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EMPLOYERS LIABILITY UPDATE

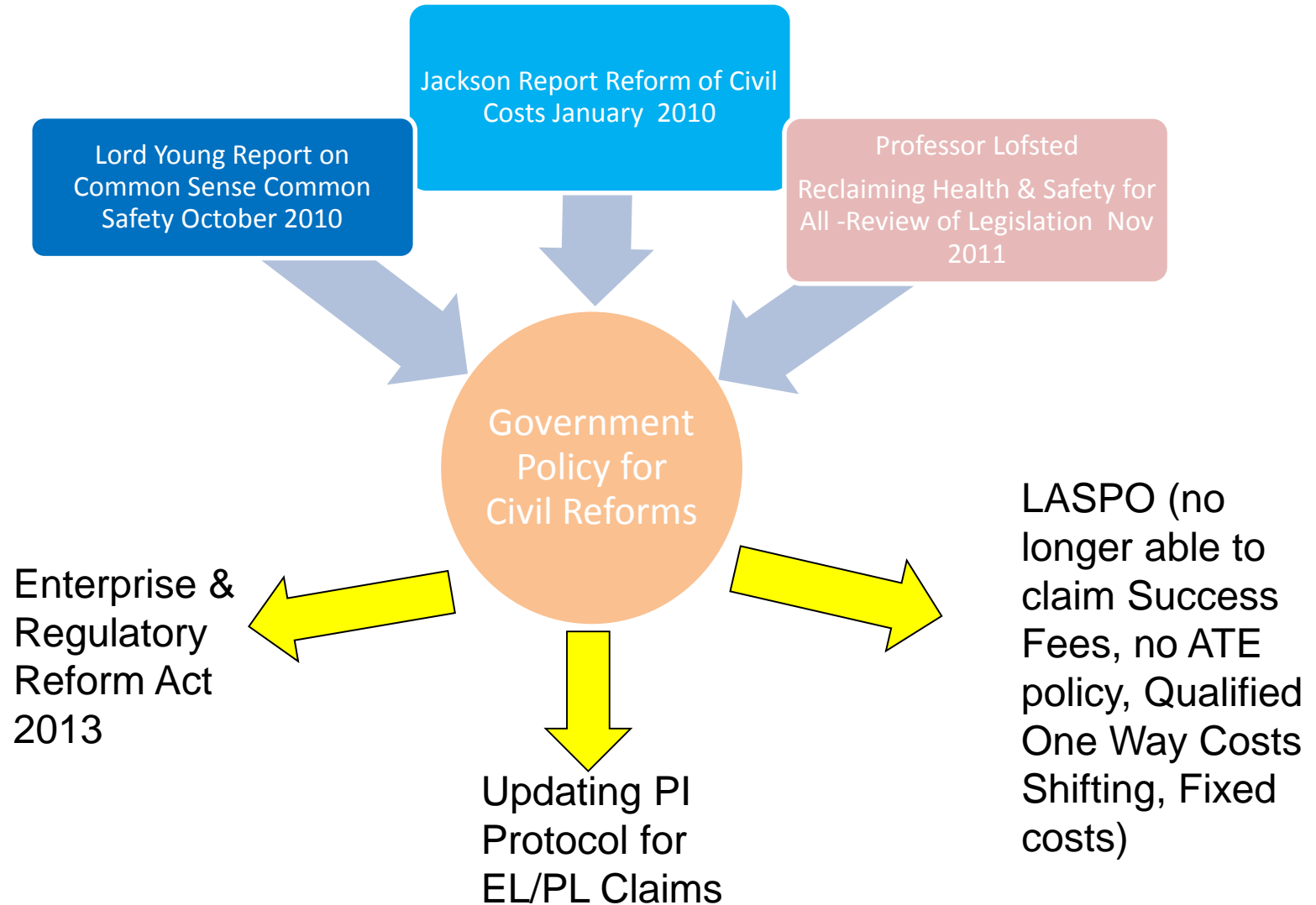
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18 November 2015

Issues:

- Changes to the Pre-Action protocol for Personal Injury in respect of Employer Liability claims?
- The impact of introduction of section 69 Enterprise Regulatory Reform Act 2013 on Employer Liability claims?
- A review of recent Employer Liability cases and prosecutions for breach of workplace regulations?



Pre-Action Protocol for EL Claims

- 1 April 2013 – MoJ introduced changes in the way claims were brought
- All EL accidents after the 31/7/13 had to be submitted via a Claims Portal www.claimsportal.org.uk
- Streamlined & cost effective system for dealing with low value PI claims

Procedure rules

Civil

Pre-Action Protocol for Low Value Personal
Injury (Employers' Liability and Public
Liability) Claims

What were the changes?

- Claimant's had to submit details of their claims on a Claim Form submitted via the Claims Portal
- Applies for claims with a value less than £25,000
- Introduction of fixed costs both at pre-litigation and post-litigation stage

The screenshot shows the homepage of the Claims Portal. At the top, there is a search bar with the text "Search" and a magnifying glass icon. Below the search bar is the "CLAIMS PORTAL" logo. A navigation menu contains the following items: "About", "Sign up to the Portal", "Using the Portal", "FAQs", "News And Announcements", and "Developers". The main content area is divided into several sections:

- Welcome**: A large heading followed by the text "What is the Claims Portal?" and a paragraph describing it as a stakeholder-led secure electronic communication tool for processing low value personal injury claims (PI). A "Learn More" link is provided.
- Is it for you?**: A section with the text "Yes, if you process low value personal injury claims covered by the Ministry of Justice's pre action protocols."
- New to the Portal...or Already Registered?**: A section with the text "Either way, find out more by clicking [here](#)".
- I'm a claimant representative.**: A blue box with the text "Already familiar with the Portal? Then you can log in and you may also like to learn what's different." and a "MORE >" link.
- I'm a compensator.**: A green box with the text "Then learn how this site can help you" and a "MORE >" link.
- I'm a software developer**: A red box with the text "Looking to develop a bespoke A2A interface?" and a "MORE >" link.

AIMS OF THE PROTOCOL

To Ensure:

- D pays damages and costs using the process out of court
- Damages are paid within a reasonable time
- C receives fixed costs at each appropriate stage



Pre-Action Protocol For EL Claims

- Exclusions:-
 - C is deceased
 - C is a protected party
 - Mesothelioma
 - PL disease
 - Clinical negligence
 - Abuse/neglect claims
 - Uninsured or insolvent D
 - An Individual as opposed to a company or organisation
 - Disease claims with more than 1 D

Overview of Claims Process

- i) Claim Notification Form
- ii) Electronic acknowledgement the day after receipt of CNF
- iii) Response with a liability decision
 - EL - 30 business days (6 weeks) from deemed service of CNF
 - PL – 40 business days (8 weeks) from deemed service of CNF
 - Loss of earnings details to be provided within 20 days of admission of liability

Documents to Disclose:

WORKPLACE CLAIMS

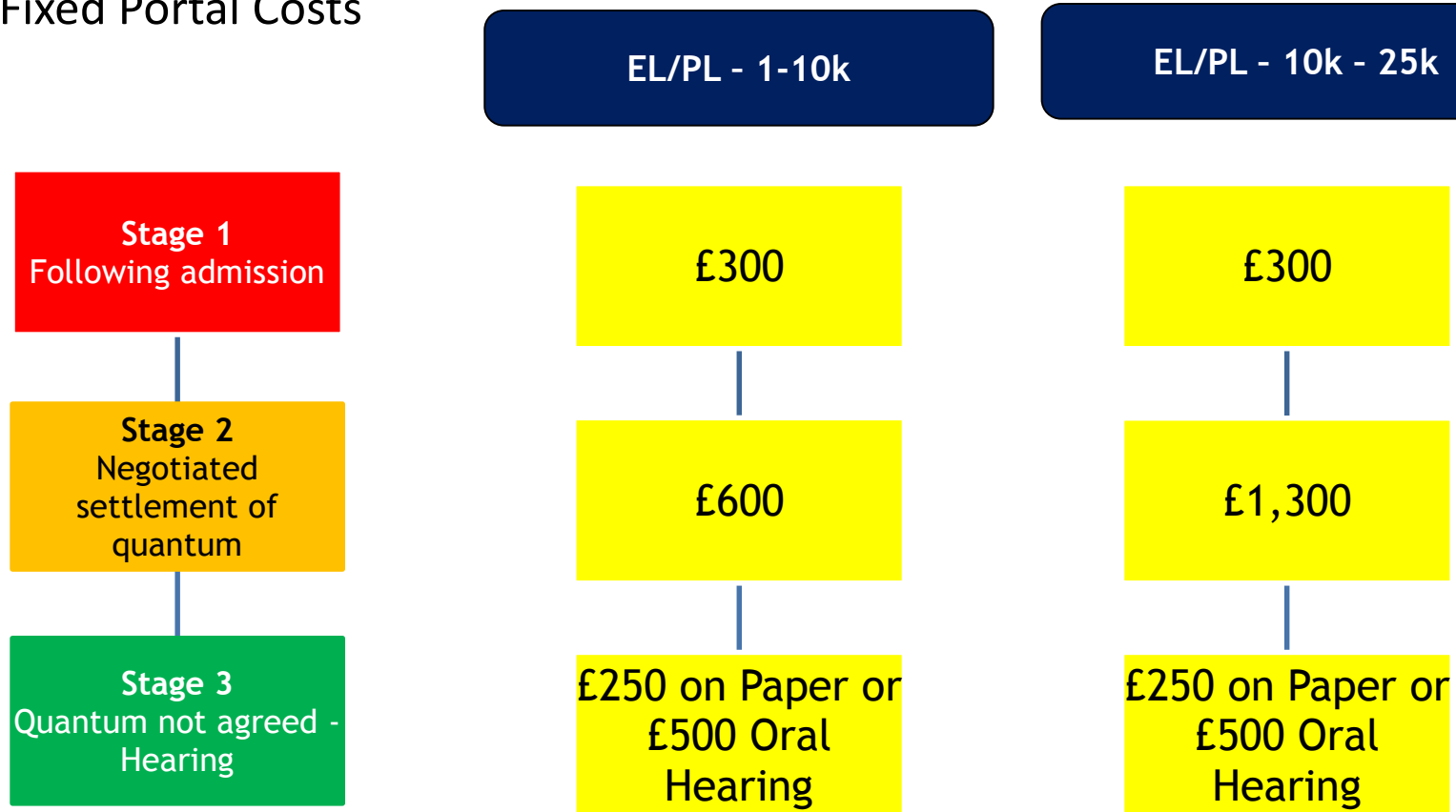
GENERAL DOCUMENTS

- (i) accident book entry;
- (ii) other entries in the book or other accident books, relating to accidents or injuries similar to those suffered by our client (and if it is contended there are no such entries please confirm we may have facilities to inspect all accident books);
- (iii) first aider report;
- (iv) surgery record;
- (v) foreman/supervisor accident report;
- (vi) safety representative's accident report;
- (vii) RIDDOR (Reporting of Injuries, Diseases and Dangerous Occurrences Regulations) reported to HSE or relevant investigatory agency;
- (viii) back to work interview notes and report;
- (ix) all personnel/occupational health records relating to our client;
- (x) other communications between defendants and HSE or other relevant investigatory agency;
- (xi) minutes of Health and Safety Committee meeting(s) where accident/matter considered;
- (xii) copies of all relevant CCTV footage and any other relevant photographs, videos and/or DVDs;
- (xiii) copies of all electronic communications/documentation relating to the accident;
- (xiv) reports to DWP;
- (xv) manufacturer's or dealers instructions or recommendations concerning use of the work equipment;
- (xvi) service or maintenance records of the work equipment;
- (xvii) all documents recording arrangements for detecting, removing or cleaning up any articles or substances on the floor of the premises likely to cause a trip or slip;
- (xviii) work sheets and all other documents completed by or on behalf of those responsible for implementing the cleaning policy and recording work done;
- (xix) all invoices, receipts and other documents relating to the purchase of relevant safety equipment to prevent a repetition of the accident;
- (xx) all correspondence, memoranda or other documentation received or brought into being concerning the condition or repair of the work equipment/the premises;
- (xxi) all correspondence, instructions, estimates, invoices and other documentation submitted or received concerning repairs, remedial works or other works to the work equipment/the premises since the date of that accident;
- (xxii) work sheets and all other documents recording work done completed by those responsible for maintaining the work equipment/premises;
- (xxiii) all relevant risk assessments;
- (xxiv) all reports, conclusions or recommendations following any enquiry or investigation into the accident;
- (xxv) the record kept of complaints made by employees together with all other documents recording in any way such complaints or actions taken thereon;
- (xxvi) all other correspondence sent, or received, relating to our client's injury prior to receipt of this letter of claim;

Disclosure Where Specific Regulations Apply Found in Annex C:

- Management of Health and Safety at Work Regulations 1999
- Workplace (Health Safety and Welfare) Regulations 1992
- Provision and Use of Work Equipment Regulations 1998
- Personal Protective Equipment at Work Regulations 1992
- Manual Handling Operations Regulations 1992
- Health and Safety (Display Screen Equipment) Regulations 1992
- Control of Substances Hazardous to Health Regulations 2002
- Construction (Design and Management) Regulations 2007
- Construction (Health, Safety & Welfare) Regulations 1996
- Work at Height Regulations 2005
- Pressure Systems and Transportable Gas Containers Regulations 1989
- Lifting Operations and Lifting Equipment Regulations 1998
- The Noise at Work Regulations 1989
- Control of Noise at Work Regulations 1989
- Construction (Head Protection) Regulations 1989
- The Construction (General Provisions) Regulations 1961
- Gas Containers Regulations 1989
- Control of Noise at Work Regulations 2005
- Mine and Quarries Act 1954
- Control of Vibrations at Work Regulations 2005
- http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_pic#C

Fixed Portal Costs



Add 12.5% for London Weighting. Claimant must live or work in London and instruct London Lawyer.

Health and Safety
REFORM 2012
Reducing the Burden of Red Tape
26 April 2012 | The Barbican, London



CODES OF PRACTICE / STANDARDS

CODES OF PRACTICE / STANDARDS

MARKET FORCES
BROKERS ← UNDERWRITERS

MORE TEST CASES

FAIR PREMIUMS TO REFLECT RISK OF CUSTOMER (BUY CHEAP, PAY DEAR)



INSURANCE INDUSTRY

SETS COMPLIANCE LEVEL
IMPERFECT INDEMNIFIED, RECOVERED, REPAIRED PERSONAL INJURY CLAIMS



STANDARDS SETTING BODIES

COMMITTEES DEVELOP STANDARDS BY CONSENSUS

RISK BASED STANDARDS
BADLY DESIGNED STANDARDS



PROCURERS

LESS BUREAUCRACY
? SETS HIGH LEVEL OF STANDARDS?
? REPORTING CREATES FEAR OF LITIGATION?



CONSTRUCTIVE ENGAGEMENT



MEDIA

LESS MEDIA HYSTERIA



EDUCATION

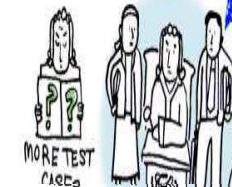
PRESSURE TO CUT CORNERS



USERS / CUSTOMERS



? COMPENSATION CULTURE?
? REPORTING CAN UNDERMINE H&S?
? FEAR OF LITIGATION DRIVES BEHAVIOUR



LEGAL INDUSTRY

"NO-ONE WILL WIN A CASE IF IT WAS AN ACCIDENT"



"AN ACCIDENT IS AN INCIDENT WHICH CANNOT BE REASONABLY FORESEEN"

"NEGLIGENCE IS WHEN SOMETHING CAN BE REASONABLY FORESEEN"

SMALL ORGANISATIONS

MAKING A PROFIT SERVING THE PUBLIC

KEEPING PEOPLE SAFE

LIMITED UNDERSTANDING OF RISK PRACTICE / ADVICE CREATES MARKET



UNCERTAINTY INACTION



SUPPORT IN PERSONAL INJURY CLAIMS



HEALTH & SAFETY PROFESSIONALS

WORTH OVER £700M PA. ONE OF THE FASTEST GROWING SECTORS

TRUST IN ENFORCEMENT AGENCIES?

DRIVES COMPLIANCE / ENFORCEMENT

DISCIPLINE BASED - PROVIDE UNOFFICIAL ADVICE
"HAMPTON" RISK-BASED APPROACH?

LOCAL AUTHORITIES



INSPECTORS POLICY COMMUNICATION



H&S ENFORCEMENT POLICY

UNCERTAINTY ON SPECIFICS

PROVIDES GENERIC ADVICE

RELIABLE ADVICE

EMPOWERMENT TO ADVISE

COMMUNICATE BENEFITS

SET-UP WITH MISSION & RESOURCE

HSE

INSPECTORS POLICY COMMUNICATION

"OUR MISSION IS TO PROTECT PEOPLE'S HEALTH AND SAFETY BY ENSURING RISKS IN THE CHANGING WORKPLACE ARE PROPERLY CONTROLLED"

EU

DWP BUSINESS LINK

CENTRAL GOVT.

BRE BERR

TARGETTED GUIDANCE FOR SMEs

PROVIDE ADVICE AND GUIDANCE

RAISES AWARENESS DEVELOPS PRACTICES

NO RISKS OR PRACTICE PROVIDES GUIDANCE / ADVICE

EMPLOYERS TAKE RESPONSIBILITY

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LESS MEDIA HYSTERIA

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Enterprise Update

- Section 69 of the Enterprise and Regulatory Reform Act 2013 (“ERRA”)



**“Erra is the god of mayhem and pestilence who is responsible for periods of political confusion”
Wikipedia**

The Enterprise and Regulatory Reform Act 2013

- During the Commons debate, Parliamentary Under-Secretary of State for Skills Matthew Hancock MP, identified key aims & objectives:
 - *“To remove unfairness of strict duty on employers*
 - *That there is a test of reasonableness so that those who have taken all reasonable precautions cannot be prosecuted for a technical breach”*



ERRA

Greatest impact on claims will be those which had previously cited *Stark v Post Office* in “*strict liability*” claims



ERRA

- *“Civil claims for personal injury can be brought by two routes:*
- *A breach of the common-law duty of care, in which case negligence has to be proved,*
- *Or a breach of statutory duty, in which case the failure to meet the particular legal standard alleged to have been breached has to be proved.*
- *The new clause will amend the Health and Safety at Work etc. Act 1974 to remove the right to bring civil claims for breach of a statutory duty contained in certain health and safety legislation.”*
- Matthew Hancock MP



Enterprise and Regulatory Reform Act 2013

CHAPTER 24

Explanatory Notes have been produced to assist in the understanding of this Act and are available separately

Purpose & Benefits:-

- Provide E'er with the opportunity to defend themselves on the basis of having done all that was "reasonable"
- Ease E'er fears of being sued & help reduce over compliance
- Maintain H&S standards & level of protection under criminal law
- Continue to allow E'ee to bring claims for compensation where an E'er has been shown to be negligent
- Contribute to the wider Govt. reform on civil litigation system

ERRA

- Section 69 came into force on 1 October 2013 and will impact on causes of action after that date.
- Breach of duty imposed by health and safety regulations will *no longer be actionable* in the civil courts unless the regulation says so.



ERRA

- Breach of regulations remains a key evidential issue
- Lord Faulks during Parliamentary debate stated:
- *“A breach of regulation will be regarded as strong prima facie evidence of negligence.*
- *Judges will need some persuasion that the departure from a specific and well targeted regulation does not give rise to a claim in negligence.”*

ERRA

- Viscount Younger on behalf of the Government during the bill phase stated:

“The codified framework of requirements, responsibilities and duties placed on employers to protect their employees from harm are unchanged, and will remain relevant as evidence of the standards expected of employers in future civil claims for negligence.”

Chief Inspector challenges small construction sites to act now to manage workers health and safety

Date:

12 November 2015

	Total
Total No. of sites	1908
Total no. of inspections (N.B there can be more than one inspection per site) –	2274
Prohibition notices	432
health	52
Safety	380
Improvement notices	260
health	152
Safety	108
Notifications of contravention	983

North West	Total
Total No. of sites	208
Total no. of inspections (N.B there can be more than one inspection per site) –	312
Prohibition notices	51
%health	14%
% Safety	86%
Improvement notices	47
% health	47%
% Safety	53%
Notifications of contravention	117

Asbestos

- High profile case
 - HSE v M&S plc
 - Fine of £1 million and costs of £600k
 - *“Better an unattractive store in the short term than the risk of anything else in the long term”*
 - Regulation 11 Control of Asbestos Regs 2006
 - *“Every employer shall prevent the exposure of his employees to asbestos so far as is reasonably practicable”*



Lack of Risk Assessments

- West Sussex County Council v Kim Fuller [2015] Court of Appeal 12/03/2015



Held:

- For liability to be established there had to be a *causal connection* between the task and the injuries sustained
- Accident did not fall within the ambit of the risks that the Employer was required to assess
- Accident wholly causally unconnected with the task of carrying post
- Claimant simply misjudged her footing
- Claim dismissed and Appeal allowed



Carter v Morgan Sindall Plc – 28/8/15

Hull County Court

- Alleged scaffold fall
- Issues of lack of reporting
- Discrepancies of contemporaneous medical records
- Had informed his supervisor he had slipped but he was ok. No subsequent investigation.
- Scaffold subject to rigorous weekly inspection
- **Held:**
- C story was evolving – credibility was in issue
- Site safety taken seriously – weekly inspection
- Satisfied that C had fallen but the cause was not any problem with the scaffold plank
- Claim dismissed



EL LEGAL UPDATE

RIDWAAN OMAR
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18 November 2015