



The Law Society

Review of civil litigation costs: final report
Response by the Law Society Of England And Wales
October 2010

supporting
solicitors

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Foreword

An effective civil justice system is part of the essential fabric of any civilised society. People need mechanisms which enable them to resolve disputes and obtain redress where they have suffered loss as a result of someone else's fault. It is the corollary of this statement that people should have access to advice and representation in pursuing such remedies. Since our legal system is complex, it is inevitable that such advice and representation will be at a cost. Society needs to find a way of ensuring that people are not prevented from obtaining remedies because of a fear of those costs. Lord Justice Jackson's consideration of this issue is immensely important for our system and his report deserves careful consideration. This is the Law Society's initial response to it.

The legal professions have come under heavy criticism for their part in what is perceived to be a developing compensation culture. That perception is fuelled by misguided media reports and claims that victims seek compensation for the most trivial matters and that costs paid to solicitors who assist those victims can be disproportionate to the actual value of the claim. Insurers complain that compensation and legal costs are spiralling upwards and causing widespread economic problems and have strenuously lobbied the Government regarding this over the last few years. This view is unfair.

Lawyers have a crucial role in the civil justice system. They provide advice and representation in complex areas. They owe duties to the court and to act in the best interests of their clients. As Jackson LJ recognises, clients are entitled to expert advice and representation. Moreover, in most cases, lawyers in fact are able to settle the matter outside court.

In recent years, changes in the justice system have enabled lawyers to provide significantly greater advice and support to victims in civil justice cases. The ability to act using conditional fee agreements (CFAs) has meant that lawyers have been able to take cases which might not otherwise have been brought. Claimants who were not eligible for legal aid, but did not have the resources to risk on litigation where the outcome is uncertain were able to bring cases with substantially less risk. Under this scheme, lawyers effectively finance the action and take the risk that they would not be paid if the case failed. This enabled many more valid claims to be brought with lawyers having an interest in not bringing claims that were likely to fail. While it is understandable that Government, businesses and insurers may regard such claims as a nuisance, there has been no suggestion that the claims brought are unmeritorious and, if they are, it is for defendants to fight them.

There can be no doubt that Jackson LJ undertook his review with dedication, enthusiasm and a thoroughness which, given the time he was allocated to complete his task, was a monumental undertaking carried out with such efficiency and completeness as time allowed. The recommendations, which have caused some controversy and much disagreement, are a challenge to all whose aim is to ensure that justice is widely available to and affordable for consumers and businesses who may become involved in dispute resolution.

This response does not aim to deal with all of the recommendations which are in excess of 100. It concentrates on a number of costs principles and several costs and access to justice issues which we have identified as priorities in an effort to assist Government with its deliberations on civil justice and costs policies.

The Society is anxious to avoid a sequence of unintended consequences which can rapidly develop when there are piecemeal changes to our civil justice system. Jackson LJ's recommendations are far-reaching. They need careful thought and it is not clear to us that all of his recommendations will have the desired result. Anything which reduces access to justice and a victim's ability to obtain redress is not acceptable in today's society. We therefore urge the urge both Government and the Judiciary to consider this when deciding civil justice and costs policy issues and changes to existing procedures which do not require primary legislation.

Linda Lee

President, The Law Society of England and Wales

Introduction

This is the Law Society's initial response to Jackson LJ's report. The Law Society, which represents over 145,000 solicitors, has been assisted in its preparation by its Civil Justice Committee and by many of its members. It should be read in conjunction with our response to Jackson LJ's preliminary report which the Society published on 31st July last year. For ease of reference a copy of that response can be found at [Appendix 1](#).

Many of the recommendations require careful scrutiny and significant impact assessments before they are implemented. We will be happy to assist Government with such assessments.

Our principal reactions to the report are:

- We share Jackson LJ's views about the costs of the system, which can be too high although we believe that the main drivers of this are the court processes which can and should be streamlined in appropriate cases.
- It is crucial that access to civil remedies should not be denied to people because they are unable to afford the costs of litigation or are afraid of the risk of liability for the other side's costs if the action fails;
- Proportionality is an important objective but it must not override the need to ensure that people are able to pursue legitimate redress;
- Reform to the CPR for low value cases should be a major priority;
- We are not opposed to fixed costs in appropriate cases at appropriate levels;
- We believe that the proposals to abolish recoverability of success fees and ATE premiums are likely to reduce the damages that claimants recover significantly and may mean that many claimants will not pursue valid claims;
- We are concerned that, as drafted, the proposed Qualified One Way Costs Shifting Rule is too vague and may result in satellite litigation and a further disincentive to bring claims;
- We share Jackson LJ's concerns about referral fees, though we doubt that banning referral fees will necessarily reduce costs;
- It will be essential for there to be increased training for the judiciary on costs questions;
- Significantly more work must be undertaken to research the likely outcomes and any changes should be properly piloted and assessed.
- Since RTA lower value claims form 70-75% of PI cases and there is a new low cost regime in place for them, all consideration of cost reform should be postponed and re-evaluated until the new RTA scheme has been operating for 12 months.

If these warnings are not heeded, there is a real danger that Jackson LJ's recommendations will significantly reduce the number of claims so that people with legitimate claims are unable to seek redress. That will be disastrous for civil justice in this country.

Consultation

In preparing this response, the Law Society organised focus groups in Sheffield, Birmingham, Manchester, Bristol, Cardiff and London. They were attended by solicitors who specialise in civil litigation and the aim was to ensure that, so far as possible, both claimants and defendants were equally represented, together with some judges. Between March and June 2010 the Society also conducted a web based survey. On the 30th June 2010 a debate at the Law Society's Hall in Chancery Lane was held.

Focus Groups

The general trend of comments from the focus groups indicated that most, but not all, of those attending would agree with the following conclusions:-

- The behaviour of all parties (including insurers, litigants, judges and solicitors) may increase costs and needs to be monitored;
- more detailed and reasonably accurate costs information should be provided by both sides at various stages of the claim but in simple format;
- contingency fees are an acceptable further method of funding cases;
- existing court rules, if applied properly, already give the judiciary power to control costs;
- judges should be ticketed/docketed according to specialisms;
- the process itself increases costs and needs review;
- success fees and ATE premiums should be staged so that there are incentives for early settlement;
- The recommendations, if implemented as a whole, are likely to affect access to justice detrimentally; and
- The draft proposals on qualified one way costs shifting would cause unnecessary uncertainty.

Web Survey

The web survey sought views on the main issues in Jackson LJ's report and how they may affect access to justice. The survey, which closed on 4th June, received 409 responses, which is high for such surveys. Of those who responded, 94% were civil litigators, 55% represented claimants, 9% represented defendants and 36% acted for both claimants and defendants. Where appropriate we have included a summary of responses to relevant questions within individual topics in this paper. A combined summary of the survey results can be found at Appendix 2.

Personal Injury Costs

Much of Jackson LJ's review concentrates on the costs of personal injury claims. This is unsurprising since these were perceived to be the main catalyst for the decision in 2008 by the then Master of the Rolls to invite Jackson LJ to undertake the task. It is therefore important to put these claims into perspective.

The vast majority of personal injury claims are settled either before issue or before a hearing. The 2009 Datamonitor Report on UK Personal Injury records that there were over 783,000 personal injury claims registered with the Compensation Recovery Unit by insurers between April 2007 and March 2008. While a number of these are abandoned, the Court Statistics Report for 2008 shows that the total number of claims

issued in the county courts was 160,248 (and this would have included many other “money claims”) while 1750 PI claims, including clinical negligence were issued in the High Court. In other words, more than 600,000 claims appear to have been settled or abandoned without proceedings being issued. Less than 20,000 cases proceeded to trial in the county courts and there were a total of 2510 High Court trials in 2008. This suggests that the system is effective in ensuring that cases are dealt with speedily with trial costs avoided and that the extent and nature of the problem is not as great as has been perceived.

Disparity between claimants’ and defendants’ costs

It must be accepted that, generally, claimants’ total costs are higher than defendants’. There are a number of reasons for this:

- The claimant’s solicitor must undertake a great deal of preparatory work and evidence gathering prior to notification of a claim to a defendant and/or the issue of proceedings. This work is necessary as the solicitor must comply not just with the requirements of the CPR but also with his/her professional obligations and rules.
- Insurance companies have driven rates for defendant work well below the accepted appropriate ones for claimant work. Additionally, defendant solicitors are working with professional and experienced clients in established relationships. This is an entirely different situation to the claimant’s lawyer who often works with a vulnerable lay client. Moreover, defendants’ solicitors are paid regularly which reduces the demand for working capital.
- In many cases, claimants’ solicitors are financing the work themselves and taking a risk that the case will not succeed – this will inevitably increase their fees. This applies particularly because they may wait for three years or more for payment. They have marketing costs also and pay disbursements as incurred and cannot recover those costs, if at all until the conclusion.

Lawyers bear the brunt of criticism about the high level of costs involved in civil dispute resolution. However, lawyers are only a part of the process. Delays in agreeing settlements and, as, Jackson LJ has correctly identified, court resources and judicial case management are areas which demand improvement if the ultimate goal of reducing the costs of litigation is to be achieved. It is estimated that at least 10% of costs are caused by inefficiencies in the court system: delay increases costs for the parties. Lack of court resources leads to inefficiencies in handling cases and increased costs. Furthermore, experts’ fees, particularly in complex cases, represent a significant element of costs and this is not addressed in Jackson LJ’s review.

Further we would refer to the recent Advisory Committee on Civil Costs report¹ which should significantly inform the cost debate across a wide range of areas and suggests that many of the concerns outlined are misplaced.

¹ Advisory Committee on Civil Costs Guideline Hourly Rates – Conclusions (March 2010)

Costs principles

The Law Society believes that the principles which should govern any costs regime are:

- The 100% compensation principle should apply and successful litigants should not be unreasonably out of pocket as a result of the process;
- The costs regime should facilitate early settlement of cases;
- The costs that can be claimed should reflect the level and complexity of the work involved so that cases are prepared appropriately and presented by people of the right expertise;
- The costs regime should not exacerbate inequality of arms between litigants;
- The regime should, so far as possible, encourage certainty;
- Litigants should have a choice of funding mechanisms available to them to suit their particular circumstances;
- Proportionality should not be an overriding consideration and, in particular, should recognise the right of people to obtain remedies, the cost of which may, at times, exceed the value of a claim.
- Future changes to procedural and costs rules should be supported by across the board evidence

Successful litigants should not be unreasonably out of pocket as a result of the process.

It has been a general principle of English law that successful claimants should be put in the same position as they would have been but for the wrongful act of a tortfeasor and therefore should be refunded their reasonable legal costs. The Society would particularly refer to the case of *Thompson*.² In that case, Swift LJ said “Awards of damages should be calculated so as to achieve, as nearly as possible, full compensation for the claimant.known as the '100% principle' ... the object of the award of damages for future expenditure is to place the injured party as nearly as possible in the same financial position as he or she would have been in but for the accident. The aim is to award such a sum of money as will amount to no more, and at the same time no less, than the net loss.” In the same case, Waller LJ said “this is all a far cry from seeking to influence the calculation of actual financial loss where the 100% recovery principle is fundamental. Once liability is established and once financial loss is being assessed, it is 'corrective justice' and not distributive justice with which the court should be concerned.”

We endorse these comments and believe that it is inappropriate to move away from the principles they set out.

There have been exceptions to this rule. Before 1999, the success fee in conditional fee agreements was not recoverable. It is almost unheard of for fees to be recovered at all in employment or most other tribunals. These exceptions have been rare. However, damages in England and Wales are relatively low: requiring victims to fund legal actions out of their damages may well cause significant loss to them. This would be unjust.

² *Thompson v Tameside & Glossop Acute Services NHS Trust* - [2006] EWHC 2904 (QB)

The costs regime should facilitate early settlement of cases.

Statistics show that the Woolf reforms resulted in earlier settlement of claims and a reduction in trials. However, they also resulted in greater costs being incurred prior to the issue of proceedings due to the requirements of the various pre-action protocols and the necessity to have undertaken more case preparation prior to the issue of proceedings. Thus, especially in high value cases and defamation claims, significant costs are incurred before the defendant has any notice of a claim.

It seems strongly arguable that the costs incurred before a claim is notified should be reduced. This could be supplemented by success fees and ATE premiums increasing as the case progresses and is likely to encourage early settlement and a reduction in costs. This type of incentive was introduced with the RTA predictive costs regime in 2005 and was one of the overriding principles behind the successful stakeholder negotiations which led to the recent industry-agreed streamlined process for RTA claims which came into force in April 2010. This issue needs further investigation because it is important that parties should not be pressured into settlement where there are real issues which deserve to be tried.

Costs should ensure that cases are prepared appropriately and presented by people of the right expertise and should reflect the work involved.

If there are limits on the costs that can be claimed, then there may well be some cases which it is uneconomic to conduct at an appropriate standard of work. This means that solicitors may find it uneconomic to do the work other than by using very junior staff. It is essential that pressures on costs should not lead to less qualified and/or less experienced fee earners being assigned to undertake work outside their expertise. Doing so will inevitably result in a poorer result for the client and the court. Similarly, it cannot be right that access to justice should be limited because it is uneconomic to bring a case.

The costs regime should not exacerbate inequality of arms between litigants.

The significant majority of litigation in our jurisdiction involves claims for personal injury where the defendants are either public authorities or have the benefit of insurance and so have access to very significant resources. They are in a position, if they so choose, to fund the defence of a claim far in excess of its actual value. The claimant is usually a private individual of modest resources or subject to the limited terms of a BTE legal expense policy. Defendants' behaviour in these circumstances is less controlled by the ability to recover costs and in some cases they may well think it reasonable to outspend a claimant in the hope that the claim may not proceed. The costs system should seek to mitigate the effects of this inequality of arms and ensure adequate compensation for the winning party.

The regime should encourage certainty.

There will always be an element of uncertainty in respect of both outcome and costs liability. The system should, however, seek to provide as much certainty as possible for both sides in a dispute, but without reducing quality, availability of advice and funding or access to justice. We are concerned that, as drafted, the proposal for qualified one way costs shifting will increase uncertainty and mean that a number of claimants will be put off pursuing claims in the absence of affordable ATE insurance.

Litigants should have a choice of funding mechanisms available to them to suit their particular circumstances.

It is important to remember that civil litigation would be out of the financial reach of most consumers, particularly if they are to be liable for the other side's costs if the claim does not succeed, unless they have access to funding by third parties. The options currently are:

- Legal aid – which is rarely available other than in clinical negligence claims;
- BTE insurance – which will cover a number of civil claims but can have significant disadvantages if the claim is complex and since many insurers do not provide freedom of choice of solicitors and increasingly auction claims to the highest bidder rather than referring them to the most suitable solicitor;
- CFAs – which are widely available for most types of claim to consumers who do not have the benefit of LEI. They have underpinned access to justice for many thousands of litigants.

The Law Society believes that contingency fees and third party funding also have a part to play.

SMEs, however, frequently encounter funding difficulties due to a lack of availability of affordable legal expense insurance, whether it is BTE or ATE. There are many thousands of SMEs operating in our jurisdiction whose contribution to the country's GDP is significant. Much more emphasis needs to be placed on ways to improve dispute resolution funding for these businesses. Contingency fees could be one option which may assist, but more affordable LEI for business disputes with appropriate levels of cover is likely to be the better option as this would offer protection against a successful SME litigant having to pay a proportion of any award to its own solicitor.

Proportionality should not be an overriding consideration and, in particular, the principle should recognise the right of people to obtain remedies, the cost of which may, at times, exceed the value of a claim.

It is too simplistic to assume that the costs of a case should not exceed the value of the claim. As the report and the research by Professor Dame Hazel Genn make clear, there is an irreducible minimum of costs associated with the smallest civil claim. This arises largely out of the provisions of the CPR. Many claims (for example the Bristol baby cases) are of relatively low value to the parties, but have immense value to the parties and, indeed, to Society. A justice system should not make it impossible to bring such cases because, judged simply on the level of costs, it is not judged to be proportionate to do so.

We believe that further work by the Law Society together with the MoJ and other stakeholders could result in a simplification of the process in certain cases. This is the appropriate way of addressing the proportionality issue.

Future changes to procedural and costs rules should be supported by across the board evidence.

The Law Society recognises the lengthy consultation that Jackson LJ undertook and his determination to engage with stakeholders. However, his work was not able to study in depth the economic effects of his proposals or the perverse incentives that might arise. We believe that it is crucial that such research should be undertaken.

In particular, the Law Society believes that reform to the costs system needs to:

- Achieve reform of the CPR to provide lower cost ways of dealing with lower value cases;
- Find incentives in the costs regime for early settlement;
- Achieve equality of arms so that claimants are not discouraged from pursuing remedies to which they are entitled.

What is important, in particular, is that those making the rules should have a wide experience of the civil justice system. As has been suggested above, judges are likely only to see the most complex and exceptional cases. Any reform needs to be informed by all of those involved in the justice system. The Society remains committed to working with Government to achieve reform in this area and has already carried out considerable work, involving a range of practitioners.

General causes of excessive costs

In chapter 4 of the final report Jackson LJ sets out 16 general causes which, in his opinion, are the causes of excessive costs. It is worth commenting on these.

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

We agree and are keen to work with Government on simplifying the procedure, particularly in less complex claims. This is one of the crucial ways of reducing costs. The Society has already done extensive preliminary work in this area and would wish, in appropriate types of litigation, to explore better and more focused use of the allocation questionnaires, truncated disclosure, a review of the procedure and use of summary judgement, restricted attendance of experts, revised statements of case and restricted witness statements.

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

We agree, but would add that most litigation in England and Wales is based upon long established principles of common law negligence and breaches of statutory duty which do not require long and complex legal argument.

The costs rules are such as to generate satellite litigation.

We agree, but are concerned that some of Jackson LJ's proposals will lead to an increase in such litigation. We also agree that rule complexity is a factor which frequently generates satellite litigation and that wherever possible civil procedure rules need to be simplified.

We cannot, however, accept that a change to the recoverability regime of success fees and ATE premiums is an acceptable way to reduce the risk of satellite costs litigation.

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

We consider that there is a lack of understanding of solicitors' costs by the judiciary and barristers and that training in this respect should be provided. This will assist in achieving the ultimate goal of reducing costs by more effective case management.

All solicitors have the ability to effectively manage the costs of making or defending a claim on behalf of clients as it is in their own business interests to do so. Inept costs management of litigation by solicitors affects income streams to such an extent that profitability is reduced.

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

There is an implication in the final report that this is a costs driver but there does not appear to be any evidence to support this. Payment by reference to time spent is not a novel concept and applies in many other professions and businesses. There is no reason why this should be different for the legal profession. Solicitors are regulated in the conduct of their business and the basis of the way that clients are charged for the work. In civil litigation, the court has the power, which it frequently exercises, to assess what is reasonable for an unsuccessful party to pay in respect of the successful opponent's legal costs and this is carried out by reference to not just the reasonableness of the amount of work done and the time it took but also the hourly charging rates to be applied to that work. Whilst we accept that there will be occasions

where it may not be easy for the costs judiciary to look back over the course of proceedings to determine what costs to allow, they generally achieve this well.

However, the Law Society accepts that, subject to a number of conditions, there is scope for fixing the costs of work in certain areas as this would create a degree of certainty for both claimants and defendants which would enable better allocation of resources to meet any potential liability. The new RTA process, which covers a substantial volume of litigation should achieve major improvements.

The recoverable hourly rates of lawyers are not satisfactorily controlled.

The Law Society disagrees with this conclusion. The Advisory Committee on Civil Costs (ACCC) provides independent advice on costs in civil claims based on evidence and economic analysis which provides a fair means of setting costs.

The ACCC has performed its task well, despite some criticism which the Law Society believes to be unfounded. The guideline hourly rates recoverable as between the parties to litigation have been reviewed on an annual basis and accepted by Government and the Master of the Rolls after due research and analysis. There is no empirical evidence to suggest that the work of the ACCC has succeeded in controlling rates. The Society does not consider that there is any need to change this form of control or appoint a Costs Council (as recommended by Jackson LJ elsewhere in his report). Responsibility for recommendations regarding recoverable hourly rates should remain with the ACCC which consists of individuals who are involved directly in the business of litigation, consumers and economists. Its membership could, with value be extended to include representatives from public bodies who pay substantial amounts in legal costs out of public funds.

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

The Law Society agrees. We consider that this is an area that needs to be addressed and were disappointed that the report did not make recommendations about this.

The costs shifting rule creates perverse incentives.

We are not aware of any evidence that the costs shifting rule creates significant incentives which could be classified as perverse.

The vast majority of solicitors would disagree that a party who does not know who will eventually pay the bill at the conclusion of a matter may believe that the more he or she spends the less likely they will be to “foot the ultimate bill”. To the Society’s knowledge there is no recent empirical evidence to support Jackson LJ’s opinion in this respect - the academic research he refers to in support of his views on this was undertaken prior to the Woolf reforms. It would be a foolhardy litigant who chose to adopt this type of tactic.

He also considers that the claimant has no incentive to control costs, although by way of clarification this will only be the case, if at all, when the solicitor is acting on a CFA. In cases where there is little or no incentive on the claimant’s part, the onus falls upon the solicitor to control costs as, if incurred unreasonably, they will be disallowed on assessment by the court and the solicitor will not get paid for the work. This creates a significant incentive for the solicitor. In cases where there is no dispute as to liability, the way to incentivise a claimant is for a defendant to make a Part 36 offer. If this is not done it is the defendant’s fault if costs are incurred without risk to the claimant.

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.

While it is understandable that this perception exists, the Law Society considers that it needs to be tempered. Solicitors are required to give costs information to all clients throughout the conduct of a case and clients do have a significant interest in controlling costs because, for example, they may have incurred a liability for all or part of their own solicitor's costs in the event that they breach the terms of the CFA. Moreover, as suggested above, solicitors have a significant interest in controlling costs because they will suffer a personal financial loss if the costs are not recovered.

In addition, the removal of legal aid funding for personal injury cases and the introduction of recoverability of after event insurance premiums and success fees from the losing party brought about a marked increase in their use. It was the Government's intention that unsuccessful defendants should pay the additional costs involved so that the claimants should not have their damages reduced.

As suggested above, the Society agrees that there may well be scope to provide greater incentives to settle early and provide greater regulation of the success fee that can be charged, but empirical evidence needs to be obtained about how success fees are, and should be, calculated by reference to risk and merits of a particular case.

Changes to the CFA regime will be a matter of public policy and the Law Society is willing to work closely with the Government in an effort to resolve any issues with CFAs whilst ensuring that access to justice for consumers is maintained.

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

We agree and consider that specialised training in e-disclosure for lawyers and the judiciary will assist with reducing costs of disclosure in substantial cases. This will only be effective if IT facilities in the courts are dramatically improved.

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

The Law Society has always supported the concept of specific pre-action protocols. They have resulted in earlier settlement of claims and fewer trials. Whilst this has led to an overall reduction in costs there can be no doubt that higher costs have been incurred pre-issue and that the only court control over how much of these pre-issue costs can be recovered comes at a much later stage of the proceedings.

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

There are significant costs generated by the courts generally:

- Courts adopt different approaches to case management which cause difficulties for solicitors;
- Many judges do not have the training to manage cases properly and may not understand the cost implications of their decisions;
- The judiciary do not always have the time to provide appropriate case management across all cases;
- Parties fail to comply with the rules and the courts need to enforce these properly.

Many firms of solicitors have case management software designed to ensure compliance with deadlines, directions of the court and other procedural requirements but the Society frequently receives complaints from its members that a lack of court resources and differing attitudes of the judiciary towards case management can frustrate progress of a case despite best intentions of all those concerned.

The lack of IT in the civil courts over years has now led to a real disparity between the Courts Service and court users in terms of their speed and ability to communicate. This is the cause of considerable delay and costs and a significant contributor to ineffective and/or incorrect case management.

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

The Law Society is unaware of evidence to substantiate this since many more cases settle prior to the issue of proceedings than they did prior to the Woolf reforms. Many claimant solicitors complain that attempts to settle claims are frequently frustrated by a lack of response from insurers and defendant solicitors complain that it is the unwillingness of claimant solicitors to negotiate a settlement, preferring to continue to litigate in order to “rack up” additional costs. However, there is no empirical evidence to support this.

Whether or not mediation, or any other form of ADR, would expedite settlement depends on the particular circumstances of the case, and the willingness of the parties to come to terms. It is not, as frequently stated, the unwillingness of legal representatives to engage in some form of ADR but frequently the unwillingness of the parties themselves and litigants in person. The expense of mediation can also be a deciding factor.

Whilst the Woolf reforms have been successful in reducing the number of matters which proceed to trial there remains scope to introduce incentives for early settlement of claims.

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.

The Law Society supports this statement and, in principle, would welcome any changes to detailed assessment procedures which simplified the process, avoided satellite litigation, and reduced costs and the necessity for a plethora of costs negotiators to be involved in the assessment process.

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

The Society has long argued that court fees are excessive and in many cases form a substantial proportion of the disbursements. We continue to be fundamentally opposed to a policy of full cost pricing. We accept that there is a cost to running the court system and that it is appropriate for litigants to be charged a fee towards that cost, if only to discourage frivolous litigation. However, it must be set at a level which enables there to be proper access to justice for all in society.

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

We agree and are concerned that the current and any forthcoming public expenditure cuts will exacerbate this problem. It will be important that the closures in courts do not exacerbate these problems as well.

Proportionality

When he was appointed to undertake the civil litigation costs review Jackson LJ's terms of reference were *"to make recommendations in order to promote access to justice at proportionate cost"*

In his report, Jackson LJ recommends that *"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"*. The Law Society believes that the strict application of this proportionality test will be disastrous for a significant number of claimants, particularly if there is to be no simplification of procedures in lower value and less complex claims.

Our starting point is that proportionality is a relative concept and should not be looked at entirely on the basis of the costs incurred to achieve the results. Damages of under £5,000 may seem relatively trivial to individuals earning more than twenty times that per year, but they represent a substantial sum to those whose incomes are low or who are surviving on state benefits. It is those people who will be affected most by injury leading to such a loss and who most need to be recompensed. They will also be least able to fund legal action, particularly since there is unlikely to be legal aid to support them. There is a serious danger that, by looking at proportionality solely in terms of the courses of bringing the action, a judgement will be made that some loss is "not worth bothering about". It is not for judges to take that decision.

Having said that, the Society accepts that it is undesirable for the costs of bringing cases to be substantially in excess of their value. However, the way to address this is to look at the procedural requirements which, under our system, drive costs. Work which is necessary should be paid for and should not be disallowed because of a concern about disproportionality.

At a costs seminar in Birmingham in 2009, when providing a preliminary analysis of data obtained by Lord Justice Jackson, Professor Dame Hazel Genn stated that *"the amount of work done on a case is a reflection of many factors and that there appears to be an irreducible amount of work that must be done even to recover damages of £2000 or less"*. This supports the Law Society's views that the strict application of the proportionality test cannot be applied in every case because of current procedural requirements as this would disadvantage claimants in lower value claims.

It is also worth mentioning that in 1999 the Law Commission recommended an increase in general damages by 50%.³ This suggests that the existing level of damages is, in fact, too low. An increase in damages might well address some of the concerns about proportionality in a number of cases.

Another problem with proportionality is that it is considered at the end of the case, when all the work has been carried out and it is, therefore, too late because the money will have been spent. Costs budgeting will not be of assistance in low value cases because the act of budgeting will itself add costs which are better used in bringing the action.

³ Damages for Personal Injury: Non-Pecuniary Loss (LC257)

Proportionality is likely to disadvantage the more vulnerable members of society who will not be able to fund litigation unless their costs are recoverable and have no protection against more powerful and better resourced opponents. Anyone who has suffered injury, damage and or loss because of the wrongdoing of another must, as a matter of public policy, have the right to seek redress against the wrongdoer with, if they so choose, the benefit of legal advice and the help of a solicitor. The question of proportionality only arises when a claimant is successful and the defendant is ordered to pay the claimant's costs which have been reasonably incurred. If those costs have been incurred out of necessity to prove the claim, whether it is due to the mandatory requirements of the CPR and/or the behaviour of the defendant, the question of proportionality should not be the overriding principle to be applied on assessment of those costs.

Fixed costs in the fast track

The Law Society does not oppose the principle of the wider introduction of fixed costs provided that:

- the rates are fixed so that the required work can be profitably undertaken by sufficiently qualified and experienced staff;
- the rate is reviewed annually in line with inflation and any changes to procedure taken into account;
- there are sufficient escape routes where complexity increases the costs;
- any fixed cost regime must avoid the risk of satellite litigation;
- since it is unlikely that they can apply to all personal injury claims, it will be simpler and more appropriate for some categories (e.g disease and clinical negligence claims) to be excluded rather than relying on escape mechanisms; and
- any further implementation of fixed costs in fast track litigation should be staged and subject to piloting, including consideration of the effect of the new RTA claims process.

Unless these conditions can be met a wider introduction of fixed costs will not gain the confidence of those solicitors who undertake fast track personal injury work. This will lead to fewer solicitors undertaking the work and access to justice will be detrimentally affected as a consequence.

There remains, however, the potential injustice that better resourced defendants or their insurers may choose to “outspend” the claimant in order to win a case. In a fixed costs regime there is no limit on what a client spends out on legal costs: the regime simply fixes the amount of costs that can be recovered from the unsuccessful party. A defendant with deep pockets may have a reputational or economic incentive to outspend a claimant in defending a particular claim, whereas claimants will be restrained by the fixed costs limit as very few can afford to pay additional costs. It is therefore essential that there should be appropriate escape mechanisms to discourage defendants from using such tactics. One such would be to apply to the court where it is clear that the defendant is taking such steps to seek an order that the costs should not be on the fixed rate.

In response to two questions on fixed costs in our web survey the majority of solicitors who responded indicated that the likely effect of fixing costs in the fast would result in more efficiencies but that they might undertake fewer complex cases. This may have a detrimental effect on access to justice.

| Question | Agree strongly | Agree slightly | Neither agree or disagree | Disagree slightly | Disagree strongly |
|----------------------------------------------------------------------------------------------------------------------------|----------------|----------------|---------------------------|-------------------|-------------------|
| The effect of fixing costs in fast track claims will be that my firm will seek more efficient ways of undertaking the work | 30% | 29% | 22% | 9% | 11% |
| The effect of fixing costs in fast track claims will be that my firm may undertake fewer complex cases | 39% | 21% | 19% | 13% | 8% |

This suggests that there needs to be an escape mechanism for complex cases, together with some certainty as to the criteria which will be used by the courts in agreeing to use it. There is also a danger that the “more efficient” ways of undertaking work may lead to less experienced people undertaking work and therefore, to potentially poorer results for clients and the courts.

The calculation of fixed costs in any particular category of claim is fraught with difficulty. Unsuccessful attempts were made to do so during stakeholder negotiations in 2009 as there were significantly differing views between claimant and defendant representatives. Those negotiations were conducted within tight time constraints. However, the Law Society is willing to engage in further negotiations with stakeholders on the subject of fast track fixed costs.

We believe these comments apply particularly to cases and have further comments on those later in this response (see page 43).

Irrecoverability of success fees and ATE premiums

Jackson LJ recommends that success fees and ATE premiums should no longer be recoverable from the losing party and should be paid for by the claimant. He argues that the benefits achieved by allowing recoverability from defendants have come at a massive cost, borne by tax payers and insurance premium payers, amongst others.

The effect of this proposal will be that successful claimants will have to bear the cost of the solicitor's success fees and any ATE premium from damages, although any payment will be capped at 25% of the recovered amount. Jackson LJ balances this by recommending an increase in general damages of 10%. This increase will not, however, cover the whole of the claimant's potential costs liability in many cases. As was mentioned in the discussion on proportionality, the Law Commission Report of 1999⁴ concluded that general damages were at 50% of what they realistically should be and Jackson LJ gives no convincing reason why 10% is enough to cover success fees and ATE costs let alone why the Law Commission figure should not be used as a base.

Jackson LJ forms the view that this proposal, coupled with qualified one way costs shifting which we deal with below, will either promote access to justice or have no impact for consumers/injured parties. It is important, however, to look at the two issues separately.

Recoverability of the success fee

The Society remains committed to the principle that victims should receive 100% compensation for their losses for the reasons given above. We believe that there is a significant danger that, given that CFAs are, for most people, the most practical way of financing claims, the inability to recover success fees will mean that consumers will lose significant amounts of their damages in order to pay the success fee to their solicitor. In particular:

- We doubt that the increase of 10% in general damages will, in fact, compensate clients for having to fund the success fee out of their damages. The research by Paul Fenn on which Jackson LJ based his recommendation does not appear to have been published and this needs to be seen and scrutinised. Moreover, funding the success fee out of damages is likely to reduce the proportion of damages that claimants receive at the lower end significantly and, by definition, the 10% increase, will not compensate in those areas.
- There will be an incentive for defendants to complicate issues and increase costs, knowing that this will be reflected in the success fee and thus put pressure on a claimant to consider whether they can continue with a relatively low value action.
- If the client is not to lose damages, the solicitor will have to absorb some of the loss. Firms are unlikely to be willing to do this in cases which are perceived to be risky, complex or of low value.

We repeat that a low value dispute may represent a significant amount of money to many consumers. For most such consumers, a CFA is the only way in which they will practically be able to fund such an action. It seems wrong in principle for a just society to condone a result that clients who have been injured or suffered some other wrong as a result of the negligence of a tortfeasor should have to pay what could be a substantial proportion of the damages recovered towards their legal costs.

⁴ Damages for Personal Injury: Non-Pecuniary Loss (LC257)

The proposal to increase general damages by 10% will not simply apply in cases which go to trial but to all personal injury claims, even those that settle at an early stage and without proceedings being issued. According to the 2009 Datamonitor Report on UK Personal Injury less than 20% of the more than 783,000 personal injury claims reported to the CRU in the year ending March 2008 resulted in the issue of legal proceedings.

If, as concluded by Jackson LJ and Professor Fenn, there is a case for personal injury damages to be increased across the board, we do not see why this should be linked to a change to the rules governing one of a number of ways of funding a case. Damages should either be increased for victims who have sustained personal injury as a result of the wrongdoing of another or they should not. If there is an increase, it should, as we have suggested above, be by more than 10%. Increasing damages simply to cover the burden of funding an action for a section of those bringing such actions seems illogical. This recommendation must be the subject of further debate, research and consultation.

The Society believes that considerable caution needs to be exercised in dealing with this recommendation and that, to ensure that people are able to bring legitimate actions, it would be preferable to look at procedural reform and staged CFAs rather than the full abolition of recoverability of success fees.

Recoverability of ATE premiums

There can be no doubt that ATE premiums are a major contributor towards legal costs over which solicitors have no control. The Society has been critical of liability insurers who complain about the burden of recoverability of ATE premiums and who have frequently challenged the amount of the ATE premium paid on costs assessments despite being members of the same industry as the ATE providers. There have been many occasions when a liability insurer has argued about the cost of a premium paid to an ATE provider where both insurers are part of the same group of companies.

However, it is not just insurers which pay the cost of a successful claimant's ATE premium. These premiums form a substantial outlay for the Government and the National Health Service which self-insure. Local authorities, the Police and a considerable number of businesses can also be in a similar position of self insuring depending upon the particular arrangements they have with insurers regarding policy excess and/or what is known as "stop loss".

There appears to be a substantial lack of transparency in the market for ATE premiums. For example, we understand that many large defendants have agreements with insurers about the amount of the ATE premium that they will actually pay in the event that the claimant is successful. This will frequently be substantially less than the amount quoted to the court. We believe that there should be an investigation into the ATE market to establish whether the current rates quoted by insurers accurately represent risk and to achieve greater transparency.

The Law Society does not consider that changes to the current recoverability of ATE premiums linked with qualified one way costs shifting will be beneficial to consumers for reasons we deal with below. We recognise that ATE premiums are a heavy burden for defendants to bear but in the majority of personal injury cases it is insurance companies which foot the bill for claimants' ATE insurance premiums which have been spirally upward for several years now. The insurance industry must therefore shoulder some blame for what has become a case of "robbing Peter to pay Paul" and alternative answers to this conundrum must be found which will not result in the burden falling upon the consumer.

Responses to three questions regarding the impact of these proposals on clients in our web survey were as follows:

| Question | No | Don't Know | Yes |
|------------------------------------------------------------------------------------------------------------------|-----|------------|-----|
| Do you think that the proposed increase in general damages is likely to be sufficient to cover the success fees? | 80% | 16% | 5% |

| Question | Agree strongly | Agree slightly | Neither agree or disagree | Disagree slightly | Disagree strongly |
|------------------------------------------------------------------------------------------------------------------------------------------------|----------------|----------------|---------------------------|-------------------|-------------------|
| If the proposed increase in general damages is insufficient, clients are likely to be content to have their damages reduced to pay my fees | 5% | 5% | 5% | 15% | 69% |
| If the proposed increase in general damages is insufficient the firm will absorb the difference to ensure that the client is not out of pocket | 9% | 11% | 14% | 17% | 49% |

These responses clearly indicate that solicitors believe the consumer will suffer if Jackson LJ's proposals regarding the non - recoverability of success fees and ATE premiums.

ATE insurance has two main roles. First, it protects someone bringing an action from liability for the other sides' costs. Secondly, it pays for the disbursements incurred if the action is unsuccessful. In addition, it can provide a further way of identifying actions which are unlikely to succeed.

The risk of liability for the other side's costs is a major disincentive to taking legal action. As we discuss below, we doubt that Jackson LJ's proposals for Qualified One Way Costs Shifting will be sufficient to remove that risk and consider that many prudent litigants would be well-advised to take out ATE insurance even if those rules were implemented. The price of ATE insurance is currently prohibitive and would be yet another cost to come out of a successful claimant's damages. This will be a major disincentive to taking legal action.

In our view, the fact that ATE insurance covers disbursements also will need to be addressed. It is important to remember that the CFA regime replaced legal aid for personal injury work. Therefore, there needed to be some way of funding the costs that a solicitor will incur in making a case. It is hard to see how a litigant who is on benefits will be able to pay those costs if he or she loses the case (irrespective of the cost-shifting rule).

The results of our web survey show that whilst some solicitors will be prepared to fund a client's disbursements, the vast majority will be unwilling or unable to do so, due, no doubt, to financial constraints.

| | |
|---------------------------------------------------------------------------------------------------------------------------------|-----|
| In the event that there would otherwise be no requirement for an ATE policy to cover adverse costs orders, my firm will: | |
| ask clients to fund disbursements in all cases | 44% |
| ask clients to fund disbursements in some cases | 28% |
| take the risk of funding disbursements itself and be more careful about the sorts of cases it takes on | 13% |
| don't know | 11% |
| take the risk of funding disbursements itself and take the same sorts of case as at present | 5% |

If ATE insurance were to be irrecoverable, a mechanism would need to be put in place to provide what it offers if access to justice for the most vulnerable is not to suffer. It cannot be certain that existing full costs cover ATE will be replaced with a disbursement insurance product. Much greater research needs to be undertaken into the insurance market and the way in which ATE is provided.

An alternative approach would be to introduce staged ATE premiums, so that premiums could increase at each stage of the process. Given that the overwhelming majority of claims settle before proceedings are issued, we believe that there must be scope to load the premium on those cases where the risk is greatest – i.e. those that proceed to trial. This could reduce the costs of insurance in the majority of cases and, therefore, the overall costs. We would urge Government to encourage the industry to develop such products rather than to provide that they should not be recoverable. The fact that such premiums would be recoverable provides a further incentive to settle.

Even if ATE premiums are irrecoverable, there will remain a need for ATE insurance and we are concerned that, if ATE premiums were no longer needed in the PI market, the whole ATE industry could be destroyed and may prove impossible to resuscitate if it is needed in the future: the bulk of the ATE industry covers personal injury cases and so there must also be some doubt as to whether ATE for other litigation will remain viable as there may not be sufficient volumes of work to justify the business, leading to fewer players in the market. This may well mean that other claimants will be unwilling to bring legitimate claims, thus creating injustice.

Qualified one way costs shifting

The proposed scheme of qualified one way costs shifting is intended to avoid the need for ATE insurance for personal injury claimants. The rationale behind the proposal is that if, in usual circumstances, there is no risk of an adverse costs order then there is no necessity for ATE insurance.

The Law Society has a number of concerns about this proposal:

- The proposal may have some merit in Road Traffic cases and other PI matters where the overwhelming majority of claims are successful and where the costs to the insurance industry of absorbing the costs of successful cases will be more than covered by savings in not having to pay ATE premiums. It is much less appropriate for employers' liability or public liability cases where the success rate is significantly lower and where many defendants may not have the benefit of insurance.
- As drafted, the proposal would create a significant element of uncertainty and a danger of satellite litigation. There needs to be much clearer guidance about what level of income and assets an individual would need before the shield could be removed and, also, much greater information about what would constitute unreasonable behaviour. Without this, some litigants will be unwilling to take the risk of bringing an action or may feel pressurised into accepting settlements because of threats from the other side. This may be a particular problem if ATE insurance becomes unobtainable. In our view, the sanctions should only be available in wholly exceptional cases and this should be clear from the rule.
- If there is to be implementation, it should be piloted in simple, low value cases or those where the prospects of success are high.

Two major considerations in any decision to litigate are certainty and cost. Qualified one way costs shifting as proposed will make the decision much more difficult for consumers and may lead to many choosing not to proceed with a valid claim.

The Society's web survey asked four questions about qualified one way costs shifting. Below is a summary of the results:

| Question | Agree strongly | Agree slightly | Neither agree or disagree | Disagree slightly | Disagree strongly |
|---------------------------------------------------------------------------------------------------------------------------------------------------------|----------------|----------------|---------------------------|-------------------|-------------------|
| Jackson's proposals on qualified one way costs shifting are likely to give clients greater confidence in pursuing actions without ATE | 9% | 20% | 23% | 16% | 33% |
| Jackson's proposals on qualified one way costs shifting are likely to mean that we will advise buying ATE in any case | 22% | 28% | 31% | 12% | 8% |
| Jackson's proposals on qualified one way costs shifting are likely to mean that clients will not take the risk of an adverse costs order | 33% | 29% | 23% | 9% | 6% |
| Jackson's proposals on qualified one way costs shifting are likely to lead to satellite litigation as insurers seek to test the boundaries of the rules | 69% | 19% | 5% | 2% | 5% |

The results suggest that consumers will lack confidence in proceeding with a claim without the benefit of ATE which many will take up and will have to pay themselves whether they win or lose.

Moreover, one major insurance company has stated publicly that non recoverability of success fees and ATE premiums combined with one way costs shifting and an increase in damages of 10% across the board will cost the company more. This must cast doubt on whether this package of recommendations will work.

Before The Event insurance

While the Law Society sees the attraction of greater use of BTE insurance, there are major concerns, recognised by Jackson LJ and with which we agree, about the role of insurers in this market both as to product quality, indemnity terms and cover offered. We also query whether, in fact, it is practical to extend it.

Our principal concerns are as follows:

- Many households will not see the need to take out cover for what they will see as a remote contingency;
- The insurance industry will become the gate-keeper of claims that, in most cases, another arm of that industry will have to pay;
- There is insufficient regulation of the industry in this field to protect claimants from the issues that give rise to Jackson LJ's concerns – at present, the FSA seems uninterested in dealing with them.
- Levels of cover and policy conditions are not standard;
- The issue of freedom of choice of solicitor needs to be addressed.

On the last point, the Law Society fully supports the views of Jackson LJ on the issue of freedom of choice of solicitor for those with LEI cover.

EU Directive 87/344, which regulates the supply of Legal Expenses Insurance, may be correctly transposed into UK law, but we consider that it is interpreted incorrectly. Insurers argue that claimants only have the freedom to choose their solicitor on the formal issue of proceedings at court. The practical effect is that the consumer may be assigned a panel solicitor, who may be geographically distant from the client, and who may not be best placed to provide the service the client needs. At the point of issuing proceedings, it is likely to be too late for the claimant to change solicitors and, even then, insurers place a series of obstacles to deter the consumer from switching, such as requiring the chosen solicitor to accept lower rates than they might otherwise. Indeed, in some cases, such as clinical negligence, where there is agreement that the claimant should have freedom of choice from the start, our experience is that pressure is brought to bear by insurers to use panel firms. Insurers seem unwilling to respond to requests for a client's preferred solicitor and the appeals process is cumbersome and takes too long in the overall context of the case. Indeed, many policies exclude clinical negligence cover.

In the context of the CPR, the practical effect of insurers denying policyholders their choice of solicitor until the issue of proceedings is to frustrate the aims of the Directive. Formal proceedings follow seamlessly from the pre-action stage and should therefore not be considered to be separate. Jackson LJ recognised that there is "a very powerful argument that national authorities such as the FSA are misapplying the Directive by recognising the legitimacy of legal insurance contracts that deny freedom of choice until the actual issue of proceedings and not allowing it at the pre-action protocol stage".

Claimants using the new RTA claims process under LEI are particularly vulnerable to the use of panel solicitors by insurers. The maximum costs claimable under the new RTA claims system is fixed at £1,400. With referral fees of £600-700 being typical for LEI panel solicitors, this leaves little left to produce motivated, high quality work for consumers, after the referral fee is paid.

Insurers maintain that providing freedom of choice for pre-action conduct would cause premiums to rise so significantly that they would be unable to offer LEI as an add-on to other insurance policies. We do not accept this in the absence of research showing what impact this would have on premiums. The vast majority of claims for personal injury are successful and consequently there is no claim on a BTE policy because the costs will be paid by the unsuccessful defendant. In unsuccessful cases, it is typical for the panel solicitor to act on a CFA basis so there will be no claim on the policy either.

As a consumer issue with access to justice implications, it is imperative that the question of freedom of choice of solicitor is resolved as soon as possible. There should be transparency for consumers at the outset who need to be aware of the exact nature of the product that they have bought. Moreover, if take up of BTE insurance is to increase, there must be proper consistency about the product and the level and standards of service that consumers are entitled to expect.

Clinical negligence

Clinical negligence demands separate consideration in its own right. Such claims are, by their very nature and because of different evidential requirements, generally more complex than other personal injury actions. In these cases in particular, the irreducible minimum amount of work is very significant indeed and, in many cases, will exceed the value of the claim. The cost to the public purse is considerable when taking into account the amount of compensation paid to medical accident victims, their legal costs, the cost to the Legal Aid Fund and the administration costs of the NHSLA.

It is also important to remember that many of these cases, notably the Bristol baby cases, have a role in bringing to public attention serious issues about patient safety which might otherwise not have been discovered. Irrespective of the value of the claim, it is in the public interest that such actions should be brought.

Our general views on qualified one way costs shifting, non recoverability of success fees and ATE premiums and other issues as referred to above apply equally to clinical negligence claims. These are complex, risky actions and we believe that this is one area where ATE insurance is essential for the consumer. We are firmly of the view that such cases are not suitable for fixed costs and that complexity and cost should not limit the right of an individual to compensation where they have been injured by the negligence of another. Jackson LJ's specific recommendations about clinical negligence are set out below together with our views on them.

- (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.

We agree but doubt whether this will be sufficient to resolve the problem.

- (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.

We have no objection to this provided that the time limits are strongly enforced by the courts.

- (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.

We agree with this proposal and believe that, in practice, there are signs that it is being adopted.

- (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.

We agree with this proposal. There should also be a procedure to report trends in clinical errors/unexplained deaths.

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

We agree with this proposal.

- (vi) Case management directions for clinical negligence cases should be harmonised across England and Wales.

We agree with this proposal.

- (vii) Costs management for clinical negligence cases should be piloted.

We agree with this proposal.

- (viii) Regulations should be drawn up in order to implement the NHS Redress Act 2006.

Before further consideration of this proposal, we would wish to study a full analysis of the Welsh Redress scheme.

Contingency fees

Jackson LJ's recommendations are that:

- solicitors should be permitted to enter into contingency fee agreements with their clients;
- costs should be recoverable from an unsuccessful opposing party on a conventional basis (on the "Ontario" basis);
- contingency fee agreements should be properly regulated and should not be valid unless the client has received independent advice.

In 2009 the Law Society conducted a web survey of its members seeking their views on contingency fees. Responses to that survey were inconclusive. This issue was particularly discussed at the regional focus groups to discuss Jackson LJ's proposals.

With only one or two exceptions, solicitors who attended those meetings were not averse to the introduction of contingency fees for contentious business but stressed that this must be as an additional method of funding where circumstances warranted it and not a replacement for any current funding method, though there may be cases where there would be overlaps. It was also unlikely to be suitable for low value claims. It was also crucial that defendants should continue to be responsible for costs in the usual way so that a claimant would not have to pay all of the solicitor's costs from any damages awarded.

Should contingency fees be allowed for contentious business, the Law Society accepts that the agreements must be regulated. For solicitors, those regulations should be embodied within the Solicitor's Code of Practice and supervised by the Solicitor's Regulation Authority. There is no need for solicitors to be the subject of "double regulation" as is now the case with damages based agreements in employment matters.

Furthermore, we do not accept that it is either necessary or financially acceptable for a client to seek independent legal advice before entering into a contingency fee agreement. There is no requirement for such advice for CFAs which are much more complex to explain to a client. Such a requirement will be an unnecessary addition to the already high costs burden. Moreover, such arrangements have been used for many years in employment cases with little evidence of disadvantage to clients.

Referral fees

The Law Society's present policy on referral fees is as follows:

"The Law Society's role

"The role of the Law Society as a representative body with respect to referral fees is to:

- a. represent the best interests of its members to the SRA, Government and other regulators;*
- b. provide practical support to solicitors to assist them to comply with conduct rules and manage ethical challenges with respect to referral fees;*
- c. assist in educating clients of legal services on referral fees and the benefits of utilising the services of solicitors in markets where referral fees are paid; and*
- d. make representations to Government that referral fees do not have a place in markets for legal services.'*

"Statement of policy

'For as long as referral fees can be requested of any provider of legal services, it would be against the best interests of the profession for solicitors to be banned unilaterally from paying referral fees.

"The Law Society is of the view that, if referral fees are to remain, there should be strict rules on referral fees aimed at reinforcing a solicitor's independence and duty to their client, which should be robustly enforced by the SRA.

"As referral fees have the potential to limit access to justice and reduce the quality of legal services, the Law Society should make representations to Government and the Legal Services Board, encouraging the banning of referral fees by all providers of legal services.'

"In accordance with the policy of Council and Section 52 of the Legal Services Act 2007 ('LSA 2007'), the Law Society should press the Legal Services Board to require all Approved Regulators to ban referral fees by those providing legal services as being contrary to the regulatory objectives contained in Section 1 of the LSA 2007"

The recommendations in the Jackson Review on the issue of referral fees are:

- a) an outright ban on referral fees in personal injury work; or
- b) a cap of £200; and
- c) a ban in other areas of work to be considered.

The question of referral fees is controversial within the profession with some solicitors seeing them as an important way of obtaining bulk work which provides them with economies of scale and enables access to justice. Others consider that they are inherently unethical. The Law Society's view is that referral fees should not have a place in legal work for the reasons that Jackson LJ indicates in his report. We believe that they add costs and place incentives on solicitors to provide a lower level of service to their clients. The Society believes that they should be prohibited for all involved in the process, including solicitors, other legal services providers and anyone else involved in the claims process. The Society relaxed the rules under pressure from the OFT and remains uncomfortable with that decision.

In the Society's web survey we asked solicitors to answer 5 questions about the effect a ban would have on their practice and marketing costs. The results were as follows:-

| Question | Agree strongly | Agree slightly | Neither agree or disagree | Disagree slightly | Disagree strongly |
|-----------------------------------------------------------------------------------------------------------------------------------|----------------|----------------|---------------------------|-------------------|-------------------|
| Solicitors should be prohibited from paying referral fees in personal injury claims | 44% | 9% | 13% | 10% | 23% |
| Solicitors should be prohibited from paying referral fees in all civil litigation work | 42% | 8% | 13% | 13% | 24% |
| If referral fees are prohibited this will not affect my practice at all | 37% | 14% | 13% | 10% | 26% |
| If referral fees are prohibited this will mean that I will spend less on marketing than I spend on referral fees | 9% | 7% | 42% | 10% | 33% |
| If referral fees are prohibited this will mean that I will spend more on marketing than I currently spend on referral fees | 25% | 13% | 39% | 8% | 16% |

The Law Society has seen and is evaluating research undertaken by the Legal Services Board (LSB) on the question. The Society is not persuaded that the research by Charles River Associates provides an adequate basis for decision to be taken: while providing interesting qualitative research, we feel that the methodology involved lacked transparency and was not sufficient to justify the strong conclusions that were reached. The Society notes and shares the concerns that the LSB's consumer panel has about lack of transparency and the problems that must be created when large proportions of fixed fees are paid in referral fees. We consider that a ban on such fees will lead to solicitors being able to compete on price and quality rather than on who is prepared to pay most for the work.

Having said that, it is important that the effects of referral fees should not be exaggerated. Defendants, and particularly their insurers, often quote referral fees as being a catalyst for the increase in annual guideline hourly rates and the setting of fixed costs for the current RTA predictable costs regime. This ignores the fact that the initial guideline hourly rates, which have been increased annually for inflation since their inception, and the predictable RTA fixed costs, were set prior to the reversal of the ban on referral fees by the Law Society in 2004.

The Society has two further points to make about Jackson LJ's recommendations. The first is that it is essential that any prohibition on referral fees should extend to all involved in the civil litigation process, not simply to solicitors as his report suggests. This is essential if there is a level playing field and hidden costs are to be removed.

The second concern is to register a doubt as to whether, in fact, a prohibition will reduce costs as the report suggests. For many solicitors, referral fees are merely a form of marketing which guarantees a return upon an investment. This means that, in most cases, a referral fee is only paid if a solicitor decides to take on a case on behalf of the referred client. Compare this with firms who do not pay referral fees but have to rely on marketing their practice by other media methods, the cost of which can be significant, without any guarantee of a return on the investment. One major central London firm which conducts a significant amount of personal injury work informed the Society that before it began to pay for referrals their media marketing costs worked out

at an average of approximately £600 per case. If this is correct, then Jackson LJ is mistaken in assuming that solicitors will simply save the money and use this to mitigate the effects of non-recoverability of success fees. The money will be spent elsewhere. This must cast doubt on the integrity of other recommendations if, as Jackson LJ stresses, the recommendations must be taken as a whole.

We do not consider that capping referral fees is an appropriate option. If referral fees are inherently wrong as a matter of public policy, they should be banned. It cannot be right that they should be capped as this would interfere with the freedom of competition and the market pricing factors.

Indemnity principle

The Law Society has long argued for the abolition of this principle. It has caused significant problems for solicitors and their clients and has been the subject of much satellite litigation. In many cases, this has resulted in wrongdoers avoiding their liability for costs because of a technical breach in an agreement between the solicitor and his/her client. This satellite litigation has also taken up significant court time and resources and led to an abundance of costs negotiators/draughtsmen who are employed to argue about costs and this in turn has led to an increase in legal costs. We are very pleased that Lord Justice Jackson has given his support to changes which would see this archaic principle disappear.

Costs management and budgeting

It is clearly essential that solicitors plan any litigation within a budget limit and provide information on expenditure to the client. This is a requirement of the Practice Rules. However, litigation is uncertain and there are real problems in providing accurate information about costs in advance.

In the focus group meetings there was a general consensus that reasonably detailed costs information should be provided by both parties at various stages of the proceedings. This would enable claimants to keep any adverse costs insurance cover under review and defendants to review their exposure and reserve for the claim.

At the moment, in most cases, costs information is only provided by the parties on completion of the allocation questionnaire. Such information can be somewhat arbitrary and therefore inaccurate and it would be better to produce a schedule of costs in summary assessment format at various stages. This could also be used in conjunction with costs budgeting.

There are two concerns about requiring greater budgeting. First, there is a cost in undertaking the work to produce this information which may prove disproportionate in smaller cases. Secondly, there is a risk of satellite litigation arising out of disputes over the budgets. The majority of respondents to questions on this subject in our web survey were concerned that Jackson LJ's proposals would lead to this.

| Question | Agree strongly | Agree slightly | Neither agree or disagree | Disagree slightly | Disagree strongly |
|----------------------------------------------------------------------------------------------------------------------------------------|----------------|----------------|---------------------------|-------------------|-------------------|
| The recommendations regarding costs management and budgeting will result in an increase in costs liability for the majority of clients | 48% | 23% | 13% | 8% | 8% |
| The recommendations regarding costs management and budgeting will result in satellite litigation | 53% | 22% | 13% | 6% | 7% |
| Pre-issue costs should be included as a component in costs management | 47% | 23% | 15% | 6% | 9% |

We agree that the judiciary, as acknowledged by Lord Justice Jackson, needs specific training in respect of costs management, but particularly in solicitors' costs and the principles behind them, particularly as to how practices are managed and operated as businesses. The Society would be willing to assist in providing such training.

Small business disputes

In his report Lord Justice Jackson concludes that business people are competent at dealing with their own disputes up to the value of £15,000 but, despite submissions received that such disputes should be dealt with in the small claims court, he does not recommend a change in those rules. He suggests that consideration should be given to a streamlined procedure for lower value business disputes in the Mercantile courts (possibly £150,000) and that a new leaflet should be produced for business disputes up to £15,000 which explains procedures.

This proposal, provided it is widely publicised and supported by appropriate literature, may improve access to justice for smaller SMEs and a streamlined process for dealing with claims will, by its own nature, result in a reduction in solicitors' costs. However, we do not believe that it is necessarily right that SMEs should be expected to conduct their own litigation. First, this will place an additional burden on the business which it may not be well resourced to manage. Secondly, if SMEs do agree to matters being dealt with in the small claims track and act for themselves without the benefit of a solicitor (and, if qualified one way costs shifting were to apply to such cases there would be a further incentive for them to do so) this would result in the courts having to deal with more litigants in person which will add pressure to an already under resourced court system.

The way forward for SMEs, as referred to earlier in this paper, is for more affordable legal expense insurance to be made available to them. The difficulty will be to persuade them to take it up on a voluntary basis.

Disease claims

Both the defendant and claimant personal injury practitioners on our Civil Justice Committee agree that disease claims are quite different from other accident injury claims and, with few exceptions, are not suitable for a fixed cost regime.

This difference is recognised by a distinct and more complex Pre Action Protocol. The Protocol, which has applied since 2003, defines a disease case as '*a PI claim where the injury is not as a result of an accident*'. A disease case requires not only proof of duty, breach of that duty and loss but, as Lord Woolf identified in *Pepal v Thorn Consumer Electronics* (1985, unreported), the court must be satisfied in respect of condition, causation, foreseeability as well as breach of duty and loss. The addition of the ever present component of limitation as a 'live' issue in many disease cases, almost always in some (for example noise induced hearing loss (NIHL) and hand/arm vibration injury cases (HAVS)) and increasingly in others (for example upper limb display screen related cases (WRULD)) adds to the exacting requirements of the evidential picture in disease cases whatever their value.

Medically, expert evidence is invariably required to identify not only the precise condition suffered but also the causal link, as the majority of diseases can have both constitutional and work-related causes. The need to establish the link with employment or indeed any one or more of possible alternate non-constitutional sources of injury is critical. By example, tenosynovitis can be caused by a viral infection, trauma or repeatedly straining activity.

However, the overriding factor which complicates these claims, and which disproportionately adds to their cost, is the simple fact that, excepting mesothelioma and lung cancer, almost all diseases are cumulative in nature - i.e. the disability builds with each and every exposure. Smith LJ accepted in the leading case of *Rothwell*⁵ that investigation of the pleural plaque cases can be '*difficult and time-consuming*'. Mostly old and infirm claimants have to describe a lengthy working history with multiple employers detailing the duration, frequency and extent of each exposure to the injurious agent. Apportionment of such exposure, not only between employers but additionally between that which is 'guilty' and 'innocent', is compounded, in time and costs terms, by the subsequent battle between insurers to assess their individual responsibilities. Yet individually these were low value cases that fell into the CPR fast track.

In disease cases the value of a case does not influence the degree of complexity or the extent of the collation of evidence demanded nor, and this is the key, the likelihood of the myriad of potential issues arising. At almost no time in a disease case can it be certain what issues will unfold as relevant. There is no overall level of certainty such that there can be predictability or even an average of what work will be required. The proposal lumps disease cases as one, yet in 2005 CPR 45.23(3)(a)-(e) listed success fees for these claims, agreed by claimant and defendant representatives, commencing with 27.5% for certain claims through 62.5% for NIHL and HAVS, to 100% for WRULD and stress. And new issues arise where they have not before. For example, recently in a HAVS case, the Court of Appeal had to consider the single issue of the interpretation of the word '*daily*' in British Standard BS 6842 (see *Vance-Daniel v Corus UK 2010 EWCA Civ 274*).

⁵ *Rothwell v Chemical and Insulating Co. Ltd* [2006] EWCA Civ 27

It is not that often that solicitors for claimants and defendants are largely *ad idem* on issues arising in the personal injury field but this is one such case and we would hope this joint concern would be respected. Defendant solicitors agree that cases where there is a single medical report obtained by the claimant and accepted as a whole by the defendant may be more amenable to a fixed costs regime, but they recognise that such cases can only be identified relatively well into the claims process. Furthermore the current practice on issue of proceedings in disease cases is largely that both parties ask for them to be assigned to the multi track.

To do otherwise than to exclude disease cases from a fixed cost regime could result in a significant denial of access to justice. Alternately there will be a large majority of cases where one or both parties will apply to rely on the escape provisions at needless and wasted cost.

Third Party Funding

Third party funding ("TPF") has been accepted by the courts as a lawful means of funding litigation. The Law Society considers that it is a method of funding which should be available to litigants where no other method of funding is available and/or where, for example, a commercial client may prefer to share its damages with a third party rather than risk its own funds.

However, TPF is an unregulated activity. In its response to Lord Justice Jackson's preliminary report in 2009 the Law Society expressed the following concerns arising out of the lack of regulation:

- No limitation on the percentage charged as a contingency (we understand that most funders require a return of 3 or 4 times their potential exposure);
- A lack of certainty about the extent of the liability for third party funders;
- The contract is likely to provide for the funder to withdraw funding in circumstances which could be unreasonable or prejudicial to a client's interests; and
- there is no protection against a third party funder becoming insolvent and therefore having to withdraw funding prematurely and/or being unable to meet its liability under the terms of the contract, which would leave the funded party being liable for his/her own costs and disbursements and, possibly any adverse costs order in the absence of ATE cover.

The Law Society considers that these issues should be dealt with by statutory recognition and regulation of such agreements. For example, strengthening the security for costs rules would help to avoid the problem of insolvency and would also be a considerable deterrent against "rogue traders".

The Civil Justice Council recently published a consultation on a self regulatory code for third party funding which deals with some of the above issues but not all of them. The Society believes that this will provide at best a partial answer to the problem.

Proposals for reform of the process

Since the Law Society has urged caution over a number of the proposals put forward by Jackson LJ, the Society should take a constructive approach in suggesting how the costs in civil litigation could be sensibly controlled so that litigants can expect the costs they face to be reasonable and structured in such a way that access to justice is enhanced and not reduced. A major project of the Society's Civil Justice Committee during 2008/2009 was to consider ways of reducing costs in multi track claims. The basis of this was that in order to reduce costs and delay the process itself had to be restructured and improved. The Committee's views on how to improve the multi track were conveyed to Jackson LJ during Phase 2 of his review. Whilst those views were in respect of multi track litigation, a number of them could be equally applicable to fast track litigation.

The Allocation Questionnaire(AQ)

The inclusion of this process in the Civil Procedure Rules after the conclusion of pleadings was a significant and imaginative departure from the former Rules of the Supreme Court (RSC). However, too often responses to the AQ have become formulaic. In most cases the claimant will put forward a series of fairly standard directions which are agreed but which fail to take into account the individual complexities of the case. In its recent report into similar issues the CCWP suggested that once pleadings had closed the claimant should prepare a detailed Schedule of Issues. These would be argued and refined by the parties at a Case Management Conference. Once agreed by the parties, with appropriate judicial input, these would form the firm basis upon which the case would then be conducted. They should then only be capable of amendment with judicial leave.

Such a process would demand extra judicial time at an early stage of the action. However, the advantage would be that the Schedule of Issues would affect (and ideally reduce very substantially) the topics that would need to be considered subsequently, and thus reduce the costs incurred. The process would not only focus the minds of the parties but might well promote Part 36 Offers or mediations. It is the case that these suggestions were met with considerable reservations by many practitioners involved in lower value cases. Their view was that the production of another document as well as the exchanges of information provided in the pre-action protocols and the Statements of Cases would result in additional work and thus costs, which would not necessarily provide a concomitant reduction in costs later in the process.

Nevertheless there was a widespread view that the opportunities provided by the Allocation Questionnaire ("AQ") were not currently being exploited and in the Society's view there exists scope in all multi track cases for a meeting at court at which both the parties and the judiciary (usually a Master or District Judge) are present and that this should take place specifically for the purposes of promoting settlement. Such a process would be similar to the financial dispute resolution hearings in the family courts. Some Fast Track cases may also benefit from a direction for a settlement meeting but this should only be in cases where it could be shown that this will result in costs benefits. In all cases such settlement meetings can only be effective if the parties themselves are also required to attend.

The problem, however, lies in determining at what stage this exercise should take place. It must be as early in the litigation process as possible if it is to make a real contribution to reducing costs. On the other hand, the chances of settlement will be reduced if the meeting takes place at too early a stage in the development of the case. Different actions will almost certainly require the employment of the process at different stages. The Society recommends that the starting point should be to include a question on the topic in the allocation questionnaire. The default position would be that the

settlement meeting should take place shortly thereafter. This would be subject to the responses of the parties to the allocation questionnaire, with or without argument before the court should this prove contentious.

It is the Society's view that in all Fast Track and Multi Track cases a list of issues should be produced by all parties and lodged with the court when the allocation questionnaire is filed. This will concentrate everyone's minds on dealing with relevant issues only and will give the court the opportunity to only give directions for evidence and disclosure which progresses the case

Further enhancements to the AQ are recommended in the sections below on Disclosure, and on Witness Statements.

Disclosure

If the CMC results in identification of specific issues, the likelihood is that the volume of documentary evidence might also reduce.

If this were not enough, then more radical ideas would need to be explored. Two possible restrictions would limit disclosure. The first would be that for certain cases the parties might be authorised to disclose only what they wanted the court to see. A more radical alternative would be for cases to be conducted without disclosure at all. Any such restriction would have to have limitations – possibly extending to claims of not more than a specified value. Questions on the AQ would identify which cases were suitable for these Orders. The harshness of the process would be leavened by the fact that either party would still be able to make an application for specific disclosure; analogous to the powers now available to the parties under CPR Part 31.12. We also recognise that there may be a small number of cases, clinical negligence and disease claims for example, where this truncated process would not be suitable, irrespective of the value of the claim.

There is one further caveat that we would include. Where the pre-action protocol process comes into play, and is adhered to, a good deal of documentation is frequently made available to the opposing party. The rules currently do not provide any specific exemption which would remove the requirement to re-identify this documentation under the Part 31 process. We recommend that there should be no duty to particularise any documentation that has been disclosed at an earlier stage of the action.

Such limitations on disclosure could apply equally to both Fast Track and Multi Track claims.

There is a significant minority of practitioners who perceive the disclosure process to have a pivotal role in litigation and would not wish to see a change. As we comment below there are arguments for allowing a less forensically scrupulous system for lower value cases, if it results in a significant reduction in costs.

Summary Judgment

Part 24 of the CPR has not been an unqualified success. A number of reasons have been put forward for this including the risk of a potential breach of the Human Rights Act 1998. It is possible that the criteria introduced in Part 24.2(a) in relation to "*no real prospect of succeeding ... defending a claim*" are calibrated at the wrong level and it may arguably be that the judiciary is reluctant to curtail a party's right to a full hearing at a later stage. Whatever the motives, the result has meant that this particular procedure is a much less valuable tool in the litigation process than it could be and causes further cost.

However, a perceived readiness on the part of the court to encourage such applications as a way of trying to conclude litigation speedily might very well improve take up. Currently both parties are enjoined to mediate and largely bear their own costs for doing so, whether successful or not. Part 24 on the other hand invites a significant risk of one party bearing the whole of the costs where the motivation (i.e. to bring the dispute to a conclusion) is not dissimilar. The introduction of summary assessment of costs in these cases has further reduced its attractiveness. Frequently, because of the pressure of time and the inadequacy of the costs framework provided, a substantial injustice can be meted out to either party, purely on the calculation of the quantum of costs payable. This is in a context where the applicant is often trying to shorten the case and thus reduce the overall costs burden.

One way to ameliorate this would be to go back to the principle often adopted under the RSC, and reserve the costs of the application to await the outcome of the case. In other words, the award of the costs on the summary judgement application should normally follow the event at trial (subject to discretion) even where the application is not successful at the interlocutory hearing. An alternative would be to give similar promotional support and cost neutrality for summary judgment that currently exists for mediation.

It will be argued that many cases are not suitable for Part 24. Equally, we suspect that many clients would be willing to spend or at least put at risk £5,000 - £10,000 to collect or defend a claim of £50,000 but would not put at risk the full costs of trial. These kinds of cases do not appear in the available statistics because they never come to fruition. We need to give more thought to whether a flawed system which provides rough and ready redress is better than a much better system that is too expensive to use at all.

The final possibility to consider if this idea is worked through, would be for some kind of process to be available so that the parties could agree deliberately and explicitly (after an appropriate objective advisory process) to submit their claim to a quasi-Part 24 process with or without some kind of limited oral hearing perhaps akin to Early Neutral Evaluation which has been in use at the Mayor's and City of London County Court for some time. Parties would agree at the outset to be bound by the decision – subject only to the normal rights of appeal, if any, available under Part 52 of the CPR.

Alternative Dispute Resolution

Whilst there are inevitably arguments as to the manner and circumstances in which ADR should be used, there is recognition by the Society of the value of ADR as a tool in the dispute resolution process. The discussion to be had therefore is about the stage at which it should be employed, whether consideration of the process should be imposed by the judiciary or requested by one or more of the participants, and whether it should be obligatory. The Society's view is that mediation (as opposed to negotiation which occurs at all stages of the litigation process) should be available at any stage if called for by either party. There should also be judicial involvement so that the process is addressed even if the parties do not independently elect to use it themselves.

The suggestion that mediation should be raised in the claim form itself and the amendments made recently in the Allocation Questionnaire are somewhat formulaic. A more analytical and authoritative Case Management Conference as proposed above would be the obvious point at which the topic could be pursued and clear judicial guidance given. Conversely, obligatory mediation would be unrealistic. The court could however provide an indication that was of sufficient clarity to have a subsequent impact on the determination of costs if the case was litigated through to completion.

However, the Society believes that mediation has its limits. In a series of Hamlyn Lectures given by Professor Dame Hazel Genn in December 2008⁶ she remarks on some of the shortcomings of the process, and equally important, some of the converse reasons that Government and the Ministry of Justice have sought to move it centre stage. The Society strongly supports Professor Genn's reservations about the possible risks as to fairness and justice in the process.

While the Society recognises that mediation has its place in the array of methods to solve disputes it is not a substitute for litigation but rather a potential adjunct. Consequently, there is no "quick fix" to be had by forcing parties to engage in an obligatory mediation as a way of reducing costs.

Early Neutral Evaluation (ENE)

This is a process which we believe would have an enormous impact in the course and longevity of litigation. It is now an integral part of the Family Courts and our understanding is that it is of considerable value. We believe it could be of similar worth in virtually all areas of civil litigation.

Timing of the exercise is important. The case must be sufficiently articulated that the judge can make a useful and meaningful contribution in the analysis of the dispute. Equally, it must be sufficiently close to the instigation of the action that there is a significant saving in costs from full trial. Moreover it must be clearly distinguished from the trial process itself. It should not be perceived or used as a "dry run".

We think that the conclusion of the pleadings would provide the obvious departure point for the process. We would not wish to see it incorporated in a Case Management Conference, even one with more analysis such as that proposed above. The reason for this, is that ENE should provide the parties with a forum (within a very brief ambit) to articulate their case and have an initial, non-binding judicial view. The process is quite different to the identification of issues and the provision of an effective mechanism for their determination which is the central requirement of a CMC. To mix the two would at best confuse the parties and at worst, would blunt the effectiveness of both processes. Both parties to the litigation should be present throughout any ENE hearing.

We would however favour a District Judge or Master at a CMC commenting on the absence of any request by the parties for an ENE. Here too the possibility of a costs sanction at the end of the case might be useful.

Experts

It is well known that the cost of expert evidence can make a substantial contribution to the overall costs of a case. This is therefore another area in which potential savings could be made, by changes to the CPR.

One possibility would be to limit further the ability of parties to instruct their own experts. We would make an exception for high value cases where it may well be proportionate for a party to obtain expert advice and evidence they feel confident in. .

⁶ Law Society Gazette 18 December 2008

In addition, the provision in the Fast Track of CPR35.5 that *“the court will not direct an expert to attend a hearing unless it is necessary to do so in the interests of justice”* could be extended to all claims up to £100,000 in value. This has these merits:

- the cost of an expert attending trial is often the most expensive element of using an expert; as distinct from the cost of the original report.
- the rule gives the court power to deviate from the norm in an appropriate case.
- in the Fast Track, there is no evidence that the rule causes problems for judges, PROVIDED THAT there has been a “discussion between experts” (CPR Part 35.12) resulting in a joint statement of matters agreed or not agreed. Our experience is that this joint statement is very helpful to the judge.

Statements of Case

We are influenced by, and endorse the view of the CCWP, that pleadings have become too long and complex and ought to be shorter. In our view that not only applies to Commercial Court cases, but also to the majority of Multi Track claims. In a straightforward case the pleadings, which are often settled by counsel have become routine and formulaic, whilst in more complex cases they can be too detailed so that it is difficult to see what issues are really in dispute.

There are two competing requirements in pleadings, namely the articulation of the parties’ claims or defences as succinctly as possible, and the inclusion of every potential cause of action in order to preserve the opportunity to pursue a number of different arguments as necessary.

There has been a tendency, notwithstanding the operation of Part 1 of the CPR, for this latter imperative to prevail. This approach reduces the easy identification of key issues, and is thus inimical to swift or cheaper dispute resolution, even though it is recognised that many cases ultimately turn on a relatively small number of facts or legal principles.

We are also reminded by the Commercial Court that in the 19th century pleadings were headed “Points of Claim,” “Points of Defence” and “Points of Reply”. In this computer age such pleadings could literally become bullet points of the significant material facts. The Multi Track claims process could then adopt the Commercial Court recommendation that, after the pleadings are closed, the parties should draw up a list of issues in dispute which, once settled, would become a court document which would become the key procedural tool and may be updated by the court only at subsequent case management conferences.

Pleading points would disappear and the issues narrowed at an early stage to those issues which are really in dispute, and the parties would thus have a good opportunity at close of pleadings to decide whether the claim should be settled or contested.

The current format of the CPR provides further support for the use of much more limited Statements of Case than are currently generally employed.

Witness Statements

One of the longer term criticisms of the English litigation process was that the resolution of the dispute was focussed on the trial process itself. Historically this was the point where the parties really came face to face with the other party's case as it was presented to the court at the hearing. In order to overcome the difficulties presented by this style of litigation and potential ambushes at trial, the process of exchanging witness statements was developed. The concept underlying witness

statements is naturally attractive. If both parties know the other side's case and evidence through their witness statements, it is more likely that they will settle the claim without the necessity of those witnesses having to give evidence at trial.

Whilst the preparation of witness statements at an early stage of the process concentrates the minds of the parties on the evidence for and against them, the modern day witness statement does not necessarily achieve the desired end. It is, in current practice, a document which receives a considerable amount of a lawyer's attention in its preparation and finalisation. The result can be a document which, rather than making plain the evidence that a witness will give, cloaks that evidence within a scripted and honed document. The result is that the witness does not give evidence in chief but the statement stands as that evidence. This has a disadvantage for the witness who is thrown straight into cross examination. On the other hand, the evidence that the court receives is prepared by lawyers for the purpose of presenting that evidence in the best possible light. In an adversarial system that is not necessarily the best method of providing the court with evidence in chief in a manner which will enable the judge accurately to determine its veracity and dependability.

The question arises as to how there may be any developments of the witness statement process that could both assist the court and ensure that the broad brush of evidence is revealed at an early stage of the proceedings. One possible development would be that witness statements be shortened to set out a more general picture of the evidence to be given by any particular witness. That witness would have to attend the court to give evidence in chief and then be subject to cross examination. The evidence in chief could be limited but sufficient to ensure that the court was able to hear the witness direct in relation to their own evidence. This would give the court a much more direct flavour of the evidence in chief and the witness. In addition, it might assist the witnesses in that they are able to give their own evidence direct to the court and not be immediately faced with cross examination.

Another alternative would be for the rules to be amended so that Witness Statements would be limited in length either rigidly by word count in the Rules themselves, or by direction of the Judge in the more focused and specific Case Management Conference envisaged in paragraph 5 (a) above. The Society's Civil Justice Committee would happily assist by identifying norms for the most common types of litigation. Again, questions on the AQ would identify why any statement in any case needed to exceed the norm.

Upon attendance at court, the witness would give evidence in chief notwithstanding the earlier statement. That evidence could be of limited duration, but sufficient to ensure the court was hearing the witness's own recollections, and not the measured analysis of his or her legal advisers.

Costs Information

During the Society's consultation with its members on Jackson LJ's recommendations a number of claimant and defendant solicitors indicated that more frequent exchange by both parties of accurate costs information would assist them with evaluating the claim and the assessment of proportionality of the proceedings in most cases. This could be done at the allocation, disclosure, witness statement/expert report exchange and listing stages. The costs information could be in the summary assessment format (form N260) and would need to be accurate enough to stand up to challenge upon any final assessment of costs.