Social Action, Responsibility and Heroism Bill ('Heroism Bill') briefing for Public Bill Committee, 4 September 2014

THOMPSONS
SOLICITORS
STANDING UP FOR YOU

While the whole premise behind The Heroism Bill is misguided and a cause for concern, Clause 3 is particularly flawed, could set a worrying precedent, and demonstrates that the Bill has not been properly thought through by the Government.

Clause 3: Responsibility

'The court must have regard to whether the person, in carrying out the activity in the course of which the alleged negligence or breach of statutory duty occurred, demonstrated a generally responsible approach towards protecting the safety or other interests of others.'

This clause will lead to greater complexity within cases and potentially lead to injured people being refused compensation. In contradiction of the Government's 'Red Tape Challenge' this clause will lead to more red tape, not less. It turns the law of negligence upside down and may lead to more cases being brought. And it's not even clear what 'heroes' the Bill is seeking to help.

Greater complexity in cases

The clause says that **'The court must have regard to whether the person…'** Given that the legal definition of a 'person' is: 'An individual, company, or other entity which has legal rights and is subject to obligations', the Act would apply to companies as well as individuals. This is confirmed at page 25 of the Research Paper where it says: 'The Bill is general in its application so it could apply to claims against individuals or organisations including employers.'

The phrase **'or other interests of others',** is so wide as to be legally meaningless. It will inevitably lead to different interpretations and ultimately challenge in the highest courts.

The phrase **'a generally responsible approach'** is equally ambiguous:

Could an employer or insurer slow down a case – that will now often be within the fixed cost regime this Government has introduced – with extra paperwork as they seek to prove that, over the last six months (?), or two years (?), or 10 years (?) they have **'demonstrated a generally responsible approach towards protecting the safety or other interests of others'** and shouldn't have to pay any compensation to the injured party?

Is an employer, in demonstrating **'a generally responsible approach towards protecting the safety or other interests of others'** required to demonstrate this in relation to the whole of the workplace, the whole of their business (if they operate over several sites), or only the department in which the accident occurred?

Would it be possible under this clause to argue that it was not negligent that a tiger's cage was left unlocked in a zoo and someone was injured if you demonstrated **'a generally responsible approach towards protecting the safety or other interests of others'** by locking it on every occasion but for this one time?

An example of the confusion Clause 3 will cause, with facts from a case we have run is: Mrs A a care assistant was injured moving a patient due to a lack of training. She hadn't been trained how to do it because when her employer trained the rest of her colleagues she was off sick. We succeeded in getting her compensation on the grounds that her employers were negligent in allowing her to work without training having failed to properly assess the risk of the work, failed to provide a safe place of work and failed to provide a safe system of work.

The Bill, if enacted unamended, would open up the prospect that Mrs A's employer could argue that the fact that most of Mrs A's colleagues had been trained showed **'a generally responsible approach towards protecting the safety or other interests of others'** sufficient for the court to decide that the employer should escape liability.

In a stroke, the duty of an employer to train all their staff will have been reduced to a duty to train **most** of their staff.

Injured people refused compensation

Would clause 3 allow a driver who injures someone whilst speeding to produce evidence that they were, for all other parts of their journey, not speeding therefore they had **'demonstrated a generally responsible approach towards protecting the safety or other interests of others'** and shouldn't have to pay any compensation to the injured party?

Can an employer say "we have a system, it may have failed this employee but it hasn't failed the other employees and since we have **'a generally responsible approach towards protecting the safety or other interests of others'** we shouldn't have to pay any compensation?

More Red Tape

If demonstrating **'a generally responsible approach towards protecting the safety or other interests of others'** is the 'get out of jail card' we fear, employers will naturally want to show this. They (and their insurers) may see the way to do this is to produce lots of paperwork to show they have ticked lots of boxes.

Turning the law of negligence upside down

The Bill raises the frightening possibility that blame gets shifted when things go wrong and this is enforced by the Research Paper which says: '…the court would **still be able to** (emphasis added) find that a person had been negligent or in breach of statutory duty in relevant circumstances…' (page 25).

The clear implication is that a finding of negligence by a court will, if this Bill is enacted in its present form, be a residual right only. This is a huge assault on the law of negligence and health and safety at work, one that is masked behind the skirts of people carrying out good deeds and behaving 'heroically'.

Whereas at present, either an act is negligent or it is not, clause 3 raises the possibility that a person can commit a negligent act but it won't be deemed as such because of other factors not directly connected to the negligence.

Predictability is a core component of our precedent based legal system. Where now identical facts in an accident should lead to the same legal finding this Bill holds the prospect that instead of a single universal test for negligence, using the standard of the reasonable man, there will be a sliding scale depending on whether one defendant could show a **'generally responsible approach'** and another could not.

We foresee a future where instead of (or in addition to) dealing with evidence about the particular circumstances of a case, lawyers for both sides will have to look at all the other factors involved to determine if the employer **demonstrated a generally responsible approach towards protecting the safety or other interests of others,** and a failure to do so would open either party's lawyers up to a professional negligence claim.

More cases

Will claimants be able to rely on clause 3 to their benefit? Will they be able to argue that "this is a case where there would not normally be a finding of negligence, but this employer has a bad safety record, so the court should make a finding in my favour"?

What 'hero gets sued' menace is this Bill actually fighting?

For over 90 years Thompsons has only ever acted for claimants, never for insurers. We run tens of thousands of personal injury cases every year. We cannot think of any case we have pursued against a 'hero'. The Government hasn't produced one example either because, in reality, individual heroes don't get sued.

Judges already consider the context in which a 'heroic' act is set and apply their common sense. This Bill seeks to replace that judicial commonsense, for which the UK legal system is held in high esteem throughout the world, with legislative nonsense. This is a recipe for uncertainty, delay, extra cost and ultimately injustice.

We ultimately question whether, were those who will be adversely affected by this not the injured and working people but rather the City and Commercial organisations, the government would be so intent on forcing through change. Where are the myriad changes in corporate law? Why are Judges in commercial cases 'trusted' to apply the law properly but Judges in personal injury cases are not?