would mean that costs over and above that would be at the parties' own expense (contrast larger "multi-track" cases where costs must be "reasonable"). This has not been implemented for now, but there will be fixed costs for certain low value claims, for example Road Traffic Accident Personal Injury cases.

- Banning of referral fees – this has been included within the Legal Aid Sentencing and Punishment of Offenders Act 2012 ("**LASPO**"), which came into force in April 2013. An example of a referral fee can be seen from the "no win no fee" TV adverts - an individual contacts the claims management company, which in turn contacts solicitors etc and referral fees are paid throughout this chain. It was considered that this encouraged a "compensation culture" and forced losing insurance companies to increase their insurance premiums, at the detriment of society as a whole. As a result, referral fees are now banned.

- Cap on success fees – In personal injury cases, the cap on success fees has been limited to 25% of damages (other than those for future care and loss).

- The government has also announced an increase of 10% in non-pecuniary general damages (such as pain, suffering and loss of amenity) in tort cases for all claimants. In effect, this means that the damages an injured party will receive from the party responsible for causing them personal injuries has increased by 10%.

- Qualified One Way Costs Shifting ("**QOCS**") – this will apply to all personal injury cases, including clinical negligence. If the claimant is successful, they will be entitled to recover their costs from the defendant. If the claimant is unsuccessful, they may be vulnerable to costs orders, but only to the extent of the damages they would be entitled to. This is subject to exceptions, including where the claimant has been dishonest or the claim was struck out for no reasonable grounds or an abuse of process. The reason for the introduction of QOCS was that it was considered that for some time claimants had enjoyed protection from adverse costs orders and there were good policy reasons for maintaining this protection.

Health and Safety

- The government pledged to review regulations regarding the strict liability of employers to their employees for breaches of health and safety regulations.

- The Lofstedt Review in 2011 recommended that regulatory provisions that impose strict liability or "no fault" duties such as the Provision and Use of Work Equipment Regulations 1998 should be qualified with "reasonably practicable" where strict liability is not absolutely necessary, or alternatively amended to prevent civil liability from attaching to a breach of those provisions.

- The final amendment has gone even further than the recommendations – the Enterprise and Regulatory Reform Act 2013 (which received Royal Assent on 25 April 2013, although there is not yet a confirmed date when it will come into force) amends the Health and Safety at Work etc Act 1974 to the effect that those claiming compensation regarding a breach of health and safety legislation will now need to prove that the employer responsible has not just breached the regulation but been negligent also.

- Significantly, this reverses the burden of proof from the claimant to the defendant, so in future it will be for the claimant to prove the employer's negligence before their claim can succeed.