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Law

TIMES PHOTGRAPHER, RICHARD POHLE

Proposals by Lord Justice Jackson, above, may have unintended consequences for defendants such as Sarah Hermitage

Will costs reforms end access to justice for those without means?

An Act to cut expense and delays in the civil courts may have the opposite effect, reports **Alex Wade**

On the eve of what just about every litigator in Britain agrees will amount to a "seismic change" in the legal landscape, there is disquiet.

In three months, Lord Justice Jackson's proposals for cutting costs and delays in the civil courts will be law. But far from promoting access to justice, as was the original intention, many solicitors now fear that the reforms — in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) — will have the opposite effect.

The impact, warns Andrew Stephenson, a partner with Carter-Ruck, "will be to make it more difficult for those of limited means to obtain legal representation". He adds: "There is widespread agreement that the cost of litigation in this country is too high but, far from curing or ameliorating it, LASPO will only make things worse."

Lord Justice Jackson was commissioned to review civil litigation in 2009, after concern among senior judges about how Conditional Fee Arrangements (CFAs) had developed. Introduced in 2001 for personal injury claims as a result of Lord Woolf's access to justice reforms, CFAs, or "no win, no fee" deals, mean that if a claimant solicitor loses a case he is not paid, but if he wins he can charge a bonus, or "success fee". With CFAs came After the Event (ATE) insurance, enabling claimants to protect themselves against paying a defendant's costs if they lost. Until now, a winning claimant could recover the premium.

Jackson's brief was to overhaul the excessive cost of litigation and "to promote access to justice at proportionate costs". The net effect, enshrined in LASPO, is the abolition of the recovery of success fees — which can up to double a normal fee— and ATE premiums from the losing side. As the Ministry of Justice put it: "People will still be able to use CFAs but will have to pay their lawyer's success fee and any ATE insurance (if taken out) themselves."

'The cost of litigation is too high, but this will only make things worse'

The bill also caps success fees at 25 per cent; a formal ban on referral fees and increases general damages by 10 per cent. There are other more technical changes but it is the reforms to "no win, no fee" deals and insurance cover that are causing most unrest.

Stephenson, a libel lawyer, cites the case of Sarah Hermitage, a client sued by Reginald Mengi, executive chairman of IPP Ltd, a company that holds newspaper and broadcasting interests in Tanzania. "The case was thrown out after a ten-day trial in November last year, but the legal costs incurred by Mr Mengi even before the issue of proceedings were just short of £300,000."

There is no way the case could have been defended without a CFA, but if the Act is implemented as it stands the only possibility of paying a success fee will be from the damages recovered. Defendants such as Sarah Hermitage, who have no prospect of recovering damages, would have no means by which to compensate the lawyers for the risk of a "no win, no fee" case.

The alarm bells sound even louder in the commercial arena, according to Razi Mireskandari, managing partner of Simons Muirhead & Burton. In a recent case he successfully represented a restaurant owner who was sued for breach of contract by his landlord. "Under the lease, he had no defence to subsidence caused to the property by building work," says Mireskandari. "He had to remortgage his house to rectify the problem, but at least he was then able to use a CFA with ATE to sue the negligent builder." He could not have done this under the new Act, Mireskandari says: his only option would be to lose everything and go bankrupt. "The legislation will result in plenty of manifest injustices like this."

There is one benefit: if a claim fails lawyers will not be liable for the defendant's costs, as long as they conducted the claim properly. Yet they remain anxious. "Overall, LASPO will set up a regime in which more complex cases are fast-tracked, combined with a proposal to slash by more than half fixed costs recoverable by lawyers," says John Spencer, a leading personal injury solicitor. "But the result of oversimplified procedure and potentially inadequate representation could well be that clients are denied justice."

Of course this is not the intention of either ministers or Jackson. There is widespread concern about what is seen as a bonanza of lawyers' fees and the growth industry spawned by "no win, no fee deals", including the impact on motorists' insurance premiums. The costs of going to law, they say, have spiralled beyond what is proportionate.

But when a libel lawyer, a commercial lawyer and a personal injury lawyer all agree, it might just be that the Jackson proposals are imperfectly translated by LASPO. There is some comfort after Government indications last month of a rethink of aspects of the Act. But unless that results in redrafting, access to justice — so prized in Britain — may be yet more elusive.

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There should be no obstacles put in the way of the right to vote

David Pannick, QC

At the 2010 general election about 1,200 eligible voters queuing at 27 polling stations in 16 different constituencies were prevented from voting, even though they had arrived before the close of polls at 10pm. The law says that you cannot vote unless you have been issued with a ballot paper by 10pm. An amendment that I tabled to the Electoral Registration and Administration Bill to change this law was debated at the committee stage in the House of Lords on Monday night, as 10pm approached, and will be voted on at report stage on Wednesday, January 23.

The argument for changing the law is that if an eligible voter presents himself at the polling station before it closes at 10pm, he or she should not be denied a vote because many other voters arrive at or around the same time, or because the administration of the polling station is less than efficient. The right to vote is precisely that: a fundamental right. It should not be defeated by circumstances outside the voter's control.

Indeed, when we are rightly concerned to do everything possible to encourage people to vote to

We must do everything possible to enhance democratic legitimacy

enhance the democratic legitimacy of the elected government, we should not be putting obstacles in the way of eligible voters who make the effort to attend at the polling station before the close of poll. The House of Lords Constitution Committee (of which I am a member) and the Electoral Commission have expressed support for a change in the law for such reasons. The amendment has cross-party support. It is also in the names of Baroness Jay of Paddington (a former Labour Leader of the House of Lords and now chairman of the Constitution Committee) and two Conservative members of the Constitution Committee, Lord Lexden and Lord Lang of Monkton. But it has been opposed by the Government for four reasons, none of which has any substance.

First, it is said that the voter need not wait until just before 10pm. He or she should vote earlier. But for many people voting early is not an option because of work or family commitments. In any event, close of poll is 10pm. Voters should not have to guess how far in advance of 10pm they need to arrive at the polling station to be sure of being allowed to vote.

The second argument is that a change in the law would cause uncertainty and practical problems. That is very unconvincing. All that would be required is for the polling officer to close the doors of the polling station at 10pm, or — if there is a queue outside — stand at the back of the queue to ensure that anyone arriving after 10pm cannot join the queue.

The Electoral Commission has pointed out that the Scottish Government introduced such a reform in 2011. At the Scottish Council elections last year, this enabled three people to vote who arrived before 10pm but would otherwise have been refused a ballot paper. There were no practical difficulties. The Electoral Commission issued sensible and simple guidance to presiding officers.

On Monday night, Lord Taylor of Holbeach, Home Office Minister, suggested that there might need to be a statutory definition of a "queue", especially as people could deliberately arrive to vote just before 10pm in order to create a problem. Such concerns are unrealistic and in any event the application of some common sense by the polling officer would avoid any difficulty.

The third argument advanced in opposition to reform is that it is unnecessary as the lessons from the 2010 general election have been learnt. The answer is that, however good the preparation, there is always a risk of a queue building up which prevents one or more eligible voters from voting because they have not received a ballot paper by 10pm.

To issue a ballot paper may take a minute or two. If several people arrive in the period just before 10pm, a queue can build up. The risk of a queue is all the greater if ballot papers are being handed out for local as well as general elections. The Electoral Commission has rightly said that "no degree of planning alone can entirely mitigate the potential risk of queues at the close of poll".

The final argument advanced by the Government is that not many voters are adversely affected. But there were 1,200 in 2010. And even one eligible voter denied a vote in these circumstances is one too many. The Government cannot have it both ways: they cannot say that very few voters will be affected and that the amendment will cause practical problems.

A change to the 10pm rule is correct in principle and workable in practice. If the Government does not accept the amendment to the Electoral Registration and Administration Bill, I hope and expect that peers will form a lengthy queue in the House of Lords to vote in favour of changing the law next week.

The author is a practising barrister at Blackstone Chambers in the Temple, a Fellow of All Souls College, Oxford, and a crossbench peer in the House of Lords