Civil Litigation Costs Review

Thompsons Solicitors response to the Interim Report

July 2009

THE QUESTIONS

In this response we will focus on the main chapters relevant to PI litigation following the order of the Interim Report. But because we believe small claims is the single most alarming aspect of the Interim Report we deal with that first.

SMALL CLAIMS. Chapter 24

What Should Be The Upper Limit For PI Cases On The Small Claims Track?

The Interim Report sets out the arguments on each side and suggests four options:

- an increase to the small claims limit from £1,000 to £5,000;
- a lesser increase to the limit (e.g. an increase to £2,500);
- an increase in line with inflation; and
- no increase to the limit.

It also suggests safeguards at page 223 (4.2):

Which could include the following:

- Types of claim. *The revised upper limit of the small claims track could be applicable only to certain types of claim. For example, uncontested claims relating to soft tissue injuries (thereby excluding more serious injuries).*
- *Revised system for assessing general damages. In order to obviate undersettlement of claims by unrepresented Claimants, a software system for assessing and calculating the level of general damages in lower value PI cases could be devised. This system would make the assessment of general damages for PI cases simpler.*
- *Provision for some form of legal advice. The small claims regime for PI claims could be revised so that Claimants are able to recover the costs of a predetermined amount of legal advice.*

Thompsons are fundamentally opposed to any suggestion of any increase in the small claims limit. PI claims in practice always involve an injury victim on their own taking on a multi-national insurance company. The starting point is an inequality of arms.

The Claimant will, by definition, be an individual whilst insurance for PI claims is either compulsory (employers liability and road traffic) or widespread (public and occupiers liability).

This is to be contrasted with other issues that could fall within the non PI small claims track. The Claimant and Defendant could both be businesses such as in commercial litigation. They could both be individuals such as in neighbour disputes.

The opposition to an increase is widespread. The strength and spread of that non partisan opposition is a true gauge of why it would be wrong and unjust to raise the current limit.

Opposition to an increase

There has been an ongoing debate about the small claims limit in PI cases since the Woolf Review in the 1990's. Not surprisingly Claimant lawyers unanimously oppose any increase. Liability insurers are split on the issue.

Of particular importance is the fact that the main stakeholders overwhelmingly oppose an increase. This includes those representing consumers of legal services such as trade unions and consumer groups.

Whilst there may well be a case for a different and higher limit in non PI small claims cases – a contract dispute or a car has an easily discernible value and you are not taking on the might of the insurance industry, that does not apply to personal injuries.

Lord Woolf decided against an increase in his Review.

The Law Society has opposed an increase.

The Civil Justice Council opposed an increase.

The Ministry of Justice decided against an increase in their response to the claims process Review.

Injury victims, when surveyed, overwhelmingly opposed an increase in the small claims limit.

Lord Woolf's decision against an increase

Access to Justice (June 1995) by the Lord Honourable the Lord Woolf

Chapter 7 The Fast Track (FT): PI cases

21. *The Association of PI Lawyers (APIL) at the meetings which I had with them were particularly emphatic as to the inappropriateness of the small claims procedure for PI cases. For the reasons I give in chapter 16 I have accepted that it is preferable for PI claims of limited value not normally to be included within the small claims procedure. I do so because I consider the Fast Track to be more appropriate if cases on that track can be dealt with at a cost which is not unreasonable.*

Law Society opposition to an increase

Law Society Compensation Fast and Fair (2006)

An increase to the small claims limit will deny injured people redress

The small claims track ensures access to justice by allowing small, straightforward claims to follow a simpler process without incurring significant costs liability. This assumes that claims under £5000 are simpler, so people can handle them without expert advice. This is true in many cases, but not in PI and housing disrepair claims.

PI

Raising the small claims limit will deprive many injured people of legal advice. PI cases usually involve complex issues of causation, liability and evidence and are too complex for most people to handle without help from a solicitor.

Defendants will usually be represented by an insurance company receiving expert advice. Many Claimants will not pursue the matter because the evidence is complex, and an insurance company may be pressuring them to drop a claim or settle.

The Government has been reviewing whether to increase the small claims limit for PI claims….

Claims worth less than £2,500 can involve quite serious injuries such as broken bones or permanent scarring and currently make up about two thirds of the total number of PI claims (and 80% in road traffic cases).

Some say that inflation is an argument for an increase, but that would require a rise of less than £500.

Civil Justice Council opposition to an increase

Civil Justice Council: "Improved Access to Justice – Funding Options & Proportionate Costs" June 2007 (author Michael Napier QC)

Recommendation 1 Small Claims Limit for PI Cases

The starting point for recovery of costs in PI claims below £5,000 should remain at £1,000.

There is no evidence to suggest that the resolution of PI claims between £1,000 – £5,000 is working unsatisfactorily for the consumer. Only a very small number of such claims do not settle and litigation to trial in these cases is a very infrequent last resort. Provided that proportionality of costs is ensured, as has already been achieved in RTA claims below £10,000, there is simply no benefit to be gained by raising the small claims limit in PI cases. Rather, any such move that would remove costs recovery in such cases would work contrary to the public interest by removing quality controlled and regulated law firms from their role in resolving such claims which are still important to the injured consumer. The resulting gap in access to justice would be filled either by unrepresented consumers who would be unequal to the task of taking on the complexities of PI law and procedure, or by non lawyers whose only means of remuneration would be to deduct a contingency fee from the injured consumer's damages.

Civil Justice Council response to MoJ consultation Case Track Limits and the Claims Process for PI Claims (2007)

Question 1. Do you agree that the small claims limit for personal injuries should remain at £1000 in view of the proposals to improve the claims process? If not, please set out your reasons why and state what you consider the appropriate level would be.

The Civil Justice Council agrees with the proposal that the small claims limit for PI should remain at £1,000. We have seen no evidence to suggest that the resolution of PI claims between £1,000 and £5,000 is not working satisfactorily for the consumer and only a very small number of such claims do not settle. Provided that proportionality of costs is insured by means of streamlining, we can see no benefit to be gained by raising the small claims limit.

Ministry of Justice decision against an increase

Ministry of Justice response to its consultation Case Track Limits and the Claims Process (2008)

1. The responses to the consultation demonstrated that some respondents were strongly of the view that increasing the limit would remove the high legal costs that they argued were currently paid out in low value claims. However, there were also real concerns that raising the limit would deny Claimants access to legal advice to assist them with their claims.

2. Having considered the arguments raised in the responses to consultation, the Government remains of the view that the small claims limit for PI claims should remain at the current level of £1000.

Injury Victims opposition to an increase

UNISON report Small claims Big deal (2005) - survey of 1,000 members with injury claims:

64% of respondents in the survey received awards of between £2000 and £5000.

63% of respondents would either not have proceeded with their case, or would not have felt confident about going before a judge without legal representation.

63% of respondents would not have trusted the insurance company to deal fairly with their claim had they not been legally represented.

Law Society 2006 Survey of PI Claimants

The largest group of respondents (42.2%) chose to use a solicitor because they believed that they would be treated more fairly by other parties than if they were to bring the case unrepresented.

83.2% of all respondents deemed it to have been 'very important' to receive a solicitor's advice on the value of their claim. A further 12.6% felt it was 'fairly important'.

More than a half of all respondents (51.3%) thought the level of compensation they had received was higher because they had received the help of a solicitor. Just over one quarter (27.7%) did not feel able to assess this factor and responded 'don't know'.

Two thirds of all respondents (66.4%) believed that they had been treated more fairly because they had a solicitor representing them. Respondents who felt they had been treated the same or less fairly accounted for 9.5% and 2.6% respectively.

Over three quarters of respondents (79.3%) said they were 'not very confident' or 'not at all confident' (35.3% and 44.0% respectively) at the thought of bringing the case themselves. This was attributed by some to a lack of legal knowledge.

<u>Consumer Group oppose to an increase</u>

Which?

At the London Seminar of the Review on 10 July 2009, Michelle Lyttle, in house lawyer for Which? gave a presentation in which she commented that small PI claims were – in her view - different to other types of claim and were not appropriate to be dealt with in the small claims track as the consumer would be dealing with an experienced insurance company.

The injustice of Increasing the small claims limit in PI claims

Damages are more complex than in other small claims. There is a need for legal advice on quantum.

Whilst PI Claimants may have some idea of basic special damages such as travelling expenses or basic wage loss, they will not be familiar with other heads of damage such as loss of services or specific rules applicable to calculating loss of earnings and interest in PI cases. In addition no Claimants will be able to properly assess general damages.

By contrast in non PI small claims quantum is much more straightforward. A debt action is for a defined sum. An action for goods or services not delivered is for the value of those goods or services. A consumer complaining about, say, defective building work may well have incurred the expense of remedial work and will be claiming that specific amount.

Expert evidence is always needed i.e. a medical report.

All PI claims need at least one medical report. Some PI cases require experts in addition to medical ones, such as engineering experts in machinery cases, meteorological reports in ice/snow slipping cases. Some cases need multiple medical reports where injuries cross medical specialities. This requires the selection and instruction of an appropriate expert and a review of the report to ensure it is complete and properly addresses all of the issues arising in order to assist both the court and the parties to assess general and special damages.

Typical non PI small claims such as consumer disputes, contractual claims, debt actions or neighbour disputes are unlikely to require any form of expert evidence.

Liability is not straightforward

The tort based system is such that Claimants cannot be expected to be familiar with the concepts of the law of negligence, contributory negligence or the relevant statutory duties applicable particularly in employers' liability claims.

By contrast non PI small claims about defective goods and services, unpaid bills and disputed agreements can in practice be pursued by litigants in person in the small claims track with little difficulty.

Defendants fiercely defend the smallest of PI claims.

For individuals or businesses, a dispute worthy of a small claim is a peripheral activity, to be avoided where possible. The individual would prefer that the goods are delivered or the services are adequate. The business would prefer that the bill is paid or the agreement honoured. Where they cannot be sorted small claims are pursued as a necessary evil to remedy a particular dispute.

Insurers, on the other hand, are professional claims negotiators and litigators. Without compensation claims they would not exist. A whole industry is built around complex claims strategies designed to best advance their interests. For some insurers that can mean trying to act quickly, fairly and reasonably – turning the cases over rather than instinctively trying to block them or reduce them in value. Sadly, in Thompsons' experience for too many it means strategies including claims capture (designed to deprive victims of independent legal advice), the use of aggressive negotiation tactics through loss adjusters or otherwise, attrition based strategies such as delays and failure to reply to correspondence

Thompsons would be pleased to provide evidence to Sir Rupert of all these techniques in the many many cases we have dealt with.

The net result is that whereas in a typical small claim it is unusual for the parties to instruct lawyers, insurers in PI claims frequently dig in and contest the case as a matter of course, whatever their value and with disproportionate resources. They fight technical points and instruct both solicitors and counsel. The calculation may be that whilst it is disproportionate to incur such costs in one case, the insurers benefit from the many other cases where the Claimant faced with this show of force gives up or undersettles to conclude the matter quickly.

Tens of thousands of people would feel the impact

Approximately 50% of Thompsons PI claims are concluded for under £2,500.

We cannot be precise about the figure because our database records total damages whereas the small claims limit applies to general damages only. Consequently a case may be valued at over the limit but will still be a small claim if the general damages component is under that figure. Over 40% of PI cases we conclude recover less than £2,500 in total and, as some of those recovering more than £2,500 will include general damages under that figure, 50% is a fair estimate.

Over 70% of Thompsons' current PI cases would be caught by a limit of £5,000. This chimes with the Association of PI Lawyers (APIL) survey referred to in the Interim Report which recorded that almost 70% of all PI claims recover less than £5,000 general damages.

As our PI case holding is typically 70,000 cases this means approximately 35,000 would be caught by a £2,500 limit and over 49,000 would fall below a £5,000 limit. Whilst we are the largest single PI law firm in the UK we have only a small part of the overall total of PI cases meaning that tens of thousands, potentially hundreds of thousands of victims will be deprived of representation by an increase to either of these figures.

Whilst it is of course conjecture – because we don't know – the question has to be asked, what would those thousands of ordinary working people make of being 'on their own' against an insurer? Would they feel justice had been done, that they had been treated fairly, that their employer who had been negligent and for whom they needed to return to work had made it up to them? Is there a risk that people will feel dissatisfied and unhappy and that effects their view of insurers, of the court system, of their employers?

Are these risks worth taking, are they consequences that as a Society we want to face when only *some* of the insurers and their lawyers (and some of the judiciary?) want change?

Damage to current balanced model

The vast majority of PI cases are above the current £1,000 limit. This means that block providers such as BTE insurers and unions can deliver representation to the minority with small claims by requiring their law firms to provide representation to them as part of the overall package.

That model is premised on the many paying for the few and would collapse should the balance shift (as it will) if the limit rises. The few cannot pay for the many and neither can half pay for the other half. The losers would not only be those with claims below the new general damages limit but also those with claims below £1,000 who are currently represented.

Defendants would continue to be legally represented.

Insurers have continued to instruct solicitors and counsel in PI cases whether they are above or below the small claims limit. This has been the position since the limit was increased to £1,000 in 1991 and continued to be so after it was increased again in 1999 when the £1,000 was specified to apply to general damages only.

The practice of most insurers in PI cases is to conduct negotiation in house or through loss adjusters until proceedings are commenced and thereafter instruct solicitors and counsel. This applies irrespective of the value and there is no reason to suggest that this would change if the limit rose. It remained the case after 1991 and has been the case since 1999 to date.

This underlines the inequality of arms - insurers can afford to pay for legal representation in order to protect their interests. This applies irrespective of recovery of costs as insurers rarely recover costs. PI Claimants are reliant on recovery of costs such that an increase in small claims would prevent them from instructing lawyers unless they are prepared to have a reduction in their compensation to allow them to do so.

This means the unrepresented injury victim would not only have to deal with experienced insurers but will also be confronted with experienced solicitors and counsel.

There is evidence of third party capture techniques actively and even blatantly taking advantage of unrepresented injury victims.

In the Interim Report there was a comment in Part 3 Ch 10 that:

"It is worth considering whether third party capture could be put on a formal basis with adequate safeguards for the Claimant's rights."

From all that we have seen third party capture is a negative thing. To formalise it would be to give legitimacy to a negative practice, one that directly exposes Claimants to the worse excesses of the inherent inequality between them and the insurer. Here are just four examples of claims capture being used as a means whereby experienced insurers take advantage of unrepresented injury victims.

1. A union member was allocated solicitors through their motor insurers following an RTA in April 2007. In November 2007 the insurer advised the Claimant to accept an offer of £2,250. The Claimant was unhappy with this offer and the service they had received. Thompsons was instructed to take over the file in February 2008. The insurer made an increased offer of £3,000 in September 2008 which we advised client to reject.

We made a part 36 at £8,537 and advised our client to accept any offer of £5,000 or more prior to issue of proceedings. The offer was rejected and proceedings were issued for an amount over £5,000.

2. A 56 year old woman who suffered severe multiple injuries including a brain injury, spinal injuries, a collapsed lung and numerous fractures in an RTA and remains very seriously ill in a nursing home (and is, tragically, likely to die) was written to within days of the accident by Broker Direct.

The letter invited her to deal directly with them and promised to make an offer "at the very top of the value bracket for the injury you have sustained". The letter continued: "However, should you wish to seek legal advice in relation to your injury claim you may wish to contact Pannone – full details of their services are attached". Pannone is one of Broker Direct's panel law firms.

The compensation claim is ongoing and the Claimant's injuries alone will be worth significantly more than £50k. There will also be a significant care claim

3. We acted for a union member who suffered a head injury in a workplace accident. He was called into the office on the day he returned to work in order to meet a representative from the employer's insurer Quinn. He was told that a form needed to be signed for health and safety reasons "so that they could keep the line going".

The insurance representative said this did not mean that he could not made a claim. He took them at their word and contacted Thompsons via his trade union. Quinn then informed Thompsons that the client had signed a waiver of his rights which stopped him claiming.

Before the letter of claim was sent the client was called to a meeting to "investigate the accident", even though it was several months after it had happened. The insurance rep was again in attendance. When the claim was lodged Quinn sent a witness statement made by their rep which they claimed was evidence that our client had made an admission that the accident was his fault.

When the claim was issued no mention of these issues were made in the defence and the claim settled on a full liability basis.

4. We were instructed by an elderly couple who were injured in an RTA that was not their fault. They reported the accident to their motor insurer who put them through to its "legal department" – a panel law firm. The couple told the panel firm that Thompsons had already been instructed and got the (untrue) response that if they used Thompsons they would be charged a fee.

They were subsequently contacted by post and phone by three more insurance panel law firm members all trying to lure them away from Thompsons. One claimed that they were 'obliged' to use their insurer's panel firm.

We can provide the Review with many other 3rd party capture examples and evidence in the form of letters to Claimants from insurance companies.

In addition, the issue of claims capture was recently featured on BBC Radio 4 Moneybox, a consumer affairs programme. This included evidence from a former insurance company employee who had been required to engage in aggressive techniques in pursuit of Claimants. An extract from the transcript is set out below.

MONEY BOX

Presenter: PAUL LEWIS

TRANSMISSION: 6th JUNE 2009 12.00-12.30 RADIO 4

Now insurance companies are being accused of putting pressure on innocent victims of traffic accidents to get them to settle claims before they get legal or medical advice. A former insider has told Money Box he door stepped people within hours of the accident, and a leading crash victim charity is calling for regulation to be tightened to stop the practice. Samantha Washington reports.

WASHINGTON: Kimberly Harrison was involved in an accident last year when another car ploughed head on into hers. It left her with serious injuries.

WASHINGTON: From the day she got home from hospital, she was taken aback by the persistence of the insurers of the other driver.

HARRISON: He was really forceful. He was like a bully. He was really trying to push me to close a deal. And it got a lot worse actually. About a month ago someone from this insurance company had been trying to get hold of all my medical reports and they were posing as my legal secretary actually and *got* all my medical reports, which I felt was really quite intrusive and invasive. And when you think about it, I've been the victim through all of this. It just seems quite shocking that the insurance people are going to treat people like this.

WASHINGTON: Well despite the frequent calls in that first week, she declined the offer put forward and instructed a solicitor. What happened to Kimberley was an attempt at what's known in the trade as 'third party capture'. It's where the insurer of the person who caused the accident tries to get the person injured to settle directly with them. Most approaches by the insurer aren't as insistent as what happened to Kimberley, but when we managed to track down an insider, a former agent of the insurer Kimberley dealt with - Quinn Direct - he said this type of approach is normal. This is former claims handler at Quinn, Tommy Scott.

SCOTT: What we were told to do was "Jump in your car and get out and doorstep them".

WASHINGTON: And that could be how soon?

SCOTT: That could be within you know two, three hours after the accident. I mean literally you could still see some of the third party drivers still physically shaking from the accident. I would be there to try and make out that you're here to help them, but in reality you know we're just trying to settle them as quickly as possible. You would try and settle them and not through a solicitor or indeed having any medical advice. You don't take no for an answer. Close the claim and then move on.

WASHINGTON: He left the company one and a half years ago when he says the practices seemed to be getting more heavy-handed - though, he says, he was well compensated for it.

SCOTT: As it got more aggressive, the third party capture, the bonus schemes came into place, so my job was keep the costs really, really low and also you know try to not get legal fees paid out. So the little that I paid out to a client, then the better it was for me to have my bonuses.

WASHINGTON: Well Quinn Direct denies Tommy's account. It says it has a "proactive" approach based on getting "fair" compensation to Claimants quickly. The company also says it "completely respects the person's choice to appoint a solicitor". The insurer tells us it's investigating the claims about Kimberley's medical reports. But this isn't just about Quinn. Solicitor groups say that insurers pressuring crash victims to settle directly is becoming widespread and that most household names now have departments dedicated to it. John Spencer is Chairman of the Motor Accident Solicitors' Society - or MASS - and says that the third party can often get left short changed.

SPENCER: The practices vary enormously, but it is things like unsolicited contact over the telephone, unsolicited visits, minors under 18 being contacted, making offers without medical evidence, seeking to make offers which are under the value of the claim involved. I have an example. An offer was made by the insurer of £15,000. The victim eventually sought legal advice. The claim was settled for £44,000.

WASHINGTON: Well it isn't surprising that lawyers and insurers should have a bun fight about this, but a leading road safety charity, Brake, is also worried. Its spokesperson Jane Horton says insurers shouldn't approach their parties directly.

HORTON: It's very difficult to see how it can be in the interest of that vulnerable individual to be approached by an insurer to try and settle a claim speedily. It's as if having been made a victim once by being involved in a road crash through absolutely no fault of your own, you may be made into a victim twice by then being approached when you're not really equipped to deal with it.

Research by Richard Moorhead and Mark Sefton revealed the perils of being a litigant in person

Litigants in person: Unrepresented litigants in first instance proceedings (for DCA 2004)

The research showed that although litigant in person cases were sometimes less serious and less heavily contested, what was at stake for litigants was nevertheless significant.

The researchers found:

- cases involving unrepresented litigants may involve more court-based activity than those cases where all parties were represented
- unrepresented litigants participated at a lower intensity but made more mistakes
- problems faced by unrepresented litigants demonstrate struggles with substantive law and procedure
- cases with unrepresented parties were less likely to be settled
- Claimants received incorrect advice from court staff

An increase in line with inflation?

We oppose any increase in the small claims limit for PI cases. It follows that we oppose an increase in line with inflation.

We consider the small claims track is unsuitable for any PI claims. Thompsons would prefer that PI cases were exempted altogether and even the £1,000 limit is dropped but we accept that this may not be supported and therefore suggest that the limit should remain where it is.

If, despite the many problems identified above there were to be an inflationary increase, that should be dated from 1999.

The limit was last increased in 1999 when CPR replaced County Court Rules and the £1,000 was specified to apply to general damages only. Prior to that, the £1,000 figure included all damages. So a PI claim valued at £1,200 in total comprising £800 general damages and £400 special damages was not a small claim until the change in 1999 after which it would have been allocated to the small claims track.

This increase was achieved by CPR 26.6 which provides at 26.6 (1):

The small claims track is the normal track for –
(a) any claim for personal injuries where –
(i) the value of the claim is not more than £5,000; and
(ii) the value of any claim for damages for personal injuries is not more than £1,000;

26.6 (2) provides:

For the purposes of paragraph (1) 'damages for personal injuries' means damages claimed as compensation for pain, suffering and loss of amenity and does not include any other damages which are claimed.

Whilst we do not have any statistics as to the breakdown of special and general damages in small claims, it is estimated that approximately 20% of damages in small claims may represent special damages. On that basis the increase in 1999 was a 25% increase in the limit.

The RPI in July 1991 (when the small claims limit was raised from £500 to £1,000) was 133.8 and in July 1999 (when the £1,000 was determined to apply to general damages only) was 165.1, (an increase of 23.5 %). This means that the 25% increase in 1999 was slightly above inflation.

Using RPI again (which is generally lower than CPI) and is presently 211.5 would see a 28% increase on £1,000.

An RPI related increase would take the limit to £1,280 or, rounded down, to £1,250.

BEFORE THE EVENT INSURANCE. Chapter 13

The Interim Report put forward the following tentative conclusion:

It seems to me to be in the public interest to promote a substantial extension of BTE insurance, especially insurance in the category BTE1. The cost of litigation in any year by the few insured who need to bring or defend claims will then be borne by the many who do not.

We do not agree with this in the context of PI claims and note that there is no reference to discussing BTE with Claimant solicitors.

We welcome the Interim Report recognising the two models and BTE2 is primarily a PI model. In our experience BTE has offered nothing to the funding of PI cases. Indeed it has been responsible for a model based on excessive referral fees which we consider drives down quality and encourages risk averse behaviour.

Our understanding of the model is that it is, in effect, hollow cover. By that we mean that whilst the policyholder may have an indemnity as against the insurer, the arrangements are such that the insurer pays little or nothing out and, in fact, simply collects referral fees and other benefits from law firms in return for the cases referred.

We understand that panel law firms receiving cases are expected to pursue those cases on the basis of an unlawful CFA, i.e. if they wish to continue to receive cases and remain on the panel,

they are expected not to seek any costs or disbursements incurred in failed cases or seek payment of any adverse costs.

Unlike a lawful CFA which is clearly expressed as such and the precise details of which the client is fully aware of, BTE arrangements are cloaked in secrecy. This lack of transparency should be a major issue of concern.

The profession has, quite rightly, been concerned about the potential for conflicts of interest where contingency fees apply. A lawyer working on a contingency has an interest in the case and extensive provisions have been made to protect clients and ensure transparency.

A contingent client knows of this interest and also knows that the system is devised to avoid risk averse advice. Lawyers will advise pursuing 50/50 cases on the basis that there will be a 100% success fee so there is payment in the successful case to cover the failed case.

But if BTE panel firms are having to accept cases on the terms above, clients are not only being kept in the dark but they can have no confidence that the advice will not be risk averse. A lawyer on such terms would have no interest in advising pursuit of a 50/50 case as there will be no success fee. There will only be payment in one case and nothing to cover the losses from the failed case. Whilst there may be some profit from the successful case, it will not – if it is reasonable and proportionate - be sufficient to carry a failed case costing approximately the same.

The same logic would apply in a 60/40 case and although ultimately a point would be reached whereby it is economic to pursue cases we do not know where that point is. We can be confident that it will be some way from 50/50 and probably more 'certain' than 60/40.

This means that BTE clients with meritorious claims must be being advised that their claim is weak when it is not. The advice won't be that the claim has prospects above 50% nor that it is not economic to pursue it under the insurers' panel terms. The advice must be being fudged or the case undersettled. To be open about the economics would expose the secret terms.

If there were an extension of BTE as suggested in the Interim Report, the majority of accident cases involving a PI would be referred by the insurer to one of a small panel of law firms who would have gone through a highly competitive tendering process when competing for referrals. This would restrict a Claimant's choice of legal adviser, undermine trade union legal services, reduce the quality of legal work undertaken and restrict access to justice. Many smaller PI firms would not survive. Those Claimant's wishing to transfer their case or to use a non panel firm would be faced with difficulties in terminating their retainers. Law firms not on the panel would have difficulty accepting cases because of fears of inevitable funding challenges raised by Defendant costs negotiators.

We condemn these arrangements. We cannot see how an extension of BTE is a good thing for the people this is meant to be about – the Claimants.

Before any encouragement of the concept there needs, we would suggest, to be an in-depth review of how the arrangements work in PI cases. Only then can a view be taken on the desirability of an extension. Should something more than a superficial review recommend and extension of BTE there would need to be much tighter regulation than at present.

In addition we condemn the conflict of interest inherent in many BTE arrangements.

In motor insurance the insurers for the Defendant driver will often provide BTE within the policy for passengers to pursue claims against the driver. They then sell that case to a panel law firm. The result is that the same insurer is choosing which lawyer takes on the case against itself and making a profit through the referral fee whilst doing so.

Insurers often refer to the setting up of 'Chinese Wall' type arrangements but we do not accept these remotely address the fundamental conflict of interest.

Ultimately the BTE policy is sold as part of the motor cover. Even if it is underwritten by a different insurer it is an insurer chosen by the motor insurer who can be easily removed from the arrangement if the motor insurer wishes to do so. This creates a business nexus between the BTE insurer and the motor insurer which is fundamentally in conflict as the BTE insurer funds cases against that same motor insurer.

The same applies when the claim is against another motorist where that driver is covered by the same motor insurer as will inevitably be the case in a proportion of claims.

Against this background the Bar proposals that compulsory BTE should be introduced for a wide range of accidents is misguided and naïve. They propose the mechanism would be as follows:

(i) Motorists should be required to take out BTE insurance in addition to third party liability insurance. Such BTE insurance would cover themselves, their passengers and any pedestrians whom they might injure.
(ii) Employers, occupiers of business premises, operators of trains and others required to have public liability insurance should also be required to take out BTE cover in respect of PI claims suffered by themselves, employees, visitors, or customers.
(iii) Such insurance would cover legal expenses only, not damages. Claims would be supported by insurers, subject to a merits test.
(iv) BTE insurers will recover their costs, but no success fee or ATE premium, in respect of cases won. BTE insurers would pay the defence costs in respect of cases lost.

In practice motorists often have BTE cover to pursue a claim and, even if they do not, their insurer will still seek to sell the claim for a referral fee to a panel law firm as they are often the first to be notified after a crash. This means that compulsory BTE cover for motorists is otiose in respect of PI claims. Where it exists the BTE model is based on referral fees, risk averse behaviour and conflict of interest and as such we believe it should be condemned, not encouraged.

In respect of employers, in practice they have cover to defend employers liability claims in that as the insurers meet those claims, they provide representation to reduce the cost to them of those claims. The same applies to other forms of liability insurance. Where there is liability insurance, there is representation for the insured: BTE is simply a non-issue.

Whether BTE is to be encouraged in non-PI cases is another matter. For the reasons set out, we have grave reservations about the conduct of insurers and the way they seek to control the litigation process for their commercial benefit irrespective of the resulting risk aversion and conflict of interest.

The best means of advance provision is, rather than BTE, through voluntary, non-profit making bodies such as unions who provide quality legal services for their members as part of a wider service and are driven only by the interests of their members, not of shareholders or constrained by the conflicts referred to above.

CONDITIONAL FEE AGREEMENTS. Chapter 16

The Interim Report records the provisional view of Sir Rupert Jackson as:

following the retraction of legal aid, either CFAs or some other system of payment by results (contingent fee agreements, CLAF, SLAS, third party funding agreements etc.) must exist in order to facilitate access to justice. The underlying principle of payment by results has been absorbed into our litigation culture over the 14 year period since 1995. In the language of Professor Kritzer the principle is already becoming embedded. A new generation of lawyers has grown up with

CFAs. The real issue, therefore, is how CFAs or alternative "no win – no fee" arrangements should be structured, not whether they should exist. We should be aiming so far as possible for structures which provide incentives:

(i) for lawyers to get the best possible results for their clients, whilst discharging their duties to the court and to other parties;
(ii) for clients to propose or accept reasonable settlements; and
(iii) for all parties to keep costs down to proportionate levels.

We consider the system is working well in PI cases. Unlike BTE where we consider the model does not drive lawyers to get the best possible results for their clients whilst discharging their duties to the court and to other parties (in fact quite the reverse) CFA's and CCFA's have forced no change in Thompsons' litigation philosophy. Where a case has merits we pursue it, confident in the knowledge that the success fees will compensate us for the failed cases – of which there are many (see below). In pursuing a case we will always seek to maximise damages.

Defendant Part 36 offers work well to ensure cases are not pursued after a reasonable offer has been made. Clients with CFA/CCFA funding and ATE are subject to strict terms which withdraw funding where advice on a reasonable offer is not accepted.

Dispute resolution mechanisms ensure a client has a second opinion (from counsel or a more senior solicitor) and the result is that in virtually all cases, where reasonable offers are made, they are accepted and the case is settled. The arrangements are designed to incentivise such behaviour

In the few cases where clients do not follow advice they will have made a positive choice to do so knowing the result will be a withdrawal of the funding provided leaving them to make their own arrangements.

We have greater concern in respect of Claimant settlement proposals and the need for greater teeth to Claimants Part 36 offers. But that concerns CPR, not the operation of CFAs/ CCFAs.

In terms of proportionate costs, in our experience costs reflect the work done and are recovered only where reasonable and proportionate as accepted by the Defendants or the Court. The funding arrangement is of no relevance to the outcome.

Courts can and do frequently tax down bills on Assessment but in most cases bills are negotiated. Whilst the quality of Assessments vary, Thompsons' experience is that the civil courts do not accept bills at face value. We are frequently put to proof to establish our costs as reasonable and proportionate.

Despite being told by Defendant solicitors that they are frequently instructed to defend claims on a fixed fee basis (sometimes as low as £750.00 per case) we have only ever in one lost case seen a fixed fee claimed. The claim is always on an hourly rate basis and not on a fixed fee basis. Similarly Defendants are increasingly acting on a CFA basis with no reference being made to fixed fees.

Costs are much lower where cases are settled early such that the emphasis should be on measures to encourage early settlement, not on artificial means to drive down recoverability of costs properly and reasonably incurred due to the conduct of the Defendant and/ or the nature of the case.

There is then a summary of a number of criticisms which have been made of CFAs in their present form as follows:

In particular, it is contended that Claimants on CFAs have no interest in the costs being incurred on their behalf, because (win or lose) they will never have to pay those costs. Therefore an important discipline is lacking. Another criticism advanced is that the costs of litigation have been massively increased by CFAs. In cases with 100% success fees Claimant lawyers recover twice their base costs. Also Defendants (in addition to paying up to double the base costs) have to pay huge sums for ATE insurance in respect of cases which they lose.

5.6 A separate issue which has been raised is whether success fees are being set too high (except, of course, in cases where they are fixed under Part 45). The allegation made by some is that success fees are set at a level which more than compensates lawyers for those relatively few cases which they lose. This is not an issue which can be debated in general terms. It needs to be considered by reference to individual categories of cases (personal injuries, defamation, etc).

We do not accept these criticisms in the context of PI cases.

We have already dealt with the suggestion that Claimants have no interest in the costs. There is no need for an interest to ensure reasonable and proportionate costs are recoverable. Appropriate procedures to drive early settlement combined with simplification of procedures and, where appropriate, robust case management and assessment will deliver adequate control of costs.

In respect of success fees these are now fixed in virtually all PI cases and we would encourage extension of fixed success fees to cover occupiers liability and public liability cases.

The process of fixing success fees was expertly mediated by the CJC using extensive data collected by Paul Fenn. The result has been a lasting agreement which in our view should be a model for other areas of litigation.

The following questions are then put:

(i) Are CFAs in their present form satisfactory?
(ii) If not, what reforms might be made in order to create appropriate incentives for all involved in the litigation process?
(iii) What is the impact of CFAs on particular categories of litigation (beyond the impacts already identified in chapters 25 to 39 below).

(i) Our response is the CFAs/ CCFAs in the context of PI litigation are satisfactory and much has already been achieved to ensure that.

The decision in 2005 to transfer the consumer protection measures contained in CFA agreements from the statutory basis of the CFA Regulations to the professional obligations of solicitors under the regulatory provisions of the Solicitors Costs Information and Client Care did much to eliminate many of the technical challenges.

Similarly the successful mediations to fix success fees in PI cases has removed the main area of disagreement and ensured fairness to all parties.

It is missing the point to focus on the means of funding as an issue driving up costs. It is behaviour and procedures that do so. Incentives should be aimed at encouraging early settlement and simplifying bureaucratic procedures.

The impact in PI has been to provide access to justice. Meritorious claims can be brought and the many weak claims are not pursued. Defendants can defend weak claims and are incentivised to do so in that they thereby avoid a liability for Claimant's damages and costs.

Much has been made of the 'costs wars'. These have been CFA technical challenges raised by Defendants and nothing to do with whether the costs have been reasonably and properly

incurred in order to progress the claim.

A debate at the Manchester Review seminar on the 'costs wars' found the majority of the audience (both Claimant and Defendant representatives) agreeing that they had been an unwelcome development as were technical challenges generally. The audience were clear that abolition of the Indemnity Principle would go a long way to deal with the issues the costs wars had been about.

At the end of the day we believe a Claimant should continue to be entitled to all costs reasonably incurred to progress the action. If the Defendant raises spurious issues, a Claimant has no choice but to investigate them and, if the claim is eventually successful, the Defendant should pay the costs associated with the carrying out of those investigations.

Very few cases reach Detailed Assessment but where they do a District Judge is more than capable of making a robust determination on any points of dispute to the Claimant's bill of costs, raised by a Defendant.

(ii) Further reforms would be welcome.

- Abolition of the indemnity principle would end most if not all technical challenges. It is a theme that has come out we gather at various of the seminars.

- Mediations should be held to extend fixed success fees to other PI cases such as public liability and occupiers liability cases.

- 'Self insurance' by membership organisations such as unions should be extended to cover own disbursements as well as adverse costs. There is no good reason for this discrimination in favour of commercial insurance.

(iii) We only seek to comment on their impact on PI cases and that has, in Thompson's view been positive.

- Claimants now recover all of their damages and can bring meritorious claims whatever their means.

- There has been no flood of weak claims. Neither solicitors on CFAs or ATE insurers would support weak claims.

- The ATE industry has grown and stabilised. This is essential for the regime to work. It is also important that ATE insurers are not owned by or related to liability insurers as there is a potential conflict of interest.

- It is important that prescribed membership organisations such as unions can compete on a level playing field with commercial insurance and offer full recoverable protection for members and their families. This will also strengthen the independent sector in this area of funding along with those ATE insurers who are wholly separate from any liability insurers.

- The work done in PI cases in terms of fixed success fees and protection by membership organisations should, in our view, be regarded as a model for other areas of litigation.

CONTINGENCY FEES. Chapter 20

The following questions are put in the Interim Report:

(i) Should solicitors and counsel be permitted to act on contingency fee agreements?

(ii) If so and if costs shifting remains, what form should that cost shifting take? In particular, should the losing party pay the additional element of costs (i.e. the amount by which the contingent fee exceeds costs assessed on the conventional basis)?
(iii) If contingency fee agreements are permitted, what form of regulation should be imposed?
(iv) If the concept of lawyers working on contingency fees is unacceptable, do the considerations set out in this chapter militate in favour of setting up a CLAF or a SLAS, as discussed in chapters 18 and 19?

We have experience of contingency fees in the Employment Tribunals (ET). We do not consider that contingency fees have worked where they are (by accident rather than design) permissible, i.e. in ET cases. In our experience they have been most extensively used in equal pay cases (an area which Professor Moorhead accepts he has not researched). The equal pay cases have highlighted contingency fee abuse which include:

- failure to properly advise of alternative means of funding such as the availability of union funding – this is due to the conflict of interest between the client and the contingency fee lawyer
- golden handcuffs and lack of advice on those
- no effective means to challenge the level of success fee unlike the position with CFAs where there is such a mechanism
- cherry picking – taking the easy cases and leaving unions to take the more difficult cases
- piggy backing – sitting back and allowing unions to lead cases and incur costs on the generic points, then trawling for cases which benefit from the decisions handed down.

Based on that experience and the fact that in PI litigation CFAs/CCFAs provide adequate means of funding we see no need to encourage contingency fees in PI cases.

If they were permitted, logic would suggest that the success fee should be recoverable as it is with CFAs/CCFAs but that would add a layer of dispute as the success fees have been fixed for those cases. We would suggest there would need to be a similar process to agree and fix success fees for contingency fee cases. Taken overall, these should not exceed the sums payable by way of success fees in CFA/CCFA cases.

Tight regulation would need to be required with transparency as the key, limits on the percentage of damages applicable as the success fee and absolute bars on certain provisions such as 'golden handcuffs.'

We do not comment on CLAF or SLAS as this is of little, if any, relevance to the PI litigation we undertake.

FIXED COSTS. Chapter 22

In our preliminary submission to the Review Team we set out extensive reasons for our opposition to fixed costs. That remains the position and we were somewhat amazed that the Interim Report referred to the "unanimous" view that:

…we should take forward this work and try to achieve a fixed costs system in FT cases.

It was not the unanimous view of those submitting a response in January.

We will not repeat here the extensive reasons we gave in January for opposing fixed costs but express our disappointment that that opposition was not answered but rather seemingly ignored in the Interim Report.

If it is the case that the Review will be recommending fixed costs in PI FT cases we would urge that any system addresses our concerns, particularly in respect of driving Defendant's behaviour.

Certain categories of case should not be included in any fixed costs regime and either be allocated to the multi-track or, if they are to remain in the FT should be specifically exempt from fixed costs.

The introduction of fixed costs would be a major benefit to insurers. It should be seen as and treated as a benefit Defendants have to justify and earn from their behaviour the right to keep.

Industrial Disease Litigation

Clinical negligence cases with a FT value are it would seem to be excluded from fixed costs. We would submit that industrial disease claims should similarly be excluded.

In an industrial disease claim, a Claimant has frequently had more than one employer with exposure to the particular substance, or noise and vibration etc going back over a number of years. Detailed statements are almost always required, not only from the Claimant but also from numerous lay witnesses. Disease cases often require significant amounts of time being spent by the Claimant's legal adviser attempting to trace insurers in the not unusual situation that one of the Defendant companies is defunct.

It is not unusual for the Defendant to raise issues of liability, causation, apportionment and limitation in disease cases. All these issues require detailed investigation and significant amounts of preparation. At the end of the case, the Claimant may not recover full compensation especially if there has to be an apportionment of compensation and certain insurers cannot be traced. On value grounds therefore, whilst a disease case may fall within the FT limit it would be wholly unfeasible to undertake the work in a fixed costs regime.

Fixed costs in disease cases would result in many Claimants not receiving the compensation and justice they deserve.

Many of these Claimants have annual take home salaries of £10,000.00 to £15,000.00. They have worked hard in difficult environments all of their working lives. To be unable to properly act for such Claimants on the basis of cost would be a retrograde step for justice and for Society.

The theoretical possibility that a Court could be persuaded to allocate a disease case to the multi track on the basis that any trial will take longer than one day or on complexity grounds pursuant to Part 26.8 of the CPR does not happen in practice. In our experience District Judges are far more likely to determine the appropriate track for a case on value grounds rather than on the grounds of complexity.

Further guidance should be provided to the Judiciary on Part 26.8.

We have said elsewhere in our submission that EL, PL and OL cases are very different to simple rear end shunts. The complexities encountered in these types of cases should, we would suggest, be recognised in any costs regime.

Rehabilitation

Where will the proposal with regards to Fixed Costs in the FT leave rehabilitation? Many Claimants whose cases have an overall value of less than £25,000, require rehabilitation. Can we e confident that a legal adviser will make the referral to an appropriate rehabilitation provider when that means increased time for no additional payment?

The notion that compensation should return the Claimant to the position they were in prior to the accident (and that means also to good health wherever possible) runs the risk of being compromised if fixed costs are introduced and the numbers of Claimants appropriately referred to rehabilitation falls.

Defendant Behaviour

Examples of Defendants failing to admit liability in straightforward cases, raising issues of contributory negligence which are without foundation and raising issues of causation are not unusual. Similarly, non compliance with the PI Protocol is far from unusual.

Such behaviour will require an extensive escape clause from fixed costs. The escape clause should not be limited to 'exceptional cases' or to 'unreasonable behaviour' but should build on the model in the PI Claims Process so that Defendants who fail to comply with the Protocol including its time limits do not earn the benefit of fixed costs in subsequent litigation.

Similarly a Defendant who fails to beat a Claimant's Part 36 Offer should not have the benefit of paying fixed costs.

Other examples of conduct which should deprive Defendants of paying fixed costs (which in these cases would be a benefit to them as they will have driven up costs by their conduct) would include:

- Delays in agreeing issues which could/should have been agreed at an earlier stage
- Procedural devices such as detailed Part 18 requests
- Failure to agree heads of damage which could/should have been agreed or delay in doing so.
- Failure to provide documents to assist the Claimant in preparing a schedule of loss e.g. wages information.
- Providing extensive disclosure of documents not relevant to the issues in dispute
- Failing to provide relevant documents inspection of which is important to determine liability. This results in the Claimant having to make applications for Pre Action Disclosure.

Examples of cases where in our experience Defendants refuse to supply documents on a voluntary basis but where the content of the documents are vital to enable the Claimant to make a determination of liability are: patient handling cases (patient records, care plans, risk assessments, accident report etc); civil assault cases (service user records, risk assessments, accident reports for the Claimant and other staff members etc) and; in industrial disease claims (noise and vibration surveys, documents relevant to a Defendant's potential date of knowledge etc).

We agree that in respect of the mediated agreements as to fixed costs:

The level of costs was only agreed after the collection and statistical analysis of data from large numbers of settled claims, with a view to revealing the distribution of costs recovered by Claimants in current practice. This enabled all parties to see the statistical relationship between the value of the claim and the average costs. Background information about the nature and size of the samples used provided the parties with a level of confidence in the finding that the costs increased in proportion with case value.

In that context, we welcome the commitment that any fixing of costs would also be based on research from Paul Fenn. It is fundamental that any regime of fixed costs is based on replicating costs actually and properly incurred which requires a research-based approach followed by mediation through the CJC. This approach succeeded in establishing fixed RTA costs and fixed success fees in PI cases which have stood the test of time and retained agreement on all sides.

To that end we also welcome the commitment confirmed at one of the Review seminars that if there are to be fixed costs then the CJC should establish a mediation process along the lines of the successful mediations, with a view to reaching agreement by the end of 2009 with the assistance of data based research by Paul Fenn.

It is, we believe, fundamental that the unions (who represent 6 million potential litigants and their families) are a party to that process, as they were in previous mediations.

Present indications suggest that the unions may not be included. No reason has been provided for this and we believe there could be no good reason. We would also add that the unions and their lawyers have been the biggest providers of data to such processes.

In terms of 'supporting "rules" we would agree that:

(i) The advocacy fees remain as a "bolt-on" as presently proscribed in the CPR.
(ii) The costs of interim applications and injunctions should be summarily assessed "on the day" and therefore are outside the matrix.
(iii) "Add-ons" need to provide for cases involving:

- children and protected persons (a fixed percentage uplift), to include provision for court approval of any settlement;
- expert evidence from more than one expert (this may be catered for within the matrix itself, otherwise a fixed percentage uplift);
- multiple Claimants or Defendants (applying a percentage uplift varying by the number of additional parties required);
- client not able to give adequate instructions in the English language (again, applying a fixed percentage uplift).

We would agree in respect of disbursements that:

Subject to any specific agreements which may be reached, disbursements should not be fixed, but should be subject to a simple form of assessment, applying the usual tests of reasonableness.

We have already commented on the need for extensive provision to deal with "unreasonable conduct" by the paying party. We would not advocate simply using that term but the party due to receive payment should be able to apply for an order for summary assessment of costs outside the fixed costs matrix. Care would need to be taken to restrict the scope for satellite litigation.

It is agreed that there must be an incentive for both sides to make good offers to settle, using CPR Part 36 or an equivalent system.

Stages of the litigation process

We would support the stages identified in the matrix at Table 22.2 which accords with our own recording of stages of settlement and will more effectively incentivise reasonable conduct by Defendants.

Early admission of liability

We agree that separate fixed costs should be applied where liability is admitted at an early stage from those in which liability was disputed. We agree that, as well as reflecting the different costs incurred in such cases, this would provide a further incentive for Defendants to admit liability early, consistent with the ethos of the CPR.

We do not agree that this is simply achieved by a reduction applied where liability is admitted within a defined time period, such as the relevant protocol period. As the figures to populate the matrix will come from all cases, including those with liability admitted and disputed, the figures are generally lower than the costs incurred in those cases where liability is disputed and may be higher than where it is admitted. So, to ensure accuracy, there would need to be a general uplift of the figures so that a reduction can then apply in liability admitted cases.

Alternative option

The alternative at Table 22.4 is noted but this would, in our view, be too imprecise a matrix and the more detailed matrix at 22.2 would be preferable.

Review mechanism

We endorse the acceptance of the criticism of the existing fixed fees that no mechanism was built in for review and adjustment in line with inflation. Such a failure is fundamental and one of the reasons why we oppose fixed costs.

We agree that any system of fixed costs would need an adequate mechanism for review built in at the outset. In practice (another reason for our fixed costs opposition) these reviews often do not happen or are delayed.

For this to work there would need to be a default position whereby, for example, in the absence of a review by a given date in the year the figures are automatically uplifted by reference to the same inflation table as is used in the assessment of general damages.

Subject to that, an annual review undertaken by the Advisory Committee on Civil Costs would be reasonable. We agree that the committee needs sufficient time and resources for this task.

Exceptional cases

We agree that whatever system is introduced, there will need to be provision for an escape clause but, as indicated above, we do not accept that it should be confined to 'exceptional cases' or to 'unreasonable behaviour' but rather that it should build on the model in the PI Claims Process and ensure that a Defendant who fails to beat a Claimant's Part 36 Offer does not have the benefit of paying only fixed costs.

Other examples of conduct that should deprive Defendants of paying only fixed costs have been set out above.

Review

We have dealt with points (i) to (v) and (vii) above.

In respect of (vi) - counsel's fees other than in respect of advocacy – a similar process is required. The figures used by Fenn are based on counsel being instructed and we would suggest that a similar process is followed to agree these figures.

Apart from the pleadings which would normally be settled by counsel, it will then be a matter in each case as to whether it was reasonable or proportionate to instruct counsel with there being no dispute as to the amount.

ONE WAY COSTS SHIFTING. Chapter 25

The Interim Report poses the question:

…whether it would be more cost effective to remove the Claimant's liability for costs in respect of unsuccessful cases.

There then follows an analysis of an insurer's figures which are interesting in themselves.

There is reference to 22,726 PI claims notified to the insurer in a given period. In the same period the insurer paid out on about 11,750 claims such that the success rate was approximately 52%. We would endorse these figures. They are consistent with our own which are as follows:

- Employers Liability accident cases - success rate = 61%
- Employers Liability asbestos cases - success rate = 51%
- Employers Liability stress/strain cases - success rate = 12%

- Employers Liability other disease cases - success rate = 31%
- Public Liability accident cases - success rate = 33%
- Road Traffic accident cases - success rate = 67%

Clearly there are vast numbers of unsuccessful PI cases and as such it is quite wrong to suggest that "Claimants usually win PI cases". This reality is important both in relation to success fees and ATE insurance.

It is then recorded that of the cases where proceedings were served 7% proceeded to trial with the remainder settled before trial, either these settlements involved making payments to the Claimant or a small number were "drop hands" settlements.

This begs the question as to why the insurer failed to settle so many cases at an earlier stage. The same can be said of those cases going to trial. Only "one or two" of these resulted in the claim being dismissed with an order for costs in favour of the Defendant. In the other cases the Claimant either succeeded on liability or (much more commonly) liability was conceded.

Why did the insurer fight so many cases to trial? Clearly they were wrong to do so as virtually all trials were successful for the Claimant.

Why in so many cases did they concede liability only at trial? Clearly liability was never a serious issue but the insurers failed to make a concession until the 11th hour. This would have substantially driven up costs in that all of the work required to establish liability was simply unnecessary.

We are concerned that the Interim Report failed to pass comment on such conduct which wholly supports our preliminary submission that costs are driven up by the behaviour of insurers, and that costs can most effectively be reduced by further incentivising early settlement.

The Interim Report then notes the following:

Claims resolved without litigation. It can be seen that about 94% of cases are resolved without the need for proceedings. In the majority of these cases X make a payment in settlement to the Claimant. In the remaining cases the Claimant does not pursue his claim, but incurs no costs liability because the claim has been dropped before issue.

The latter point is not correct as the Claimant has incurred a costs liability for own costs and disbursements. Own costs will be covered by a CFA/CCFA such that, in these unsuccessful cases, they are paid out of the success fee in successful cases. Own disbursements, typically the medical report, are paid by the ATE insurance cover.

Reference is also made to counsel's fees which it is said would not form part of the disbursements, because in all or virtually all cases counsel would have been on CFAs. That is not our experience. In our experience counsel's fees are more commonly covered by the ATE as a disbursement. We accept this is cost neutral to the Defendant who either pay counsel's success fee and a lower ATE premium where counsel is on a CFA or pay only a higher premium when there is no CFA with counsel.

It is noted that the Personal Injuries Bar Association suggested that in low value PI cases:

…counsel are required to proceed on CFAs. If any counsel insists upon being a disbursement, instructions will be transferred to some other barrister who is more compliant.

That is not what happens in Thompsons cases. In most of our cases counsel's fees are a disbursement. But, where counsel's fees are not covered by the ATE, counsel is then expected to act on a CFA.

What is clear is that the figures proceed on the false premise that ATE cover is solely or mostly for Defendants' costs. A comparison is made between the ATE premiums paid by the insurer against the Defendants' costs paid by the Claimant. But that is not the correct comparison as ATE would still be required for a Claimant's disbursements.

We are informed by ATE insurers that, in fact, Defendant's costs are a much smaller component of ATE than own disbursements. The information we have in respect of one scheme is that the breakdown is as follows:

	Own Disbursements	Defendants Costs
RTA	52%	48%
EL Accident	65%	35%
EL Disease	70%	30%
Total	**66%**	**34%**

This is not surprising. The figures in respect of failure rates and when cases fail are consistent with the figures considered by Fenn during the success fee mediation.

The biggest cost is in the many cases that fail at an early stage. In the context of insurance, that cost is the medical report fee. So in EL accident cases, the Defendants' costs in the few cases lost at trial or discontinued with costs are much lower than the medical report fees in the many of cases which fail without proceedings. Not all of the 39% of cases in that category will have a medical report but many will.

In addition, where cases fail at a later stage, those with drop hands arrangements require the ATE to cover the extensive (and now much higher) court fees as well as expert's fees and counsel's fees.

It should also be noted that payment of claims is only a part of the ATE insurers' outgoings, the remainder being the substantial costs of tying up capital to provide insurance together with compliance costs, administrative expenses, commissions etc.

In the circumstances, it would appear that one-way costs shifting will only have a limited impact on ATE premiums but the market may well be de-stabilised by uncertainties around the issue of recoverability.

TRANSACTIONAL COSTS. Chapter 26

We are very concerned by the sweeping statement in this chapter that:

Claimants usually win PI cases. In the great majority of PI cases Claimants are successful on liability. This can be seen from many of the appendices to this report, but perhaps most clearly from Appendix 25. Liability is generally conceded on behalf of the Defendant well before trial and often before issue of proceedings.

This is fundamentally flawed and in our experience fundamentally wrong.

Appendix 25 is the Compensation Recovery Unit (CRU) data.

Whilst this data is objective and accurate *as to the claims it covers* it does not cover all cases. In particular, since the CRU only deals with cases where a claim is made, it does not cover the many cases which fail without a claim being made. There are also many cases which fail after a claim is made. It is only in successful cases that the claim will definitely be notified to the CRU as in those cases a payment of damages is made and the statutory provisions as to recoupment then apply.

This was a point accepted and understood in the CJC PI success fee mediation. Data was obtained by Fenn to account for such cases and that information was then fed into the decision trees. Those figures ultimately led to the agreed success fees.

There is a considerable difference between the figures quoted in the Preliminary Report (*over 90% of road traffic accident claims succeed and, in most years, over 70% of employers liability claims succeed*) and our statistics which show the success rates as being for road traffic 67% and employers liability ranging from 12% to 61% (average 55%).

The success rate for public liability cases, of which there are many, should not be disregarded either as it is as low as some industrial diseases at 33%.

We don't accept that p*ersonal injuries litigation is generally fairly straightforward.* We do accept that there are many cases which can be straightforward provided they are conducted by *lawyers and paralegals who specialise in this area* (as Chapter 26 correctly records).

We do not accept that the "…*cost of personal injuries litigation remains remarkably high*." We provided figures in our preliminary submission to demonstrate that where cases are settled early and insurers behave reasonably, costs are not high.

Where cases are not settled early and/or insurers do not behave reasonably, recovered costs are inevitably higher but they should be recoverable since they have been incurred due to Defendant behaviour. Those costs are, by definition, reasonable and proportionate since they are invariably paid by the Defendants or recovered on Detailed Assessment.

Perhaps the misconceptions in this section are only to be expected in the light of the reliance (albeit limited) on the hugely flawed Frontier Economics report. The report was the subject of an extensive critique attached by way of appendix to our January submission.

We do not accept the simple assertion that Claimant solicitor costs are substantially higher than the Defendant solicitor costs as is suggested. This is not comparing like with like for two reasons:

1. Claimant's costs are total costs and include within them marketing expense. In direct contrast Defendant's costs may not be the total costs incurred and in fact we understand are widely discounted as a form of marketing to pick up other more lucrative work. This form of discounting has double the impact. If marketing costs are 10% they will be added to other costs on the Claimants side whilst at the same time they will be deducted on the Defendant's side making for a 20% difference.

2. In our experience insurers frequently both play games with litigation dragging cases out, making concessions only at the last minute, often at trial etc and delay due to confused lines of communication, or limited lines of authority, in other words due to structural problems. There is evidence of this in the Report which refers to:

An analysis recently carried out by one trade union of cases concluded in 2008 shows that in 72% of successful cases there was no admission of liability within 4 months of the pre action protocol letter.

We would endorse that.

Only the Defendants know what they are really fighting and what is being kept in issue as a negotiating ploy or otherwise to be conceded late. The Defendant's solicitor need only do real work on the limited issues they intend to contest whereas the Claimant's solicitor must work on all issues unless/until they are formally conceded by the insurer.

So irrespective of the burden of proof being on the Claimant – which itself requires more work incurring costs – additional unnecessary work is often required of the Claimant's solicitor due to the insurer's litigation tactics.

The Preliminary Report recites the answers given by Defendant representatives for what they see as high Claimant side costs:

1. No proper scrutiny of costs.
   It is said that:

   Whereas liability insurers watch over the costs of defence solicitors like hawks, there is no-one watching over the costs of Claimant solicitors. The Claimants have no interest in the level of costs, because they will never have to pay those costs. The liability insurers can only exercise limited control, essentially for two reasons. First, it is prohibitively expensive to go to detailed assessment. Secondly, after-the-event, it is not easy to challenge items of profit costs which may be excessive.

This is not accepted. Claimants' costs are routinely and extensively challenged. In most cases a settlement is negotiated. No insurer will pay more than would be awarded on Assessment – why would they? In those cases which proceed to Assessment, the costs follow the event so the insurers pay only where they have failed to make a reasonable offer. It is only 'expensive' to act unreasonably and to fail to make a proper offer which equals or beats the award on Assessment.

2. Excessive hourly rates.

   The hourly rates charged by Claimant solicitors are substantially higher than the hourly rates charged by Defendant solicitors and are excessive. Indeed, the very fact that Claimant solicitors are paid by the hour (whereas some Defendant solicitors are on fixed fees) tends to encourage inefficiency on the Claimants' side.

There is no merit in this. On the comparison between hourly rates see our comments above in respect of marketing in particular. As to the inefficiency point this is dealt with by the Assessment process. Costs must be reasonable. A solicitor who takes 2 hours to prepare a schedule which would have taken an efficient solicitor 1 or 1.5 hours will recover from the Defendant only the time that should have been spent, not the time actually spent.

3. Referral fees.

   Claimant solicitors pay substantial referral fees to acquire business. They are only able to pay such fees because these are built into the solicitors' profit costs.

This is also wrong. Thompsons rarely pay referral fees and when we do, they are modest and much lower than the figures suggested during the consultation process. Indeed it is insurers themselves who are the worst culprits for charging excessive referral fees, together with the claims companies who, in our experience, are simply parasitic in the claims process. We accept cases from neither source.

But this misses the point that referral fees will always equate to/ can never be more than marketing costs. A solicitor can choose to advertise directly (or in combination with other solicitors such as InjuryLawyers4U) or to pay referral fees. No solicitor would pay a referral fee which exceeded the cost of advertising or other forms of marketing – it would make no business sense.

4. Exploitation.

   Some Claimant solicitors exploit the rules, for example (a) by issuing unnecessary applications for pre-action disclosure (which is a revenue generator) or (b) by issuing proceedings

prematurely (in order to escape the predictive costs regime for RTA claims). This is part of a process described by some as "cost building".

Again there is no merit in this. Costs will not be awarded in a pre-action application unless the application was necessitated by the conduct of Defendants. Indeed, the starting point is that the Claimant pays for these applications but costs are often awarded due to the insurer failing to comply with the Protocol.

As for premature proceedings, the same point applies. Costs simply will not be awarded by the court where proceedings are premature – in those cases the Defendants are awarded their costs.

5. No competitive tendering.

Claimant solicitors, unlike Defendant solicitors, do not obtain work by competitive tendering. Thus Claimant solicitors do not have the same incentive to devise and operate procedures which will hold down costs.

It is not correct that there is no competitive tendering. There is a great deal. But the main control on costs is exercised by the courts as outlined above.

6. Excessive legal input.

Some low value PI claims (for example where liability is admitted and the injury is straightforward) are not "legal" disputes at all. They could perfectly well be resolved direct between the Claimant and the liability insurer without any input from lawyers (as are many other more complex insurance claims – e.g. following flood damage).

This is very much disputed. This is not comparing like with like. See above in respect of small claims and claims capture.

So we do not accept the view that:

> *…there is some force in the points made by both sides, and that cumulatively the matters which are complained of by both sides account for the remarkably high costs of personal injuries litigation*.

We have set out our view as to how and why costs are incurred in PI cases and what can be done to ensure costs remain reasonable and proportionate – the key being early settlement.

Referral fees

As indicated, referral fees are of little relevance to our business and where they are, only modest amounts apply. They are also of little relevance to costs for the reasons given above in respect of marketing.

Claims Process

We have been closely involved in the discussions and mediations which have formulated the Ministry of Justice Claims Process. We do not accept the view that:

…a process along the lines suggested by the DCA in the original consultation paper makes eminently good sense.

This amounts to a position that the Minister was wrong to modify the proposals as was done following the extensive consultation. In particular, the Process was limited to RTA claims following

the consultation. We supported that decision. In our Response to the consultation paper we argued that the Process be confined to RTA cases.

The MoJ agreed in its response after the consultation:

19. Some respondents considered that EL and PL claims were more complex than RTAs and should not therefore be included in the new process. In PL claims, respondents pointed to the difficulties in identifying the correct Defendant and in investigating claims where the alleged accident often happened some time ago. There were also concerns that the proposed time periods would prevent the detection of fraudulent claims. In EL claims, there were concerns about the insurers carrying out investigations into liability and the potential difficulties in witnesses feeling intimidated by employers' interests.

20. Other respondents considered that EL and PL cases should be included and that the new process should apply to as many cases as possible. Respondents emphasised that disproportionately high legal costs continued to be a problem, which needed to be dealt with effectively.

21. The Government recognises that there are strong arguments on both sides. However, the Government considers that RTA cases tend by their nature to involve fewer complexities than EL and PL cases and therefore lend themselves to the new claims process more immediately than the others.

22. The Government considers that EL cases in particular involve a different dynamic in terms of the economic and power relationship that exists between an injured employee making a PI claim against their employer, and two parties contesting a road traffic accident.

23. The Government has therefore decided not to include EL and PL cases in the new process, as currently constructed, but to restrict it to RTA cases, which constitute around 70-75% of PI claims.

We endorse the position of the Government with regard to EL and PL cases. EL cases frequently involve complex issues of liability and causation and require detailed knowledge of the different Regulations governing Health and Safety Law. Only recently Thompsons represented the Claimant in the case of *Smith v Northamptonshire County Council [2009] UKHL 27* in the House of Lords where legal argument took place over the interpretation and application of the Workplace Regulations. This is typical of the sort of complex issues arising in EL cases

All parties will acknowledge that EL cases involve issues of significantly greater complexity, than for example, those RTA cases involving a straightforward 'rear end shunt'. In EL and PL cases insurers rarely admit liability within the pre action protocol period and, when the do, they frequently raise arguments of contributory negligence which have no basis in fact or law, but which require further investigation.

Since publication of the Preliminary Report the Claims Process has continued to be refined and commencement is anticipated in late 2009 or early 2010. We agree that:

The introduction of two different packages of reforms addressing the same subject matter may be unsettling for both practitioners and court users.

Work is ongoing to implement the new Claims Process as soon as possible. These new arrangements will apply to the vast majority of PI claims and we have grave concerns about duplication between those new arrangements and this Review.

The following questions are put to conclude chapter 26:

(i) How the proposed new claims process would be affected, if any of the reforms canvassed in this report were to be adopted.

(ii) How the new claims process might be built upon, in order to embrace all PI claims within the FT limits.
(iii) Any other constructive suggestions for co-operation between Claimant and Defendant solicitors, which might facilitate the swift and fair resolution of that vast mass of low value PI claims where (a) there is no defence on liability and (b) quantifying damages is straightforward.

We would respond as follows:

(i) The new Claims Process is aimed at PI claims under £10,000 – the vast majority of PI claims – and should be allowed to 'bed down', and time allowed to review its effectiveness before any further reforms are introduced. A state of constant upheaval in PI litigation is of no benefit to either party.

(ii) We would refer to our comments above with particular reference to employers liability claims. There were very good reasons why the Claims Process was confined to RTA claims and we would suggest that should logically remain the case at this stage. Once the Process has been allowed time to bed down, there is no reason why consideration should not be given to including other types of claim. But that will require careful deliberation and sensitivity to the different characteristics of employers liability claims in particular. It may require substantial modifications to the Process. But that is an issue to consider at a later stage when the Process has been finalised and perfected for RTA claims and is accepted as working well in those cases.

(iii) We suggest the following practical reforms of the PI process:

- Compulsory pre-action settlement discussions;
- Claimants' Part 36 offers with teeth to include additional damages;
- Unambiguous rules to ensure compliance with pre-action protocols and to enable consistent enforcement of those rules by the courts;
- Burden of proof reversed where protocol response on liability is delayed;
- Streamlining the litigation process by simplifying the procedures for directions and witness statements.

Compulsory settlement discussions

A change in attitude from insurers is required so that resources are focussed on securing early settlement. That does not mean settling for more than a case is worth. And it does not mean settling those (few) cases where there are genuine issues of dispute requiring a trial.

Neither is it a call for mass use of mediation and other forms of alternative dispute resolution which we support but in reality are rarely required in PI claims as both parties are represented by experienced practitioners who should be able to resolve cases by settlement discussions and, in more complex cases, settlement conferences.

We suggest that a requirement for pre-proceedings settlement discussions and real sanctions for non-compliance with protocols is needed.

In our experience it is always good to talk. Even if it is not possible to have two relatively senior executives on either side in a case who have authority to settle the case in that discussion, issues can be agreed so that costs are incurred only on those issues in dispute. In addition sharing information makes early settlement more likely at a subsequent discussion.

Third party intervention adds to cost but it has a role where discussions have broken down and there is a real prospect that a mediator can add value. Thompsons hosted the London launch of the Centre for Alternative Dispute Resolution at our London offices in March. In our view mediation/ADR should be seen as part of the toolkit to deliver earlier settlement but as the exception rather than the rule.

Where mediation/ADR is called for as a legitimate means to resolve a dispute, the costs should properly follow the event. Unless it can be shown that the injury victim's behaviour led to the need for Third Party intervention a victim of another person's negligence should not be required to pay part of the costs of mediation out of their damages.

Sanctions

The requirement to meet will be meaningless if it is not backed by sanctions for failure to do so. Clearly these sanctions need teeth.

Insurers can no doubt produce similar figures to ours and will know that costs increase when they settle cases late but if 47% of our cases settle between issue and trial the current sanction of increased costs is clearly not enough.

We advocate reversal of the burden of proof as the appropriate sanction to drive insurers' behaviour. This would also force them to take a pro-active approach in the proceedings as putting the Claimant to proof will no longer be an option.

We also suggest that the real teeth that Part 36 has in respect of Defendants' offers should be applied to Claimants' offers.

The Part 36 costs penalties are such that no Claimant will reject such an offer unless they have clear advice that there are reasonable prospects of securing an improved settlement or award. That is not the case with Claimants' offers. The additional interest available is modest and rarely awarded in practice.

In addition there is a reluctance to award indemnity costs following a Defendant's failure to beat a Claimant's Part 36, and in those few cases where such an award is made a reluctance to assess costs properly on the indemnity basis. Not surprisingly the result is that insurers do not take a Claimant's Part 36 offer with the same level of seriousness.

We suggest that this process is strengthened so that where a Claimant is awarded the amount in their Part 36 or more, substantial additional damages are payable by the Defendant who should have settled the case when the offer was made and indemnity costs awarded and properly allowed on assessment.

Procedures

We accept that some reforms in recent years have driven up the cost of litigation without any demonstrable benefit.

1. The costs of witness statements are a concern. We frequently rely upon basic handwritten witness statements but we have seen cases where Defendants have produced extensive and lengthy statements, often drafted by solicitors and/or counsel.

   The current system positively encourages detailed and lengthy statements as these may have to stand as evidence in chief. That requirement, combined with the burden of proof (it never being possible to foresee all developments in a case between drafting statements and trial) inevitably encourages lawyers to err on the side of length rather than brevity.

   If there is a real risk that a case could fail because some aspect of the evidence, which may appear peripheral on drafting is left out of a statement and cannot be introduced at trial, then more rather than less will be put in.

This can be resolved by returning to the purpose of exchanging witness statements which was to ensure a cards on the table approach which itself should encourage settlement. An approach which accepts skeletal statements and supplementary evidence at trial - provided the substance of the evidence has been disclosed and there is no attempt to take advantage and effectively ambush the opponent – would reduce the detail in statements at present.

2. The requirement for lengthy questionnaires and procedural hearings such as CMCs will inevitably increase costs. There has been no review of whether these increased costs have delivered any consequential benefits. There are many cases where questionnaires and procedural hearings could be dispensed with and replaced by automatic directions with the parties having the opportunity to seek different directions where appropriate.

   This need not undermine judicial case management as automatic directions could still provide for procedural hearings to be listed where the case remains unresolved after the period covered by the directions.

DAMAGES IN PI CASES. Chapters 27 and 28

The Preliminary Report reviews methods of assessing damages in other jurisdictions and systems used by insurers and:

…discusses whether those processes could be streamlined to make them more transparent, more user friendly and more accurate in outcome.

In our view it is clear that:

1 Damages are too low.
2. Insurers IT based systems such as Collossus are part of the problem, not part of the solution.
3. Judicial accuracy needs to be improved by expanding the JSB Guidelines and introducing means to ensure there are up to date authoritative decisions on low value claims.

1 Damages are too low

We have prepared a short paper on the issue of damages and it is attached as an appendix to this Response.

2. Insurers IT based systems such as Colossus are part of the problem, not part of the solution.

The interim report makes reference to insurers using:

… a software tool, either "Colossus" or "Claims Outcome Adviser" ("COA"), as a general damages calculator. These have been in use for many years by insurers. I am told that the majority of cases (for some insurers in excess of 90%) settle within the Colossus or COA recommended figures. Colossus and COA work on a points system, after information from the medical report has been fed into the system. The system generates a points figure from the information provided, which translates into a settlement bracket for negotiation purposes. The system is kept up to date by feeding back in the agreed damages figures post settlement. This enables insurers to carry out regular checks on the validity of the brackets, following which the system can be recalibrated where necessary. It may be thought unsatisfactory that these software systems, which exert a massive influence over PI settlements, have no direct judicial input.

There is then reference to the risk of under-settlement.

It is worrying that, according to Claimant representatives, when cases go to a hearing, judges almost invariably award more than is predicted by the insurers' software systems. Furthermore, I have heard during Phase 1 some worrying (but confidential) stories relating to under-settlement of PI claims. I have an open mind at the moment as to the extent of this problem. This is an issue which I wish to explore further during Phase 2. If it is the case that our present system of evaluating PI claims is (a) expensive and (b) sometimes resulting in under-settlements, then it may be reasonable to look towards radical reform.

Much of this misses the point. Insurers have devised automated systems such as Colossus or COA for various reasons. The primary reason will inevitably be for their own business imperative which is to drive down their outlay, whether in damages, costs or both. Put simply, they won't have software systems that inflate damages or costs if they can reduce them.

The Preliminary Report correctly identifies that these systems are producing offers which are too low so that Judges almost invariably award more. This fits with the section of the Report dealing with one-way costs shifting and insurers rarely making successful Part 36 offers.

The pattern is clear, these systems are failing. Because insurers created them and have convinced themselves of their usefulness they cannot accept they are error strewn and have led to more, not less litigation. The reality is that they have prevented settlements. Where previously experienced insurance claims handlers would resolve cases by meetings, through dialogue and negotiations, insurers have, partly through an obsession with certainty and partly to drive down their costs, introduced computerised systems in place of experienced negotiators.

The staff we deal with now (often in call centres) are far less experienced and have less discretion and authority. They avoid meetings and discussions. Their hands are tied by a system which too often produces inadequate offers.

In many cases we have no alternative but to litigate. Even then the Defendant solicitors instructed are frequently constrained by the computer so litigation continues and too often the case is settled too late in the proceedings.

It is this lack of authority and slavish adherence to the computer that drives up costs. Ironically the same insurers whose systems have created these log jams and extra costs then complain that costs are too high.

The issue of under-settlement is entirely separate from computer systems. The systems of themselves do not drive down damages. They produce offers which are too low. What then happens depends on the competency and the attitude of the Claimant's solicitors.

Competent, independent solicitors acting in their clients best interests, and with the resources to do so will advise rejection of the low offer and press on with the claim until an adequate offer is forthcoming or until trial, whichever comes first.

Sadly for Claimants some solicitors will advise acceptance of the offer or negotiate a modest increase such that the case is under-settled. This may be down to incompetence or inexperience. But, more worryingly, it may be a reflection of financial self interest.

It is suggested that funding arrangements based on CFAs result in pressure to settle for a lower offer because a win is a win, irrespective of the amount recovered. That is wrong. CFAs apply the success fee to the base costs and both the base costs and the success fee will be lower if a case is settled too early. Hourly rate base costs mean that later settlement results in higher base costs and higher success fees.

Incentives work both ways under the current system. But, as outlined in our preliminary

submission, that is the not the case with fixed costs. With fixed costs the incentives are towards lower settlement as the same base costs are paid whatever the damages recovered as in the current RTA fixed costs regime applicable in unissued cases.

The fixed costs distortion is compounded by the insurers' BTE model of high referral fees. They effectively force their panel law firms to employ less experienced staff due to the loss of income to referral fees. A similar model applies to those firms paying high referral fees to claims farmers.

Again we emphasise there is a clear pattern here.

The model suits the insurers because it drives down both damages and costs whilst delivering high referral fees to them. Effectively the lawyers can't use costs recovered to employ the right level of quality experienced staff to recover the right levels of damages, since they are passing much of their costs onto the insurers in referral fees.

The result is lower quality representation and lower damages, effectively in built under settlement. That fits a model based on computer systems – the insurers don't employ experienced staff and neither do their opponents and they can get away with low offers

It also suits those law firms who work with the insurers who can maximise their profits by large turnover on low margins.

Against this background, the fundamental importance of union legal services and other independent law firms is clear. Unions are not for profit membership organisations. For them the objective is to deliver the best quality justice for their members. They have high expectations that their law firms will maximise damages. There is no place for undersettlement or any models based on high volume, low margins. The key for unions is quality legal representation – union firms compete on that basis.

For that reason we have been highly critical of the BTE model and the influence of insurers in seeking to squeeze out independent Claimant firms whether by pressing for an increased small claims limit, by claims capture, through BTE panels etc.

If our analysis of the situation is right then we cannot begin to understand why computer based systems could somehow be regarded as part of the solution. The systems were extensively considered in the MoJ Claims Process consultation. We met the providers of those systems both before and during that process and it was clear to us and the other Claimants' firms concerned that these systems had been designed for insurers and will only benefit insurers.

The mistake is often made that the systems simply need re-calibration or input of the correct data to work fairly and effectively. The Preliminary Report falls into this trap:

In conclusion, therefore, Colossus and COA are tools that allow for sophisticated and personalised valuation of an individual's claim. By using a rules based software package, the system ensures consistency in valuation. If such a system is properly operated, it should mean that all Claimants, whether represented or unrepresented, are treated in the same fashion. Although these systems have the benefit of consistency and precision, the wider question remains whether they are calibrated at "proper" levels. By "proper" levels, I mean levels which reflect the damages which judges would award in 2009 if all cases were litigated.

This fails to appreciate that the calibration or input of data is simply the top level input. The system itself, the programme, is the base level, what it does with what it is fed is crucial. But the insurers and those who own the rights to the system won't say how it works. Only a system that is wholly transparent and made available to all parties for detailed analysis and critique would be acceptable to play any part in the assessment of damages.

During the Claims Process consultation we asked the providers for such details but they were very clear that this is highly confidential intellectual property. Effectively, they are prepared to allow adjustments to the machine, re-calibrations, or inputting of different top level data, but the machine itself is not open to inspection, review or alteration.

Given that the machine has been designed for insurers, and used by insurers, it is wholly unsatisfactory that Claimants would be expected to simply accept the programme as it is, without any opportunity to inspect or challenge it. This would effectively amount to a transfer of control of adjudication from the judiciary in a transparent process as at present, to a private contractor in a process cloaked in secrecy and confidentiality.

Neither were we impressed with the accuracy of the system.

It is very easy for an insurer to calibrate the system so that it produces offers that are too high and encourages Claimants to accept it. But it can as easily be adjusted down at a later stage and who would have control over that?

The key is to produce accurate offers taking into account all relevant facts. Nothing we saw in the demonstration indicated that the system was capable of that. In addition there were many issues, case types and other matters which these systems simply could not accommodate.

Damages are either determined by the courts or they are not. There is no difficulty with insurers trying to devise systems to accurately assess what the courts might award but thus far they have not been particularly successful as their systems have produced inadequate offers resulting in more litigation than there should be.

Insurers may regard producing low offers is a success and we believe that, sadly, they often get away with them. We understand they calibrate their systems to suit different opposing law firms. A less experienced firm or one known to be more prepared to take lower offers has the system calibrated to hopefully result in undersettlement.

This is sinister and unacceptable. The only means to avoid undersettlement is to have a funding system that ensures Claimants are adequately represented and a judicial system of adjudication that is transparent and open to challenge through appeals.

Insurers can use whatever computers they want to. PICAS, for example, is simply an extension of Colossus and COA. It allows direct access by the Claimant. But it makes no difference if the offer is made by the insurer or direct through PICAS. It is still an offer from the insurers using their computer.

If computer systems are transparent, work well and produce proper offers, they are acceptable. If they do not, competent Claimants' lawyers will advise rejection and proceed to an assessment of damages.

Anything which suggests that computers can somehow replace competent lawyers or an independent judiciary is in our view a very dangerous move.

3. Judicial accuracy needs to be improved by expanding the JSB Guidelines and introducing means to ensure there are up to date authoritative decisions on low value claims

Damages are not only too low, as outlined in the appendix to this Response but there is also too much inconsistency.

To some extent we would endorse the comments in the Preliminary Report that:

The JSB guidelines have undoubtedly brought greater certainty to the assessment exercise. However, it remains the case that individuals suffering from similar injuries may obtain significantly different levels of general damages, dependent on who is negotiating on their behalf or (rarely) the decision of the court. Whilst the JSB guidelines, therefore, provide a significant improvement upon the use of case law alone, they have not created a clear, transparent and simple method of calculating general damages.

What is required is more expanded JSB Guidelines. The gaps need to be narrowed and greater certainty created. This may require narratives not representing decided cases but giving guidance as to the appropriate damages for particular injuries, particularly less serious injuries where there is a lack of authorities.

It may also be appropriate to consider allowing some low value claims to be considered as test cases, to be assessed by more senior judges with representation permitted from interested parties such as the unions, APIL, MASS, consumer groups, ABI etc. This would expand the body of senior level authorities in low value claims. It is clearly not adequate to leave it to the parties to pursue appeals in such cases as it will rarely be proportionate to do so.

On the issue of tariff or points based systems, we have extensive experience of operating the CICA tariff system and would regard that as having wholly failed. Instead of creating certainty, the result has been numerous anomalies and the growth of technical issues being taken on categorisation.

On that basis, and for the reasons given, we would respond to the questions posed as follows:

(i) Whether a judicially approved points-based software system along the lines discussed above might be developed and, in due course, brought into general use.

No

(ii) Whether under-settlement is currently perceived as being a significant problem and, if so, whether the use of such a system might benefit Claimants by reducing the risks of under-settlement.

Yes, it is a significant problem but the answer is not a computer system but to have funding arrangements that ensure Claimants are adequately represented and a judicial system of adjudication that is transparent and open to challenge through appeals.

(iii) Whether the use of such a system might assist in reducing the (currently substantial) costs of handling lower value personal injuries claims.

No. What might assist would be more expanded JSB Guidelines, to narrow the gaps and create greater certainty. Also a system to ensure there are more authorities applicable in low value claims.

COLLECTIVE ACTIONS. Chapter 38

Thompsons believes that access to justice for working people is vitally important and supports any proposals which retain and improve on the ability of working people to obtain legal redress for illnesses and injuries sustained in circumstances where there is a culpable Defendant.

In Group actions it is often the case that difficult and complex issues arise which require a great deal of investigation and preparation. By definition such cases impact upon sometimes hundreds if

not thousands of individuals. The law in certain areas has greatly benefited from the opportunity for groups to litigate rather than for the courts to be clogged with lots of individual cases.

It is crucial that groups with similar cases have access to justice. It is important not only for the sake of the individuals but to ensure that Health and Safety remains a high priority for those organisations who have it within their power to cause pain and suffering to large numbers of people by their negligent acts or omissions.

ATE insurance is not always available to fund such actions either wholly or in part - because the risks are so unknown and the potential costs so vast. Often it is down to the Trade Unions to provide funding for their members to bring test cases and provide access to justice. Such cases are invariably robustly fought by Defendants with the financial backing of large insurance companies and others which produces an inequality of resources.

It is important to preserve the power of the Court to impose a limit on costs recoverable and that the mechanism for determining the level of those costs is fair and reasonable having regard to the issues in the case and the need to ensure access to justice for working people.

SUCCESS FEES & ATE. Chapter 47

Consideration is given to abolishing recoverability of success fees and ATE.

'If success fees and ATE premiums cease to be recoverable, then the question arises as to how the interests of individual Claimants (most of whom could not sensibly afford the costs of litigation) might be protected. In the field of PI litigation, possible measures might include:

(i) Introducing one way cost shifting.
(ii) Capping the proportion of damages which the Claimant's lawyers might take in respect of success fees. Prior to April 2000 the cap was in practice 25% of damages. I am told by Michael Napier QC and Senior Costs Judge Peter Hurst (both assessors to the Costs Review) that this arrangement worked satisfactorily and did not give rise to complaint.
(iii) Providing that no element of damages referable to future care costs could be subject to any deduction.
(iv) Raising the level of damages. This might be perfectly feasible if some of the huge transaction costs could be reduced, as discussed in chapter 26.
(v) Introducing a CLAF or a SLAS for PI claims, as discussed in chapters 18 and 19.'

Reference is made to Professor Paul Fenn who:

'… points out that if success fees and ATE premiums become irrecoverable (as they were before April 2000), then market forces would once more come into play. Claimants would have incentives to shop around for low success fees and low ATE premiums. "While there might be costs then faced by Claimants to come out of their damages, it is possible that the increased efficiency of the system could lead to reductions in these costs as well as knock-on reductions in liability insurance premiums."'

The following questions are then put:

(i) The appropriateness of the levels of success fees currently set in different types of litigation.
(ii) The appropriateness of the levels of ATE premiums currently charged in different types of litigation.
(iii) Whether success fees and ATE premiums should continue to be recoverable under costs orders.

(iv) If not, (a) what steps should be taken to provide for the funding of personal injuries litigation; (b) what other steps should be taken to preserve access to justice for those who currently depend upon success fees and ATE insurance.

We cannot conceive why what can only be an insurance drive to abolish recoverability of success fees and ATE premiums should be given credence.

Recoverable success fees and insurance premiums were the government's answer to doing away with legal aid in PI cases. To now make them non recoverable must mean that Claimants will end up having to make deductions from their damages. Why should a victim of someone else's negligence not get 100% of their compensation?

If the answer is that it is too costly for the insurance industry we would ask where is the hard evidence that EL and Motor insurers are making a loss? We would say there isn't any.

If, as the government's Better Regulation Task Force found, EL premiums have been driven to the lowest levels in the EU that is a comment on the market and the insurance companies response to that market rather than a fault of the Claimant for which they should suffer a detriment.

If the answer is that Society suffers because insurers have to raise other premiums we again ask where is the hard evidence that they have been driven, by recoverable success fees and ATE, to raise premiums? Again we have never seen any.

We suggest - if there is a concern about a negative impact on Society or on the levels of premiums generally - then the question that should be put to the insurance industry is: What reduction would there be in premiums if recoverability were removed?

It is a question Thompsons have constantly posed to the insurance industry and one they have consistently failed to answer. We have had long explanations about how it is hard to predict etc but serious consequential and long term reductions must be the corollary of any move on recoverability of ATE and success fees. The fact is that to date the insurance industry have failed to commit.

If there is no recoverability then, ironically, the process by which union lawyers made deductions from damages to give to the unions for them to build up a fighting fund for future cases - what was called the 'member's returned contribution' - which has been the subject of enormous criticism within the miner's compensation schemes for Vibration White Finger and Chronic Bronchitis and Emphysema would return.

Some system of deductions must be the result if recoverable success fees and recoverable ATE are ended. How is that fair for Society? How does that deliver Justice for ordinary working people?

There will be those who will say that the market will adapt. We suspect that a major feature of that 'adaptation' will be off shoring to India and South Africa. The majority of case work will end up being done abroad cheaper than in the UK. That way lawyers keep their profits but standards may fall. Is off shoring a desirable thing for Society? What will be the impact on legal recruitment in the UK?

In any event even if one way costs shifting were introduced, Claimants would still need to take out ATE insurance to cover their disbursements. Representatives from the insurance industry have indicated that should one way costs shifting be introduced they would not be in a position to offer ATE insurance to Claimants. This again, has serious implications for Access to Justice. Many Claimants would not be able to afford to fund disbursements and would be prevented from pursuing a valid claim.

To answer the specific questions:

(i) The success fees in the vast majority of PI scenarios have been mediated to an agreed sum. They are figures agreed by both sides and in reality are not (and have no reason to be a continuing issue). The insurers were fully involved in that process and accepted the mediated result.

(ii) There have been previous studies into the appropriateness of success fee levels and they have found them to be appropriate. Ultimately premiums are market driven. Premiums can be challenged within an Assessment and they can be reduced. Insurers who pay them shouldn't be allowed to complain within this Review if they have failed to challenge them.

(iii) Yes. We would ask, for the reasons above, why not? It is a cost of negligence, it is a cost of losing and that way the victim gets 100% of their damages for that negligence. The Success Fee is there to set against cases investigated and not pursued and lost cases. To remove it will leave a shortfall and the consequence will be a negative impact on the Claimant or a 'cheaper' (for which read lower damages) service from the Claimant's lawyer.

(iv) We believe they should be recoverable and the other scenarios anticipated above are unacceptable. It is impossible not to see access to justice being impaired and any attempt to say that it won't is, frankly, self justificatory window dressing.

SUMMARY ASSESSMENT (Ch 52 page 523)

1. Proposed change. We are in favour of change to the current system in place for summary assessments of costs. Whilst the process can work well and avoids unnecessary costs associated with Detailed Assessment we believe there should be change. We therefore favour Option 3: restructure.

2. Scope. Summary assessments should remain limited to FT cases (subject to any overriding proposals to fix costs in FT matters) and multi-track trials lasting less than one day. We agree that summary assessment on interim applications works in both FT and Multi-Track cases, subject to appropriate hourly rates being allowed (see below).

3. Issues on conduct. It makes sense to carry out summary assessment where the judge and advocates present at trial are fully familiar with the issues. Conduct nearly always affects costs, increasing them and preventing parties from reaching a settlement prior to trial. On summary assessment, the trial judge will be very familiar with the factorial issues it can be difficult, within the short time usually allocated for summary assessment for them to explore reasons for extensive additional work caused, for example, by a defendant intent on defending every single issue or due to breaches of pre-action protocol. These are the sorts of issues that usually become clear on Detailed Assessment when the court allocates more time.

4. Format of statement of costs. We agree the format of the precedent N260 Statement of Costs is too simple and should be revised. The lack of information and transparency may lead to arbitrary decisions. Our suggested amendments to the format are:

    a. The inclusion of a schedule detailing time spent considering and preparing documents.
    b. A brief narrative to describe the work done by the solicitors pre and post proceedings. If the narrative was only disclosed when the question of costs came to be decided, details of "without prejudice save as to costs" negotiations could be included to assist the judge

in deciding whether the costs are proportionate, reasonably incurred and reasonable in amount.

5. Time allocation. We agree that summary assessments are often rushed. Proper time should be allocated to deal with the costs.

6. Costs experience of the trial judge. We agree with the proposal for training and a provision for judges to request assistance if the assessment is not within their experience. Thompsons has found that some trial judges occasionally hear civil trials and, on summary assessment, costs have been treated as they would in a criminal case. The concept of additional liabilities has been treated as a somewhat foreign concept.

7. Indemnity basis assessments. Summary assessments can be effective and straightforward if all costs are to be assessed on the standard basis. Thompsons believe that any case where costs are awarded wholly or in part on the indemnity basis should not be dealt with by way of summary assessment at the end of a trial.

8. Early disclosure of costs. Disclosure of costs 24 hours before the date of the hearing is too short. Costs should in our view be disclosed earlier.

9. Hourly Rates. One hourly rate does not fit all. We very much support the use of the "A" plus "B" factor calculation on hourly rates.

    i. The "B" factor should be assessed with reference to CPR Part 44.5. Clinical negligence and disease cases for example have far greater personal impact and importance to Claimants than say litigated RTA whiplash injury cases.

    ii. If guideline rates were to be applied we would suggest different guidelines for different types of PI such as clinical negligence, disease and EL accidents.

    iii. Guideline hourly rates should be limited to FT cases.

    iv. Guideline hourly rates in multi-track cases (e.g. on interim applications) and on appeals should be treated as only a starting point for guidance.

    v. We strongly disagree that success fees should only apply to the "A" factor. A success fee is not an element of profit. Success fees are a risk based financial support for solicitors in cases where none or only part of the solicitors' profit costs are recovered.

    vi. We believe the contention that Defendants charge less than Claimants for the work they do is misconceived. In our experience, Defendant firms are increasingly acting on Collective Conditional Fee Agreements that allow them to charge full 'guideline' hourly rates if they win an award for costs and discounted rates if not. I

    Defendant solicitors are, at least in theory, paid on a solicitor and own client basis, akin to the indemnity basis. Proportionality plays no part. By contrast Claimant solicitors' fees are usually subject to proportionality on the standard basis. A Claimant whose solicitors pursue a head of claim unsuccessfully will be denied the costs for that part of the work.

We should also not lose sight of how solicitors' hourly rates came about. The Law Society's 'Expense of time' calculation encouraged solicitors to charge on an hourly rate basis to ensure work was conducted economically, to raise awareness of the time they were spending compared to the overall fees they were charging their clients and to ensure they were adequately remunerated for the job done.

10. Interim payments. We are very much in favour of the proposal on interim payments.

DETAILED ASSESSMENT (Ch 53 page 534)

1. Fast Track. We agree there should be an allowance for receiving parties to apply for discretion to exceed any fixed matrix figure or scale fee. There needs to be adequate costs compensation in cases where there have been conduct issues, or unreasonably contested claims. There also needs to be effective deterrents to discourage defendants from making unreasonable offers or disproportionate challenges in litigation in the knowledge that the price of losing is fixed.

2. Length of points of dispute.

    a. Points of Dispute are currently poorly drafted and overlong – they could be substantially improved and cut down. Taxation by ambush does not put the parties on an equal footing. Parties should be encouraged to be open about issues in dispute and avoid hearings all together. Only where parties cannot agree to compromise on all the issues should a Detailed Assessment take place.

    b. Preliminary points are often standard, non-case specific and in some instances inappropriate e.g. issues are raised about CFA Regulations in non-CFA cases. This lack of focus on the real issues leads to Claimants drafting 'standard' Replies which in some cases become a formality. Very often points are raised that are not pursued and there is no disincentive not to put in 'boiler plate' points. They give the paying party the flexibility to keep the Claimant lawyer guessing as to which points they will decide to pursue at the Assessment.

        We are not confident that limiting points to 3 pages will overcome this problem. The real issue is that parties are rarely penalised for raising points that have no merit. If they were penalised they would stop taking needless points. We feel there should be costs penalties on Detailed Assessment to deter the practice.

3. Compulsory offer procedure. The problem is not so much a party failing to make an offer but Defendants' tendency to make low initial offers which draws out the Assessment process and increases Assessment costs.

    Despite the widespread belief, CPR Part 47 does not reflect the well established 'Calderbank' principle for the Claimant seeking costs. It has no 'teeth'.

    There are no prescribed sanctions against Defendants where a Claimant recovers more than was previously offered as a case proceeded to Assessment. We suggest a provision for indemnity costs and indemnity interest (in parallel with the provisions of Part 36 but improved – see below) where a Claimant equals or does better than their Part 47 offer.

    Lord Woolf originally recommended 25% interest on damages where a Claimant beat their own Part 36 offer, up to £10,000. That was never implemented. We contend it should be and the same should apply to Claimant's Part 47 offers but as 25% interest on costs.

Currently the only certainty is in favour of the paying party. Where a Claimant fails to beat a Defendants' offer on costs, which are often made very late in the day, they are likely to be deprived of their costs. In our view as with Part 36, late offers should not carry the same weight. At present there is nothing within the Rules about this but if there was, it would surely deter unreasonably low offers, encourage parties to agree costs at an early stage and discourage late offers.

4. New bill format. In low value costs cases we agree there should be a revised bill format. This could include provision for the paying party to annotate the bill to indicate whether an item is agreed or disputed. The bill as well as the points and replies could be incorporated into one document. Headings within a revised bill format might include:

Item Claimed (Description)	**Profit Costs**	**VAT**	**Disbs**	**Paying Party**: Offer / Item Agreed	**Paying Party** Comment	**Receiving Party**: Accepted / Concession / Maintained	**Receiving Party**: Comment

This could even be done electronically, with the use of drafting software, to automatically recalculate the costs based on concessions and items agreed.

5. Disclosure. In our experience as part of Detailed Assessment directions County Courts are increasingly ordering parties to disclose items to be relied upon in support of the bill of costs. One court has been ordering parties to prepare trial bundles for Detailed Assessment. This serves only to increase costs as Defendants may interpret this direction as open access to view the Claimants' full file of papers, and in turn fish for loopholes which might excuse Defendants from having to pay any costs at all. It encourages 'nit-picking' arguments.

6. Time for appeal. We strongly support the proposal regarding appeals during the Detailed Assessment.

7. Provisional assessment.

We suggest some form of pre-commencement costs protocol in lower value costs cases. Within the protocol period parties may not make technical challenges e.g. in relation to funding arrangements. There should be timetable for negotiation and provision for interim payments with a first offer.

Thompsons view the ceiling figure for provisional assessment as too high. We suggest this should be limited to £10,000 profit costs rather than the proposed global £50,000.

If paying parties choose to take technical challenges they could be excluded from such a protocol, required to pay a deposit and there would be an automatic referral to the court (with court fees paid initially by the paying party) for the issue to be heard as a preliminary point with

costs to follow the event and penalties where points are pursued without merit.

We would be concerned if there were to be Protocol about how Part 47 offers and costs of Detailed Assessment would be dealt with. There have to be costs penalties and 'teeth' to Part 47 offers, to incentivise parties to settle and courts being inundated with provisional assessments.

8. Hourly rates. For the reasons given above in relation to Summary Assessment we do not feel guideline rates are appropriate in Detailed Assessments.

   Costs draftsmen's fees should have a similar provision to the "A plus B" principle. The costs draftsman's role has evolved. Costs Lawyers are qualified litigators with higher rights of audience in costs proceedings. Technical costs challenges, for example, should permit senior costs lawyers to command hourly rates equivalent to their solicitor counterparts reflecting their experience, the complexity of the issues, time spent and value of the costs involved.