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ADVISORY

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AN END TO THE ENGLISH "LOSER PAYS" RULE IN PERSONAL INJURY LITIGATION? A REVIEW OF THE JACKSON REPORT AND ITS IMPLICATIONS FOR DEFENDANTS

- The Jackson Report concerns possible changes to the English costs rules relevant to personal injury litigation under which, to date, the unsuccessful claimant is normally liable to pay the defendant's reasonable legal costs.
- In order to improve "access to justice" it is proposed that amendments be made to limit the costs awarded against a defendant where a successful claimant has pursued litigation under a conditional fee arrangement.
- A corresponding proposal is that if the claimant's case is unsuccessful, he should not pay the defendant's costs.
- It is uncertain whether and when the proposal will be implemented, but if adopted it is likely to increase significantly the amount of personal injury and product liability litigation pursued against corporate entities with supposedly "deep pockets".

"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."

—Jackson L.J., January 2010

Most businesses have an interest in the costs of personal injury litigation. All sorts of people, employees as well as customers, have accidents and trip and slip in all sorts of places. People using or exposed to products marketed by others can suffer injury, which may or may not be caused by those products. Increasingly, people are looking to well-insured businesses for redress.

In England and Wales, the "loser pays" rule has for eight centuries caused potential litigants to pause and consider the strength of their case, weighing up the risks of losing and having to pay the defendant's costs against the prize of damages, before launching into the legal fray. Even the modern overlay of after the event insurance, allowing a claimant to insure against that risk, requires a prudent insurer to pick more winners than losers if he is to stay solvent.

This traditional rule could, however, be set to change. In his final report, published on 14 January 2010, Lord Justice Jackson boldly proposes the sweeping away of the rule in personal injury, judicial review, and defamation

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cases, leaving the defendant to pick up his own costs in every case, even if he is successful in every point of his defence. Lord Justice Jackson advances this proposal as a necessary reform to promote access to justice in the event that his other proposals—that success fees and after the event insurance should no longer be recoverable—are accepted.

In light of these proposals, we examine in this advisory whether what will be promoted is access to risk-free compensation rather than access to justice. It seems at least possible that businesses in England and Wales, including state run enterprises such as the National Health Service, will be deluged with claims for personal injury, including product liability claims, pitched just below the value at which it is cheaper to settle the claim rather than to investigate it.

THE BACKGROUND TO THE REPORT AND THE NEED FOR CHANGE

Although the report is wide-ranging and covers all costs issues in civil litigation, its focus is on personal injury and clinical negligence litigation funded by conditional fee agreements (CFAs). Such cases include unitary and group actions involving product liability and toxic tort. It is difficult to see that the proposals will have much effect in other areas of civil litigation, apart from defamation.

CFAs were introduced in 1995 to supplement Legal Aid in providing access to justice. Under the CFA scheme, the claimant's lawyers can charge an uplift of up to 100% on top of their usual fee in the event of success; the "success fee". This differs from a the issue of the legality of contingency fee agreement where the lawyers take a percentage of damages awarded and each side picks up its own costs; such arrangements are not permissible for contentious work. After the event insurance (ATE) is necessary because the usual rule of the "loser pays" applies (as it would in a contingency fee arrangement). The insurance is used to cover the potential liability for the claimant if the claim is not successful. As such, the success fee and the ATE insurance premium represent additional costs liabilities; they were previously payable by the successful claimant out of any damages awarded.

The Access to Justice Act 1999 (the 1999 Act) introduced changes to the Legal Aid and CFA schemes. Legal Aid is no longer available for most personal injury cases. The CFA success fee and the ATE insurance premium are now payable by the unsuccessful defendant. In practice, such fees are agreed by the claimant (who is a party to the CFA and the contract of insurance) but are only ever paid by the unsuccessful defendant. It has led to the costs of these additional liabilities spiralling out of control as there is no market incentive for the claimant to control these costs.

THE JACKSON PROPOSALS

The report's focus is on balancing the interests of the claimant and defendant in personal injury and clinical negligence claims in the context of litigation funded by CFAs, in order to promote access to justice at proportionate costs. In doing so, it identifies the two key drivers of disproportionate costs as the lawyer's success fee and the after the event ATE insurance premium.

The principal recommendations of the report are:

- The success fee under a CFA should not be recoverable from the unsuccessful opponent. It should be funded by an uplift in general damages of 10% and capped.
- The ATE insurance premium should not be recoverable from the unsuccessful opponent. This requires primary legislation.
- Qualified one-way costs shifting: the claimant will not be required to pay the defendant's costs if the claim fails. The defendant will be required to pay the claimant's costs if the claim succeeds, however. This proposal is in complete contrast to the established rule of the "loser pays" and could apply to personal injury, clinical negligence, judicial review, and defamation claims.

The report states that the overall result of introducing the proposed reforms will include:

- Most personal injury claimants will receive more damages than at present, although some will receive less.
- Claimants will have a financial interest in the level of costs incurred on their behalf.
- Costs payable to claimant solicitors by defendants will be significantly less.
- Costs will become more proportionate because defendants will no longer have to pay the success fees and ATE insurance premiums of successful claimants.

There is only limited support for contingency fee

agreements in the report.

A FAIR SET OF PROPOSALS?

The proposal that the success fee should not be recoverable seems reasonable and sensible. It is a reversion to the position prior to the 1999 Act. However it does mean that claimants' damages are no longer protected, and, on occasion, claimants may receive less compensation; as expected, this has been the subject of criticism by claimant groups.

The proposal that the ATE insurance premium should not be recoverable requires primary legislation, specifically the repeal of section 29 of the 1999 Act. The effect of this would be to place a disproportionate burden on the claimant, so there is a linked consequential proposal that there should not be liability for the unsuccessful claimant to be exposed to costs: the proposed qualified one-way cost shifting. Lord Justice Jackson cites with approval the costs protection enjoyed by publicly funded litigants under the operation of section 11 of the 1999 Act as the model for this proposal.

The usual costs rule is that costs follow the event: the unsuccessful party pays the successful party's costs. The operation of this rule promotes the resolution of cases according to their merits. It imposes mutuality between the parties and distributes the risks of litigation. As such, it deters nuisance claims (low value claims which may be cheaper to settle than defend where defendant costs are not recoverable). It may mean that the so-called "Legal Aid blackmail" that operates under the one way costs shifting of the Legal Aid scheme, may be of universal application. The removal of the risk of costs liability would encourage speculative claims to be advanced. The control mechanisms which presently apply (availability of public funding and the requirement for ATE insurance) would no longer apply. This could represent an unintended and uncosted consequence of the proposal.

A SPUR TO PERSONAL INJURY CLAIMANTS?

The focus of the report is on the main drivers of disproportionate costs, the additional costs liability (the success fee and the ATE insurance premium) in personal injury litigation funded by CFAs. The recommendation is that these should no longer be paid for by unsuccessful defendants. Lord Justice Jackson believes that such an abolition will be likely to deter claimants with meritorious claims from seeking appropriate redress in the courts, but he has devised a solution that rewards the unmeritorious claimant as well. A simpler solution merely regulating the levels of success fess and ATE insurance might well have been preferable.

One significant outcome of these proposals, if accepted, is that group personal injury litigation in areas where claimants have historically been deterred by the risk of having to pay the defendant's costs may be revived. Exposure to defendants' costs is seen by several commentators to be one of the main reasons why there has been limited litigation in the United Kingdom concerning medicinal and some other products, whereas such litigation has been common in the United States. The Jackson proposals could entice claimant lawyers back into the fray on contingency fee agreements, secure in the knowledge that they only have to underwrite their own losses and not those of the defendant.

Nonetheless, the future of these proposals remains uncertain. As the report was requested by the Master of the Rolls, not by Parliament, its relevance to any legislative programme is uncertain. With a general election within a few months, the political significance of the report is also questionable. The views of the legal profession and other stakeholders have been varied and conflicting.

Political reality and the legislative priorities may well determine whether these proposals are destined to gather dust in the Justice Secretary's "pending" tray or whether they are enacted and usher in a new free for all (except for defendants) era of personal injury litigation. So far, Jack Straw's response has been muted and extends merely to a confirmation that the government is 'actively assessing' the proposals.

We hope that you have found this advisory useful. If you have additional questions, please contact your Arnold & Porter attorney or:

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