



The Law Society

A summary of Sir Rupert Jackson's final report

Prepared by the Law Society

April 2010

supporting
solicitors

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A summary of Sir Rupert Jackson's final recommendations

- Success fees and ATE insurance premiums should cease to be recoverable.
- Awards of general damages for pain, suffering and loss of amenity to be increased by 10%.
- Amount of damages that lawyers may deduct from a client's damages award for success fees to be capped at 25% of damages (excluding any damages referable to future care or future losses).
- Referral fees should not be permitted for solicitors in respect of personal injury cases.
- Qualified one way costs shifting. Where the claimant will not be required to pay the defendant's costs if the claim is unsuccessful, but the defendant will be required to pay the claimant's costs if it is successful - there will need to be further consultation on which categories of litigation should involve qualified one way costs shifting. Likely in personal injury case.
- Fixed costs for fast track personal injury cases – a dual system (at least for now), whereby costs are fixed for certain types of case, and in other cases there is a financial limit on costs recoverable (£12,000 be the limit for pre-trial costs). The ideal is for costs to be fixed in the fast track for all types of claim.
- A Costs Council to be established to undertake the role of reviewing fast track fixed costs.

- Lawyers should be able to enter into contingency fee agreements with clients for contentious business, provided that: the unsuccessful party in the proceedings, if ordered to pay the successful party's costs, is only required to pay an amount for costs reflecting what would be a conventional amount, with any difference to be borne by the successful party; and the terms on which contingency fee agreements may be entered into are regulated, to safeguard the interests of clients.

- Contingency Legal Aid Fund ("CLAF") and Supplementary Legal Aid Scheme ("SLAS") could play a role in funding litigation to be kept under review.

- Assessment of general damages for pain, suffering and loss of amenity - a working group be set up consisting of representatives of claimants, defendants, the judiciary and others to explore fixing graduated levels of damages.

- Intellectual property litigation - recommend that the Patents County Court be reformed to provide a cost-effective environment for IP disputes. These reforms include (i) allowing costs to be recovered from opponents according to cost scales; and (ii) capping total recoverable costs to £50,000 in contested actions for patent infringement, and £25,000 for all other cases. Also a fast track and a small claims track in the PCC.

- Small business disputes - a High Court judge should be appointed as judge in charge of the Mercantile Courts, whose role will include streamlining procedures and preparing a court guide for users of all Mercantile Courts. A "small business disputes" guide for business people who wish to conduct lower value county court cases on the small claims track. The limits of the small claims track could be extended in cases where the parties on both sides are businesses.

- Large commercial claims – no major changes.

- Chancery litigation - CPR Part 8 should be amended to enable actions to be assigned to the fast track at any time. This would enable smaller value chancery cases to be dealt with under the economical model that applies in the fast track. Another recommendation is that there should be developed a scheme of benchmark costs for routine bankruptcy and insolvency cases.

- Technology and Construction Court litigation – a fast track in the TCC.

- Judicial review - qualified one way costs shifting looks likely.

- Nuisance cases - greater take-up of BTE insurance be encouraged, particularly for households.

- Defamation and related claims. Lawyers' success fees and ATE insurance premiums should cease to be recoverable for all types of civil litigation with complementary measures for defamation and related proceedings, namely:
 - a. increasing the general level of damages in defamation and breach of privacy proceedings by 10%; and
 - b. introducing a regime of qualified one way costs shifting, under which the amount of costs that an unsuccessful claimant may be ordered to pay is a reasonable amount, reflective of the means of the parties and their conduct in the proceedings.

- Collective actions - costs shifting should remain for collective actions (with the exception of personal injury collective actions), but that the court

should have a discretion to order otherwise if this will better facilitate access to justice.

- Pre-action protocols. The Practice Direction – Pre-Action Conduct, which was introduced in 2009 as a general practice direction for all types of litigation - substantial parts of this practice direction be repealed.
- Disclosure - Solicitors, barristers and judges alike be given appropriate training on how to conduct e-disclosure efficiently.
- A “menu” of disclosure options available for large commercial and similar claims, where the costs of standard disclosure are likely to be disproportionate.
- Case management - a number of measures to enhance the courts’ role and approach to case management, including:
 - where practicable allocating cases to judges who have relevant expertise;
 - ensuring that, so far as possible, a case remains with the same judge;
 - standardising case management directions; and
 - ensuring that case management conferences and other interim hearings are used as effective occasions for case management, and do not become formulaic hearings that generate unnecessary cost
- Costs management - lawyers and judges alike receive training in costs budgeting and costs management. Rules be drawn up which set out a standard costs management procedure, which judges would have a discretion to adopt if the use of costs management would appear to be beneficial in any particular case.

- Part 36 offers - where a defendant fails to beat a claimant's offer, the claimant's recovery should be enhanced by 10%.
- IT - eworking, which is currently used only in the TCC and the Commercial Court, be rolled out across the High Court in London and (suitably adapted) across all county courts and district registries.
- Summary and detailed assessments. A new format for bills of costs be developed. A streamlining of the procedure for detailed assessment through the use of IT.

Chapter summaries

Chapter 1

The civil justice costs review

In this chapter LJJ relates the background to the setting up of the Civil Justice Costs Review which was at the request of the then Master of the Rolls, Sir Anthony Clarke, who was concerned at the costs of civil litigation and believed that the time was right for a fundamental and independent review of the whole system.

His objectives were to carry out an independent review of the rules and principles governing the costs of civil litigation and to make recommendations in order to promote access to justice at proportionate cost.

He sets out the organisation of the Review, the identities of assessors who assisted him, written submissions, conferences, meetings and seminars, pilot exercises and working groups.

He also sets out the views of the Citizens Advice Bureau, who had not put in any written submission during phase 2 of the Review but he considered that their input was so important he arranged a meeting with the National Association of Citizens Advice Bureaux and summarised the views expressed to him at that meeting as follows:-

- 36% of the adult population of England and Wales have unresolved legal problems. CAB is concerned that in many small debt claims the costs which debtors have to pay exceed the primary debt.

- Consumers do not understand CFAs and percentage based contingency fees would be better as they would be easier to understand. ATE is unsatisfactory and in many cases clients have to repay loans taken out to cover premiums. CAB view is that one way cost shifting as exists in legal aid cases would be better than ATE insurance as a means of dealing with adverse costs risk.
- Regulation of fees chargeable by solicitors would be far more effective than the process of retrospective assessment in individual cases. CAB state it is aware of some firms of solicitors charging £200 to assess if a client is eligible for legal aid, which is a task that should only take a couple of minutes with the aid of the LSC eligibility calculator.
- CAB agrees with comments in a preliminary report about levels of court fees and indicates there is a particular problem in relation to the remission of the scheme.
- Possession proceedings cause a serious problem as private landlords do not comply with rent arrears protocol and mortgagees do not comply with the mortgage protocol. CAB considers the language of the protocols should be tightened so that must is used in place of should.
- CAB regrets the declining availability of legal aid.

Chapter 2

The costs of civil litigation

This chapter is dedicated to the review of data received from judicial surveys, insurers, the NHSLA, Treasury Solicitor and others.

LJJ deals specifically with results from data in the following categories:-

- i Low value personal injury claims;
- ii Personal injury claims in the multi-track;
- iii Clinical negligence claims;
- iv Libel and privacy cases;
- v Intellectual property cases;
- vi CFA funded cases against publicly funded bodies

The data is either reviewed in detail within the chapter and/or full details provided within appendices to the preliminary report or appendices to the final report.

Chapter 3

Proportionate costs

At the beginning of the chapter LJJ reviews the principles upon which recoverable costs are assessed and then goes on to review the principle of proportionality in relation to civil procedure followed by a review of the judicial guidance on the meaning of proportionate costs since April 1999. He concludes by discussing the principles governing recoverable costs and states how, in his view, the principle of proportionality should be formulated and applied in relation to recoverable costs.

He relates that there is a debate amongst law reformers and commentators across the Commonwealth as to whether it is appropriate to limit costs by reference to proportionality and refers to work done on this by the Victorian Law Commission. He indicates that 'the luxury of this debate is not open to (him) because of the objective of the Costs Review'.

He sets out the history of the principles of recoverability/assessment of costs and principles of proportionality and judicial guidance. During this he concludes that the whole concept of the fast track (introduced by Lord Woolf) was intended to increase access to justice by removing the uncertainty over excessive cost which deterred people from litigating. He quotes Lord Woolf in stating the aim of the new procedural rules as 'to ensure that litigation is conducted less expensively than at present and to achieve greater certainty as to costs'.

He concludes with discussion on relevant principles of costs, the impact upon litigation costs and proposed amendments to rules and the costs practice direction before making his recommendations. In considering to what extent should the winning party in litigation recover the costs which it has incurred against the losing party he states that two principles are relevant to the debate and that they are (a) compensation and (b) proportionality.

He indicates the principle of compensation is embedded both in common law and equity, the essence of which is that a wrongdoer should restore the innocent party to the position in which he would have been if the wrong had not occurred. The essence of proportionality is that the ends do not necessarily justify the means.

LJJ considers the principle of proportionality requires that the cost burden cast upon the other party should not be greater than the subject matter that the litigation warrants. The focus of the chapter is upon the extent to which the second principle limits the operation of the first principle.

He states that proportionality of costs is not simply a matter of comparing the sum in issue with the amount of costs incurred. It is also necessary to evaluate any non-monetary remedies sought and any rights which are in issue, in order to compare the overall value of what is at stake in the action with the costs of resolution. He also considers that in addition conduct and any wider factors, such as reputational issues

or public importance, should also be taken into account when considering proportionality.

He considers that disproportionate costs do not become proportionate because they were necessary and that disproportionate costs should be disallowed in an assessment of costs on the standard basis.

He proposes that the CPR should be amended to include a definition of proportionate costs along the following lines:-

'Costs are proportionate if, and only if, the costs incurred bear a reasonable relationship to:

- (a) The sum in issue in the proceedings;
- (b) The value of any non-monetary relief in issue in the proceedings;
- (c) The complexity of the litigation;
- (d) Any additional work generated by the conduct of the paying party; and
- (e) Any wider factors involved in the proceedings such as reputation or public importance

He recommends that the rules should also provide that costs which were necessarily incurred do not make them proportionate and that this should be stated explicitly. The policy underlining the proposed new rule is that cost benefit analysis has a part to play and if parties wish to pursue claims or defences at disproportionate cost they must do so, at least in part, at their own expense.

He indicates that in relation to multi-track cases the proposed rule should act as a longstop. He explains this as – in the first instance the court should assess costs by applying the test of reasonableness as set out in the rules. He considers that process would usually result in a total sum which is proportionate as defined and the receiving party's entitlement to costs will be limited to such sum as is proportionate.

In relation to fast-track cases, he concludes that the proposals for fixed costs he has made (Chapter 15) should secure that recoverable costs are always proportionate in accordance with his proposed definition. However, for fast-track cases which 'escape' fixed costs he considers it may be necessary to apply the principle of proportionality as a longstop. The principle of proportionality should also be applied to fast-track cases for which no matrix of fixed costs has been devised.

In order to safeguard against unreasonable conduct the sanction will be an order for indemnity costs which will substantially (but not entirely) free the receiving party from 'the shackles of the requirement for proportionality'.

He proposes amendments to cost practice directions relating to proportionality and additional liabilities.

His recommendations at the conclusion chapter are:-

1. That proportionate costs be defined in the CPR by sums in issue, value of non-monetary relief, complexity of litigation, conduct and any wider factors, such as reputation or public importance; and that the test of proportionality should be applied on a global basis.
2. That the costs practice directions consequently be amended (details of which he deals with in the chapter).

Chapter 4

The causes of disproportionate costs and how they should be tackled whilst promoting access to justice

His views are that:-

- (a) Access to justice entails that those with meritorious claims are able to bring those claims before the court for judicial resolution or post issue settlement as the case may be. It also entails those with meritorious defences being able to put them before the court for judicial resolution or, alternatively, settlement based upon the merits of the case.
- (b) Access to justice is only possible if both parties have adequate funding. If not, the litigation will not happen. If only one party has adequate funding the litigation will be a walk over.
- (c) Access to justice is only practicable if the costs of litigation are proportionate. If costs are disproportionate then even a well resourced party may hesitate before pursuing a valid claim or maintaining a valid defence. The party may simply drop a good claim or capitulate to the weak claim.
- (d) It is wrong to regard funding and costs as separate topics which must be tackled individually in order to provide access to justice. They impact upon each other.

He considers that in some areas of litigation both the recoverable costs and the actual costs are excessive. The reforms he advocates in Chapter 3 (limiting recoverable costs to a proportionate sum) are only part of the answer. It is also

necessary to identify the causes of excessive costs and to prescribe how those causes should be tackled.

LJJ forms the view that there are sixteen general causes which, in differing combinations, according to the particular circumstances give rise to excessive costs. They are, in no particular order, as follows:-

(i) The rules of court require parties to carry out time consuming procedures involving professional skill.

(ii) In some areas of litigation, the complexity of the law causes parties to incur substantial costs.

(iii) The costs rules are such as to generate satellite litigation.

(iv) Too few solicitors, barristers and judges have a sufficient understanding of the law of costs or how costs may be controlled.

(v) Lawyers are generally paid by reference to time spent, rather than work product.

(vi) The recoverable hourly rates of lawyers are not satisfactorily controlled.

(vii) The preparation of witness statements and expert reports can generate excessive costs.

(viii) The costs shifting rule creates perverse incentives.

(ix) The conditional fee agreement ("CFA") regime has had unfortunate unintended consequences, namely (a) litigants with CFAs have little interest in controlling the costs which are being incurred on their behalf and (b) opposing litigants face a massively increased costs liability.

(x) The advent of emails and electronic databases means that, in substantial cases, the process of standard disclosure may be prohibitively expensive.

(xi) There is no effective control over pre-issue costs; certain pre-action protocols lead to magnification of these costs and duplication of effort.

(xii) In some instances there is ineffective case management, both by the parties and by the court.

(xiii) Some cases which ought to settle early settle too late or not at all.

(xiv) The procedures for detailed assessment are unduly cumbersome, with the result that (a) they are unduly expensive to operate and (b) they frequently discourage litigants from securing a proper assessment.

(xv) The current level of court fees is too high and the current policy of full cost pricing is wrong in principle.

(xvi) Despite the growth of court fees in recent years, the civil courts remain under-resourced in terms of both staff and IT.

With regard to specific causes of excessive costs and how they should be tackled he merely refers to how he deals with these in Chapters 18 to 34 (these chapters are summarised below).

He then asks the question 'Should legal fees be regulated?' This was an issue which arose at a late stage in his discussion with the CAB. He does not, however, recommend the regulation of legal fees having discussed the matter with the SRA and the LSB as the regulation of fees could be anti-competitive and that a client could complain about overcharging to the Office for Legal Complaints.

He concludes that if the causes of excessive costs are tackled effectively this will promote access to justice and proportionate costs.

His recommendations in respect of the general causes of excessive costs (as listed above) are:-

- i When striking the balance between the need for predictability and the need for simplicity the Rule Committee, the MoJ Drafting Team and the authors of Practice Directions, Protocols and Court Guides should accord higher priority in future to the goal of simplicity.
- ii There should be no further increases in civil court fees, save for increases which are in line with RPI. All receipts from civil court fees should be ploughed back into the civil justice system.

Chapter 5

The indemnity principle

LJJ introduces the chapter by defining the indemnity principle in relation to both the common law and statute. He refers to the Government's position in 1999 when it added section 51(2) to the Supreme Court Act 1981 by section 31 of the Access to Justice Act 1999. He refers to the fact that the explanatory notes to the 1999 Act stated that section 31 was a general provision allowing rules of court to limit or abolish the indemnity principle. The explanatory notes also refer to the exceptions which have been carved out of the indemnity principle and conclude 'the Government believes that the partial survival of the principle is anomalous; section 31 is intended to rationalise the position'. At various cost forums held by the Civil Justice Council most attendees have also favoured the abolition of the indemnity principle.

He then goes on to deal with the forceful submissions made from both sides of the debate during phase 2. He concludes that supporters maintain that the indemnity principle is vital in the battle to control excessive costs and they rally round it as their standard. Opponents see the indemnity principle not only as a relic of the 19th century but also as the root cause of satellite litigation and wastage of costs and maintain that it must be abolished.

He concludes that provided CPR Rule 44.4 is amended so as to constitute an effective control on recoverable costs the indemnity principle should be abrogated once CPR Rule 44.4(1) has been amended to provide proper protection for the paying party.

Chapter 6

Costs Council

In 2005 the Civil Justice Council recommended that a Costs Council should be established to oversee the introduction, implementation and monitoring of reforms it recommended and in particular to establish and review annually recoverable fixed fees in the fast-track and guideline hourly rates between the parties in the multi-track. Membership of the Costs Council was to include representatives of the leading stakeholder organisations involved in the funding and payment of costs and should be chaired by a member of the judiciary. This recommendation is reported as gaining the support of both practitioners and senior judges at the CJC Costs Forum held in March 2006.

Further work/recommendation regarding a Costs Council was made by senior costs judge Peter Hurst and the CJC Costs and Funding Committee.

LJJ considers that if the recommendations made in his report are accepted an independent and authoritative body will need to undertake the following tasks every year:-

- i Set GHRs for summary assessments and detailed assessments;
- ii Review the matrices of fixed costs for the fast-track;
- iii Review the overall upper limit for fast-track costs

He considers that the current Advisory Committee on civil costs could carry out the function in an expanded role but criticises the small number of its current members which represent particular interest groups chaired by an economist with no intimate experience of litigation costs and that proceedings at the Committee tend to be dominated by 'trench warfare'. If a Costs Council is established it will be able to take on wider functions, in particular it could set or give guidance upon recoverable fees for Counsel. It could also give guidance upon recoverable fees for experts.

He believes that the level of GHRs is a critical element in the civil justice system and the Costs Council would have to make some robust decisions in order to redress, what he considers, are existing anomalies (some of which are identified in Chapter 44).

He agrees that regular reviews of fast-track costs are important but that if they are to be credible and authoritative it is necessary that the reviews are carried out by a well informed and independent body which commands the respect of all parties.

He considers that a Costs Council should also undertake periodic reviews of hourly rates for litigants in person, levels of fees for medical reports in the fast-track, the amount of recoverable Counsel's fees and any further issues requiring review which may arise from time to time.

His recommendation is that the Advisory Committee on civil costs be disbanded and that a Costs Council be established.

Chapter 7

Legal aid

LJJ considers that the Law Society's point about the diminishing financial eligibility for civil legal aid is well made. Whilst the LSC did not submit a formal response during phase 2 it did indicate that it welcomed the review and noted that any reforms consequent upon that will impact upon the context in which the legal aid scheme operates. However, it added that financial pressures on the legal aid budget are particularly intense and that it would have concerns over any wider reform which could result in an increase in pressures on the fund, especially in areas like clinical negligence, and that any such pressures could lead to the need to make savings in other areas.

LJJ considers that it is vital that legal aid remains in the existing areas (particularly clinical negligence) but the continued tightening of financial eligibility criteria which excludes people who could not possibly afford to litigate inhibits access to justice in those areas. Any further tightening of the criteria would be unacceptable. He considers such a proposal by the CAB to give the judiciary power to make an Order for legal aid in any civil case where this would be in the public interest, eg. ECHR matter, is neither viable or necessary. He refers to comments made by the Master of the Rolls in his opening of the legal year speech on 30th September 2009 at which he stated that 'we should still ask how we manage to find ourselves in the situation that the total (criminal and civil) legal aid budget for 2008 came to no more than the total NHS budget for two weeks'.

His conclusions are:-

- i Whilst he would welcome, as some respondents recommended, that legal aid be restored to at least the pre-2000 levels he does not regard such recommendation (if made) as having any realistic chance of implementation. Also a review of the legal aid system does not figure in his terms of reference.
- ii He makes no recommendation for expansion or restoration but he does however stress the necessity of no further cutbacks in availability or eligibility. For a system that plays a crucial role in promoting access to justice at proportionate cost in key areas. The maintenance of legal aid at no less than

the present levels makes sound economic sense and is in the wider public interest.

Chapter 8

BTE

At the beginning of the chapter LJJ deals with the question of freedom of BTE policyholders to choose their own lawyer by referring to the EU Council Directive 87/344 and the Insurance Companies (Legal Expenses Insurance) Regulations 1990.

LJJ states that he was originally attracted by the Bar CLAF Group's proposal (see preliminary report). However, he was persuaded by arguments advanced against that proposal during phase 2 and does not recommend that motorists or any other potential tortfeasor be compelled to take out BTE insurance on behalf of those they might injure.

Trade unions argue that BTE insurance is far from beneficial and should neither be promoted nor encouraged. He believes that they are far from comprehensive and many lead to a cost shortfall to be paid by claimants. BTE insurers exercise control and there are problems with panel lawyers who may be encouraged to keep costs down and the quality of service is generally suspect.

A number of solicitors express similar concerns about BTE insurance and several made the point that the cover is limited, usually to £50,000. They also observed that if banning referral fees would cause a further escalation of BTE premiums.

LJJ is a supporter of BTE and encourages the use of it but he makes no specific recommendations in respect of it for personal injury claims.

In his preliminary report he expressed views that litigation costs are a particular problem for SMEs and that BTE may offer a solution. The Federation of Small Businesses consider that BTE was beneficial for their members but that it was expensive.

He confirmed his opinion, expressed in the preliminary report, that BTE insurance is beneficial for small businesses. He recommended that both insurers and the Department for Business Innovation and Skills makes serious efforts to draw to the attention of SMEs, and especially micro businesses, the forms of BTE insurance available and the cost. A great take up of BTE by small businesses would be one way of promoting access to justice.

On evidence received during phase 2 he concludes that BTE as an add on to household insurance is effective when required. BTE supports the significant number of clinical negligence claims which according to data set out in Appendix 1 of the report indicates that such claims have a reasonable success rate. Also costs are significantly lower in BTE funded clinical negligence claims than in such claims when supported by CFAs.

He concludes that BTE insurance as an add on to household insurance is a beneficial product at an affordable price established on the basis that the many pay for the few. He considers that if his reforms (see Chapter 9) are implemented then BTE insurance will have an increasingly important role in promoting access to justice and therefore the up take of BTE by householders should be actively encouraged.

Prior to summarising his recommendations he concludes the chapter with a section devoted to the client's role to choose his/her own lawyer in which he extensively quotes extracts from the Law Society's submission during phase 2. He concludes that there are three BTE issues which need to be resolved:-

- i) The insured has no say in the terms of the contract between the insurer and the panel solicitor and therefore has less influence in the handling of the case than a client who does not have the benefit of BTE.
- ii) The solicitor panels are restricted by insurers and there are frequently issues regarding the lack of freedom of choice of a client's own solicitor. The Law Society considers that freedom of choice of solicitor is important in the public interest. It is essential that the litigant should feel confidence in his or her legal advisers and will enhance the integrity of the system. Secondly, the litigant will be able to assess the competence of the firm directly and take action if dissatisfied.
- iii) The definition of proceedings in the Regulations and how this is interpreted. The Law Society's view is that any extension of BTE should be subject to the agreement by insurers that the definition of 'proceedings' under the 1990 Regulations includes the pre-action protocol procedure or by clarification of those Regulations."

LLJ considers there is considerable force in the three specific concerns raised by the Law Society. He takes the views that they would all, in substance, be met if regulation 6 of the 1990 Regulations were amended to provide freedom of choice. He does not make a formal recommendation in this respect but places on record his support for making such amendment if the impact on premiums turns out to be modest.

His formal recommendations are:-

- i) Positive efforts should be made to encourage the take up of BTE insurance by SMEs in respect of business disputes and by householders as an add-on to household insurance policies.
- ii) His views on other BTE issues are set out the chapter but which are not the subject of recommendations.

Chapter 9

After the event insurance and how to deal with the liability for adverse costs

At the beginning of this chapter LJJ reminds readers that the principle function of ATE (but not the only function) is to provide the insured with a fund to meet an adverse costs order. He then goes on to deal with the debates he had during phase 2 and written submissions.

He regards the regime of ATE insurance as an extremely expensive form of one way costs shifting and that even if one disregards the portion of the premium referable to own disbursements present ATE premiums are substantially more expensive for defendants than one way costs shifting.

He discusses if the recoverability regime is abolished then how should claimants, as a matter of social policy, be protected against risk of adverse costs. In his view the answer is by introducing one way costs shifting and the advantage to this would be that cost protection can be targeted upon those who need it rather than offered as a gift to the world at large. He considers the best formula for one way costs shifting is the one that has been available for 60 years to protected legally aided parties.

He does not consider that there is place for qualified one way costs shifting or for recoverable ATE premiums in the context of commercial, construction or similar litigation as the parties are generally in a contractual relationship and there is symmetry in their legal positions.

He accepts that claimants in personal injury litigation require protection against adverse costs and he refers to his recommendation for qualified one way costs shifting in PI cases which deals with in Chapter 19.

He takes the view that further consultation is required if his recommendations are accepted in principle. The “essential” thrust of the chapter is that recoverability of ATE premiums should be abolished and that this should be replaced by a qualified one way costs shifting targeted upon those who need such protection on grounds of public policy.

He then goes on to deal with what he considers will be the effect on the insurance industry. He accepts that the industry will suffer a significant loss of business but he is of the view that the present regime of recoverability of the premiums is one of the factors that has driven up litigation costs.

He then considers the position if it is concluded that recoverability of premiums is to remain. He concludes that in those circumstances there should be a limited period in which a defendant has the opportunity to admit liability and avoid the cost of the ATE policy premium. This should be no longer than the relevant protocol period and there may be a case for a more restricted window of opportunity (possibly 42 days). He does not consider that it is appropriate to leave the cost of premiums uncontrolled as other elements of costs are subject to caps. In his view the same approach should be adopted to towards ATE. He recommends that recoverable ATE premiums should be capped at 50% of damages with any shortfall being a matter for negotiation between the claimant and their insurer.

With regard to insurer's rights to repudiate an ATE policy for material non-disclosure, he considers that the most useful measure will be for the insurer to pay out and then have a right to recover any payments from the policyholder if necessary.

He makes the following recommendations:

- (i) Section 29 of the Access to Justice Act 1999 and all rules made pursuant to that provision should be repealed.
- (ii) Those categories of litigants who merit protection against adverse costs liability on policy grounds should be given the benefit of qualified one way costs shifting.
- (iii) Alternative proposals as a fall back if ATE insurance premium remain recoverable are:
 - no ATE insurance premium to be recovered if liability is admitted within the protocol period;
 - no ATE premium to be recovered for Part 36 risks
 - cap premiums at 50% of damages awarded and
 - in cases where the ATE insurer is entitled to avoid, allow recovery from the insurer with rights against the policyholder preserved.

Chapter 10

Conditional fee agreements

In this chapter LJJ deals with conditional fee agreements (CFAs) and sets out the position prior to April 2000 when success fees and ATE premiums were recoverable from the claimant's damages. He then goes on to deal with comments made during debates during Phase 2 and the written submissions received.

He continues by dealing with the issue of recoverability from the unsuccessful defendant which was introduced with effect from 1 April 2000 by Section 58A(6) of the Courts and the Services Act 1990. This change set England and Wales apart from all other jurisdictions. A study into the cost of funding of litigation in other jurisdictions did not find one which allows success fees to be recovered from the losing party (33 jurisdictions were examined).

The recoverability from the losing party was introduced when legal aid was withdrawn from all personal injury claims. However, LJJ concludes that the recoverability regime does not include two crucial figures of the legal aid scheme:-

- (i) Legal aid is targeted upon those who merit financial support with litigation.
- (ii) The assisted party is required to make a contribution towards costs in accordance with his/her means. He considers that a third flaw in the recoverability regime is the excessive costs burden placed upon opposing parties and the fourth flaw is that in only picking "winners" lawyers substantially enlarge their earnings. In his view the proper course would be to abolish recoverability and to revert to the same regime for CFAs that existed before April 2000.

LJJ acknowledges that his conclusions will cause dismay to many lawyers. However, he stresses that the benefits achieved by allowing recoverability have come at a massive cost which is borne by taxpayers, council tax payers, insurance premium payers and others.

He then goes on to deal with the measures which he proposes if his recommendation to abolish recoverability is accepted. In personal injury litigation he concludes that the level of damages for pain, suffering and loss of amenity should be increased by 10% across the board, the success fee should be capped at 25% (excluding damages for future care/losses) and the reward for making a successful claimant's Part 36 offer which the defendant fails to beat at trial should be enhanced.

If his recommendation to abolish recoverability is not accepted then he considers that the level of recoverable success fees will need to be rigorously controlled.

His recommendations are:-

- (i) Section 58A(6) of the CLSA 1990 and all rules made pursuant to that provision should be repealed.
- (ii) The level of general damages for personal injuries, nuisance and all other civil wrongs to individuals should be increased by 10%.

Chapter 11

Third party funding

In his preliminary report LJJ expressed the view that third party funding was beneficial in that it promoted access to justice. He confirms that he remains of that view essentially for five reasons:-

- (i) Third party funding provides an additional means of funding litigation and therefore third party funding promotes access to justice
- (ii) Although a successful claimant with third party funding foregoes a percentage of the damages it is better for him to recover a substantial part than to recover nothing at all.
- (iii) The use of third party funding does not impose additional financial burdens upon opposing parties.
- (iv) Third party funding will become even more important as a means of financing litigation if success fees under CFAs become irrecoverable.
- (v) Third party funding tends to filter out unmeritorious cases and this benefits opposing parties.

He concludes that at the moment it would be acceptable for there to be a satisfactory voluntary code for third party funders but that if third party funding expands in the future, then full statutory regulation may be required. He is critical of the current draft voluntary code which is the subject of a debate facilitated by the Civil Justice Council and indicates flaws within that code that need to be reconsidered.

He considers that it would be wrong in principle that a litigation funder which stands to recover a share of damages in the event of success should be able to escape part of the liability for costs in the event of defeat (as currently can happen) as this is unjust. He recommends that either by rule change or legislation that third funders should be liable for adverse costs in respect of litigation which they have funded.

He does not consider that Section 14(2) the Criminal Law Act 1967 (unlawfulness of maintenance and champerty) should be repealed but forms the view that it should be made clear either by statute or by judicial decision that if third party funders comply with whatever system of regulation emerges from the current consultation progress,

then the funding arrangements would not be overturned on grounds of maintenance or champerty.

He makes the following recommendations:-

- (i) A satisfactory voluntary code to which all litigation funders subscribe should be drawn up. This code should contain effective capital adequacy requirements and should place appropriate restrictions upon funders' ability to withdraw support for ongoing litigation.
- (ii) The question whether there should be statutory regulation of third party funders by the FSA ought to be re-visited if and when the third party funding market expands.
- (iii) Third party funders should potentially be liable for the full amount of adverse costs, subject to the discretion of the judge.

Chapter 12

Contingency fees

In this chapter LJJ reports on a number of debates, meetings and seminars which he attended during phase 2 of his review. The majority of those present at the various events were of the view that contingency fees should be permitted in non contentious business but that the unsuccessful defendant should pay reasonable costs with the client paying the balance out of damages.

In written submissions a number of organisations were against contingency fees these included: APIL, PIBA, PNBA, TUC, GC100, CLA and CBA.

The recommendations are that both solicitors and counsel should be permitted to enter into contingency fee arrangements with their clients (on the Canadian Ontario model – ie that there is conventional costs shifting as well). LJJ considers that the arguments in favour outweigh the arguments against and that it is desirable to have as many funding options available as possible. In the case of private litigants he favours independent legal advice together with effective regulation of agreements.

He proposes:

- Regulated damages based agreements (DBAs) for both solicitors and counsel based upon recent MoJ proposals
- Liability for adverse costs must be agreed at the outset and if the solicitor is to be liable (as often the case in Canada) the additional risk should be reflected in the percentage fee.
- Counsel fees could be dealt with in one of two ways:
 - a. Paid as a disbursement by the solicitor in any event
 - b. Counsel could be on a contingency arrangement as well
- Other disbursements can also dealt with in two ways
 - a. Paid by the client
 - b. Funded by solicitor as part of the contingency fee
- Independent advice with the “DBA” to be counter signed by an independent solicitor that the client has been advised about the terms of the agreement

- Contingency fee to be capped at 25% of damages in personal injury cases excluding damages for future costs or losses.
- Costs recoverable against opposing parties on a conventional basis and not by reference to the contingency fee

Chapter 13

CLAF or SLAS

LJJ defines the terms as “self funding schemes proposed as a means of funding litigation in the event that the present regime for conditional fee agreements is changed”. He deals in detail with the Bar Council’s CLAF Group proposals. He then reports on the various events which were held and written submissions received where there were conflicting views about the viability/workability of such schemes.

He concludes that self funding schemes could not replace CFAs as the dominant funding of litigation due to vast start up costs and the consequent reliance on a “novel” method of funding which is untried on such a scale anywhere in the world and even if tried would be taking far too greater risk of loss of access to justice if the system proved unviable. Also – the need for such an approach would disappear if other reforms he is recommending proceed.

He supports the creation of a CLAF as an additional funding method if a viable financial model could be found but they would only function in a minority of cases. He makes a conclusion regarding a SLAS in that it would only be a supplementary means of funding a minority of cases. He does, however, indicate that if there is a possibility that a SLAS could meet any gaps in access to justice then financial modelling should be carried out as recommended by the CJC.

Despite being cautious about the potential of a CLAF he also recommends that financial modelling be undertaken to ascertain the viability of one or more CLAFs as well as a SLAS.

Chapter 14

Litigants in person

He indicates that he agrees that there is force in the argument that a successful litigant in person should be compensated for the time that is spent performing work in litigation which would otherwise be performed by a legal representative, on the basis of the actual cost, or opportunity of costs, to the litigant.

He considers that the current prescribed hourly rates of £9.25 (set more than a decade ago) is now too low and it under compensates very many litigants in person and over compensates very few. He considers that the rate should be raised to a realistic level but not one as would positively encourage litigants to act in person. He then recommends an arbitrary rate.

Recommendation that the prescribed rate of £9.25 per hour recoverable by litigants in person be increased to £20 per hour. The prescribed rate should be subject to periodic review

Chapter 15

Fast track costs

LJJ indicates at the start of the chapter that if the recommendations he makes therein are accepted they could all be implemented fairly rapidly by the Civil Procedure Rules Committee without any primary legislation. He makes proposals for introducing a regime of fixed costs which will apply in any fast track case where costs fall to be assessed on a standard basis. The fixed costs will not apply in a case where a party acts so unreasonably that the court makes an order for indemnity costs against that party.

He summarises views expressed to him during seminars and written submissions. He then forms the view that the key element of any fixed costs regime are:-

- i) The costs must be fair and must represent the current cost of doing the work. This will require careful evidence gathering and surveys.
- ii) There must be an annual review
- iii) Proportionality appears to be the starting point for the proposed matrices and this will cause considerable problems for cases where the value may be relatively small but, where, as Hazel Genn has suggested, there is an irreducible minimum of work, it would be unacceptable for consumers effectively to be deprived of a remedy because the level of the claim was low.
- iv) There must be a fair 'escape clause' which provides the right to recover costs actually incurred where the issues in the case and the interests of justice so require. Also, either party should have the right to apply at any stage if the circumstances of the case requires.
- v) The scheme must ensure that a fair amount of costs is recovered so that claimants get their damages and their solicitors are paid fairly for the effort in achieving this. As most cases are driven largely by defendant insurers to their conclusion, the amount of work done will be dictated by them. It will be unfair if such work is not paid for because of a restrictive scheme. The current emphasis seems to be weighted towards savings for defendants and insurers.
- vi) There needs to be careful provision for additional factors which can include:

- Multi defendants
- Language difficulties
- A child or patient client
- Multi experts required
- Cases involving psychiatric as well as physical injury
- Self employed claimants
- Numbers of witnesses
- Contributory negligence
- Fatal cases and inquest costs”

He then gives a brief summary of the various views expressed in support or against fixed costs in the fast track.

The Civil Justice Council had facilitated meetings during autumn 2009 between stakeholders representing both claimants and defendants at which data produced by Professor Fenn There was, however, no “industry agreement” obtained at that time but the stakeholders did agree that the analysis of the data provided by Professor Fenn was statistically reliable.

Having considered the competing arguments expressed by representatives he concludes that all costs for personal injuries litigation in the fast track should be fixed. He accepts data known as “Fenn 2” as the correct starting point and indicated that two important points stand out regarding the levels of fixed costs:-

- (i) Claimant solicitors will no longer have to maintain documentation required for costs assessment or spend time arguing about costs. Thus the hitherto substantial “costs of costs”, will be saved.
- (ii) A fixed costs regime is bound to generate business process efficiencies in the form of reduced management costs or overheads.

He proposes a dual approach in non-personal injury fast track cases. First there should be an overall limit on recoverable costs in all cases and secondly, so far as the subject matter allows, there should be matrices of fixed costs for specific categories of fast track cases. He further proposes that there should be a limit of £12,000 upon pre-trial costs that can be recovered for any non-personal injury fast track claims unless an order for indemnity costs is made.

His recommendations are:-

- (i) The recoverable costs of cases in the fast track be fixed.
- (ii) The fixed costs for fast track cases should be as described in his report

Chapter 16

Fixed costs outside the fast track

The primary focus of the chapter is whether any categories of multi track litigation should be subject to fixed costs. The majority of respondents during Phase 2 oppose any fixing of costs in the multi track.

He considers that it would be premature to embark upon any scheme of fixed costs or scale costs in respect of lower value multi track cases for the time being. The priority is to achieve a comprehensive scheme of fixed costs in the fast track and to introduce a scheme of capped scale costs for lower value multi track IP cases (See Chapters 15 and 24). After a period of evaluation he recommends that further consideration should be given to the possibility of introducing a scheme of fixed costs into the lower reaches of the multi track and that there should be a variety of models for consideration.

With regard to insolvency litigation, on the basis of the recommendations of the working group he set up he recommends a scheme of benchmark costs for bankruptcy petitions and winding up petitions (see Chapter 28).

Recommendation:-

LJJ does not recommend that any general scheme of fixed costs be introduced into the multi track at the present time. However, this question should be re-considered after experience has accumulated of fixed costs in the fast track and capped scaled costs in the Patents County Court.

Chapter 17

Integration of recommendations for fixed costs with recommendations in respect of additional liabilities

This chapter makes no recommendations but sets out a roadmap for the law makers to consider and seeks to resolve the conflict between:

- 1) the proposal to cease the recoverability of ATE premiums and success fees; and
- 2) the recommendation for fixed costs in fast track cases.

Should the proposal to cease success fee and ATE recoverability be accepted then an integration process is suggested on three assumptions:

- 1) A regime for fixed costs in RTA and PI claims is in force by October 2010;
- 2) At a later date, success fees and ATE premiums become irrecoverable;
and
- 3) The payment for referral fees for PI cases is banned/capped.

On the date when ATE/success fees become irrecoverable ("relevant date"), claimants will no longer be responsible for adverse costs if they lose. General damages will rise by 10%. For cases that go to trial general and special damages will increase by a further 10% for beating a Part 36 offer.

All provisions relating to success fees repealed from the relevant date. Instead solicitors can charge a success fee not exceeding 25% of the damages (excluding future losses).

Solicitors free to advertise their success fee so that consumer the beneficiary of competition not claims managers.

Clients will find a deduction easier to grasp and solicitors will find it easier to advertise.

There should be an easy mechanism available for clients to resolve complaints.

Overall result anticipated by the report:

1. Most claimants should recover more damages;
2. Claimants have a financial interest in level of costs incurred;
3. Solicitors can still make a reasonable profit;
4. Cost payable by insurers to solicitors will reduce significantly; &
5. Costs will become more proportionate.

Chapter 18

Upper limit for personal injury cases on the small claims track

In his preliminary report LJJ put forward the following options:

- An increase to the PI small claims limit from £1,000 to £5,000
- A lesser increase to the limit of £2,500

- An increase in line with inflation
- No increase to the limit

He deals with the views of those for and against which were expressed during Phase 2 and concludes that he can see considerable force in the arguments for raising the small claim limit for PI cases. On the other hand he acknowledges the strength of feeling about the issue on all sides. He does not consider that the time is right to review the limit.

In his view the top priority at the moment should be:

- (a) to fix all costs on the fast track
- (b) to establish an efficient and fair process for handling personal injury claims

He proposes that during the first Phase of reform which follows publication of his final report there should be no change to the PI and small claims limits.

If a satisfactory scheme of fixed costs is established for fast track personal injury cases and if the process beds in satisfactorily he considers that all that will be required in due course will be an increase in small claims limit to reflect inflation since 1999.

A series of small rises in the limit would be confusing for practitioners and judges alike. He proposes that the present limit stays at £1,000 until such time as inflation warrants an increase to £1,500.

If a satisfactory scheme of fixed costs is not established or if the process reforms prove unsatisfactory then the question of raising the PI small claims limit will have to be revisited at the end of 2010. He concludes the chapter by stating he would be willing to undertake that task if so requested.

Chapter 19

One way costs shifting

This chapter outlines Jackson LJ's proposals for future adverse costs protection for claimants in personal injuries litigation by replacing ATE insurance with one way costs shifting (i.e. a winning claimant would still recover his costs from the insured defendant, but the insured defendant would not recover costs from an unsuccessful claimant). He proposes that in personal injuries litigation (including clinical negligence) there should be no need for after the event insurance at all.

The report states that personal injuries litigation is a special case because it is almost exclusively brought by individuals against insured defendants. The vast majority of

households would be putting their own assets (usually a house) on the line to meet an adverse costs order. Most personal injuries cases succeed. There was one way costs shifting in personal injuries litigation for legally aided claimants prior to 1 April 2000 (when legal aid for personal injuries litigation was withdrawn)

The report analyses the data and submissions from legal expense insurers (and clinical negligence defendant organisations) and says that this confirms the view expressed in the preliminary report that it would be much cheaper for defendants to agree not to enforce costs in the minority of cases they win than to pay after the event insurance premiums (which include administration costs and profit) in all the cases they lose. The report summarises the debate in Phase 2 by saying that many were supportive of the concept, with qualifications.

Jackson LJ describes the ATE regime for personal injuries litigation as 'indefensible'. However, personal injuries victims should enjoy protection from adverse costs orders. This is 'the only way' he can see it being achieved. He thinks it must apply 'across the board', not just for limited categories of personal injury claim (e.g. low value claims). The report proposes the 'legal aid shield' which provides that a costs order shall not exceed 'a reasonable sum' taking into account 'financial resources' and 'conduct'. He says that this should mean in practice that only fraudulent or 'conspicuously wealthy' claimants would be at risk of a costs order. If the claimant unreasonably refuses a Part 36 offer, the defendant's post offer costs can be taken out of the damages awarded (as happens in legal aid cases).

The other benefit of ATE is that it also insures the claimant's own disbursements if the claim fails. Jackson LJ concludes that the cost of disbursements in unsuccessful claims should be borne by the claimant or his solicitor 'depending upon what may be agreed between them.' He suggests that when referral fees are banned (as recommended elsewhere in the report) solicitors may reallocate part of that cost to meeting the costs of disbursements in unsuccessful cases.

At the conclusion of the chapter LJJ confirms his recommendations that a regime of qualified one way costs shifting be introduced for personal injury cases.

Chapter 20

Referral fees

LJJ deals with the historic background of referral fees culminating in the change of the Solicitor's Code of Conduct so as to allow solicitors to pay such fees.

The issue which was repeatedly raised during his review was whether referral fees should be banned, alternatively capped or otherwise regulated. He then goes on to deal with views expressed at debates and those contained in written submissions received during Phase 2.

He sets out a passage from an email which was sent to his judicial assistant by the OFT on 6 August 2009. In that email the OFT sets out reasons for concluding that a total prohibition on solicitors from entering into referral fee arrangements with non-lawyers can unnecessarily impede competition. LJJ does not, however, see how the OFT arrive at its original conclusion (March 2001) and why it adheres to essentially the same conclusions. He then goes on to remark that the evidence which he has received points strongly to the opposite conclusion. In his view there is no benefit in competition terms to be gained from allowing referral fees and he does not consider that such a ban would be inconsistent with European competition law.

He also takes the view that it is offensive and wrong in principle for personal injury claims to be treated as a commodity and that BTE insurers should not be in a position of auctioning off the personal injury claims of those who they may insure. He also considers it is equally unacceptable for claims management companies to buy in personal injury claims from other referrers and then sell them on at a profit. He is not persuaded by the argument that a prohibition on payment of referral fees could not be enforced as the vast majority of solicitors are honourable professionals who would respect such a prohibition whether imposed by legislation or by rules of conduct.

He considers that referral fees paid as a matter of routine is one of the factors which contributes to the high costs of personal injury litigation and that the lifting on the ban on referral fees has not proved to be of benefit either to claimants or to providers of legal services and that the only winners are the recipients of referral fees.

His recommendations are:-

- (i) Payment of referral fees for personal injury claims are banned.
- (ii) If the recommendation is accepted it could be implemented in one or two ways. It could be primary legislation which would prohibit anyone from buying or selling personal injury claims. Alternatively, the Solicitors Code of Conduct could be amended so that solicitors are prohibited from paying referral fees. In the latter event, the Codes of Conduct binding upon other legal representatives would have to be similarly amended. If the primary recommendation is rejected, then he recommends that referral fees should be capped at a modest figure which he suggests should be £200.
- (iii) If either of the recommendations is accepted serious consideration will have to be given to the question whether referral fees should be banned or capped in other areas of litigation.

Chapter 21

Assessment of general damages for pain, suffering and loss of amenity

LJJ recommends the computerisation and standardization of the calculation of general damages for PSLA for all injuries up to £10,000.

Summary

LJ Jackson summarizes the comments that arose out of the events and meetings he attended and the written submissions he received as follows:

1. Claimant Solicitors views range from opposition to cautious support
2. APIL, state that they do not oppose technology, but fear that the tool could easily become defendant biased system made to save defendant costs rather than to assist injured people and does not believe that the system would reduce the risk of under settlement
3. MASS, state that they support a judicially approved database, based on court decisions, however MASS counsels extreme caution in moving towards a points based system or a software system and concludes that the assessment of general damages could be made simpler and more predictable in lower value cases.
4. Defendant Solicitors, state that they are supportive of the proposals and FOIL believe that the use of the tool would reduce the cost of fee earner, research and valuation.
5. Trade Unions, state that they are generally opposed to the tool and do not believe that a tool would ensure that claimants receive full compensation, but that a tool would depress the value of settlements.
6. Action against Medical Accidents can see the value of a tool for assessing general damages in low value clinical negligence claims but not in complex cases.
7. Liability Insurers are strongly supportive of the proposal to develop an authoritative software system. They dispute that current software leads to under settlement. One insurer accepts that present software systems generate under valuations but adds that the software can be “tuned” to deliver

a different outcome and proposes a single authoritative software system available to all and moderated by the MOJ.

8. The Bar is generally opposed to the use of software tools for assessing general damages
9. PIBA, states that current software systems are under calibrated by about 20% and that no computer system could produce justice to claimants.
10. District Judges do not support a points based of software based assessment tool and urge for more precision in the medical reporting of injuries.
11. Software companies support the proposition.

A Working Group comprising of APIL, MASS, insurers, CSC and ISO identified one key issue, namely whether and to what extent data from settlements, as opposed to judicial decisions could be used to calibrate the software systems.

The group concluded that a pilot scheme may possibly be appropriate in order to provide;

- a. methodology on gaining unbiased data
- b. on the basis of these data, proof that a system can work

CSC and ISO compared results on hypothetical data and achieved broadly similar results but there were also difference of between 5% and 13%.

LJJ recommends that a working group be set up to establish a uniform calibration for all software systems used in assessment of damages for PSLA up to £10,000. That calibration should accord as nearly as possible with the awards of general damages that would be made by the courts.

The group's tasks would be;

- a. to ensure that all software systems are calibrated in a manner that approximates damages which courts would award up to £10,000
- b. to review the format of medical reports.

Members to be;

- a. two district judges with PI and IT expertise
- b. representative from each software provider

- c. two claimant representative (one APIL and one MASS)
- d. two liability insurer representatives
- e. possible trade union representative and a consumer representative
- f. possible medical representative

If the project is successful, some system for maintaining and appropriate calibration should be in place. This could be the working party, an independent body or a committee of the CJC or JSB

Chapter 22

Personal injuries litigation process and procedure

Having set out the views of stakeholders during meetings, seminars and written submissions LJJ then deals with the specific comments and recommendations on the fast track and multi-track cases, rehabilitation and other issues.

He has two concerns about the new RTA claims process negotiated over a lengthy period by stakeholders. He is concerned with the sheer complexity of the process in that over 80 pages of new material will be added to the rule book in order to deal with the simplest category of litigation. He considers that collectively the procedures could possibly open a new theatre for the costs war. He repeats his view that we should be looking for ways of simplifying the rules rather than add to their volume. His second concern is that the new process, contrary to the original intention, does not embrace all categories of personal injury claims, in particular employers' liability and public liability claims, nor does it apply to the whole of the fast track.

Recognising that significant work has gone in to the new process he considers it will be necessary to keep the operation under review in order to ensure that costs savings which it achieves are not negated by satellite litigation and avoidance behaviour. He makes the point that amendments will have to be made to that new process subsequently if his recommendations for abolishing recoverability of success fees and ATE insurance premiums are accepted.

With regard to fast track PI cases outside the new process he recommends that there should be discussion between claimant and defendant representatives under the aegis of the CJC in order to develop a streamlined process for all fast track personal injury cases which fall outside the new proposed process. He recommends that the parties should aim for a procedure that is much simpler and much shorter than that devised for the new process as it is neither practical nor necessary to spell out every little detail of what must be done in every situation.

According to reports it appears that the piloted multi-track code is proving successful and that it promotes speedier resolution of cases at lower overall cost. The code currently applies to cases valued £250,000 whereas solicitors were instructed after 1 June 2008. Generally speaking in multi-track cases he recommends that the judge should decide in any individual case whether to adopt costs management as an adjunct to case management (further dealt with in Chapter 40).

He acknowledges that good progress has been made in recent years in recognising rehabilitation as a central part of post accident recovery. He considers that substantial benefit could be gained by encouraging co-ordination of effort between

the public and private sector rehabilitation organisations and urges all stakeholders involved in PI claims to support the Rehabilitation Code.

As a result of evidence considered during Phase 2 he concludes that medical reporting agencies have had the overall affect of control in the costs of obtaining medical evidence in personal injury cases. However, it is a matter which must be kept under close scrutiny and that this should be carried out by the Costs Council. If it transpires that such agencies are increasing costs of the process he considers the appropriate course might be for the rules to provide that only the fees recoverable for an expert report are the fees properly charged by the expert and not the MR agency fees. He recommends that direct communication should always be permitted between a solicitor and any medical expert whom the MRO instructs on behalf of a solicitor. This matter should be dealt with in the MRO agreement when the agreement comes to be re-negotiated in March 2010.

His recommendations are:

- (i) The new process for low value RTA claims should be monitored to ensure that the costs savings achieved are not negated by satellite litigation and avoidance behaviour.
- (ii) There should be discussions between claimant and defendant representatives, under the aegis of the CJC in order to develop a streamlined process for all fast track personal injury cases which fall outside the MoJ's new process.
- (iii) The effect of MROs upon the costs of personal injuries litigation should be kept under close scrutiny.
- (iv) Direct communication should always be permitted between a solicitor and any medical expert whom an MRO instructs on behalf of that solicitor.

Chapter 23

Clinical negligence

LJJ sets out views expressed by both claimant and defendants during meetings/events and the various written submissions he received. He then considers three main principles and the NHS Redress Act before going on to make his recommendations. The principles are:-

- 1) Control of pre action costs
- 2) Case management in clinical negligence cases
- 3) Costs management of clinical negligence cases

He quotes the sums paid out by the NHSLA as:-

2006/07	£579,391,000
2007/08	£633,325,000
2008/09	£769,225,000

The figure for 2008/09 he breaks down as follows:-

Damages paid to claimants	£312,454,000
Claimant solicitors	£103,632,000
Costs paid to own solicitors	£39,638,000
Total	£455,744,000

He states two objectives to be borne in mind as follows:

- a) patients who have been injured as a result of clinical negligence must have access to justice so they can receive proper compensation.
- b) public expenditure must be brought under control so that the resources of the health service are not unnecessarily squandered on litigation costs.

Defendant lawyer's views are:

- Claimant lawyers run up pre issue costs which are often unnecessary and there should be a mechanism to control these.
- The protocol currently gives claimant lawyers a mandate to front load
- The defendant seldom has any advance notice of a claim before the letter of claim arrives
- Claimant hourly rates are excessive and substantially above defendant rates as the Advisory Committee on Civil Court Costs sets rates too high and which are above the rates set by the market in this sector
- Claimant solicitors enter CFAs on day one before investigating and justifying the 100% success fee
- Claimant solicitors inflate costs by “costs building”.

Claimant lawyer's views are:

- There about 1 million adverse incidents in healthcare each year of which less than 1% result in claims so there is an access to justice gap.
- The rates paid by the NHSLA, MDU and MPS are so low that many good firms are refusing to do the work
- Costs are run up because the NHSLA does not investigate early
- Defendants often refuse to admit liability in respect of strong claims until late in the day
- Claimants do not get adequate or consistent support from the courts (e.g. indemnity costs)
- Defendants often fail to comply with the protocol and there should be stronger penalties for late compliance
- Records are not provided within the 40 day period as provided by the protocol

- Defendants delay in sending their response letters beyond the protocol period

In his deliberations regarding pre action costs he considers that if a Health Authority fails to provide health records within the 40 day period then it should not be entitled to its copying charges and if the delay is beyond 60 days there should be a financial penalty unless there is some reasonable explanation for the delay. He concludes that there are seven reasons which cause excessive costs in claims which ought to settle before issue as follow:

- (i) There is no effective control over the costs which claimant lawyers may incur before sending a letter of claim or between the date of the letter of claim and the date when proceedings are issued.
- (ii) When NHS Trusts and similar bodies receive letters of claim, they sometimes fail to notify the NHSLA.
- (iii) In a number of cases it is not possible for the defendant's advisers to investigate the claim "from scratch" within three months, starting on the date when the letter of claim is received. Thus the limited period allowed to defendants by the protocol can lead to proceedings being issued unnecessarily.
- (iv) Although the MDU and MPS normally obtain independent expert evidence upon receipt of a letter of claim, the NHSLA seldom does so. Instead, the NHSLA usually relies upon comments obtained from the clinicians involved or others at the relevant NHS Trust.
- (v) In some cases the defence team fails to come to grips with the issues until too late.
- (vi) In some cases either the claimant's advisers or the defendant's advisers send protocol letters which do not comply with either the letter or the spirit of paragraphs 3.14 to 3.25 of the protocol. For example, the claimant may not provide quantum information or the defendant may not give proper reasons for denying liability.
- (vii) On some occasions the defendant is willing to settle without admitting liability, but the protocol makes no provision for this.

He recommends penalties for failure to comply with the protocol and deals with these in the relevant chapter. Also, claimants had remarked that they had case screening costs which he has accepted but then recommends that clients should either pay these costs if unsuccessful but that if successful they should be paid by the defendant.

On case management he prefers harmonisation of case management directions (recommending an increase from 2 to 3 of QBD Masters who specialise in clinical negligence matters and a docketing system for the judiciary which he believes is essential.

On costs management in these cases he wants 10 minute costs budget telephone hearings where the claimant and the court only will be involved but the defendant will be permitted to apply to vary the costs order (although these applications will be discouraged). He believes these should be part of a two year pilot and that there should be a wider consultation but that the following timetable is his preferred implementation plan:-

(i) A start date of 1st June 2010 allows sufficient time for consultation on the details of the proposal.

(ii) The two existing costs management pilots are each running for one year and are due to conclude on 31st May 2010 and 30th September 2010 respectively. The feedback from those two pilots will be assessed during 2010. It will be highly advantageous to start receiving feedback from the clinical negligence costs management pilot as soon as possible.

In respect of costs management before issue of proceedings he recommends a threshold figure of £15,000 prior to letter of claim and a further £15,000 up to the start of proceedings.

He recommends that these issues can be left to the Costs Council which he is proposing.

He considers that the scheme envisaged by the NHS Redress ACT 2006 is a sensible one and that regulations to implement those proposals should be taken forward in the interests of saving costs for the NHS.

His concluding recommendations are:

(i) There should be financial penalties for any health authority which, without good reason, fails to provide copies of medical records requested in accordance with the protocol.

(ii) The time for the defendant to respond to a letter of claim should be increased from three months to four months. Any letter of claim sent to an NHS Trust or ISTC should be copied to the NHSLA.

- (iii) In respect of any claim (other than a frivolous claim) where the NHSLA is proposing to deny liability, the NHSLA should obtain independent expert evidence on liability and causation during the four month period allowed for the response letter.
- (iv) The NHSLA, the MDU, the MPS and similar bodies should each nominate an experienced and senior officer to whom claimant solicitors should, after the event, report egregious cases of defendant lawyers failing to address the issues.
- (v) The protocol should provide a limited period for settlement negotiations where the defendant offers to settle without formal admission of liability.
- (vi) Case management directions for clinical negligence cases should be harmonised across England and Wales.
- (vii) Costs management for clinical negligence cases should be piloted.
- (viii) Regulations should be drawn up in order to implement the NHS Redress Act 2006.

Chapter 24

Intellectual property litigation

LJJ considers that the creation and use of IP plays a crucial role in economic activity and in the achievement of many social goals such as effective health care or renewable energy. He considers that the civil justice system must enable parties to assert or defend their IP rights but that the system must deliver correct judgments at affordable cost.

Litigation in the Patents Court requires specialist solicitors, specialist counsel and appropriate experts and a significant level of costs is unavoidable (a summary of costs involved in 15 recent High Court patent cases are set out in Chapter 2.)

Whilst making recommendations he draws attention to the process of judicial appointments indicating that the competing views expressed during Phase 2 so that others might take them into account in considering whether a greater number of patents' specialists should be appointed within the Chancery Division.

Despite the Patents Court already having an active case management process stakeholders generally called for more active case management and he recommends that consideration be given by the Patents Court judges and the IPCUC together to the question whether the Court Guide should be amended to reflect views set out in section 2.5 of the Chapter – Case Management in the Patents Court.

He draws attention to his recommendations in respect of costs management (see Chapter 40) but makes no specific recommendations with regard to their application in IP matters.

In respect of concerns expressed about the high level of Counsel's fees in substantial IP cases, he leaves it for the Costs Council as proposed to consider and give guidance as to what extent such fees should be recoverable inter parties.

He indicates that there is concern that many SMEs do not have access to justice in respect of IP disputes because of prohibitively high costs in the Patents County Court. He sets out the four proposals of the IPCUC Working Group which reported in June 2009. These are:

- (i) The PCC should be re-named the "Intellectual Property County Court", in order to make clear the breadth of that court's work.
- (ii) The procedures of the PCC should be reformed, so that parties set out their respective cases fully at the outset. The initial pleadings would contain the evidence and the arguments relied upon. After completion of pleadings there would be a main case management conference, at which the judge (applying a cost-benefit test) would decide whether to order or permit further evidence, further written argument or specific disclosure. Any other hearings would be dealt with by telephone. The trial would be limited to one to two days.
- (iii) The recovery of costs should be governed by scale fees. Total recoverable costs would be capped at £50,000 in contested actions for patent infringement and validity, and at £25,000 in all other cases.
- (iv) There should be a limit of £250,000 on the financial remedies available in the PCC.

The IPCUC published a final report in June 2009 proposing that the limit bracket (see 4 above) should be £500,000 and £250,000 and made a number of detailed recommendations including that there should be guidelines to assist in determining transfer applications as between the PCC and the Patents Court. LJJ recommends that the proposal of the final report be implemented.

Whilst not within his terms of reference he does indicate his agreement that the PCC judge should be given the opportunity to be promoted to the High Court and that the judge should always be a senior Circuit Judge to be appointed for a five year term.

He recommends that after reformation of the PCC the Guide be amended to give clear guidance on the requirements for statements of case, illustrated by model pleadings and annexed to the Guide.

He recommends that there ought to be a small claims track in the PCC for IP claims with a monetary value of less than £5,000 and a fast track for IP claims with a monetary value of between £5,000 and £25,000. If there is a small claims track then there will effectively be no costs shifting and small businesses will be able to represent themselves. If a fast track is created then the parties will get the benefits of the fixed costs proposed in his report.

He recommends that the district bench should be able to deal with the small claims and fast track IP cases and makes a number of recommendations regarding the district judiciary. However he indicates that a further alternative which merits consideration is the possibility that IPO Hearing Officers (with appropriate qualifications, concerned with deputy district judges in the PCC, if necessary by video link from their Newport Office

He recommends that there should be consultation with court users, practitioners and judges in order to ascertain whether there is support either for (a) an IP pre-action protocol or (b) the Guide to give guidance regarding pre-action conduct.

His recommendations are:

- (i) Consideration should be given by the Patents Court judges and the IPCUC to the question whether the Guide should be amended to include any of the proposals set out in paragraph 2.5 of Chapter 24.
- (ii) The proposals in the IPCUC Working Group's final report for reforming the PCC should be implemented.
- (iii) After reformation of the PCC, the Guide should be amended to give clear guidance on the requirements for statements of case, illustrated by model pleadings annexed to the Guide.
- (iv) There should be a small claims track in the PCC for IP claims with a monetary value of less than £5,000 and a fast track for IP claims with a monetary value of between £5,000 and £25,000.
- (v) One or more district judges, deputy district judges or recorders with specialist patent experience should be available to sit in the PCC, in order to deal with small claims and fast track cases.

- (vi) There should be consultation with court users, practitioners and judges, in order to ascertain whether there is support either for (a) an IP pre-action protocol or (b) the Guide to give guidance regarding pre-action conduct.

Chapter 25

Small business disputes

LJJ considers the Court system insofar as it relates to small businesses and concludes that business people are competent at dealing with their own disputes up to the value of £15,000. Despite the submissions received that these disputes should be dealt with in the small claims court, LJJ does not recommend a change in the rules, as he points out that parties can consent to allocation to the small claims track. To expand the small claims limit would be unfair to individuals/customers who might need representation.

He also notes that the litigant in person rate is considered to be too low. He deals with this elsewhere in his report where he proposes to increase the litigant in person rate to £20.

LJJ considers that the Mercantile Courts have an advantage over the other Courts because of the continuity of judge (aka “docketing”). However, the Mercantile Courts lack a uniform guide and do not have a single judge in charge of them. He therefore recommends that a High Court judge be appointed to manage them and for a single guide to be produced.

LJJ suggests that consideration be given to a streamlined procedure for low value business disputes in the Mercantile Courts. (perhaps £100,000 - £150,000).

LJJ does not recommend fixed costs for business disputes at the present time in the multi-track.

LLJ suggests a new leaflet for businessmen with disputes of £15,000 explaining the procedures.

His recommendations are:

- (i) A High Court judge should be appointed as judge in charge of the Mercantile Courts.

- (ii) A single court guide should be drawn up for all Mercantile Courts.

- (iii) Consideration should be given to devising a special streamlined procedure for business disputes of lower value.

(iv) HMCS should prepare a guide in respect of “small business disputes” for the assistance of business people who wish to deal with such disputes themselves without the assistance of lawyers, either by mediation or on the small claims track.

Chapter 26

Housing claims

LJJ makes a point that the law is complex and deals in depth with the current proposals for reform by the Law Commission, the Government and the Tenant Services Authority.

He remains of the view that simplifying substantive housing law will considerably reduce the costs of litigation and improve access to justice. He recommends that the Government should reconsider undertaking the process of simplification as proposed by the Law Commission in its November 2003, May 2006 and August 2008 papers.

He proposes that all possession proceedings which are brought in the fast track should be the subject of fixed costs as set out in chapter 15 of the report as this will be beneficial to tenants who are frequently ordered to pay the costs of the proceedings. He also proposes that where a landlord issues manually but could have issued online under PCOL he/she should only be able to recover the PCOL issue fee. He sees this as a sensible proposal which will encourage the use of the online facility, reduce the burden on court staff and reduce the costs burden on tenants.

He deals with pre action protocols and considers that they work well and any concerns about failure to comply with them can be dealt with under the courts existing powers. He does however favour amendment of the rent arrears protocol to achieve compliance with developing jurisprudence on ECHR article 8 and to avoid lengthy and costly battles about the effect of article 8 proceedings.

He does not recommend any changes in the costs rules in respect of costs recoverable by mortgagees.

He remains of the view (expressed in chapter 7 – Legal Aid) that rates should be set at a level which allows properly organised solicitors to operate profitably but which are fair for both publicly and privately funded housing cases.

He agrees with some views that housing disrepair cases should be brought on legal aid where that is available rather than a CFA. He believes there is a strong case for non legally aided claimants to benefit from one way costs shifting (as proposed in chapters 9 and 19). In addition he recommends fixed costs in disrepair cases as proposed in chapter 15.

He does not recommend a protocol for homelessness appeals cases but the practice direction (CPRPD 52) should be amended in order to set out what documents the respondent should lodge and when.

Where a housing claim is settled in favour of a legally aided party they should have the right to ask the court to determine which party should pay the costs and that right should not be overridden by terms of settlement.

His recommendations are:

(i) The Government should reconsider undertaking a simplification of substantive housing law, as proposed by the Law Commission in 2003, 2006 and 2008.

(ii) Where a landlord could use PCOL to issue possession proceedings but chooses to issue manually, he should only be able to recover an amount equivalent to the PCOL issue fee.

(iii) The Rent Arrears Protocol should be amended in order to set out what steps should be taken by landlords, so as to comply with their obligations under ECHR article 8.

(iv) Paragraph 24.2 of CPR Part 52 practice direction should be amended in order to set out what categories of documents should be lodged by the respondent in homelessness appeals and when these should be lodged.

(v) Consultation should be carried out on the proposal that where a housing claim is settled in favour of a legally aided party, that party should have the right to ask the court to determine which party should pay the costs of the proceedings.

Chapter 27

Large commercial claims

Generally speaking the users of the commercial court are reported as being satisfied. It is widely considered that the commercial court is one of the best centres for dispute resolution in the world and international cases are attracted to London because of the "Rolls Royce" service.

Data supplied by users during phase 1 indicated that most (but not all) cases in the commercial court were resolved at proportionate costs. LJJ recognises the importance of the international work dealt with by the commercial court.

He does however express a little caution and identifies a small number of issues which have emerged during the costs review.

Disclosure was recognised as a major source of costs in commercial litigation and the current commercial court guide encourages the court to consider alternative orders as follows:

- dispensing with or limiting standard disclosure;
- ordering sample disclosure;
- ordering disclosure in stages;
- ordering disclosure otherwise than by service of a list of documents (e.g. service of copy documents) and;
- ordering specific disclosure.

He reports that a ground swell of support emerged for the “menu” option of disclosure. This is an option where standard disclosure ceases to be the default position. Various breadths of disclosure would be set out in a Practice Direction. At the first CMC the parties and the court will be forced to turn their mind to what would be the most appropriate process to adopt in those proceedings.

Respondents during phase 2 stress the importance of the judiciary receiving more training in relation to a disclosure. LJJ agreed this view.

LJJ refers to the Long Trial Working Party (LTWP) and asks that the piloting of that group's proposals regarding the commercial court guide was amended again. He refers to the guide (in particular D6 dealing with lists of issues). He considers that whether D6 of the guide promotes savings of costs or causes wastage of costs is a question of obvious importance to the Review. He concludes that the list of issues procedure should not be adapted to large commercial claims outside the commercial court and recommends that the relevant section of the guide be re-considered afresh after 18 month of experience under the new provision.

LJJ appears to be keen on docketing of the judiciary but recognises that it is not within his terms of reference to recommend any substantial change to the docket system. He has been informed that in the commercial court substantial improvements have been made in relation to docketing within the existing procedure. Assignment of a judge is dealt with in D4 of the commercial court guide and LJJ considers that the section should no longer be restricted to cases which are exceptional in size or complexity and recommends that categories of cases to be assigned to a designed judge should be broadened.

Proactive case management in the commercial court is acknowledged but a number of respondents considered that it should be more robust. A firmer line should be taken by judges in enforcing their orders and dealing with instances of non-compliance. LJJ makes no specific recommendations for reform but draws them to the attention of the commercial court and its users committee for further consideration.

Despite recommending costs management for certain categories of litigation (Chapter 40) the general view with the commercial court was that it would not be appropriate for high value cases. However the question of whether costs management should be adopted in these matters, he recommends should be left to the discretion of judges in individual cases. He does however encourage judges to actively adopt costs management in any lower value cases which are brought to the commercial court.

His major recommendations:

- (i) After 18 months, the question whether section D6 of the Guide ought to be repealed or amended should be reconsidered in the light of experience.
- (ii) Sections D4 and D8 of the Guide should be amended to permit more frequent allocation of appropriate cases to designated judges.
- (iii) In respect of disclosure, his recommendations are set out in chapter 37.
- (iv) In respect of costs management, his recommendations are set out in chapter 40

Chapter 28

Chancery litigation

LJJ summarises the seminars and written submissions during phase 2. In general all submissions from the Bar indicate that the Chancery system works well and there should be no changes.

He recommends however that in respect of fast track cases CPR Part 8 should be amended to enable the court to assign a case to the fast track at any time. This would then result in the parties gaining the full benefit of the fixed costs regime which he proposes (Chapter 15). The allocation rules in respect of possession claims are satisfactory.

He does not recommend any changes in the rules governing probate claims. However he reports that there is an acknowledged problem in achieving settlement of such claims. Whilst he makes no specific recommendation to amend CPR Part 57, he does respectfully draw the attention of all practitioners to the special importance of commencing ADR at an early stage in this category of dispute. LJJ agrees specifically with the Law Society's view that judges should pay greater attention to the costs implications of litigation on the estate fund. The parties should also be made aware of the costs risks at early stage rather than work on the assumption that costs will be met out of the central pot. He agrees with these observations and that both objectives will be fulfilled if proper costs management is introduced into chancery litigation.

He accepts the Law Society's views that there should be a limitation (appropriate to each case) on the amount of costs that can come out of the trust fund or estate. His view is that these ought to be set at proportionate level at the early stage of litigation.

He does not advocate any rule change in order to discourage inappropriate Beddoe applications. He again agrees with the Law Society on this view.

Neither does he advocate any rule change in relation to neighbour disputes or make any formal recommendation in relation to such disputes. He does however suggest that practitioners and judges adopt the practice which is used by HHJ Oliver-Jones QC in the West Midlands (para 4.1.1).

Having considered whether or not Agassi should be reversed he concludes that it should not but that a suitable body of tax experts should become an "approved regulator" within section 20 of the Legal Services Act 2007.

He recommends that the Law Society and the Chancery Bar Association should set up a working group to examine specific areas of chancery work which can then recommend specific changes in the light of Jackson's report (see para 2.10).

He considers that a number of Chancery actions would benefit from costs management and recommends that Part 6 of the Costs Practice Direction be amended to require parties in Part 8 proceedings to lodge costs assessments 14 days after acknowledgement of service.

On the subject of insolvency proceedings he adopts the recommendations of the Fixed Costs Working Group (see Appendix 8 of report). The recommended figures are to be treated as benchmark costs rather than fixed costs.

In respect of more complex insolvency proceedings he accepts that the Costs Management Working Group proposals are sensible and these should be considered by the Insolvency Rule Committee (see para 5.9).

His main recommendations are:

- (i) CPR Part 8 should be amended to enable the court to assign a case to the fast track at any time.
- (ii) The amount of costs deductible from a trust fund or estate should be set at a proportionate level at an early stage of litigation. Whether the balance of costs should be paid by the party who incurred them or by some other party should be determined by the judge.
- (iii) Practice Direction B supplementing CPR Part 64 should be amended to provide that, save in exceptional cases, all *Beddoe* applications will be dealt with on paper.
- (iv) A suitable body of tax experts should become an approved regulator within section 20 of the Legal Services Act 2007.
- (v) Part 6 of the Costs Practice Direction should be amended to require parties in Part 8 proceedings to lodge costs estimates 14 days after the acknowledgment of service (if any) has been filed.
- (vi) A scheme of benchmark costs should be implemented for bankruptcy petitions and winding up petitions.
- (vii) Costs management procedures should be developed in order to control the costs of more complex insolvency proceedings.
- (viii) The Law Society and the Chancery Bar Association should set up a working group in order to the remaining chancery issues raised by the Preliminary Report.

Chapter 29

Technology and construction court litigation

He recalls that respondents during phase 2 expressed a high degree of satisfaction with the TCC service and that data provided during that phase indicated that most cases in the TCC are resolved at proportionate cost. Court users would also appear to be satisfied with case management and the TCC judges also formed the view that the court operates successfully and efficiently. He does however indicate that there are specific concerns about disproportionate costs in small construction disputes.

Whilst accepting that complacency is dangerous he advises that he would be extremely cautious before recommending any significant changes to the existing TCC procedures and that it is important not to make procedural changes which would be unacceptable to overseas litigants who choose London as their forum. He reports views on prolix pleadings, statements and lists of issues, all of which increase costs. He recommends that Section 5 of the TCC Guide should be amended and that the court should be more flexible in allowing supplementary evidence in chief. With regards to lists of issues, he recommends that the requirements in the relevant paragraphs of the TCC Guide be simplified so that they are focused upon key issues rather than upon all issues in the case.

Most respondents believe that standard disclosure is the proper approach in TCC cases. He concludes that there cannot be any different or special rule of disclosure in TCC cases and concludes that the menu option is the best approach. He deals with disclosure in Chapter 37.

On document management issues whilst recognising that there can be many documents in TCC cases e-working was introduced as a pilot scheme in July 2009. He expresses the hope that relatively soon IT may provide the solution to problems identified in his preliminary report (para 34.5.3).

On the question of lower value construction disputes, he refers to the fact that at the moment there is no fast track in the TCC. He recommends that CPR Part 60 be amended to permit TCC cases to be allocated to the fast track where appropriate. He also recommends that the small number of District Judges with suitable experience be authorised to try fast track TCC cases. Lower value construction disputes which are outside the scope of the fast track should be assigned to the county court TCC at the earliest possible time so that such cases can be managed and tried by judges or recorded with specialist expertise.

He encourages the use of ADR (mediation is dealt with in Chapter 36).

He deals with costs management issues in Chapter 40 but refers to the pilot in the Birmingham TCC commencing July 2009 and reports that the results are so far encouraging. He does not believe that costs management should be made compulsory in the TCC but the decision must be made in every case where costs management will be beneficial. This should be at the discretion of the TCC judge in each case.

His main recommendations are:

- (i) Section 5 of the TCC Guide should be amended to draw attention to the power of the court to disallow costs in respect of pleadings or witness statements which contain extensive irrelevant or peripheral material.

- (ii) Paragraphs 14.4.1 and 14.4.2 of the TCC Guide should be amended, so that they are focused upon key issues rather than all issues in the case.
- (iii) The CPR should be amended so that appropriate TCC cases can be allocated to the fast track. The 1981 Senior Courts Act should be amended, so that district judges of appropriate experience may be authorised to manage and try fast track TCC cases.
- (iv) Mediation should be promoted with particular vigour for those low value construction cases in which conventional negotiation is unsuccessful.

Chapter 30

Judicial review

Jackson makes two recommendations:

- That qualified one way costs shifting should be introduced for judicial review claims
- If the defendant settles a judicial review claim after issue and the claimant has complied with the protocol, normally the defendant should pay the claimant's costs

Jackson supports one way costs shifting (defendant pays claimant's costs if claim successful but claimant does not pay defendant's costs if claim unsuccessful) because:

- Simplest way to comply with Aarhus Convention requirements in respect of environmental judicial review cases
- The costs rules for environmental judicial review cases should be the same as for other judicial review cases
- The requirement for permission filters unmeritorious claims and makes two way costs shifting (claimant liable to defendants costs as well as visa versa) unnecessary to deter frivolous claims
- Not in the public interest that claimants are deterred from bringing properly arguable judicial review proceedings by the financial risks involved
- One way costs shifting works in Canada
- Protective costs orders are ineffective in protecting claimants against excessive costs liability – protective costs are uncertain and often too late in proceedings.

Jackson's proposed rule would also limit costs awarded against a claimant to an amount which is reasonable for him to pay having regard to the resources of all parties to proceedings and their conduct during proceedings. If a default position is to be applied to that rule, then Jackson suggests that the claimant's liability for adverse costs should be up to £3000 up to grant of permission and up to £5000 up to the end of the case.

Given one way costs shifting, defendants should not have to pay success fees to the claimant's lawyers.

His main recommendations are:

- (i) That qualified one way costs shifting should be introduced for judicial review claims.
- (ii) That if the defendant settles a judicial review claim after issue and the claimant has complied with the protocol, the normal order should be that the defendant do pay the claimant's costs. For example, the defendant has settled for pragmatic reasons, despite having a strong defence to the claim.

Chapter 31

Nuisance cases

LJJ refers to the Aarhus Convention which requires the UK to ensure that members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons which contravene provisions of national law relating to environment. It also provides that there should be adequate and effective remedies and that such procedures must not be prohibitively expensive. LJJ therefore concludes that the Convention is capable of applying to private nuisance actions in the civil courts in which an alleged nuisance is an activity (a) damaging the environment and (b) adversely affecting the wider public interest, rather than the claimant's alone. Having recommended previously in the report that recoverability of success fees and ATE insurance premiums from defendants is no longer sustainable. He goes on to consider how nuisance proceedings between private parties should be funded and adverse costs orders should be met.

He concludes that the present costs rules in the magistrates courts are satisfactory and that a claimant can engage solicitors on a CFA without success fee. Whilst costs in the magistrates court are generally lower than in the civil courts, he finds no serious complaint about the magistrates costs rules and makes no recommendation for reform in relation to statutory nuisance proceedings in those courts.

In respect of private nuisance proceedings in the civil courts he considers qualified one way costs shifting could be introduced if such reform was deemed desirable on

policy grounds. He would appear, however, to prefer that the best way forward would be for all home owners to have the benefit of BTE insurance, and that it will be highly beneficial if the level of cover was at least £100,000.

LJJ makes the point that if in the consultation exercise following publication of the report a strong view emerges that the abolition of recoverable ATE insurance premiums gives rise to a breach of the Aarhus Convention or as an obstacle to access to justice for claimants in private nuisance then qualified one way costs shifting could be introduced.

His main recommendation, as already made in the report is that positive efforts should be made to encourage the take up ATE insurance as an add on to household insurance policies.

Chapter 32

Defamation and related claims

Lord Justice Jackson considers that success fees and After The Event insurance premiums should cease to be recoverable. For defamation claims, he considers that other measures must be put in place in order to ensure that claimants have access to justice. In paragraph 2.6 Lord Justice Jackson refers to the submissions made by the Law Society.

It is apparent from this chapter that a number of parties including the Law Society made submissions to the effect that active case management and cost management for defamation proceedings were required.

The London Solicitors Litigation Association echoed the Law Society view that many of the costs issues concerning defamation proceedings equally concerned other civil proceedings.

Lord Justice Jackson set up a CLAF working group. The group concluded that a CLAF for libel cases was not viable because of the low number of such cases, the likelihood of adverse selection in favour of CFAs, the difficulty of obtaining seed funding and the lack of any viable financial model.

The working group indicated that the present CFA regime helped many claimants gain access to justice but imposed heavy costs burdens upon defendants. Lord Justice Jackson appears to be attracted by a suggestion that there be an early resolution procedure to determine meaning in defamation claims and to give the parties an early opportunity to test any defence of fair comment.

In addition to the Law Society and the London Solicitors Litigation Association, the working group also indicated that good case management would reduce costs.

On damages, Lord Justice Jackson indicated that there was a loose relationship between defamation damages and personal injury damages.

Lord Justice Jackson indicates that claimants in defamation actions do not need to devote any part of their damages to future care and that their main remedy is vindication by way of either a judgment or a statement in court after a settlement. In the circumstances he says that he sees no reason why claimants should not be prepared to pay a substantial proportion of their damages to their lawyers as success fees. Lord Justice Jackson also indicates that claimants will be much more generously treated in England and Wales than they are in any other jurisdiction which he has researched.

In relation to ATE insurance premiums and adverse costs he states *“the present system for achieving costs protection for claimants is, in my view, the most bizarre and expensive system that it is possible to devise”*. He states *“In my view a regime of qualified one way cost shifting would be a better and less expensive means of achieving the intended social objective. I propose the same regime for defamation and breach of privacy cases as I have proposed for personal injury and judicial review cases, namely one that is modelled upon Section 11(1) of the Access to Justice Act 1999....”* (paragraph 3.9). For these purposes Lord Justice Jackson has indicated that the seriousness of the subject matter would be a matter that falls within the “circumstances” that the court is allowed to take into consideration in dealing with costs.

His fallback recommendation is the same as in relation to chapters 9 and 10, ie. that there should be fixed and staged success fees, staged ATE insurance premiums, etc.

Lord Justice Jackson recommends amending the defamation pre-action protocol to state that the claimant should, in a letter of claim, identify the meanings that he or she attributes to the words complained of (the current position being that the protocol says that it is desirable for the claimant to do so).

In relation to case management, Lord Justice Jackson says that case management is already carried out to a high standard and he makes no recommendations in this regard.

Finally, Lord Justice Jackson indicates that the evidence suggests that jury trials involve costs that are 20% to 30% higher than trials by judge alone. On the basis that costs are potentially a serious impediment to access the justice in the field of defamation, he considers that there is an argument for saying that all trials should be by judge alone. However at this stage he does not go as far as saying this.

The primary recommendations are:

1. Recoverability of success fees and ATE insurance premiums abolished.
2. General level of damages for defamation and breach of privacy increased by 10%.
3. Regime of qualified and one way cost shifting introduced.
4. Amendments to the defamation pre-action protocol to require the claimant to identify the meaning attributed to the words complained of.
5. The issue of whether to retain trial by jury in defamation cases to be reconsidered.

Chapter 33

Collective actions

Jackson's only comments on collective actions relate to the costs implications. He does not deal with the wider questions about "class actions" and the procedure to allow consumers access to justice through such actions. His analysis is concentrated on questions of funding and cost shifting.

It is difficult to analyse precisely what Jackson is saying about one-way cost shifting on group litigation other than group personal injury claims. In those he is suggesting one-way cost shifting but in all other cases two-way cost shifting. He then goes on to suggest, however, that the court could direct a different costs regime in relation to collective actions upon application to the court. In practice that is a difficult course because it will be difficult to advise clients as to their likely liabilities in preparation of the case and prior to any direction from the court.

He does suggest, however, that in group litigation the individual litigant should only be liable for a proportion of the common costs and that the general rule in CPR Rule 48.6A should be extended to that effect.

Jackson examined some of the funding possibilities for collective actions and relies on some of his recommendations elsewhere in the report. If his changes to the conditional fee regime apply then the success fee will no longer be recoverable. He promotes the place of third party funding for collective personal injury claims and generally for collective actions.

He repeats his recommendation for contingency fees which may have a place in collective actions. He also talks about a supplementary legal aid scheme similar to a scheme in Ontario and suggests that he sees no reason why such a scheme would not work.

He finally turns to the distribution of damages. In collective actions where you have an opt-out rule there is often left in the pot substantial damages. The US courts are often addressed on the subject and make directions as to the distribution of those sums that are left over in the pot. The beneficiaries tend to be charities (sometimes

proffered by the claimant's lawyers). Lord Jackson suggests that the Access to Justice Foundation would be a worthy recipient of such funds in order to help pro bono representation.

Chapter 34

Appeals

LJJ confirms the view that he expressed in his preliminary report that the control of costs on appeal to the Court of Appeal must be addressed after decisions have been made regarding the control of costs in courts of first instance. He also concludes that the issue would be much easier to debate when the new Court of Appeal practice direction has been published. He goes on to offer preliminary observations on the issues and makes one interim recommendation.

His concern is with the transfer from a no costs regime to a costs shifting regime when matters (e.g. employment tribunal proceedings and small claims) are appealed to the Court of Appeal. He considers that appellate courts should have a discretionary power in those cases to make an order that each side should bear its own costs or that costs should be capped.

He does not consider that there should be a case management officer appointed to manage cases which go to the Court of Appeal as this would add to the cost of litigation. With regard to appeals in the Patents County Court, his view is that if the reforms he has proposed in Chapter 24 are implemented first instance costs will be capped at £50,000 (patent infringement and validity matters) and £25,000. He therefore considers there ought to be commensurate caps regarding costs of appeals from the Patents County Court.

His current view is that any litigation which is subject to one way costs shifting at first instance should also be subject to one way costs shifting on appeal for the following reasons:-

- (i) If a category of litigation at first instance merits one way costs shifting for policy reasons then those same policy considerations should apply on appeal.
- (ii) Most appeals are subject to a permission application, so that frivolous appeals are rarer than frivolous actions.
- (iii) If a party not at risk of adverse costs is successful below it is harsh to expose that party to the risk of adverse costs on an appeal brought by his opponent.

He considers that a "suitors" fund (as operates in New South Wales) should be considered if and when a full review of the Court of Appeal procedures and costs rules is undertaken. This could, for example, provide for litigants who succeeded in a no costs shifting regime and then lose in the Court of Appeal. He also believes that

the costs management proposals he makes in respect of first instance proceedings should also be introduced in the Court of Appeal but that that should be a matter to be looked in the context of a general review of that court's procedures.

He makes the following recommendations:

- (i) There should be a separate review of the procedures and costs rules for appeals, after decisions have been reached in relation to the recommendations in the report concerning first instance litigation.
- (ii) Pending that review, appellate courts should have a discretionary power, upon granting permission to appeal or receiving an appeal from a no costs jurisdiction, to order (a) that each side should bear its own costs of the appeal or (b) that the recoverable costs should be capped at a specified sum.

Chapter 35

Pre-action protocols

He reviews the various opinions throughout Phase 1 and Phase 2 of his review and deals with specific pre-action protocols, including the recent Pre-Action Conduct Protocol. With the exception of the general pre-action protocol it appears that most court users as them as a benefit but that this is at a cost.

He makes the following recommendations:-

- (i) The Pre-Action Protocol for Construction and Engineering Disputes should be amended, so that (a) it is less prescriptive and (b) the costs (or at least the recoverable costs) of complying with that protocol are reduced. The need for that protocol should be reviewed by TCC judges, practitioners and court users after 2011.
- (ii) The general protocol, contained in Sections III and IV of the PDPAC, should be repealed.
- (iii) Annex B to the PDPAC should be incorporated into a new specific protocol for debt claims.

Recommendations into other pre-action protocols and in securing compliance with them are dealt with in other chapters of the report.

Chapter 36

ADR

In his assessment of views expressed to him throughout Phases 1 and 2 he is of the opinion that the benefits of ADR are not fully appreciated but accepts the following propositions:-

- (i) Both mediation and joint settlement meetings are highly efficacious means of achieving a satisfactory resolution of many disputes, including personal injury claims.
- (ii) The benefits of mediation are not appreciated by many smaller businesses. Nor are they appreciated by the general public.
- (iii) There is a widespread belief that mediation is not suitable for personal injury cases. This belief is incorrect. Mediation is capable of arriving at a reasonable outcome in many personal injury cases, and bringing satisfaction to the parties in the process. However, it is essential that such mediations are carried out by mediators with specialist experience of personal injuries litigation.
- (iv) Although many judges, solicitors and Counsel are well aware of the benefits of mediation, some are not.

He does not consider that mediation is a universal panacea as the process can be expensive and can on occasions result in failure. He believes there is a need for a cultural change and not a rule change and that there is a need for an authoritative handbook, training of judges and lawyers and public education.

Recommendations:-

He does not recommend any rule changes in order to promote ADR. He does however accept that ADR brings considerable benefits in many cases and that this facility is currently underused especially in personal injury and clinical negligence cases.

He recommends that:-

- (i) There should be a serious campaign (a) to ensure that all litigation lawyers and judges are properly informed about the benefits which ADR can bring and (b) to alert the public and small businesses to the benefits of ADR.

- (ii) An authoritative handbook should be prepared, explaining clearly and concisely what ADR is and having details of all reputable providers of mediation. This should be the standard handbook for use at all JSB seminars and CPD training sessions concerning mediation.

Chapter 37

Disclosure

Lord Justice Jackson indicates that e-disclosure is inevitable in cases where the parties hold the relevant material electronically.

A working party on e-disclosure chaired by Senior Master Whitaker has submitted a draft practice direction to the Civil Procedure Rules Committee, which is currently considering the draft. It is anticipated that the practice direction will be brought into effect in April 2010. It proposes that:

1. Parties and their advisors should consider the use of technology at an early stage to identify potentially relevant material and to collect, analyse and review it. It is also thought that this will assist in creating a list of documents.
2. The practice direction encloses an “Electronically Stored Information” (“ESI”) questionnaire which must be completed except for small claims or fast track cases. The questionnaire requires parties to provide information about documents held in an electronic form.
3. Once the questionnaires have been exchanged prior to the first CMC the parties must discuss disclosure of ESI.
4. The extent of a reasonable search will depend on the circumstances of the case.
5. Where parties are disclosing ESI, the list of documents may be agreed between the parties to be in an electronic file in a defined and agreed format.

Lord Justice Jackson considers the substance of the practice direction to be excellent and to make appropriate provision for e-disclosure.

Lord Justice Jackson recommends that e-disclosure as a topic forms a substantial part of the continuing professional development for solicitors.

In relation to standard disclosure, Lord Justice Jackson concludes that if the parties comply strictly with the rules there are often two consequences:

- (i) that the parties disclose fewer documents;
- (ii) that they incur higher costs in doing so than they would under the old rule.

This is because lawyers now need to review all documents that are collated as part of the “reasonable search” to consider whether they are disclosable.

Lord Justice Jackson considers the possibility of introducing “disclosure assessors”. He notes that the Law Society takes an intermediate view on this issue. The Law Society felt that it would increase costs considerably although it might ultimately save costs for those matters that proceed to trial. The Law Society recommended that a pilot might be useful before a view was taken.

In relation to large commercial cases, the general view was that a “menu option” was the best way forward. A draft rule has been prepared but will need to be revised to take into account the e-disclosure practice direction.

The current draft Rule 31.5(A) applies to substantial cases and he sets out a definition of a substantial case, being one in which the case is before the Commercial Court or Admiralty court, has a value in excess of £1m (in terms of total sums or assets in issue) is agreed by the parties to be a substantial case or because of the nature and extent of disclosure is likely to be marked as a substantial case by the court. In such cases the parties can agree proposals for the scope of disclosure for the court to approve. Before the first CMC, the solicitor with conduct of giving disclosure should identify the broad categories of documents which exist, where they might be located, the costs involved in giving standard disclosure and whether any specific directions are sought.

Also before the first CMC, the parties are to discuss and seek to agree a proposal in relation to disclosure that meets the overriding objective.

At the first CMC (and any subsequent CMC), the court is to decide whether to:

- (a) dispense with disclosure;
- (b) order a party to disclose the documents on which it relies and request any specific disclosure required from any other party;
- (c) order that disclosure be given on an issue by issue basis;
- (d) order standard disclosure;

- (e) order a party to disclose any documents which it is reasonable to suppose may contain information which (i) may enable the party applying for disclosure to advance his own case or damage that of the party giving disclosure or (ii) lead to a trail of enquiry which has either of these consequences;
- (f) make any other order in relation to disclosure that the court considers appropriate having regard to the overriding objective.

The court is also able to give directions as to what searches are to be undertaken, whether lists are required, how and when the disclosure statement is to be given, what format documents are to be disclosed in, what is required in relation to documents that once existed but no longer exist and whether disclosure should take place in stages.

The court is to consider what disclosure would be proportionate in the circumstances of the case.

Lord Justice Jackson indicates that the “menu option” cannot be finalised until the e-disclosure practice direction has reached its final form.

Lord Justice Jackson concludes that full “Peruvian Guano” disclosure must be included as an option as this level of disclosure is sometimes appropriate in fraud cases.

Lord Justice Jackson considers that the “menu option” should not be confined to large commercial cases but should be extended to any case where the cost of standard disclosure are likely to be disproportionate. He recommends that personal injury and clinical negligence claims be excluded from the new rule as disclosure does not give rise to such serious and frequent problems in those categories of case as to warrant displacing standard disclosure.

Lord Justice Jackson is of the view that there is a “swathe of litigation” where standard disclosure is not the appropriate starting point and that the court should select the order which is most appropriate to the instant case. He feels that this would encourage more rigorous case management in relation to disclosure.

He does not recommend any formal rule change to provide for disclosure assessors but notes that it would be possible for the parties to agree to the appointment of a disclosure assessor.

There was discussion about changing the rules on costs in relation to disclosure. Lord Justice Jackson indicates that the court’s case management powers under CPR Part 3 are wide enough to embrace orders that parties seeking disclosure pay the other side’s costs of giving disclosure or that costs should be treated as costs in the case.

Lord Justice Jackson also indicates that he favours the allocation of all complex cases to specific judges.

He recommends

(i) E-disclosure as a topic should form a substantial part of (a) CPD for solicitors and barristers who will have to deal with e-disclosure in practice and (b) the training of judges who will have to deal with e-disclosure on the bench.

(ii) A new CPR rule 31.5A should be drafted to adopt the menu option in relation to (a) large commercial and similar claims and (b) any case where the costs of standard disclosure are likely to be disproportionate. Personal injury claims and clinical negligence claims should be excluded from the provisions of rule 31.5A.

Chapter 38

Witness statements and expert evidence

In this chapter LJ Jackson examines the extent to which witness statements and experts' reports have become either too lengthy and/or irrelevant.

Witness statements

In relation to summary witness statements he makes a comparison with the German procedure ("Relationsmethode"). This requires each party to identify the witnesses upon whom they intend to rely to prove the factual matters contained within the pleading. He suggests that such a procedure should be adopted in this country. (Allocation questionnaires should contain some of this information).

He proposes that there should be cost sanctions applied against the party responsible for adducing unnecessary, lengthy or irrelevant statements. He considers that the use of computer technology may assist in limiting the number of exhibits to statements. He recognises that "exhaustive" witness statements are thought to be required because of a party's concern that the evidence from a witness will not be allowed to be amplified at trial. He acknowledges that the Courts already have a discretion to allow supplementary evidence in chief, although how this is operated in practice varies considerably. He makes the recommendation that Judges should be more willing to allow a modest amount of supplementary oral evidence.

However, he makes no specific recommendations in relation to witness statements and considers that there should be more effective use of the existing Court powers to manage the length of statements and the cost at detailed Case Management Conferences (CMC's).

Expert evidence

There is concern expressed by the length of experts' reports and when experts should be instructed. There is also a concern expressed about when it would be appropriate to use single joint experts. There is a wide range of views expressed. The Counsel of Her Majesty's Circuit Judges commented as follows:

"Either they are necessary or they are not. If they are, then they have to be paid their market price, which in the case of eminent people, may be considerable. As has now been recognised, it is not fair to the parties to try to force them to (appoint) a single expert in many situations, and this tendency in fast track cases can in effect lead to trial by expert, not by Judge..."

Overall however, Lord Justice Jackson comments that there is now a wealth of guides in the use of expert evidence, particularly as CPR Part 35 has recently been amended; it is supplemented by a Practice Direction and there is a protocol for the instruction of experts to give evidence in civil claims. He comments *"It is doubtful whether either Lawyers or Litigants or experts will welcome yet another raft of rules about expert evidence emerging from this review"*

He comments that expert evidence can be controlled by appropriate and effective case management; he recommends that 'one size does not fit all'; he recommends that Annexe C to the Practice Direction – Pre-Action Conduct should be repealed; the Court should be more willing to use cost sanctions; he proposes a pilot for the use of concurrent evidence; he recommends that any party seeking to adduce expert evidence should furnish an estimate of the cost of that evidence to the Court.

He recommends:

(i) CPR Part 35 or its accompanying practice direction should be amended in order to require that a party seeking permission to adduce expert evidence do furnish an estimate of the costs of that evidence to the court.

(ii) The procedure developed in Australia, known as "concurrent evidence" should be piloted in cases where all parties consent. If the results of the pilot are positive, consideration should be given to amending CPR Part 35 to provide for use of that procedure in appropriate cases.

Chapter 39

Case management

In his chapter he concentrates principally upon multi track cases proceeding in the county courts, district registries and QBD in London. Whilst some comments in the chapter are equally applicable to fast track cases as well he does accept that cases with greatest need for “hands on” case management are in the multi track.

As previously, he summarises the views expressed to him during meeting seminars and written submissions in Phase 2 during which views were generally expressed that there should be more pro-active case management by the judiciaries and that judges should be more specialist in matters that they deal with. In that respect he recommends:-

- (i) All High Court judges, circuit judges and district judges should complete questionnaires indicating their areas of existing expertise and their areas of interest. The information contained in such questionnaires should be digested in a convenient form and made available to listing officers and the relevant court centres.
- (ii) So far as possible at every court centre each multi-track case should be assigned for case management purposes (a) to a district judge who specialises in that type of case and (b) to the same district judge throughout the life of the case.
- (iii) So far as possible, each multi-track case which requires a hearing before a circuit judge should be assigned (a) to a circuit judge who specialises in that type of case and (b) to the same circuit judge throughout the life of the case.
- (iv) So far as possible, complex cases requiring trial by QB judges should be allocated to judges in accordance with their specialist skill and experience.

With regard to case management hearings and directions LJJ identifies two matters which have tended to generate unnecessary costs. The first, that individual district judges have their own preferred standard directions which, although they are often of a similar effect, they vary from judge to judge and from one court to another. Secondly, CMCs are not used as occasions when the court gets to grips with the case and narrows the issues but rather as ritualistic occasions when the district judge issues standard directions in his or her standard. Even when conducted by telephone such hearings are expensive and the costs wasted and nothing substantial is achieved. He therefore recommends:-

- (i) A menu of standard paragraphs for case management directions for each type of multi-track case of common occurrence should be prepared and made available to all district judges both in hard copy and online in amendable form.
- (ii) A CMC should only be convened at the outset of a multi-track case if some useful purpose is likely to be achieved (for example, defining the scope of factual or expert evidence) otherwise the initial case management direction should be dealt with on paper.
- (iii) Subsequent CMCs should be held if they are needed to progress the case justly and expeditiously or to save costs.
- (iv) The PTR should, so far as practicable, be conducted by the trial judge. The PTR should be dispensed with if it is agreed that it would serve no useful purpose, in which case any pre-trial directions should be given on paper.
- (v) In multi-track cases the entire timetable for the action, including trial date or trial window, should be drawn up at as early a stage as is practicable. If possible, the trial date or trial window should be included in the initial case management directions and CPR rule 29.8 should be amended accordingly.
- (vi) Every interim hearing which is held should be an occasion for effective case management. Before every interim hearing the judge should be given, and should make use of, sufficient time for pre-reading.

LJJ confirms that he is satisfied that based upon evidence during Phase 2 that there are serious problems with non-compliance with pre-action protocols and that these problems arise in many areas of litigation.

He recommends that CPR Rule 25.1 should be amended so as to permit any party to apply to the court if another party fails to comply with a pre-action protocol which causes serious prejudice to the applicant and that the remedies which should be available should be any of the following:-

- (i) The parties are relieved from the obligation to comply or further comply with the protocol.
- (ii) That a party takes any step which might be required in order to comply with the protocol.
- (iii) The party in default pays such costs as may be summarily assessed by the court as compensation for losses caused by that default.

- (iv) The party in default forego such costs as may be specified in the event that it subsequently secures a favourable costs order.
- (v) In the fast track, the fixed costs regime ceases to apply to that case.

He further recommends that sub-paragraphs (a) to (i) of CPR 3.9 be repealed and replaced by:

- (a) the requirement that litigation should be conducted efficiently and at proportionate cost and
- (b) the interests of justice in the particular case.

He considers that compliance with directions is preferable to punishment for non-compliance and therefore recommends that, if time allows, judges or clerks should contact parties at appropriate stages in order to enquire what progress has been made in complying with orders and directions.

He recommends that the Master of the Rolls should designate two Lords Justices in the Court of Appeal which could be called upon to consider issues concerning the interpretation or application of the CPR in order to ensure consistency of guidance of their interpretation. He also believes that consideration should be given to the possibility of the Court of Appeal sitting with an experienced district judge as assessor when case management issues arise.

He makes the following formal recommendations:-

- (i) Measures should be taken to promote the assignment of cases to designated judges with relevant expertise.
- (ii) A menu of standard paragraphs for case management directions for each type of case of common occurrence should be prepared and made available to all district judges both in hard copy and online in amendable form.
- (iii) CMCs and PTRs should either (a) be used as occasions for effective case management or (b) be dispensed with and replaced by directions on paper. Where such interim hearings are held, the judge should have proper time for pre-reading.
- (iv) In multi-track cases the entire timetable for the action, including trial date or trial window, should be drawn up at as early a stage as is practicable.

- (v) Pre-action applications should be permitted in respect of breaches of pre-action protocols.
- (vi) The courts should be less tolerant than hitherto of unjustified delays and breaches of orders. This change of emphasis should be signalled by amendment of CPR Rule 3.9. If and in so far as it is possible, courts should monitor the progress of the parties in order to secure compliance with orders and pre-empt the need for sanctions.
- (vii) The Master of the Rolls should designate two Lords Justices, at least one of whom will so far as possible be a member of any constitution of the Civil Division of the Court of Appeal, which is called upon to consider issues concerning the interpretation or application of the CPR.
- (viii) Consideration should be given to the possibility of the Court of Appeal sitting with an experienced district judge as assessor when case management issues arise.

Chapter 40

Costs management

LJJ views the essential elements of costs management as follows:-

- (i) The parties prepare and exchange litigation budgets
- (ii) The court states the extent to which those budgets are approved.
- (iii) The court manages the case so far as possible so that it proceeds within the approved budgets.
- (iv) At the end of the litigation, the recoverable costs of the winning party are assessed in accordance with the approved budget.

A costs management pilot exercise was set up in the Birmingham Mercantile Court in June 2009 and will conclude on 31 May 2010. The intention of this pilot is to consider how to resolve a number of issues before any costs management rules can be drawn up. The issues include, for example, the procedure for approval of budgets to be adopted, the extent to which the master approved budget should be binding, whether or not the budget acts as an upper limit or as a form of assessment in advance and what form of training should be given to lawyers and judges.

A defamation costs management pilot commenced on 1 October 2009 in London and Manchester for 12 months. Unlike the Birmingham pilot, the defamation costs pilot is mandatory.

LJJ reviews discussions at meetings and seminars, reports of a Costs Management Working Group and the written submissions he received during Phase 2. He reports that the majority of submissions received by him were supportive of costs management “albeit with greater or lesser degrees of enthusiasm”.

LJJ accepts that costs management is an exercise which generates additional costs and which makes additional demands upon the limited resources of the court. However, he concludes there are two powerful factors in support. First, he believes that case management and costs management go hand in hand and secondly he fully agrees with the Law Society’s view that costs management, if done properly, will save substantially more costs than it generates.

He does have concerns regarding the number of solicitors, barristers and members of the judiciary who would currently possess the skills required to carry out costs management. He does not, however, consider that should be a bar. His view is that judges, barristers and solicitors need to be trained in the assessment of costs plus costs budgeting and costs management and that such training include practical exercises. He recommends that costs budgeting and management should be included in CPD training for litigation solicitors and in the training offered by the JSB to the judiciary.

He believes that the way forward should be first to introduce an effective training programme whilst rules are being drafted and that the procedures should be adopted initially at the discretion of the judiciary as it would be wrong to make costs management a compulsory procedure in the early stages. Whether or not the procedure should be made mandatory should be considered at a later stage.

He makes the following recommendations:

- (i) The linked disciplines of costs budgeting and costs management should be included in CPD training for those solicitors and barristers who undertake civil litigation.
- (ii) Costs budgeting and costs management should be included in the training offered by the JSB to judges who sit in the civil courts.
- (iii) Rules should set out a standard costs management procedure, which judges would have a discretion to adopt if and when they see fit, either of their own motion or upon application by one of the parties.
- (iv) Primary legislation should enable the Rule Committee to make rules for pre-issue costs management.

(His recommendations in respect of piloting pre-issue costs management are set out in Chapter 23 of the report).

Chapter 41

Part 36 offers

LLJ reports that Part 36 has generally been regarded as a success even by those who are otherwise critical of the Woolf reforms. There are however three issues he deals with which are:-

- (i) the interpretation of “advantageous” in rule 36.14(1)
- (ii) the rewards for a claimant whose offer is not beaten
- (iii) how Part 36 should operate in those areas where one way costs shifting is introduced.

CPR Rule 36.14(1) uses the term “advantageous” when considering when a claimant beats the defendant’s offer. This was interpreted by the Court of Appeal in *Carver v BAA plc* [2008]. In that case a claimant was given judgement for £51 more than the defendant’s Part 36 offer but the Court of Appeal considered that such amount did not fall within the judgment of being “more advantageous” than the defendant’s original Part 36 offer.

He concludes with his views, which he provisionally expressed in the preliminary report, is that Carver introduces an unwelcome degree of uncertainty into the Part 36 regime and tends to depress the level of settlements and considers that the decision should be reversed.

He concludes that “adequate offer” should mean one which is at least as good (from the point of view of rejecting party) as the result which the rejecting party achieves at trial. His view is that the claimant’s reward for making an adequate offer should be increased and that there should be an uplift of 10% on damages awarded. However, this may have to be scaled down in higher value claims (say over £500,000). Where non-monetary relief is claimed he proposes that the judiciary should make a broad assessment of the value of the relief on the basis of evidence received at trial and then add the up lift of 10% to that figure where the claimant has made an adequate offer which has been rejected.

In cases where there is qualified one way costs shifting, if a claimant fails to accept a defendant’s adequate offer, then the claimant will forfeit or substantially forfeit the benefits of one way costs shifting.

His recommendations are:

- (i) The effect of *Carver v BAA plc* [2008] EWCA Civ 412; should be reversed.
- (ii) Where a defendant rejects a claimant's offer, but fails to do better at trial, the claimant's recovery should be enhanced by 10%.

Chapter 42

Courts administration

In this chapter LJJ refers to the issues which were brought to his attention during Phase 2 of the review regarding the effect of courts administration on the conduct and costs of civil litigation. He also refers to the concern about the current level of court fees. He considers that the costs of civil litigation are affected by the efficiency of the administration of the courts themselves.

He sets out measures which he considers will improve efficiency in the court, for example increased use of technology, docketing and increased delegation to proper officers.

He considers that in any package of reforms to promote access to justice at proportionate cost, issues regarding court administration cannot be ignored and that structural changes must be made focusing upon improving standards of service delivered to court users and not upon saving costs.

He makes the following recommendations:

- (i) Most county court cases should be issued at regional centres where the staff will be skilled in processing routine proceedings. However, a facility to issue proceedings at all county courts must be retained.
- (ii) Only if cases are defended should they be transferred to or retained in county courts, where the staff should be specifically trained for, and focused upon the administration of contested cases.

- (iii) The Association of District Judges and HMCS should together draw up a scheme for the increased delegation of routine box work from district judges to proper officers within the court service.

Chapter 43

Information technology

Summary

Jackson sees IT as key in future development of the court systems, but he attempts to ensure time is not wasted in introducing IT.

Jackson recommends that the current system that has proved to work e.g. e-working in the TCC should be extended to other high courts in London and later to all county and district courts in and outside of London. Thought is also given to the future developments which is to be reviewed by a single suitable body. Jackson also comments on the need to implement changes in the current attitude and education of the judiciary and solicitors regarding IT, in order to be prepared once the new system is in place.

His conclusions are:-

- A suitable body should be appointed to exercise strategic oversight over all IT systems which are installed in the civil courts.
- Judges and practitioners should be included in future development teams for individual court IT projects.
- E-working should be extended to the rest of the High Court in London, in particular the Queen's Bench Division and also to the SCCO.
- Once e-working has been introduced across the High Court in London, it should be rolled out (suitably adapted) across all county courts and district registries in England and Wales.
- Consideration should be given to establishing an IT network for the courts which is separate from, and therefore not constrained by the security requirements of, the GSI system. This network should have its own appropriate level of security.
- Judges and court staff should receive proper training in relation to court IT systems. Likewise legal practitioners and their staff should be properly trained in relation to court IT systems and should be willing to adapt their procedures.

Chapter 44

Summary assessment

In his preliminary report LJJ proposed three possible options for assessment of costs:-

- (i) Make no change to the present rules governing summary assessment.
- (ii) Abolish the summary assessment procedure and instead encourage judges to order interim payments on account of costs, alternatively provisional assessments.
- (iii) Restructure the summary assessment procedure.

He considers that summary assessment is a valuable tool which has made a substantial contribution to civil procedure whilst deterring frivolous applications and reducing the need for detailed assessments. He considers that the summary assessment procedure should be retained but that improvements should be made in order to deal with criticisms expressed to him during Phases 1 and 2 of the review. Earlier in the report (Chapter 40) he recommends that all judges should receive effective training in relation to costs and that an incidental benefit of that training should be an increase in the skills of judges carrying out summary assessments. If his recommendations for fixing costs in the fast track are accepted, then costs will be agreed between the parties in most cases. Where the amount is not agreed summary assessment of costs would then be relatively straightforward and would be undertaken at the end of the trial. He considers that cases would be few and far between where they would need to proceed to a detailed assessment in fast track matters.

He is satisfied that in the county court summary assessment of costs at the conclusion of interim applications are satisfactory. However, in the Court of Appeal, High Court and specialist courts, some members of the judiciary do not, apparently, feel comfortable with summary assessment. Guideline hourly rates for the purposes of summary assessment should be set by the Costs Council (see Chapter 6) as the level of those rates is a critical element in the civil justice system. He considers that robust decisions will be required with regard to GHR which will include:-

- (i) He challenges whether there is any justification for paying city rates to firms of solicitors which choose to set up in the city of London but are not doing city work. Defamation, clinical negligence and similar work should not be remunerated at rates above London 2.
- (ii) What reductions should there be in hourly rates for personal injury work if referral fees are banned or capped as recommended within the report (Chapter 20) He considers that the present level of referral fees has grossly distorted the costs of personal injuries litigation.

- (iii) If defendant hourly rates are taken as representing reasonable rates set by the market in certain areas of civil litigation, what factors justify higher rates for claimant solicitors and what allowance should be made for those factors?

He indicates that one of the first tasks of the Costs Council will be to formulate the principles upon which GHR are set and he suggests that the aim should be to reflect market rates for the level of work being undertaken and that those rates would be those which an intelligent purchaser who was trying to shop around for the best deal would negotiate. GHRs are guidelines or starting points only and the judge undertaking summary assessment should up or down from those rates as appropriate.

Recommendations:

(i) If any judge at the end of a hearing within costs PD paragraph 13.2 considers that he or she lacks the time or the expertise to assess costs summarily (either at that hearing or on paper afterwards), then the judge should order a substantial payment on account of costs and direct detailed assessment.

(ii) A revised and more informative version of Form N260 should be prepared for use in connection with summary assessments at the end of trials or appeals.

In his preliminary report LJJ proposed three possible options for assessment of costs:-

- (i) Make no change to the present rules governing summary assessment.
- (ii) Abolish the summary assessment procedure and instead encourage judges to order interim payments on account of costs, alternatively provisional assessments.
- (iii) Restructure the summary assessment procedure.

Chapter 45

Detailed assessment

LJJ summarises comments of those attending a Costs Assessment Seminar hosted by the Senior Court Costs Office, a Working Group report and written submissions.

If LJJ's recommendations for fixing all costs in the fast track are accepted he concludes that the need for detailed assessments will largely be eliminated, although not totally. Where parties are unable to agree disbursements incurred during fast track cases, he is of the view that there should be a procedure whereby disputed items can be referred to the court with submissions in writing for consideration by a costs judge/district judge on paper with the right to appeal (with oral argument) if merited.

In multi-track cases he considers that there are three requirements to be satisfied:-

- (i) The bill must provide more transparent explanation than is currently provided about what work was done in the various time periods and why.
- (ii) The bill must provide a user-friendly synopsis of the work done, how long it took and why.
- (iii) The bill must be inexpensive to prepare..

In his view, in order to meet those requirements, technology provides the solution and he recommends that work should be put in hand to develop existing software systems so that they can capture relevant information as work proceeds, an automatically generated bills of costs at whatever level of generality may be required.

In the long term he expresses the view that consideration should also be given to developing a single software system which can generate both costs budgets and bills of costs with the ultimate aim to harmonise the procedures and systems which will be used for costs budgeting, costs management, summary assessment and detailed assessment.

As new software and a new format for bills will take some time to develop he then focuses on reforms to detailed assessment procedures which should be made in the near future. These include interim payments to be made whenever the court makes an order for costs to be assessed and shorter and more focused points of dispute and reply. He also proposes compulsory offers to be made and that the Part 36 procedure should apply to these. He is of the view that guideline hourly rates should apply to both summary and detailed assessments.

His recommendations are:

- (i) A new format of bills of costs should be devised which will be more informative and capable of yielding information at different levels of generality.
- (ii) Software should be developed which will (a) be used for time recording and capturing relevant information and (b) automatically generate schedules for summary assessment or bills for detailed assessment as and when required. The long term aim must be to harmonise the procedures and systems which will be used for costs budgeting, costs management, summary assessment and detailed assessment.
- (iii) A package of measures to improve detailed assessment proceedings should be adopted (as set out in section 5 of the chapter).

- (iv) The proposals for provisional assessment should be piloted for one year at a civil justice centre outside London in respect of bills up to £25,000.

Recommendations

Chapter 3: proportionate costs

1 “Proportionate costs” should be defined in the CPR by reference to sums in issue, value of non-monetary relief, complexity of litigation, conduct and any wider factors, such as reputation or public importance; and the test of proportionality should be applied on a global basis.

Chapter 4: the causes of disproportionate costs and how they should be tackled whilst promoting access to justice

2 When striking the balance between the need for predictability and the need for simplicity, the Rule Committee, the MoJ drafting team and the authors of practice directions, protocols and court guides should accord higher priority in future to the goal of simplicity.

3 There should be no further increases in civil court fees, save for increases which are in line with the Retail Price Index rate of inflation. All receipts from civil court fees should be ploughed back into the civil justice system.

Chapter 5: indemnity principle

4 The common law indemnity principle should be abrogated.

Chapter 6: costs council

5 The ACCC should be disbanded and a Costs Council should be established.

Chapter 8: before-the-event insurance

6 Positive efforts should be made to encourage the take up of BTE insurance by SMEs in respect of business disputes and by householders as an add-on to household insurance policies.

Chapter 9: after-the-event insurance

7 Section 29 of the Access to Justice Act 1999 and all rules made pursuant to that provision should be repealed.

8 Those categories of litigants who merit protection against adverse costs liability on policy grounds should be given the benefit of qualified one way costs shifting.

Chapter 10: conditional fee agreements

9 Section 58A(6) of the Courts and Legal Services Act 1990 and all rules made pursuant to that provision should be repealed.

10 The level of general damages for personal injuries, nuisance and all other civil wrongs to individuals should be increased by 10%.

Chapter 11: third party funding

11 A satisfactory voluntary code, to which all litigation funders subscribe, should be drawn up. This code should contain effective capital adequacy requirements and should place appropriate restrictions upon funders' ability to withdraw support for ongoing litigation.

12 The question whether there should be statutory regulation of third party funders by the FSA ought to be re-visited if and when the third party funding market expands.

13 Third party funders should potentially be liable for the full amount of adverse costs, subject to the discretion of the judge.

Chapter 12: contingency fees

14 Both solicitors and counsel should be permitted to enter into contingency fee agreements with their clients. However, costs should be recoverable against opposing parties on the conventional basis and not by reference to the contingency fee.

15 Contingency fee agreements should be properly regulated and they should not be valid unless the client has received independent advice.

Chapter 13: CLAF or SLAS

16 Financial modelling should be undertaken to ascertain the viability of one or more CLAFs or a SLAS, after and subject to, any decisions announced by Government in respect of the other recommendations of this report.

Chapter 14: litigants in person

17 The prescribed rate of £9.25 per hour recoverable by litigants in person should be increased to £20 per hour. The prescribed rate should be subject to periodic review.

Chapter 15: fixed costs in the fast track

18 The recoverable costs of cases in the fast track should be fixed, as detailed in chapter 15.

Chapter 19: one way costs shifting

19 A regime of qualified one way costs shifting, as detailed in chapter 19, should be introduced for personal injury cases.

Chapter 20: referral fees

20 The payment of referral fees for personal injury claims should be banned.

Chapter 21: assessment of general damages for pain, suffering and loss of amenity

21 A working group should be set up to establish a uniform calibration for all software systems used in assessment of damages for pain, suffering and loss of amenity, consequential upon personal injury, up to £10,000. That calibration should accord as nearly as possible with the awards of general damages that would be made by the courts.

Chapter 22: personal injuries litigation: process and procedure

22 The new process being developed by the MoJ for low value RTA claims should be monitored to ensure that the costs savings achieved are not negated by satellite litigation and avoidance behaviour.

23 There should be discussions between claimant and defendant representatives, under the aegis of the CJC, in order to develop a streamlined process for all fast track personal injury cases which fall outside the MoJ's new process.

24 The effect of MROs upon the costs of personal injuries litigation should be kept under close scrutiny.

25 Direct communication should always be permitted between a solicitor and any medical expert whom an MRO instructs on behalf of that solicitor.

Chapter 23: clinical negligence

26 There should be financial penalties for any health authority which, without good reason, fails to provide copies of medical records requested in accordance with the Pre-Action Protocol for the Resolution of Clinical Disputes.

27 The time for the defendant to respond to a letter of claim should be increased from three months to four months. Any letter of claim sent to an NHS Trust or ISTC should be copied to the NHSLA.

28 In respect of any claim (other than a frivolous claim) where the NHSLA is proposing to deny liability, the NHSLA should obtain independent expert evidence on liability and causation during the four month period allowed for the response letter.

29 The NHSLA, the MDU, the MPS and similar bodies should each nominate an experienced and senior officer to whom claimant solicitors should, after the event, report egregious cases of defendant lawyers failing to address the issues.

30 The protocol should provide a limited period for settlement negotiations where the defendant offers to settle without formal admission of liability.

31 Case management directions for clinical negligence cases should be harmonised across England and Wales.

32 Costs management for clinical negligence cases should be piloted.

33 Regulations should be drawn up in order to implement the NHS Redress Act 2006.

Chapter 24: IP litigation

34 Consideration should be given by the Patents Court judges and the IPCUC to the question whether the Patents Court and Patents County Court Guide should be amended to include any of the proposals set out in paragraph 2.5 of chapter 24.

35 The proposals in the IPCUC Working Group's final report for reforming the PCC should be implemented.

36 After reformation of the PCC, the Guide should be amended to give clear guidance on the requirements for statements of case, illustrated by model pleadings annexed to the Guide.

37 There should be a small claims track in the PCC for IP claims with a monetary value of less than £5,000 and a fast track for IP claims with a monetary value of between £5,000 and £25,000.

38 One or more district judges, deputy district judges or recorders with specialist patent experience should be available to sit in the PCC, in order to deal with small claims and fast track cases.

39 There should be consultation with court users, practitioners and judges, in order to ascertain whether there is support either for (a) an IP pre-action protocol or (b) the Guide to give guidance regarding pre-action conduct.

Chapter 25: small business disputes

40 A High Court judge should be appointed as judge in charge of the Mercantile Courts.

41 A single court guide should be drawn up for all Mercantile Courts.

42 Consideration should be given to devising a special streamlined procedure for business disputes of lower value.

43 HMCS should prepare a guide in respect of “small business disputes” for the assistance of business people who wish to deal with such disputes themselves without the assistance of lawyers, either by mediation or on the small claims track.

Chapter 26: housing

44 The Government should reconsider undertaking a simplification of substantive housing law, as proposed by the Law Commission in 2003, 2006 and 2008.

45 Where a landlord could use PCOL to issue possession proceedings but chooses to issue manually, he should only be able to recover an amount equal to the PCOL issue fee.

46 The Pre-Action Protocol for Possession Claims based on Rent Arrears should be amended in order to set out what steps should be taken by landlords, so as to comply with their obligations under ECHR article 8.

47 Paragraph 24.2 of the Part 52 practice direction should be amended in order to set out what categories of documents should be lodged by the respondent in homelessness appeals and when these should be lodged.

48 Consultation should be carried out on the proposal that where a housing claim is settled in favour of a legally aided party, that party should have the right to ask the court to determine which party should pay the costs of the proceedings.

Chapter 27: large commercial claims

49 After 18 months, the question whether section D6 of the Admiralty & Commercial Courts Guide ought to be repealed or amended should be reconsidered in the light of experience.

50 Sections D4 and D8 of the Admiralty & Commercial Courts Guide should be amended to permit more frequent allocation of appropriate cases to designated judges.

Chapter 28: chancery litigation

51 CPR Part 8 should be amended to enable the court to assign a case to the fast track at any time.

52 The amount of costs deductible from a trust fund or estate should be set at a proportionate level at an early stage of litigation. Whether the balance of costs should be paid by the party who incurred them or by some other party should be determined by the judge.

53 Practice Direction B supplementing CPR Part 64 should be amended to provide that, save in exceptional cases, all *Beddoe* applications will be dealt with on paper.

54 A suitable body of tax experts should become an “approved regulator” within section 20 of the Legal Services Act 2007.

55 Part 6 of the Costs Practice Direction should be amended to require parties in Part 8 proceedings to lodge costs estimates 14 days after the acknowledgment of service (if any) has been filed.

56 A scheme of benchmark costs should be implemented for bankruptcy petitions and winding up petitions.

57 Costs management procedures should be developed in order to control the costs of more complex insolvency proceedings.

58 The Law Society and the ChBA should set up a working group in order to consider the remaining chancery issues raised by the Preliminary Report.

Chapter 29. Technology and construction court litigation

59 Section 5 of the TCC Guide should be amended to draw attention to the power of the court to disallow costs in respect of pleadings or witness statements which contain extensive irrelevant or peripheral material.

60 Paragraphs 14.4.1 and 14.4.2 of the TCC Guide should be amended, so that they are focused upon key issues rather than all issues in the case.

61 The CPR should be amended so that appropriate TCC cases can be allocated to the fast track. Section 68(1)(a) of the Senior Courts Act 1981 should be amended, so that district judges of appropriate experience may be authorised to manage and try fast track TCC cases.

62 Mediation should be promoted with particular vigour for those low value construction cases in which conventional negotiation is unsuccessful.

Chapter 30: judicial review

63 Qualified one way costs shifting should be introduced for judicial review claims.

64 If the defendant settles a judicial review claim after issue and the claimant has complied with the protocol, the normal order should be that the defendant do pay the claimant's costs.

Chapter 32: defamation and related proceedings

65 If recoverability of success fees and ATE insurance premiums is abolished:

(i) The general level of damages for defamation and breach of privacy claims should be increased by 10%.

(ii) A regime of qualified one way costs shifting should be introduced.

66 Paragraph 3.3 of the Pre-Action Protocol for Defamation should be amended to read as follows:

“The Claimant should identify in the Letter of Claim the meaning(s) he/she attributes to the words complained of.”

67 The question whether to retain trial by jury in defamation cases should be reconsidered.

Chapter 33: collective actions

68 The starting point or default position in collective actions should be (a) in personal injury actions, qualified one way costs shifting and (b) in all other actions, two way costs shifting. At the certification stage, the judge may direct that a different costs regime shall operate.

69 Rule 9.01(4) of the Solicitors' Code of Conduct 2007 should be amended, so as to permit the third party funding of collective personal injury claims.

Chapter 34: appeals

70 There should be a separate review of the procedures and costs rules for appeals, after decisions have been reached in relation to the recommendations in this report concerning first instance litigation.

71 Pending that review, appellate courts should have a discretionary power, upon granting permission to appeal or receiving an appeal from a no-costs jurisdiction, to order (a) that each side should bear its own costs of the appeal or (b) that the recoverable costs should be capped at a specified sum.

Chapter 35: pre-action protocols

72 The Pre-Action Protocol for Construction and Engineering Disputes should be amended, so that (a) it is less prescriptive and (b) the costs (or at least the

recoverable costs) of complying with that protocol are reduced. The need for that protocol should be reviewed by TCC judges, practitioners and court users after 2011.

73 The general protocol, contained in Sections III and IV of the Practice Direction – Pre-Action Conduct, should be repealed.

74 Annex B to the Practice Direction – Pre-Action Conduct should be incorporated into a new specific protocol for debt claims.

Chapter 36: alternative dispute resolution

75 There should be a serious campaign (a) to ensure that all litigation lawyers and judges are properly informed about the benefits which ADR can bring and (b) to alert the public and small businesses to the benefits of ADR.

76 An authoritative handbook should be prepared, explaining clearly and concisely what ADR is and giving details of all reputable providers of mediation. This should be the standard handbook for use at all JSB seminars and CPD training sessions concerning mediation.

Chapter 37: disclosure

77 E-disclosure as a topic should form a substantial part of (a) CPD for solicitors and barristers who will have to deal with e-disclosure in practice and (b) the training of judges who will have to deal with e-disclosure on the bench.

78 A new CPR rule 31.5A should be drafted to adopt the menu option in relation to (a) large commercial and similar claims and (b) any case where the costs of standard disclosure are likely to be disproportionate. Personal injury claims and clinical negligence claims should be excluded from the provisions of rule 31.5A.

Chapter 38: witness statements and experts

79 CPR Part 35 or its accompanying practice direction should be amended in order to require that a party seeking permission to adduce expert evidence do furnish an estimate of the costs of that evidence to the court.

80 The procedure developed in Australia, known as “concurrent evidence” should be piloted in cases where all parties consent. If the results of the pilot are positive, consideration should be given to amending CPR Part 35 to provide for use of that procedure in appropriate cases.

Chapter 39: case management

81 Measures should be taken to promote the assignment of cases to designated judges with relevant expertise.

82 A menu of standard paragraphs for case management directions for each type of case of common occurrence should be prepared and made available to all district judges both in hard copy and online in amendable form.

83 CMCs and PTRs should either (a) be used as occasions for effective case management or (b) be dispensed with and replaced by directions on paper. Where such interim hearings are held, the judge should have proper time for pre-reading.

84 In multi-track cases the entire timetable for the action, including trial date or trial window, should be drawn up at as early a stage as is practicable.

85 Pre-action applications should be permitted in respect of breaches of pre-action protocols.

86 The courts should be less tolerant than hitherto of unjustified delays and breaches of orders. This change of emphasis should be signalled by amendment of CPR rule 3.9. If and in so far as it is possible, courts should monitor the progress of the parties in order to secure compliance with orders and pre-empt the need for sanctions.

87 The Master of the Rolls should designate two lords justices, at least one of whom will so far as possible be a member of any constitution of the civil division of the Court of Appeal, which is called upon to consider issues concerning the interpretation or application of the CPR.

88 Consideration should be given to the possibility of the Court of Appeal sitting with an experienced district judge as assessor when case management issues arise.

Chapter 40: costs management

89 The linked disciplines of costs budgeting and costs management should be included in CPD training for those solicitors and barristers who undertake civil litigation.

90 Costs budgeting and costs management should be included in the training offered by the JSB to judges who sit in the civil courts.

91 Rules should set out a standard costs management procedure, which judges would have a discretion to adopt if and when they see fit, either of their own motion or upon application by one of the parties.

92 Primary legislation should enable the Civil Procedure Rule Committee to make rules for pre-issue costs management.

Chapter 41: part 36 offers

93 The effect of *Carver v BAA plc* [2008] EWCA Civ 412; [2009] 1 WLR 113 should be reversed.

94 Where a defendant rejects a claimant's offer, but fails to do better at trial, the claimant's recovery should be enhanced by 10%.

Chapter 42: courts administration

95 Most county court cases should be issued at regional centres, where the staff will be skilled in processing routine proceedings. However, a facility to issue proceedings at all county courts must be retained.

96 Only if cases are defended, should they be transferred to, or retained in, county courts, where the staff should be specifically trained for, and focused upon, the administration of contested cases.

97 The Association of District Judges and HMCS should together draw up a scheme for the increased delegation of routine box work from district judges to proper officers within the court service.

Chapter 43: information technology

98 A suitable body should be appointed to exercise strategic oversight over all IT systems which are installed in the civil courts.

99 Judges and practitioners should be included in future development teams for individual court IT projects.

100 E-working should be extended to the rest of the High Court in London, in particular the Queen's Bench Division and also to the SCCO.

101 Once e-working has been introduced across the High Court in London, it should be rolled out (suitably adapted) across all county courts and district registries in England and Wales.

102 Consideration should be given to establishing an IT network for the courts which is separate from, and therefore not constrained by the security requirements of, the gsi system. This network should have its own appropriate level of security.

103 Judges and court staff should receive proper training in relation to court IT systems. Likewise legal practitioners and their staff should be properly trained in relation to court IT systems and should be willing to adapt their procedures.

Chapter 44: summary assessment

104 If any judge at the end of a hearing within Costs PD paragraph 13.2 considers that he or she lacks the time or the expertise to assess costs summarily (either at that hearing or on paper afterwards), then the judge should order a substantial payment on account of costs and direct detailed assessment.

105 A revised and more informative version of Form N260 should be prepared for use in connection with summary assessments at the end of trials or appeals.

Chapter 45: detailed assessment

106 A new format of bills of costs should be devised, which will be more informative and capable of yielding information at different levels of generality.

107 Software should be developed which will (a) be used for time recording and capturing relevant information and (b) automatically generate schedules for summary assessment or bills for detailed assessment as and when required. The long term aim must be to harmonise the procedures and systems which will be used for costs budgeting, costs management, summary assessment and detailed assessment.

108 A package of measures to improve detailed assessment proceedings should be adopted, as set out in section 5 of chapter 45.

109 The proposals for provisional assessment should be piloted for one year at a civil justice centre outside London in respect of bills up to £25,000.