

Impact of the Jackson Reforms

Introduction

This paper is a response to the invitation to give evidence about :-

- a) the types of cases being taken on (and not being taken on) by law firms, and
- b) the funding of civil litigation in the light of changes to CFAs and the introduction of DBAs and QOCS,

We write from the perspective of a medium sized firm but with a particular specialisation in Actions against the Police and other state bodies responsible for detaining people against their will.

This is an area of law where “Legal Aid” is still available but, as will be explained, post-Jackson if a person is not eligible for Legal Aid they are in real danger of being deprived of access to the courts and access to justice.

The area is a niche area of the law but is recognised as being vital in a civilised society to ensure that the power of the state can be subject to judicial scrutiny and thereby the checks and balances necessary to preserve freedoms are maintained.

For the sake of ease of reference the cases will be referred to as Actions against the Police (AAP) although the ambit is much wider than that.

The Jackson Reforms

The Jackson reforms impacted these cases in major ways.

First the ATE premium became irrecoverable from the Defendant. This in turn meant that if the ATE cover could be found that the person bringing the claim would now have to foot the bill for the premium, presumably from their own pocket or the damages.

In this type of case damages are often very low and costs very high. The costs are often high because the state will wheel out their lawyers to defend a position and to put up every conceivable objection and barrier to disclosure of evidence and to accepting liability.

The ATE premiums would, pre-Jackson, often run into tens of thousands of pounds where a case was fought to trial. If ATE cover is available now the premium would exceed the damages making a case wholly uneconomic to the client.

However the situation is worse than that because removing recoverability has meant that the market has all but disappeared. Our experience is that the providers previously willing to provide ATE cover are not doing so. These providers include DAS, Temple, Burford Capital. All of whom were major players in the ATE market, for these sort of cases, pre-Jackson.

It is not clear why, as with clinical negligence cases, ATE premiums in such high cost complex litigation were not made recoverable.

The second reform which has had consequence is that of Qualified One Way Costs Shifting (“QOCS”). For no discernable good reason the principles of QOCS have been limited to personal injury cases. This is highly beneficial to those cases and no doubt will serve to drive down costs overall.

However in AAP cases the QOCS protection does not apply.

Consequences

What are the consequences?

The first is that there are now only a very few cases where people can afford to run the risk of bringing proceedings without the benefit of public funding. The risk that a non-publicly funded party will face are massive.

Can it be correct that justice depends on the size of your assets to pay the other sides’ costs in the event that a case is lost?

The second is that, in our experience, AAP cases are now not being pursued if the claim is repudiated. The illustrations below clarify the point.

Can it be correct that the state is free from the checks and balances which the court provide where it is alleged power is abused?

Third without the cost protection provided by QOCS the Claimant has no idea what the likely bill will be if they do embark on litigation.

Can it be correct that there is no way of ensuring costs protection is available where there is misuse of power when the state is the Defendant?

Illustrations

To provide very brief illustrations of the point we cite three examples, of many, from our current caseload :-

1. We act, under a No Win No Fee agreement, for a taxi driver who was involved in an incident where his passenger was arrested for an offence. The taxi driver co-operated with the Police and it was confirmed that the taxi had been properly hired. The Police were given his details and indicated that they may need a statement from him as a witness. However later the same day the police changed their minds and the driver too was arrested. This decision appears to fall foul of first the concept of reasonable suspicion but secondly necessity, both of which are required to be satisfied to render an arrest lawful. The taxi driver can bring proceedings to challenge the lawfulness of the arrest but in doing so is exposed to a massive costs risk. He cannot obtain ATE insurance despite our best efforts as the commercial ratios imposed by the insurer make the premiums prohibitive. If he succeeded in the case then the arrest information would, in all likelihood, be removed from his record. If he does not get the arrest record removed it will be disclosed on his next CRB and may well affect his taxi licence.

2. We act, under a No Win No Fee Agreement, for a former youth worker who has had a complaint upheld against his arresting officer. There is an allegation of malicious prosecution which is denied by the force legal department. We have tried to no avail to get ATE cover since Jackson and are now left with a massive risk for the client. Does he proceed and face a potentially disastrous costs bill if he loses.
3. We act, under No Win No Fee Agreements for a family of five whose house was raided on Christmas Day 2012. The Police admit to the allegation that they did not provide the warrant however there is a legal argument about the effect of a Court Of Appeal case. Does the family put their house in jeopardy by pursuing the litigation as ATE cannot be obtained?

In all of these three cases, unless a solution is found to the funding problems these clients will be denied access to justice because of the lack of a level playing field.

Solutions

There are a number of solutions :-

1. The best would be to make Legal Aid in this area of law non-means tested. It happens in Mental Health when the state removes your liberty. Why not when the state interferes with your liberty in the shape of the Police?
2. If ATE were recoverable this would balance the scales to a very large extent. The courts are well used to scrutinising the level of premium. The advantage insofar as the public purse is concerned is that if the Claimant loses the case then the Police budget recovers the legal fees incurred.
3. Making provision for QOCS to apply – under clearly defined rules – would also balance the scales. There is no reason why this could not be done and again the Court can confirm at an early stage whether the QOCS regime would apply.

Conclusions

This is a very short paper which we believe the Police Action Lawyers Group will expand upon. It gives a flavour of how the Jackson Reforms in this area now positively deny justice to a vast section of the population and weight the scales in favour of the state to a grossly unfair extent.

The Jackson Reforms have had the immediate effect of depriving a large group of people access to justice. We have been returned to a society where only the very rich or the very poor have access to the courts and ultimately to justice. This is not the sort of society we should be satisfied with, justice needs to be done, be seen to be done and to be available to all.

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