

***WORKING GROUP ON
CIVIL LITIGATION COSTS***

ON A SLIPPERY SLOPE

**A RESPONSE TO THE JACKSON
REPORT**

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Conclusions

- The Jackson proposals are **inconsistent with a fundamental principle of civil justice** – the principle of full compensation for wrongful injury – because they entail the ‘raiding’ of damages recovered by successful claimants to pay for their legal costs. They would be the beginning of a slippery slope towards ever greater inroads into the compensation to which injured persons are legally entitled.
- The evidential base for such a radical reform is entirely inadequate. The Jackson report presents **a misleading and partial account of the problems** requiring solution because it too frequently treats anecdote and opinion as if it were fact, and systematically prefers the evidence of the defence lobby over that favouring injured persons.
- What evidence is available suggests that the Jackson proposals, if implemented, will have **an adverse impact upon access to justice** because they favour the financial interests of defendants over the interests of claimants in getting effective legal advice and assistance and proper compensation for their injuries.
- Additionally, they will **reduce the availability of legal services to injured persons** because legal and practical limits on what lawyers can charge will inevitably cause them to turn away clients they represent under the current system
- Overall, the Jackson proposals will **benefit defendants at the expense of injured persons**, because some injured persons with claims that are currently recognized will find it impossible to find a lawyer to represent them, while those who do get legal representation will generally have to pay for it out of their damages. Those with serious injuries are likely to be the biggest losers. Additionally, the level of damages recovered is likely to be adversely affected by the unpredictable incentives in the proposed regime, and health and safety to suffer because of the reduced legal sanction for dangerous practices.
- The Jackson report also **pays insufficient attention to alternative and potentially superior methods of containing civil litigation costs** (eg a mandatory BTE component of motor insurance, properly coordinated with other forms of advance protection against legal costs) that could address properly evidenced difficulties in a proportionate and focused manner.
- The Jackson report would effect major changes in the civil litigation system by **a process of questionable legitimacy** in which a single judge was left to determine issues of significant political and social consequence on the basis of evidence very largely supplied by one party to a long-running and polarized debate, with insufficient independent verification.

Recommendations

- The core Jackson proposal to amend the CFA regime so that the lawyer’s success fee is taken out of the injured person’s damages should be rejected.
- The Government should appoint a commission of inquiry, with representatives from all stakeholder interests, to gather and assess evidence about the costs of civil litigation, and to evaluate possible solutions to problems identified with it. As part of the process, insurers should provide unimpeded access to case files, subject only to redaction necessary to maintain the anonymity of persons concerned.

Executive Summary

Background

This is the report of an independent working group on the main recommendations in Sir Rupert Jackson's *Review of Civil Litigation Costs*, which forms the basis of the Government's proposals to reform civil litigation funding and costs in England and Wales. Our analysis focuses on the central recommendations in the Jackson report, which deal with conditional fee agreements (CFAs).

CFAs, also known as 'no win no fee' agreements, were introduced in 1995 and their scope was extended in 2000 with the intention that they would take the place of public funding via Legal Aid for most categories of civil litigation. Civil Legal Aid was effectively abolished in the vast majority of cases. Claimants whose CFA-funded action fails pay their own lawyer nothing and, though theoretically liable for the other side's costs, can protect themselves against this risk by taking out after-the-event (ATE) insurance. If a CFA-funded claim is successful, the costs recoverable from the losing party include both the claimant lawyer's 'success fee' and the claimant's ATE premium.

The Jackson Report identifies the CFA regime as a major driver of costs in the civil justice system, and proposes a fundamental change in the funding of legal services in order to address this perceived deficiency. The key Jackson strategy is to transfer the costs of securing access to justice from defendants and their insurers (and hence the community at large) to injured persons and their lawyers. It does so by proposing to abolish the recoverability of success fees and ATE insurance premiums from defendants. By way of trade-off, it recommends that damages for pain and suffering be raised by 10% - because the success fee would have to be paid out of the injured person's compensation - and the introduction of a 'one way' costs rule in personal injury cases, meaning that claimants will generally have no liability for the defendant's legal costs even if their claim is unsuccessful, and that ATE insurance would become largely redundant.

The working group set out to subject the Jackson proposals and their evidential foundations to critical analysis, to make an independent contribution to the debate on civil litigation costs as respected academic experts not previously committed to one side or other of an at times polarised debate, and to stand up for both the interests of claimants and the general public interest rather than the narrow commercial interests of insurers, claimant personal injury firms, or others with a direct financial stake.

In particular, the working group sought critically to evaluate the recommendations in the Jackson Report on the Costs of Civil Litigation, having regard to their consistency with fundamental principles of civil justice, their likely impact upon access to justice, their likely impact upon the availability of legal services, who will gain if the recommendations are implemented and who will lose, whether the recommendations address real problems that deserve solution, the existence of alternative and superior methods of containing civil litigation costs, and the legitimacy of the process adopted to effect major changes in the civil litigation system. The primary but not exclusive focus of the working group's review is liability for personal injury.

Conclusions

In our view, the Jackson proposals are **inconsistent with a fundamental principle of civil justice** –the principle of full compensation for wrongful injury – because they entail the 'raiding' of damages recovered by successful claimants to pay for their legal costs. They would be the beginning of a slippery slope towards ever greater inroads into the compensation to which injured persons are legally entitled.

The evidential base for such a radical reform is entirely inadequate. The Jackson report presents **a misleading and partial account of the problems** requiring solution because it too frequently treats anecdote and opinion as if it were fact, and systematically prefers the evidence of the defence lobby over that favouring injured persons.

What evidence is available suggests that the Jackson proposals, if implemented, will have **an adverse impact upon access to justice** because they favour the financial interests of defendants over the interests of claimants in getting effective legal advice and assistance and proper compensation for their injuries.

Additionally, they will **reduce the availability of legal services to injured persons** because legal and practical limits on what lawyers can charge will inevitably cause them to turn away clients they represent under the current system

Overall, the Jackson proposals will **benefit defendants at the expense of injured persons**, because some injured persons with claims that are currently recognized will find it impossible to find a lawyer to represent them, while those who do get legal representation will generally have to pay for it out of their damages. Those with serious injuries are likely to be the biggest losers. Additionally, the level of damages recovered is likely to be adversely affected by the unpredictable incentives in the proposed

regime, and health and safety to suffer because of the reduced legal sanction for dangerous practices.

The report **pays insufficient attention to alternative and potentially superior methods of containing civil litigation costs** (eg a mandatory BTE component of motor insurance, properly coordinated with other forms of advance protection against legal costs) that could address properly evidenced difficulties in a proportionate and focused manner.

The Jackson report would effect major changes in the civil litigation system by **a process of questionable legitimacy** in which a single judge was left to determine issues of significant political and social consequence on the basis of evidence very largely supplied by one party to a long-running and polarized debate, with insufficient independent verification.

Recommendations

The core Jackson proposal to amend the CFA regime so that the lawyer's success fee is taken out of the injured person's damages should be rejected.

The Government should appoint a commission of inquiry, with representatives from all stakeholder interests, to gather and assess evidence about the costs of civil litigation, and to evaluate possible solutions to problems identified with it. As part of the process, insurers should provide unimpeded access to case files, subject only to redaction necessary to maintain the anonymity of persons concerned.

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Chapter 1

INTRODUCTION

*Ken Oliphant**

1.1 - This is the report of an independent working group invited to consider the proposals in Sir Rupert Jackson's *Review of Civil Litigation Costs*.¹ The report forms the basis of the Government's proposals to reform civil litigation funding and costs in England and Wales, which were announced by the Justice Secretary on 15 November 2010.²

About the working group

Constitution

1.2 - The working group consists of leading academic experts in the law of civil liability for personal injury and labour law. We were invited to give a preliminary assessment of the Jackson Report at a meeting hosted by Thompsons Solicitors in January 2010. Following this meeting, Thompsons agreed to give financial support for further meetings of the group with a view to publication of a reasoned response to the Jackson proposals.

1.3 - The working group is chaired by Ken Oliphant (Vienna and Bristol). Its members are: Roderick Bagshaw (Oxford); Douglas Brodie (Edinburgh); Keith Ewing (King's College London); Julian Fulbrook (London School of Economics); David Howarth (Cambridge); Richard Lewis (Cardiff); Claire McIvor (Birmingham); Annette Morris (Cardiff); John Murphy (Manchester); and Kevin Williams (Sheffield Hallam).

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¹ The Right Honourable Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (TSO, 2010). Available online at <www.judiciary.gov.uk/about_judiciary/cost-review/>.

² <http://www.justice.gov.uk/news/newsrelease151110b.htm>. See Ministry of Justice, 'Proposals for reform of civil litigation funding and costs in England and Wales: Implementation of Lord Justice Jackson's Recommendations' (Consultation Paper CP 13/10, 2010).

Independence

1.4 - Members of the working group have diverse political allegiances. No external pressure was placed on them in compiling this report. Thompsons provided financial support, assisted in the drafting of the working party's terms of reference, provided information about personal injury practice, and had the opportunity to comment on a draft of the report, but, after the initial meeting, it was not represented during the group's deliberations. It exerted no editorial control over the content of this response. The working group should therefore be regarded as independent. We collectively take full and exclusive responsibility for the findings and recommendations in this report.

Aims

1.5 - The primary aims of our work were:

- to subject the Jackson proposals and their evidential foundations to critical analysis,
- to make an independent contribution to the debate on civil litigation costs as respected academic experts not previously committed to one side or other of an at times polarised debate, and
- to stand up for both the interests of claimants and the general public interest rather than the narrow commercial interests of insurers, claimant personal injury firms, or others with a direct financial stake.

Terms of Reference

1.6 - These aims were reflected in our agreed Terms of Reference, which identify more precisely the criteria against which we sought to evaluate the Jackson report and its proposals:

Terms of Reference:

The working party will critically evaluate the recommendations in the Jackson Report on the Costs of Civil Litigation, having regard to:

- Their consistency with fundamental principles of civil justice
- Whether they address real problems that deserve solution
- Their likely impact upon access to justice
- Their likely impact upon the availability of legal services
- Who will gain if the recommendations are implemented and who will lose?

- The existence of alternative and superior methods of containing civil litigation costs
- The legitimacy of the process adopted to effect major changes in the civil litigation system.

The primary but not exclusive focus of the review will be liability for personal injury.

Working Methods

1.7 - After the initial meeting in January 2010, the working party met on two more occasions at Thompsons' London offices (in May and August 2010). As the group sought to make progress towards a common position, there was also extensive exchange of ideas and comments by email. It was agreed that there would be a division of function within the group, with some members being asked to draft chapters of the final response and others to comment on the drafts produced. All members assisted in the formulation of the conclusions and recommendations stated in Chapter 6. The individually authored analyses found in Chapters 2 to 5 explain the reasoning behind the agreed propositions, and the factual foundations on which they rest, as well as giving the authors freedom to develop their own analyses and arguments.

About the Jackson Report

1.8 - Lord Justice Jackson's review into the costs of civil litigation was set up by the Master of the Rolls, Sir Anthony Clarke, in November 2008.³ Its establishment reflected general concern at the burden of civil justice costs. The Report makes 109 recommendations about matters of widely divergent importance. This response does not seek to address them all. Many of the proposals are of relatively minor significance, or relate to largely technical matters, and can be supported (or at least not opposed). Our analysis focuses on what we regard as the Report's key finding – that Conditional Fee Agreements (CFAs) have emerged as a major driver of excessive costs in the civil justice system (para 4.3.26) – and the recommendations Jackson makes for addressing this perceived problem by effecting a fundamental change in the funding of legal services to provide access to justice. These are the key recommendations taken up by the Government in its consultation paper of November 2010.

³ This account draws on passages in M Lunney & K Oliphant, *Tort Law: Text & Materials* (4th edn, 2010).

Funding Legal Services to Provide Access to Justice

1.9 - The accessibility of the courts to ordinary persons has been a political objective in Britain since the foundation of the welfare state in the years following World War II. Access to justice was initially secured by the establishment in 1949 of a system of Legal Aid which was designed to help persons of low to moderate means with the cost of legal advice and representation in both civil and (eventually) criminal cases.⁴ Almost all types of civil litigation, including personal injuries litigation, were covered. Over time, however, eligibility for Civil Legal Aid became more restrictive: at the scheme's inception in 1949, it is estimated that 80% of the population satisfied the income criteria, but this slumped to 48% by 1990.⁵ Political enthusiasm for cuts in public spending induced Government to consider whether the cost of securing access to justice might be transferred to the private sector, and quickly led to the introduction of conditional fee agreements (CFAs) and the further rolling back of Civil Legal Aid.

CFAs

1.10 - CFAs, also known as 'no win no fee' agreements, were first made lawful in 1995.⁶ Claimants whose CFA-funded action fails pay their own lawyer nothing and, though theoretically liable for the other side's costs, can protect themselves against this risk by taking out what is known as 'after-the-event' (ATE) insurance. If a CFA-funded claim is successful, the costs recoverable from the losing party include both the claimant lawyer's 'success fee' and the claimant's ATE premium.⁷

CFAs and Access to Justice

1.11 - The scope for CFAs was extended as from 1 April 2000 by the Access to Justice Act 1999. The intention was that CFAs would take the place of public funding via Legal Aid for most categories of civil litigation. Civil Legal Aid was effectively abolished in the vast majority of cases (excluding clinical negligence) from the same date. This was a decisive moment. It entailed the transfer of the financial burden of securing access to justice from the state to the private sector – in the first instance, to the claimant's lawyers, but ultimately to the liability insurers standing behind

⁴ Following the recommendations of the Rushcliffe Report on Legal Aid and Legal Advice (1945).

⁵ Legal Action Group, *A Strategy for Justice: Publicly Funded Legal Services in the 1990s* (1992).

⁶ Conditional Fee Agreements Order 1995/1674.

⁷ Courts and Legal Services Act 1990, section 58A(6); Access to Justice Act 1999, section 29.

the vast majority of defendants (or, in a minority of cases, to a self-insuring defendant). In this way, the cost was – and continues to be – spread throughout the community.

1.12 - The process by which this further transfer is effected varies according to the success or failure of the claim. In a successful action in court, the defendant is usually ordered to pay the claimant's legal costs, which ultimately means that the defendant's insurer – or, in cases of self-insurance, the defendant personally – pays the claimant's lawyers. If a compensation payment is agreed out of court, the settlement will also provide for reimbursement of the claimant's legal costs – so here too the cost is spread throughout the community by the insurance mechanism. Where, conversely, the claim fails, the process is different. The claimant would normally be liable to his or her own lawyers – but under a CFA pays them nothing if the claim fails: no win, no fee. But there's still the matter of the defendant's legal costs, which, under the usual 'loser pays' rule, the claimant would have to pay. However, by taking out ATE insurance, the claimant is protected against the risk of liability for the defendant's costs. If the claim fails, it is the ATE insurance that bears the cost, not the claimant.

1.13 - So... if the injured claimant is insulated from legal costs even if the claim fails, who picks up the bill? In the first instance, it's the claimant's lawyers: no win, no fee. But the trade-off for them in the current CFA regime is the success fee they can charge in every case they win. This is a percentage 'up-lift' on their regular fee, not (unlike in the United States, or as in the Government's post-Jackson consultation paper⁸) a cut of the damages. The maximum they can claim is twice their regular fee – but industry standards provide for much less in typical cases: 12.5% in road traffic cases, which make up almost four in five personal injury claims,⁹ and 25% in work injury cases.¹⁰ The success fee thus acts as a quid pro quo for the claims in which, under a CFA, the lawyers get nothing. But who pays the success fee? Nominally the lawyers' client, ie the claimant, but actually the defendant or the defendant's insurer – because the success fee is included in the costs that the claimant gets back from the other side. And so is any ATE premium the claimant has paid. Ultimately, then, the cost of unsuccessful claims is spread throughout the community by the same insurance mechanism that spreads the cost of compensation for wrongful injuries throughout the community. The community at large pays to secure access to justice.

⁸ Ministry of Justice, 'Proposals for reform of civil litigation funding and costs in England and Wales' (2010) para 220 ff.

⁹ According to the official statistics released by the Compensation Recovery Unit. See www.dwp.gov.uk/other-specialists/compensation-recovery-unit/.

¹⁰ See further CPR Pt 45. The figures are for claims settled out of court (as in the vast majority of cases).

1.14 - It is this system that the Jackson Report proposes to reform, with the intention of transferring the costs of securing access to justice from defendants and their insurers (and hence the community at large) to injured persons and their lawyers.

Alleged Flaws in CFA Regime

1.15 - The Jackson Report identifies four alleged flaws in the CFA regime (para 10.4.7 ff). First, it is unfocused because there is no eligibility test for entering into a CFA. It is necessary only that a willing solicitor can be found. Secondly, CFA claimants generally have no interest in, and exert no control over, the level of costs being incurred in their name. Whether the case is won or lost, the client will usually pay nothing. Thirdly, the costs burden placed upon defendants (or their insurers) is excessive and sometimes amounts to a denial of justice because a defendant who quite reasonably contests a case to trial, but loses, may incur a grossly disproportionate liability in costs. The costs consequences of the recoverability rules can also drive defendants to settle at an early stage despite having good prospects of a successful defence. Lastly, the current CFA regime presents an opportunity for lawyers substantially to increase their earnings by 'cherry picking' (ie taking on only the most potentially lucrative cases and rejecting others), which tends to demean the profession in the eyes of the public.

Jackson's main recommendations

1.16 - Having regard to the alleged flaws in the CFA regime, the Jackson Report recommends that success fees and ATE premiums should no longer be recoverable from the defendant (paras 9.4.1 ff and 10.4.1 ff). It recognizes, however, that implementation of this proposal will leave personal injury claimants worse off than they are at present. In this context, the Report emphasises two important features of personal injuries litigation (para 19.1.2). First, the claimant is an individual, for whom in the vast majority of cases it would be prohibitively expensive to meet an adverse costs order in fully-contested litigation. In an estimated three quarters of households, the claimant's own home or other financial assets would be at risk from an adverse costs order. Secondly, the defendant is almost invariably either insured or 'self insured' (ie a large organisation which has adopted the policy of paying out on personal injury claims as and when they arise, rather than paying substantial liability insurance premiums every year). Personal injury litigation is thus the paradigm instance of litigation in which the parties are in an asymmetric relationship because of the inequality of bargaining power between them.

1.17 - So that injured persons are not deterred from bringing claims for compensation, the Report makes two proposals designed to offset the non-recoverability of success fees and ATE premiums in personal injury

cases. First, a general 'one way costs shifting rule' should apply, ie the defendant pays the claimant's costs if the claim succeeds, but the claimant normally pays the defendant nothing if the claim fails. The claimant therefore has no need for ATE insurance. According to the Report, one-way costs shifting is a superior mechanism for protecting personal injury claimants against the risk of adverse costs. Claimants are successful in the majority of personal injury claims anyway and, even under the present system, defendants seldom recover costs and so derive little benefit from two-way costs shifting (para 19.1.3). The Report emphasises, however, that this approach is not appropriate in all areas, and specifically excludes its application to commercial and construction litigation (para 9.5.5).

1.18 - Secondly, because successful claimants will, if the proposal is implemented, end up paying their lawyers' success fee out of the damages they recover, there should be a one-off and across-the-board increase in the level of general damages for pain, suffering and loss of amenity of 10 per cent, and a cap on the amount of success fee that lawyers may deduct at 25 per cent of damages, excluding damages for future economic losses (para 10.5.3 ff). The Jackson Report claims – on the basis of evidence not released to the public – that the increase in general damages will leave the great majority of claimants whose claims settle early no worse off (para 5.4).

Our Analysis

1.19 - The subsequent chapters of this report consist of analyses of particular issues by individual members of the group, followed by a set of conclusions and recommendations. In Chapter 2, Claire McIvor addresses the likely impact of the Jackson proposals on access to justice. Chapter 3 consists of an analysis by David Howarth of the likely consequences of the Jackson proposals on the provision of legal services. Chapter 4, by Richard Lewis, inquires as to possible alternatives to the Jackson Report's preferred approach, and considers in particular the option of making before-the-event (BTE) insurance a component of mandatory motor insurance as a more proportionate and focused response to the real problems in the current system. Lastly, Keith Ewing addresses the politics of the Jackson Report, and questions the legitimacy of the process adopted for making fundamental and far-reaching recommendations for change in the civil justice system.

1.20 - Cutting across chapter boundaries are some issues that could not easily be confined in our analysis. Access to justice – though nominally the theme only of Chapter 2 – in fact underscores almost our whole consideration of the Jackson proposals, which in our view are likely to threaten access to justice by restricting the availability of legal

representation to injured persons (Chapter 3). The question arises whether access to justice can better be guaranteed by alternative means (Chapter 4), without the broader social and political consequences described in Chapter 5.

1.21 - Other issues that are addressed by more than one chapter are the consistency of the proposals with fundamental principles of civil justice, who will gain if the proposals are implemented and who will lose, and whether the Jackson report identifies real problems that deserve solution.

1.22 - The various strands of the first five chapters are tied together in Chapter 6, which gives the working group's conclusions on the issues raised in its terms of reference, and its recommendations.

Chapter 2

JACKSON AND ACCESS TO JUSTICE

*Claire McIvor**

2.1 - The official objective of the Jackson review was 'to promote access to justice at proportionate cost'. There are thus two separate but inter-related limbs to this objective: (i) promoting access to justice; and (ii) making costs proportionate. At first sight, the notions of 'access to justice' and 'proportionate costs' are not obviously compatible. The notion of access to justice is, after all, a fundamental human right. It is specifically enshrined in Article 6 of the European Convention of Human Rights where it is unqualified, save as to the question of publicity in certain circumstances. Importantly, it is unqualified in terms of cost considerations. However, to suggest that the notion of access to justice in the civil law context is concerned solely with, to borrow the language of Article 6, an individual right of access to a fair and public hearing for the determination of civil rights and obligations is obviously to over-simplify the issue. Where personal injury claims are concerned, a natural interpretation of this formulation of access to justice is one which focuses primarily on the interests of the injured party and which therefore prioritises the interests of the claimant over those of the defendant. It is important however that a more balanced approach is taken and that the interests of both the defendant and the claimant are weighed in equal measure. If a sufficiently balanced approach is taken, then both the relevance of costs considerations and the significance of the proportionality principle become more readily apparent.

2.2 - Arguably a good measure of the success of our civil justice system in promoting access to justice is the extent to which it balances the competing interests of claimants and defendants. In order to assess it on this basis, we first need to identify the relevant interests of both parties and to determine how the balance between these interests is ideally to be drawn. Views on where the balance is to be drawn will differ depending on the theoretical leanings of the individual assessor and it is in relation to the costs issue that opinion will be most divided. Thus the distributive justice theorist is likely to approach the issue in a very different way to the corrective justice theorist. The discussion in the first section of this

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chapter will engage with these issues and seek to identify, from an access to justice perspective, how well the current rules on costs in personal injury cases reconcile the interests on both sides of the dispute.

2.3 - Having determined how well our civil justice system currently promotes access to justice, the discussion will move on to consider whether the main Jackson recommendations are likely to have an overall positive or negative impact in this respect. It is clear that the majority of the recommendations are weighted heavily in favour of defendants, particularly insurer defendants. This would be acceptable if it were the case that the current balance is skewed heavily in favour of claimants, as he suggests it is, for such defendant-friendly steps would correct the imbalance and thereby promote overall access to justice. By the same token, if his assessment of the current state of balance turns out to be incorrect, then his defendant-friendly recommendations will have the effect of skewing the balance in favour of defendant interests and thereby placing unwarranted restrictions on access to justice from the claimant perspective. Unfortunately, it is the latter that would appear to be the case.

2.4 - Following an analysis of the evidence relied upon by Jackson in identifying the main problems with the current rules on costs, it will be argued that he fails by a considerable degree to justify, from an access to justice perspective, his defendant-friendly recommendations. Firstly, the evidence presented fails to substantiate the suggestion that the primary source of the problem of high costs is unscrupulous behaviour on the part of claimant solicitors in exploiting the CFA funding model. Secondly, his package of recommendations goes far beyond the specific problems that he purports to identify and as such they must be described as both excessive and unwarranted. The discussion at this point will focus on his reformulation of the proportionality principle, his proposal to fix costs in the fast track and his comments in relation to the small claims track limit.

Balancing the interests of claimants and defendants

2.5 - In personal injury claims, the interests of the claimant from an access to justice perspective will naturally differ from those of the defendant. While from an academic point of view it would be possible to engage in a long and detailed theoretical debate about the meaning of access to justice, it is argued that for present purposes what matters most is what it actually means to the ordinary citizens who find themselves caught up in a civil dispute. For the aggrieved victim seeking a remedy for injury suffered, what is important is obtaining easy access to an official legal forum in which to air his/her grievance against the defendant and consequently to have the dispute properly resolved. The dispute resolution itself will be the most important part of the process, and as explained by

Genn, proper dispute resolution may be said to occur when the relevant substantive legal rules are correctly applied to the facts of the claim.¹ Where the application of the substantive law rules indicates that the claimant has been tortiously injured by the defendant, proper dispute resolution will also involve the provision of an appropriate remedy, which more often than not will consist of an award of damages.

2.6 - While the procedural aspects of the access to justice notion clearly play a crucial role in facilitating the substantive resolution of the claim, it must be recognised that they are subordinate to the substantive law aspect. Auxiliary in nature, they will therefore fall to be judged in accordance with how well they support the substantive dispute resolution process. The procedural aspects of access to justice relate to the idea of obtaining easy access to a legal forum in which dispute resolution can take place. The most obvious legal forum will be that provided by the court where the claim proceeds as far as a trial, but more often it will take the form of solicitor negotiations.² In either case, access to a legal forum must involve at the outset access to proper legal advice on the substantive merits of the grievance, for the claimant should be given an indication at the earliest possible stage as to whether there is any point in pursuing a claim. If the claim has no legal substance, then it should be dropped as early as possible for the benefit of all concerned, and certainly before any significant resources are invested in it. Where the injury in question is significant and the value of the claim falls outside the small claims limit, proper legal representation will ordinarily also be synonymous with idea of access to a legal forum. This is because the average claimant will be a one-time litigant lacking the necessary skills and confidence required to argue a case. From the costs perspective, the claimant who feels that he/she has been seriously wronged will expect to access the machinery of justice without incurring a risk of significant expense, regardless of whether the case is won or lost in the end.³ Such an expectation will stem from the generally held view that the justice system is a public service, available to all citizens. Where the claimant is a tax payer, this sense of entitlement is likely to be even stronger. For although the civil justice system is no longer publicly funded in the way that the criminal system is, the ordinary citizen is likely to be unaware of this.

¹ H Genn, *Judging Civil Justice* (Cambridge University Press, 2010) p 14.

² While mediation provides another common forum for resolving civil law disputes, it is not, at present, particularly well used in personal injury cases.

³ One of the findings of a recent large-scale study into the public's perception of the law and legal processes is that people want quick, cheap and relatively stress-free solutions to civil law disputes. To quote the study's lead author, Hazel Genn, '[p]eople want to get on with their lives as quickly as possible and few relish the thought of having to pay to pay to obtain what they believe is their right or what is due to them.' See H Genn, *Paths to Justice: What People Do and Think About Going to Law* (Hart Publishing, 1999) p 254.

2.7 - For the alleged wrongdoer, the concept of access to justice will be defined in a slightly different way. Once again, proper dispute resolution will be paramount, and as such the substantive element of the access to justice process will be the same. However, in terms of the procedural aspects of the process, what the defendant will be most concerned with will be having the opportunity to respond to the allegations of wrongdoing put forward by the claimant. From this point on, the content of the procedural aspects of the justice process will differ depending on whether the defendant wishes to settle the claim or to contest it. Moreover, unlike the claimant, the defendant will not be so concerned with having access to an official legal forum with legal advice and legal representation. This is because defendants are usually insurance companies who have subrogated the rights of their clients, the alleged wrongdoers, and they have the kind of knowledge and experience required to defend themselves in many instances. Where the claim is evidently a sound one such that, on the basis of clear and settled legal substantive law principles, it is evident that a court would uphold it, the defendant will wish to negotiate a settlement. From a costs perspective, the defendant will obviously be concerned to keep costs to a minimum. As made clear by the defendant insurers consulted by Jackson, defendants finding themselves in this situation would ideally prefer to negotiate directly with the claimant so as to avoid having to pay for the services of a claimant solicitor.

2.8 - It is in cases where the defendant wishes to deny liability and to thereby contest the claim that the defendant will be concerned with having access to an official legal forum. In many cases, the defendant insurer will have an in-house legal team, but where this not the case, access to such legal services will be required. It is important to note that, while the claimant will not expect to incur any risk of significant expenditure, win or lose, the defendant will anticipate being saddled with a hefty financial burden in the event of losing the case to the claimant. The principle of individual moral responsibility which lies at the heart of our fault-based legal culture dictates that we accept the consequences of our wrongdoing. We expect to have to put the victim back into the position that he/she would have been in absent our fault behaviour. Thus, in addition to meeting the damages award, the defendant will also expect to incur some kind of liability for costs. Again, the defendant will want the bill for costs to be as low as possible.

2.9 - Based on the above discussion, the access to justice interests of both parties can be summarised as follows: (i) for both the claimant and the defendant, proper dispute resolution will be paramount; (ii) the claimant will require access to an official legal forum, including, in the vast majority of cases, access to legal advice and legal representation; (iii) win or lose, the claimant will not expect to incur any significant expense; (iv) the defendant who wishes to contest liability will similarly require access to an official legal forum, including legal advice and legal representation; (v) the defendant who wishes to settle will only require a forum for negotiation with the claimant; and finally, (vi) the defendant will expect to

incur costs in the event of losing the case and will be concerned to keep the bill for costs as low as possible.

2.10 - Based on the above summary, the ideal balance between claimant and defendant interests, from an access to justice perspective, will be achieved when substantive rights and obligations are properly enforced at minimum cost. Minimum costs will consist solely of those costs which are necessary for the purposes of proper dispute resolution. The use of necessity as the criterion for determining the minimum level emphasises the fact that the substantive aspect of the process takes priority over the procedural, and that the procedural rules are purely facilitative in nature. And lastly, in a state of perfect balance, there should also be equality before and under the law. It goes without saying that the rich and powerful should therefore not be able to gain any advantage by deploying extra resources into tactical costs manoeuvres.

2.11 - There are those who would strongly disagree with this particular description of the ideal balance of interests. Zuckerman, for instance, would argue that economic efficiency considerations should dictate the level of recoverable costs in every civil claim. For him what matters most is making costs both predictable and proportionate to the value of the claim, and as such he advocates the adoption of either the US no-costs shifting rule or the German system of fixed recoverable costs.⁴ For Zuckerman, the economics of the process takes clear priority over the substance of the legal claim. However, it is argued strongly here that, for as long as the English tort system continues to be based, at least ostensibly, on the fault principle, economic efficiency considerations must play second fiddle to considerations of moral justice, and that this applies to both the procedural and substantive aspects of a personal injury claim in tort. As pointed out above, procedural rules are not ends in their own right. Rather they must be viewed as a means to an end, with the end being the proper application of substantive law to individual cases. And despite the great efforts of the largely US-based law and economics movement, headed up by the highly prolific Richard Posner, economic efficiency considerations still have a very limited role to play in English tort law. It is generally agreed that the current English tort regime is founded upon the doctrine of corrective justice, and that while distributive justice considerations, such as those of economic efficiency, are far from irrelevant within this regime, they have at best a supplementary role to play. In accordance with the principles of corrective justice, the primary purpose of English tort law is to implement a theory of personal moral responsibility and to ensure that compensation is paid as a matter of recompense from the wrongdoer to the victim. It is for this reason that tort liability is predominantly fault-based. If we really believed that tort

⁴ A Zuckerman, 'Lord Justice Jackson's Review of Civil Litigation Costs – Preliminary Report (2009)' (2009) 28 Civil Justice Quarterly 435.

law was primarily a mechanism for the provision of economically efficient compensation, we would have abandoned our fault-based system long ago and replaced it with something completely different. For as long as the fault-based tort system continues to exist, it is moral justice theory rather than economic efficiency considerations that must be allowed to drive both substance and procedure. That is not to suggest that we should be unconcerned with economic inefficiency. If the system ends up being so inefficient as to be unsustainable in the long run, then for practical reasons it is obvious that compromises have to be made. However, such compromises in the interests of economic sustainability must also be guided by the principle of the paramountcy of moral justice theory.

Access to justice under the current civil justice arrangements

2.12 - In assessing how well the current civil justice arrangements promote access to justice, the discussion will focus on the following: (i) the Conditional Fee Agreement funding model; (ii) the recoverability of success fees; (iii) the recoverability of ATE premiums; (iv) the proportionality principle; and (v) the existing schemes for predictable and fixed costs.

The current Conditional Fee Agreement funding model

2.13 - The current civil justice system is self-funding. This means that it is paid for entirely by those who use it, with no state contributions. The cost of running the courts is intended to be covered by the court fees paid by litigants which have increased substantially in recent years. Since the Access to Justice Act 1999 came into force, the vast majority of civil litigants are no longer entitled to legal aid and so they are obliged to make their own arrangements for covering the costs of legal advice and representation. The legal aid system was a creation of the welfare state, and its specific aim was the protection of the access to justice interests of those unable to afford the cost of legal services. With the retraction of legal aid for civil claims, the danger that the civil justice system would be unavailable to all but the most affluent once again presented itself. It is as true today as it was sixty years ago that the average claimant does not have the means to personally finance a legal action. In a direct attempt to plug the justice gap left by the new legal aid rules, the Access to Justice Act 1999 set out to revamp the existing but little-used CFA funding model in an attempt to make 'no-win, no-fee' agreements more attractive to both claimants and claimant solicitors. Most notably, the 1999 Act made

provision for the recoverability of both success fees⁵ and ATE premiums⁶ under such agreements. Previously where the insurance and success fee model was used, such fees had been payable by claimants out of their damages. As a direct consequence of the recoverability provision in relation to success fees, it also became feasible for solicitors to negotiate success fees of 100%, for claimants obviously no longer had any vested interest in controlling the level of such fees. These measures were specifically designed to provide claimant solicitors with incentives to take on risky cases and to thereby persuade them to take on the financial risks that would otherwise fall on individual claimants. In promoting the access to justice interests of claimants, the current civil justice system is thus dependent on the willingness and ability of claimant solicitors to take on cases that they might not necessarily win. This will only happen if it is commercially viable for claimant solicitors to take on such cases, and for such activity to be regarded as commercially viable, its attendant risks must be offset by the possibility of significantly lucrative rewards. At the very least, the extra profits earned in the winning cases can be used to cover the costs of the cases that are lost. This means that the current civil litigation system is largely funded by defendant insurers through their payment of this additional liability fee in the cases that they lose.

2.14 - Out of all the relevant players, the insurance industry is best placed to carry the burden of funding civil justice system. Not only is it the richest player to begin with, it is the only one capable of engaging in effective loss distribution, for it can pass on the cost to its own consumer through an across-the-board increase in premium prices. Ultimately, as with the previous legal aid model, it is the public that again ends up paying, this time wearing their consumer hats as opposed to their tax-paying ones, for it is undoubtedly the case that most people carry at least one insurance policy at all times. Moreover, it should be borne in mind that the defendant insurer will have voluntarily entered into the litigation process as a profit-making venture, having accepted a payment from the alleged tortfeasor to take on the financial risk of liability.

The recoverability of success fees

2.15 - The recoverability of success fees rule undoubtedly protects the access to justice interests of the claimant. A question which remains to be answered, however, is whether the current levels of success fees that are actually recovered by claimant solicitors are necessary for this purpose, in the sense that they represent the minimum amount required to induce these solicitors to take on the maximum number of valid cases. As set out

⁵ Access to Justice Act 1999, section 27 inserting new section 58A into the Courts and Legal Services Act 1990.

⁶ Access to Justice Act 1999, section 29.

above, any unnecessary costs recovered from losing defendants will infringe upon the access to justice interests of the defendant and thus upset the basic balance of interests. While it is obvious that the claimant solicitors will seek the full 100% success fee wherever possible, it is important to note that in many personal injury cases success fees are fixed by statute at a much lower level. Under Part 45 of the Civil Procedure Rules (CPR 45), a partial scheme of predictable costs with specific provision for success fees applies to the following categories of claims: (i) road traffic accidents (RTAs); (ii) employers liability claims (EL); and (iii) employers liability disease claims (ELD). Thus, in relation to RTA claims, a fixed solicitor success fee of just 12.5% applies to cases which are settled before trial, while for EL and ELD claims the fees are higher at 25% and 27.5% respectively. In all 3 categories, success fees of 100% are only recoverable where the claim is concluded at trial. Crucially these figures are said to be 'revenue neutral', that is, fixed at a level which, over a sufficiently large number of cases (with most won but some lost), will yield the equivalent of a solicitor's normal hourly rate.⁷ They were arrived at following research carried out by Fenn and Rickman for the Civil Justice Council⁸ and were given the approval of both claimant and defendant organisations.

The recoverability of ATE premiums

2.16 - While a case can certainly be made for arguing that the current rules on recoverable success fees are capable of respecting the balance of interests, the rule relating to the recoverability of ATE premiums is less easy to justify in this respect. ATE policies are designed to cover the unsuccessful claimant's liability for the defendant's costs. However, it would seem disingenuous to make unsuccessful defendants effectively pay into a fund which can then be used to provide cover for their own costs in the cases which they win. The same outcome, on a swings and roundabouts basis, could arguably be achieved by cutting out the middleman and compelling defendants pay their own costs in every case. Either way, however, the defendant's interests are compromised.

2.17 - This convoluted ATE insurance arrangement is a direct consequence of the costs shifting policy that lies at the heart of the English civil justice system. Under the costs shifting rule, also known as the 'polluter pays' rule, the costs of the litigation are borne entirely by the losing party. The rationale behind this rule is said to be one of moral fairness: the wrongdoer should be made to shoulder all of the consequences of his/her wrongdoing, including the expense that the

⁷ As described in the Preliminary Report at p 97.

⁸ 'Calculating "reasonable" reasonable success fees for RTA claims' (2003) and 'Calculating "reasonable" success fees for employers' liability claims' (2004).

victim has incurred in obtaining the remedy to which he/she is legally entitled. The main purpose of the costs shifting rule is to give effect to the important substantive law principle of full compensation. However, the obvious problem with the rule is that it works both ways. Where the defendant is absolved of wrongdoing, the costs burden falls on the claimant, for even though the claimant cannot be described as a 'polluter' or wrongdoer, he/she is less innocent than the defendant in that sense of being the only party to hold any kind of responsibility for the theoretically unwarranted proceedings having been brought in the first place. However unless the claimant can be shown to have persisted with the claim in the knowledge that the defendant was not at fault in the circumstances, it is problematic from an access to justice perspective to hold the claimant to blame for attempting to find out whether he/she is entitled to a legal remedy for injuries suffered. It was thus specifically to protect the access to justice interests of the claimant that ATE insurance scheme was conceived.

2.18 - To require innocent defendants to cover their own costs, whether it is through the ATE insurance scheme, or by way of a more direct and transparent route, is to infringe upon the access to justice interests of the defendant. However it is submitted that, to the extent that the CFA funding model is dependent on the ATE recoverability rule to give effect to the fundamental principle of full compensation, the rule must unfortunately be regarded as a necessary compromise forced upon the relevant players by the decision of the executive to deny the civil justice system any state funding. Furthermore, it is the lesser of two evils to compromise the interests of the strong and resilient defendant than to eviscerate the interests of the vulnerable claimant. And the defendant will at least be able to pass the cost on, thus ending up not significantly worse off in the long run.

The proportionality principle

2.19 - In determining the amount of recoverable costs in individual cases, a suitably qualified test of proportionality is applied, as set out under CPR 44. Crucially, the courts are instructed to take into account a wide range of factors in assessing whether costs incurred are proportionate, such as the conduct of the parties and the importance of the issues at stake, as well as the value of the claim.⁹ It was Lord Woolf who created this test of proportionality as part of his Final Report on Access to Justice,¹⁰ and in his judgment in the Court of Appeal decision in *Lownds v. Home Office*,¹¹ he subsequently elaborated upon the

⁹ CPR 44.5(3).

¹⁰ HMSO, 1996, Chapter 2.

¹¹ [2002] EWCA Civ 365.

relationship between the concepts of proportionality, reasonableness and necessity. In short, he formulated a two-stage approach to determining when costs are proportionate. The first stage involves looking at whether the global sum claimed by way of costs appears to be disproportionate on the basis of the broad contextual test set out in CPR 44.5(3). If not, then all that is required is that each item listed should have been reasonably incurred at a reasonable cost. If the global figure does appear disproportionate, then the court must apply a test of necessity to each item. If the court is satisfied that the work for each item was necessary and that the cost incurred was reasonable, the cost will be recoverable. With this necessity principle operating at its core, the proportionality test may thus be seen to respect the balance of interests at stake

Fixed and predictable costs schemes

2.20 - The predictable costs scheme under CPR 45, discussed above in relation to fixed success fees, makes provision for fixed recoverable costs in RTA cases up to a value of £10,000 which settle before issue. The amount is set at a total of £800, plus 20% of the damages agreed up to £5,000 and 15% of any damages agreed between £5,000 and £10,000. Once again these figures were the product of research carried out by Fenn and Rickman,¹² and approved by the relevant stakeholders.

2.21 - According to the figures produced by the Compensation Recovery Unit, RTA claims accounted for 78% of all claims made in 2009-10.¹³ It is widely recognised that there is a particular problem with costs exceeding damages in low-value straightforward RTA claims. While the predictable costs scheme under CPR 45 addresses the problem to a degree, its impact is limited in so far as it only applies to those cases which settle before issue. In direct response to this problem, and following a consultation exercise undertaken by the Ministry of Justice in 2007-8,¹⁴ a new streamlined process with fixed costs for all personal injury RTA claims valued at between £1,000 and £10,000 with liability admitted was brought into effect in April 2010. It is estimated that there are about 500,000 RTA cases per year which will fall within its scope.¹⁵ The standardised procedures under the new process are divided into 3 stages and

¹² 'Costs of low value RTA claims 1997-2002' (2003).

¹³ See <http://www.dwp.gov.uk/other-specialists/compensation-recovery-unit/performance-and-statistics/performance-statistics/>. In 2009-10, out of a total of 861,325 claims registered by the CRU, 674,997 were described as motor claims.

¹⁴ Both the consultation paper and response paper, entitled 'Case track limits and the claims process for personal injury claims', can be found at <http://www.justice.gov.uk/publications/cp0807.htm>.

¹⁵ 'Explanatory Memorandum to the Civil Procedure (Amendment) Rules 2010', 2010 N 621 (L3) para 2.3.

recoverable costs are fixed at each stage with the claimant receiving payment for costs at the end of each stage. Importantly, the costs have been the subject of industry agreement, and although they are significantly lower than the costs previously recovered by claimant solicitors, it is anticipated that the new process will enable offsetting operational efficiencies to be made.¹⁶ At the very least, there should be a quicker turnover of cases and improved cash flow.

2.22 - Apart from the requirement that defendants in effect always cover their own costs, and bearing in mind the constraints of the funding model imposed on the parties by the executive, the current rules and principles on civil costs are generally compatible with the access to justice interests of both claimants and defendants. Whether they achieve this aim in practice is another matter. The Jackson Review was prompted by concerns that the cost of litigation had become both excessive and disproportionate. If this is true, then any notional balance of interests achieved by the current rules on costs will be meaningless, for what matters here is what actually happens in practice. Costs that are unnecessarily high will distort the interests of both claimants and defendants. In assessing whether Jackson's proposed reforms are, first of all, likely to succeed in addressing the alleged problems with the costs system, and secondly, whether they will promote the access to justice interest of the parties, it is necessary to begin with Jackson's evaluation of the nature and source of the main problems.

An analysis of Jackson's case for reform

2.23 - It is clear that the majority of Jackson's recommendations are designed to protect the financial interests of the defendant. In abolishing the recoverability rule, Jackson aims to transfer the burden of funding the civil justice system from defendant insurers to claimants. In recommending the introduction of a system of one-way costs shifting, his primary aim is to protect defendants from expensive ATE premiums and in proposing to fix costs in the fast track, his aim is to further reduce the general financial liabilities of defendants at the expense of claimant solicitors. While the one-way costs shifting rule may be described as having a neutral impact on claimants, the other two recommendations severely compromise their access to justice interests. The requirement that claimants use part of their damages to pay for the costs of legal advice and representation also offends against the principle of full compensation which lies at the heart of English tort law. Even with a 10% increase in the level of general damages, and a 25% cap on solicitor costs, it is inevitable that claimants will lose out overall, despite Jackson's

¹⁶ Ibid, para 6.33.

claims to the contrary. 25% is a significantly larger amount than 10%. As regards the proposal to fix costs in the fast track, while this will initially hit claimant solicitors, it is again inevitable that some claimants will lose out overall too. Claimant solicitor firms are first and foremost commercial enterprises and they are simply not going to work for free. The likelihood is that they will either refuse to take on the time-consuming and resource-intensive difficult cases in the first place, or they will take them on and push for early settlements below value.

2.24 - From an overall access to justice perspective, Jackson's pro-defendant approach will be justified if, and only if, it is indeed the case that the balance of interests is currently weighted heavily in favour of claimants and/or claimant solicitors. While Jackson does his best to portray the situation as being so, and to convince his audience that liability insurers need to be protected from unscrupulous claimant solicitors, the evidence he advances is far from convincing.

2.25 - On page 2 of the Preliminary Report, Jackson immediately places responsibility for the mounting costs of civil justice squarely at the feet of claimant solicitors. Describing the problem, he begins with the statement that '[l]iability insurers have maintained that the costs payable to claimant lawyers are becoming ever more disproportionate to the damages paid to claimants.' He goes on to refer to the concerns of the media about the escalating costs of defamation litigation, and only then does he refer to the 'protests' of claimants that liability insurers run up costs by procrastinating. Tellingly, he then quotes the following passage from a speech given by the Lord Chancellor in September 2008:

I am concerned about another element of legal services – 'No win – no fee' arrangements. It's claimed they have provided greater access to justice, *but the behaviour of some lawyers in ramping up their fees in these cases is nothing short of scandalous*. So I am going to address this and consider whether to cap more tightly the level of success fees that lawyers can charge.¹⁷

The behaviour of claimant solicitors is presented as the primary source of the problem. On page 1 of the Preliminary Report, he acknowledges that some of the cost increases since the Access to Justice Act 1999 are due to specific Woolf reforms: '[p]re-action protocols and the requirements of the CPR have led to "front loading" of costs. Also the detailed requirements of the CPR and case management orders of courts cause parties to incur costs which would not have been incurred pre-April 1999. Where cases settle between issue and trial (and the vast majority of cases do settle) the costs of achieving settlement are sometimes higher than before.' However he specifically identifies the CFA funding model and the recoverability of additional liabilities rule as the main culprits.

¹⁷ Emphasis added.

2.26 - On page 3 of the Preliminary Report, where he sets out that his objective is to achieve access to justice at proportionate cost, the phrase 'proportionate cost' inevitably links back to the liability insurer argument set out on the previous page that the claimant costs are disproportionate to damages. The reader is left in no doubt that the problem lies with claimants solicitors and the scene is duly set for the entire review.

2.27 - In terms of the available evidence about costs, Jackson looks first at the official Judicial Statistics on the number of civil claims brought in recent years. Subject to the caveat that the figures are known to be inaccurate, but that they can be relied upon to give 'a reasonable order of magnitude',¹⁸ he provides the following summary of litigation in 2007: 'Approximately 2.1 million civil cases were launched, of which at least 95% were brought in the county courts. Approximately 90% of all civil cases were concluded without any prolonged contest and at costs proportionate to the issues at stake. The remaining 10% of cases were contested (whether or not settled before trial) and potentially gave rise to significant costs liabilities.'¹⁹ This is far from a damning indictment of the current system. If costs are only potentially disproportionate in 10% of all cases, the problem is not really a great as we might initially have thought. And indeed it would indicate that the costs system is generally operating in a very successful fashion.

2.28 - It is worthy of note that these figures are not reproduced in the Final Report. In the Final Report, Jackson concentrates on the data collected for the specific purposes of his review through a series of judicial surveys. There is no denying the fact that the figures are shocking: claimant costs in the CFA cases featuring in the surveys ranged between 158% and 203% of the damages awarded. Claimant costs in the non-CFA cases ranged between 47% and 55% of the damages awarded. However, as noted by Genn, who carried out a preliminary analysis of the data, the cases surveyed are not representative of the average civil claim. The figures relate to litigated cases only, which are inevitably the most expensive, whereas the vast majority of claims settle. To quote Genn, '[u]sing these figures to make assumptions about average costs is rather like generalizing about war from the most bloody and hard fought battles.'²⁰

2.29 - The remaining data referred to by Jackson in the Final Report was supplied almost entirely by liability insurers. As such a degree of circumspection is required in assessing its reliability. Moreover, the figures

¹⁸ Preliminary Report, p 45.

¹⁹ Ibid, p 53.

²⁰ H Genn, 'Preliminary Analysis of Costs Data', p 2, presented at Review of Civil Litigation Costs Seminar held in Birmingham on 26 June 2009 and available at <http://www.judiciary.gov.uk/docs/costs-review/analysis-costs-data.pdf>.

emerging are not necessarily consistent. The first set of data, set out in PR appendix 18, covers the details of all cases resolved in favour of claimants by one liability insurer during a one week period in February 2009. Out of 943 cases, 494 involved a CFA, and on average claimant costs equalled just 59% of damages. In the remaining 449 non-CFA cases, claimant costs equalled just 39% of damages. By contrast, data provided by another liability insurer, set out in the Preliminary Report appendix 23, showed a much higher costs to damages ratio. This data related to all personal injury claims settled by the insurer during 2007 and 2008. In 2007, there were 182 cases up to £15,000 and the average costs amounted to 227% of damages, while in 2008, the average costs out of 247 cases was 218%. A third set of insurer data, set out in PR appendix 24, showed that average costs in cases below £5,000 which were settled post-issue amounted to almost three times the average damages.

2.30 - Six Cardiff district judges who were consulted by Jackson expressed very negative opinions about the costs issue in low value personal injury claims. Most memorably, they suggested that in straightforward fast-track cases, it is not unusual for the claimant's costs to be 10 or 15 times the amount of the damages recovered, eg damages of £2,500 with the claimant's bill being £30,000. They went on to say that they suspected in many cases that the bill was being seen as a costs building exercise by solicitors charging an hourly rate. The judges in question did not provide details of any cases over which they had presided which involved such high costs, basing their evidence instead on general observations. And of course, it is important to note that, in their capacity as judges, they only ever come across the expensive contested cases, such that their experience of civil claims is far from representative.

2.31 - Notably, in his Final Report, Jackson fails to refer to the evidence put forward in the Preliminary Report about alleged bad behaviour on the part of liability insurers. By way of contrast to the Cardiff district judges, the Merseyside district judges whose opinions featured in the Preliminary Report suggested that the high costs incurred in disposal hearings were generally the fault of defendant insurers. According to them, insurers make offers which are too low and then incur additional costs which run into thousands of pounds.²¹ Similarly, the Liverpool Civil Users Committee suggested that if defendants made reasonable offers promptly, substantial costs would be avoided. According to them, 'the remedy lies in the hands of defendants' insurers. In the general run of cases, insurers offer too little too late.'²²

2.32 - Moreover, as regards the fact that claimant solicitor fees are typically much higher than those of defendant solicitors, it has been

²¹ Preliminary Report, p 129.

²² Ibid, p 127.

acknowledged by the Forum of Insurance Lawyers that there are good reasons for this. As referenced in the Preliminary Report, they accept that the business model of insurance solicitors is very different to that of claimant solicitors. Not only do insurance solicitors always get paid for cases, whether they win or lose, they also do very little speculative work and they have educated clients who do not need lengthy explanations of the issues. Thus it is inevitable that they charge less.²³ As far as they are concerned, the courts do not exercise enough control through case management. One of the other problems they identify is the lack of any sanction for failure to comply with pre-action protocols and they argue that the courts could generate better behaviour through stricter case management.²⁴ Such views expressed by the Forum of Insurance Lawyers are clearly unbiased, and yet they not referred to in the Final Report.

2.33 - Far from establishing that the current balance is weighted in favour of claimant interests and that radical defendant-centred reforms are needed to restore equilibrium, the evidence collected by Jackson for the purposes of the review shows that, at most, there is a problem with disproportionate costs in a small percentage of cases and that there is probably some undesirable costs-increasing behaviour on both sides. As such, the most appropriate solution would appear to be better case management. Nor does the evidence necessarily demonstrate that the primary source of the current high levels of costs is the recoverability of success fees and ATE premiums. In short, the evidence fails by a considerable margin to justify the huge restrictions that Jackson seeks to place on the access to justice interests of the claimant.²⁵

Going beyond the brief

2.34 - To the extent that some of his recommendations go way beyond the problems that he identifies, Jackson's overall package of reform must be described as both excessive and over-zealous. Particular reference in this respect is to be made to the following: (i) his approach to the principle of proportionality; (ii) his recommendations in relation to fixing costs in the fast track; and (iii) his comments as regards the small claims limit.

²³ Ibid, p 113.

²⁴ Ibid.

²⁵ It is disappointing to note that, in its recently released consultation paper on the Jackson recommendations, the Government has accepted without question Jackson's case for reform: 'Proposals for Reform of Civil Litigation Funding and Costs in England and Wales' (Cm 7947, 2010), in particular at paragraphs 31 and 39.

The proportionality principle

2.35 - Jackson recommends a new approach to proportionality which eliminates the test of necessity. His recommendation involves both the reversal of the Court of Appeal decision in *Lownds v. Home Office*²⁶ and amendments to both CPR 44 and section 11 of the Costs Practice Direction. Under this new approach, the key criterion for proportionality is the relationship between costs and the sums in issue in the proceedings. He explicitly states, at page 38 of the Final Report, that disproportionate costs do not become proportionate simply because they were necessary in order to bring or defend the claim. Moreover, he proposes that proportionality as to the value of the claim should also prevail over the question of reasonableness.

2.36 - To deny recovery for costs that are necessary for the purposes of basic dispute resolution is to deny the access to justice interests of many claimants, particularly those with low value claims. It is widely recognised that costs tend to be proportionately higher in smaller claims, particularly those for less than £3,000, and that as the value of the claim rises, the cost to value ratio decreases. As set out in paragraph 11.2 of the Costs Practice Direction:

In any proceedings there will be costs which will inevitably be incurred and which are necessary for the successful conduct of the case. Solicitors are not required to conduct litigation at rates that are uneconomic. Thus in a modest claim the proportion of costs is likely to be higher than in a large claim, and may even equal or possibly exceed the amount in dispute.

To remove the test of necessity from the proportionality equation is to place undue weight on the financial interests of the defendant at the expense of the access to justice interests of the claimant.

Fixed costs in the fast track

2.37 - Jackson's proposal for a comprehensive regime of fixed costs in the fast track was fully anticipated. Such a regime had been recommended by Lord Woolf in his 1996 Report, but was not implemented at the time. The difference with Jackson's proposal is that it sits alongside his other radical proposals to shift costs from defendants to claimants. Moreover, since 1996, the fast track limit has been raised from £15,000 to £25,000, which means that the Jackson's proposal will cover significantly more cases than Woolf's would have done, and all at the top end where it is generally accepted that there is not actually a problem with disproportionate costs. The data relied upon by Jackson in Chapter 2 of his Final Report clearly demonstrates that the problem of costs exceeding

²⁶ [2002] EWCA Civ 365.

damages is more or less confined to the claims below £5,000. In fixing all costs within the fast track, he is restricting the access to justice interests of a large number of claimants for no good reason.

2.38 - Moreover, although the sub-committee on fixed costs, set up by Jackson for the purposes of the review, recommended that advocacy fees should remain as a 'bolt-on',²⁷ as currently prescribed under the existing CPR predictable costs regimes, Jackson decides in the end to include them within the fixed fee sums. He suggests that in future, 'bar style' work should be done either by junior counsel, whose services will obviously be cheaper, or by the claimant solicitors themselves. It goes without saying that such a proposal will deprive claimants with complex claims of the high levels of expertise offered by experienced barristers and thereby compromise their access to justice interests by lowering the standard of the legal service that they receive.

2.39 - Most importantly of all, it is argued that, as regards low value claims, Jackson has failed to take adequate account of the likely impact of the new streamlined process for RTA claims. As indicated above, this new process will now cover a large percentage of the low value RTA claims which would previously have fallen into the fast track, and if it turns out to be a success, it will solve a large part of the problem that Jackson's comprehensive fixed costs regime is designed to address. It should also be borne in mind that the original plan in relation to the new process was to bring all personal injury claims up to the value of £25,000 (ie, all those falling within the fast track limit) within its remit. Following consultation with relevant stakeholders it was decided that the plan was too drastic. As a result it was revised and significantly scaled down to include only RTA cases up to a value of £10,000. In fixing all costs in the fast track, Jackson is effectively resurrecting a scheme, albeit without the standardised procedures and time-limits, that was rejected by the Ministry of Justice following a detailed assessment of its desirability.²⁸

Small claims

2.40 - It is in Chapter 18 of the Final Report, which looks at the upper limit for personal injury claims in the small claims track, that the pro-defendant tenor of the review is most evident. While Jackson ultimately decides to leave the £1,000 upper limit unchanged for the time being, he

²⁷ Ibid, p 206.

²⁸ Lord Young, in his recent report on health and safety ('Common Sense, Common Safety', HM Government, 2010), has also recommended extending the new RTA scheme to all fast track personal injury claims, including clinical negligence. Regrettably, in its consultation paper on Jackson, the Government has confirmed that it aims to implement Lord Young's recommendation by April 2012, subject to consultation and as part of wider civil justice reforms: (Cm 7947, 2010) at paragraphs 37 and 260.

suggests that the issue should be revisited should it transpire that a satisfactory regime of fixed costs is not established or that the new RTA process does not prove successful.

2.41 - It was always going to be difficult for Jackson to justify raising the small claims limit. In 2001, the Department of Constitutional Affairs, before it became the Ministry of Justice, published a detailed consultation paper on this very question. The paper, entitled 'Case track limits and the claims process for personal injury claims', advanced the main arguments for and against raising the limit, and crucially, it concluded that the current £1,000 limit should remain. As confirmed by the Ministry of Justice in its 2008 post-consultation report, the majority of stakeholders who responded to the consultation paper were also strongly opposed to the idea of increasing the limit.

2.42 - The arguments summarised by Jackson in Chapter 18 of the Final Report are considerably less detailed than those set out in the 2007 consultation paper. Neither side added anything new to the debate. The pro-defendant stakeholders merely repeated the argument that raising the limit would lead to significant cost savings. The pro-claimant stakeholders put in more detailed submissions, referring, inter alia, to the risk that unrepresented claimants with valid but complex claims will end up either settling for less than the claim is worth, or even deciding not to pursue the claim at all. In his conclusions, Jackson claims to have seen 'considerable force' in the arguments for raising the limit. In relation to the arguments against, he acknowledges merely 'the strength of feeling' over the issue.²⁹

2.43 - To increase the small claims limit would be to deal the single hardest blow to the access to justice interests of victims of personal injury. As confirmed by Genn's research into the public's experience of the law and legal processes, the average person does not have the necessary knowledge or confidence to launch into legal proceedings without advice and guidance about their legal position.³⁰ Given that the majority of claims are low value ones, even a small increase in the small claims limit would have the effect of alienating large numbers of personal injury victims. Such a move would require the strongest possible justification, and on this front, the Jackson review does not even come close.

Conclusion

2.44 - The Jackson Review has failed to achieve its core objective, which was to promote access to justice at proportionate cost. Excessive and ill-

²⁹ Final Report, p 183.

³⁰ *Paths to Justice*, p 260.

justified, the proposed package of reforms places disproportionate weight on the financial interests of defendants at the expense of the access to justice interests of claimants. If implemented, the reforms would significantly restrict the ability of injured victims to obtain the compensation to which they are legally entitled and for this reason alone such implementation is to be opposed at all costs.

Chapter 3

THE JACKSON REVIEW – CONSEQUENCES AND LESSONS

*David Howarth**

3.1 - Under the existing arrangements for conditional fee agreements (CFAs), winning claimants' legal costs, including their lawyers' fees, are paid for by defendants, while losing claimants do not pay their own lawyers and pay the defendants' costs from the proceeds of an after-the-event (ATE) insurance policy. Losing claimants also pay for their own side's disbursements (court fees, witness expenses and so on). Both ATE insurance premiums and disbursements are, however, claimable from the defendant if the claimant wins. Claimants only pay these costs if the case is lost. Sometimes they do not even pay that much, because their lawyers either agree, or decide later, not to pursue them for the cost of the ATE premium, and their ATE insurance might also cover the costs of disbursements.

3.2 - We may therefore say that the price paid for legal services by claimants under the existing CFA regime is a blended price that takes into account both the situation in which the claimant wins (viz. a price of zero) and the situation in which the claimant loses (viz. a price consisting of the claimant's outlays for the ATE premium plus disbursements, discounted by the probability that the claimant's lawyer will absorb even those costs). If one takes the probability of winning the case into account, the full blended price faced by a potential litigant is the sum of the ATE premium and the disbursements discounted by the probability of losing.¹ Claimants as a whole will want to bring more cases as the probability of winning rises and as the cost to them of ATEs and disbursements fall.²

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¹ More formally, if p_i is the probability of winning case i , I_i the discounted cost of the ATE insurance premium and D_i cost of the disbursements in that case, a prospective CFA claimant faces an effective price for legal services of $(1-p_i)(I_i+D_i)$.

² That is the quantity demanded (q_d) is a function of $p, -I$ and $-D$ across the range of all cases.

3.3 - In each case, the claimant is buying a bundle of legal services, the value of which the claimant has to compare to the price. At the forefront of most thinking about how claimants behave is their expected financial return from the case in terms of damages, which is to say the damages they expect discounted by the probability of winning the case.³ But deciding to bring a case is not just a matter of comparing the price and the expected compensation. There might be other rewards of winning the case, some of which, for example injunctions and other specific orders, might be more important to the claimant than damages. There might also be less tangible rewards, such as a feeling of vindication. Some rewards of bringing a case do not depend on winning but on quite different events, for example, in a medical negligence case, claimants might hope finally to discover what happened to them. On the other hand, there are also costs of bringing a case that go beyond the price. One is the emotional wear and tear of litigation – often a very high cost, albeit one to some extent hidden from first time litigants. Another is possible damage to the claimant’s reputation, not just from losing the case but also from bringing it at all. Adverse reputational effects can be very strong in cases brought by employees against employers where the employees hope to work again, but they can affect any case in which the claimant has any kind of continuing relationship to maintain.

3.4 - On the supply side, claimants’ lawyers are paid no fee if the claimant loses, but if claimants win they are entitled to a fee paid for by the defendant that consists of two elements, a base fee for the work done and an uplift or success fee, expressed as a percentage of the base fee. Only defendants ever pay either type of fee under CFA arrangements. Claimants pay nothing to their own lawyer if they lose, and the defendant pays if they win. That means that the fees claimants and their lawyers agree as base fees or as uplifts need bear no relation at all to what claimants think the work is worth to them or to what they can afford.

3.5 - Both base fees and success fees are, however, limited by regulation, which takes two forms. First, costs are controlled by the courts through assessments of their reasonableness and proportionality.⁴ Secondly, in some types of case, for example, in road traffic cases and industrial injury and disease cases, some fees, particularly success fees in CFAs, are fixed by regulation according to established rates, some of which are expressed as sums of money, others of which are expressed as percentages of the amount in issue.⁵

³ More formally, the expected return for the claimant is $p_i(G_i)$, where G_i is the damages the claimant expects to win.

⁴ CPR 44.4(1) and (2)(a).

⁵ CPR Pt 45.

The Oddity of the Market for CFAs

3.6 - Because it is unconstrained by its own client, a rational law firm in a CFA will always charge the maximum fee it thinks it could persuade a costs judge to assess as reasonable and proportional or the maximum amount allowed by the fixed fee regulations.⁶ To simplify only a little, each firm knows that there is a regulated fee it can charge for a case. Since its own client is not interested in how much the fee is, it makes no sense to charge less than the maximum.⁷ It is also important to note that although the fee paid is the sum of two elements, the base fee and the success fee, the fact that lawyers are only paid if they win means that the precise division between the two elements is of little practical consequence for them. What matters to them is the total revenue they can expect from a case, which turns on the total fee they can charge the defendant if the claimant wins, discounted by the probability of winning that case.⁸ Each case will also require the firm to commit resources to it, of various types but principally lawyers' time, which we can summarise as its expected costs in taking the case. Firms decide whether to take a case on the basis of expected net revenues, which means that they take into account the fees they expect to earn if the case is won and the costs of taking that case.⁹

3.7 - The decision also involves the question of whether devoting the same resources to other activities would generate greater revenues, for example whether the firm would make more money if it took a commercial or criminal case, but for these purposes we can conceptualise those costs as part of their expected costs overall (so that it would count as an extra cost to the firm of taking a case if it could have earned greater revenues by devoting the relevant resources to another activity). On that basis, a firm will take a case unless it expects the net revenue from it to be negative. Looking across all law firms, the quantity of cases taken by firms depends on the fees they expect to earn, the probability of winning and the costs they face (including other opportunities foregone).¹⁰

⁶ In practice firms seem often to charge above the allowable limits to give room for negotiation and knock-back by the assessing court. See ABI, 'Research Brief: Report by Frontier Economics, Analysis of personal injury legal costs' (January 2009), published as Appendix 28 to Jackson, 'Review of Civil Litigation Costs: Preliminary Report' (TSO, 2009).

⁷ It is instructive, for example, to consider the facts of *Gloucestershire CC v Evans* [2008] EWCA Civ 21, in which solicitors seem to have increased their base fees considerably when they moved the same case from a traditional fee contract to a CFA.

⁸ That is, if each case brings with it a total fee revenue of F_i at a particular probability of success p_i , expected revenues from a case are $p_i(F_i)$.

⁹ Ie taking a case depends on R_i , which is a function of $p_i(F_i)$ and $-C_i$, where R_i is the net revenue for the case and C_i is the cost of taking that case.

¹⁰ Ie the quantity supplied (q_s) is a function of $p_i(F_i)$ and C_i across the totality of cases.

3.8 - The oddity of this set-up is that there is no reason to believe, a priori, that the market for legal services under CFAs will clear (in the sense that the quantity of cases claimants are willing to bring is the same as the quantity of cases lawyers are willing to take). In a standard market, quantities demanded and supplied are brought into line by market prices, which determine both what consumers have to pay and what revenues firms generate. But the price faced by claimants in CFAs bears very little relation to the price offered to law firms. Claimants agree fees that they themselves do not pay and what they do pay is unrelated to those fees. The probability of success in a case influences both claimants and their lawyers,¹¹ but that probability is taken into account in quite different ways in the two instances – for claimants it discounts the cost of ATEs and disbursements, but for lawyers it discounts expected total fees. The determinants of lawyers’ and clients’ decisions are therefore largely unrelated.¹²

The Effect of the Regulation of Fees

3.9 - Since regulators – in practice, costs judges and the Civil Procedure Rule Committee¹³ – control fees, it is they who control firms’ expected revenues and, via that mechanism, they influence the number of cases lawyers take.

3.10 - It is not entirely clear what precise goals the regulators are aiming at. One plausible goal, however, is that they might set fees so that in each case regulated, the fees are no higher than the minimum amount sufficient to ensure that the case is taken on. That is to say, they are aiming at reducing firms’ net revenues to as near zero as possible without overstepping the mark and creating a situation in which the firm would not be willing to take the case.¹⁴

¹¹ Note that in a no-win-no-fee arrangement, lawyers have no incentive to misinform their clients about the chances of winning the case, and so we can assume that claimants and their lawyers share the same assessment of the probability of winning any particular case.

¹² Some fixed fees are linked to the amount of damages at issue, and, in case-by-case regulation of costs, assessing courts can take into account the damages at issue in judging the proportionality of base fees, so that there might in some cases be some connection between the value of what the claimant is buying for the price of $(1-p_i)(D_i+I_i)$ and what the lawyers expect to receive $(p_i(F_i))$, but it is unsystematic and unpredictable.

¹³ The government, in the shape of the Lord Chancellor, may veto changes to the rules and order the CPRC to make new rules to achieve particular ends, but it does not have a direct power to write new rules. See Civil Procedure Act 1997 ss 1, 2, 2A, 3 and 3A, as amended (confusingly) by the Courts Act 2003 and the Constitutional Reform Act 2005. Parliament has, in reality, no say, since only the negative SI procedure applies.

¹⁴ In symbols, if we say that Φ_i is the fee in case i that will induce a lawyer to take case without any surplus, the lawyer will take the case if $F_i \geq \Phi_i$. If $F_i > \Phi_i$, $F_i - \Phi_i$ represents the lawyer’s rent from case i . Φ_i is conceptually the same as R_i where $R_i=0$, namely the minimum

3.11 - If regulators succeed in finding exactly the right level of fees in each case, they will have produced a situation of perfect price discrimination with respect to all suppliers. Each lawyer receives enough but only enough to induce them to act, and no lawyer receives any surplus above that amount.¹⁵ It is entirely possible, however, that they will go too far and in a particular case set fees higher than that perfect level, that is to say at a level beyond what was strictly necessary to induce a lawyer to take the case. That would mean that in that case there is a rent-like producer's surplus, revenue the law firm could give up without changing its mind about whether to take the case.

3.12 - It is also possible, however, for the regulators to go too far the other way and set fees below the perfect level, so that lawyers are discouraged from taking cases. But that is not necessarily a mistake. It might be a deliberate act of policy to leave some proportion of willing claimants (that is, willing to bring a case given the blended price they face) without a willing lawyer.

Jackson's Proposed Reform

3.13 - Under the reform proposed in Jackson LJ's final report,¹⁶ and now the subject of consultation by the Ministry of Justice,¹⁷ defendants would continue to pay claimants' costs where the claimant wins the case, but if the defendant wins the case, the claimant would not have to pay the defendant's costs (a set-up Jackson describes as 'one-way cost shifting'). In addition, success fees and ATE premiums would become non-recoverable from defendants, so that claimants would bear them even in the event of their winning the case. Jackson also recommends altering the rule that costs should be 'reasonable' and 'proportionate' to a rule that they should be 'proportionate' alone, a move designed to reduce costs by eliminating the idea, which derives from the *Lownds* case,¹⁸ that even if costs look disproportionate overall, they can nevertheless be allowed if they are 'necessary' and 'reasonable'. The change would give more prominence to the idea that costs should be judged by comparing them to

net revenue required to cover the firm's costs. Where that point occurs, however, is usually unknown to regulators.

¹⁵ The effect of perfect price discrimination with respect to suppliers is, conventionally that all the surpluses fall to consumers. As we shall see below, in these circumstances, that means that the surpluses fall to defendants, not claimants.

¹⁶ Jackson, *Review of Civil Litigation Costs: Final Report* (TSO, 2010).

¹⁷ Ministry of Justice, 'Proposals for Reform of Civil Litigation Funding and Costs in England and Wales' (CP13/10, 2010).

¹⁸ [2002] EWCA Civ 365.

the sums claimed in damages. It would not, however, eliminate other factors in judging the importance of a case for costs purposes.

3.14 - For CFA claimants, Jackson would mean that they would still face no costs if they won, but there would no longer be any point in buying after-the-event insurance to cover the defendants' costs, because claimants would no longer be liable for defendants' costs if they lost. The non-recoverability of ATE premiums is therefore otiose and of no concern to claimants. They would still, however, face the cost of disbursements, and might insure after the event against them. Assuming that the probability of winning the case and the cost of disbursements hold constant, and that any other prospective rewards and intangible costs of bringing the action remain unchanged, and before we consider what else claimants might do, the effect of Jackson's reform for claimants is that they effectively face an even lower price for legal services.¹⁹ The quantity of legal services demanded would therefore be higher than under the present arrangements.

3.15 - On the supply side, the abolition of success fees would mean that, in effect, each case would be worth less to claimants' lawyers than it was previously. The intention of changing the basis of assessment of costs from reasonable and proportionate to proportionate alone is also to reduce fees. Holding the probabilities of success and costs, including other opportunities, constant, lawyers would therefore tend to reject cases they previously would have taken, with the effect that the quantity of cases offered to be taken by lawyers would fall.

3.16 - In the absence of corrective measures, the effect of Jackson's proposals would be a gap (or a larger gap) between the number of cases claimants are willing to bring and the number of cases lawyers are willing to take.

The Claimant Success Fee and the 10% Increase in Damages

3.17 - Jackson proposes to deal with the situation in which demand rises but supply falls by allowing a new form of success fee, under which claimants offer uplifts to be paid only if the case is won, but which would not be recoverable from the defendant. In effect, the uplift, which we might call a claimant success fee, to distinguish it from the present system in which success fees are paid exclusively by defendants, would be financed out of the claimant's damages award. The size of the claimant success fee would be limited by regulation to 25% of damages (excluding

¹⁹ That is, $(1-p_i)D_i$ instead of $(1-p_i)(I_i+D_i)$, remembering that both D_i and I_i take into account the chance that the claimant's lawyer will absorb those costs.

damages for future earnings and care). To facilitate such payments Jackson proposes an increase in general damages of 10%.

3.18 - It is unclear, however, to what extent this combination of measures would work to close the new gap between the quantity demanded and the quantity offered that the Jackson reform would otherwise create. Jackson says that, according to Paul Fenn, the economic assessor to the review, the majority of claimants would be better off under the new arrangements. But it is not clear on what basis that calculation was made, and in any case it is not necessarily relevant to the question of how many cases lawyers will accept.

3.19 - To try to answer the question of the effect of the Jackson reform on the quantities of cases demanded and offered, we have to look separately at the effects on claimants and lawyers. On the one side is an increase in demand from the reduction in the blended price faced by claimants combined with an increase in damages of up to 10%²⁰ On the other side is a reduction in supply arising from a reduction in fees equivalent to at least the amount of the present success fee,²¹ itself offset by a claimant success fee limited to 25% of general damages.

3.20 - The question is what would happen given this combination of measures? We will look at that question in two parts. First, we will look at the question of what net effect on the overall number of cases taken the new claimant success fees might have. Second, we will look at whether the 10% increase will be enough to compensate claimants for the cost to them of having to pay success fees.

The Market for Claimant Success Fees

3.21 - The hopeful scenario for claimant success fees goes something like this. Claimants with a potential claim will contact a lawyer who tells them how (post-Jackson) CFAs work. The claimant compares the price (expected disbursements discounted by the probability of winning the case) with the reward, (the damages, now enhanced by 10%, but reduced by the success fee asked for by the lawyer).²² The claimant asks for time to consider and rings around other lawyers to find what level of success fee they ask for (and what proportion of the disbursements they are prepared to absorb). The claimant takes the best deal available.

²⁰ 'Up to' because only part of the damage award is to be enhanced. Damages for future loss of income and expenses are not to be increased.

²¹ 'At least' because the shift to a 'proportionate' basis for assessment will lead to further reductions in fees through reductions in base fees.

²² The post-Jackson price is $(1-p_i)D_i$, the reward $p_i(G_i+G_i/10 - G_i/s_i)$, where G_i/s_i is the success fee and $s_i \geq 4$.

3.22 - Unfortunately, the market for legal services is not so simple. Clients, especially one-off claimants, have limited information about the quality of the service they are offered. If different lawyers, for example, estimate the probability of winning differently, which one does the claimant believe? Having little else to go on, claimants might believe that price is a signal of quality and go with the most expensive lawyer, especially if that lawyer claims the highest probability of success. Also, having little knowledge of average success rates, claimants might take seriously recommendations from friends that are statistically meaningless. In addition, claimants are often in distress and find the process of finding a lawyer wearing and difficult. They might therefore simply accept or reject the first offer they receive. As for decisions about risk and future states, they might, as people do in many situations, give greater weight to the prospect of loss (price and the chance of losing) than to the prospect of gain (the damages and the chance of winning).²³ They might also have inconsistent valuations over time, so that giving away x% of their damages might strike them as acceptable a long time before they receive those damages but might strike them as unacceptable just as they are about to be paid.²⁴

3.23 - We know, for example, that claimant understanding of CFAs is poor, that claimants rarely shop around, and that they are unaware that success fee and disbursement absorption can vary from firm to firm.²⁵

3.24 - On the supply side, the optimistic story is that under the existing system, fees have been set vastly above what lawyers would work for, so that removing the defendant success fee either will have no effect at all on the number of cases lawyers take, or the effect will be that lawyers will take cases in exchange for very modest claimant success fees.

3.25 - The difficulty with the optimistic story on the supply side is that it implies that the existing system for controlling costs, even though it operates case-by-case, at considerable cost, and allows every item to be challenged, has utterly failed to limit fees to levels close to those necessary to induce lawyers to take cases. The case-by-case nature of the assessment of base fees is especially significant. It means that we are not in the position of some regulated markets where a single regulated price prevails, so that there is a 'marginal' firm, the firm for whom the regulated price is just enough, and 'infra-marginal' firms, all the other firms for whom the regulated price gives a rent-like surplus. In case-by-case control of costs, all firms are marginal.

²³ Cf Kahneman and Tversky 'Prospect Theory: An Analysis of Decision under Risk' (1979) 57 *Econometrica* 263-291.

²⁴ See eg O'Donoghue and Rabin, 'Doing it now or later' in Camerer, Loewenstein and Rabin (eds), 'Advances in Behavioral Economics' (Princeton UP, 2004) pp 233ff.

²⁵ Yarrow and Abrams, 'Nothing to Lose?' (Nuffield Foundation and Westminster University, 2000).

3.26 - It is also worth noting that an important characteristic of the existing system is that costs are usually assessed after lawyers have decided to take the case rather than before, which means that it is entirely possible for lawyers to end up with less than the fee necessary to induce them to take the case. Lawyers presumably take this possibility into account when making a judgment in advance about the value of the case, so it makes no fundamental difference to the analysis of what lawyers do, but it does matter for thinking about the kind of error a costs judge might make about setting fees too high or too low. Errors on the downside can be made as well as errors on the upside. Admittedly, a constant flow of errors on the downside are more easily observed by the courts and by the CPRC than errors on the upside, because it is easier to observe lawyers fleeing the market than invisibly pocketing the surpluses and staying in it. Nevertheless, the possibility of downside error makes it more likely that overall the average error made in setting fees is not great.

The Quantity of Cases under Jackson

3.27 - Let us look at the cases that lawyers would have taken under the pre-Jackson arrangements. We know that the revenue previously offered was sufficient to induce a lawyer to take each of those cases. Let us assume, for the sake of argument, that in every such case the pre-Jackson level of fees had been set at precisely enough, but no more than enough, to induce the lawyer to take that case. Now remove the pre-Jackson success fee from the lawyers. The chances of winning each case and lawyers' cost structures will not have changed.²⁶ We can therefore say that, on those assumptions, to bring back each case to a situation in which the revenue offered is just enough to induce the lawyer to take the case, any success fee negotiated with the claimant would have to be worth at least as much to the lawyer as the previous success fee paid by the defendant. To the extent that there are any cases in which a claimant success fee is not negotiated, there will be cases that would have been taken by lawyers pre-Jackson which would not be taken post-Jackson.

3.28 - It is, of course, highly unlikely that the present rather ramshackle mixture of case-by-case determination of fees by costs judges and fixed fees set by regulation has perfectly found the right level for each case. We do know, however, that if fees had been set below the perfect level, a claimant success fee worth only the same as the pre-Jackson success fee would not be enough to induce the lawyer to take the case post-Jackson,

²⁶ It is possible that cost structures would change in the longer term, but if the regulation of base fees continues on the same case-by-case basis, there would be no further incentive for cost control or technical innovation than exists pre-Jackson. See paras 3.68–3.70 below.

so that the number of such cases taken could not increase unless the claimant success fee were to be more than the defendant success fee.

3.29 - If the fee had been set to produce a surplus, it could be reduced by the difference between the perfect level and the fee set without any reduction in the number of cases taken. But if the fee is reduced by more than that difference, the quantity of cases taken will still go down unless a claimant success fee is offered worth at least that difference.

3.30 - We also know that the maximum claimant fee that can be offered under Jackson is 25% of general damages. That means that where the gap created between the regulated fee and the revenue required to induce the lawyer to take the case is greater than 25% of general damages, no deal is possible that would restore the case to the list of those taken. Even if the claimant is prepared to offer the maximum allowed, the lawyer will not take the case.

3.31 - One might ask whether the quantity of cases taken by lawyers might nevertheless increase because lawyers might accept cases that would not even have been offered by pre-Jackson claimants because of the effective price reduction flowing from elimination of the need for an ATE. We cannot know anything about the nature of such cases, in terms, for example, of how costly they would be to run and what their chances of success might be, so that, for the purposes of analysis, we have to treat them as having the same distributions of characteristics as the pre-Jackson cases. To the extent, however, that claimants' lawyers absorb ATE and disbursement costs at present, the difference in price will be small, and we can say, as a matter of arithmetic, that, because any reduction in the proportion of cases taken by lawyers applies across the board, to all the available cases, and any increase in the number of cases available is likely to be a much smaller than the existing total, it would not take a very large proportional loss of cases overall to wipe out any increase in the number of cases taken due to an increase in the total number of cases made available by claimants.

Putting Some Figures in

3.32 - What data is available that might enable us to turn these theoretical considerations into practical advice? The best place from which to take data for these purposes is the Jackson Review itself, the data it relied on for its own conclusions. The Jackson Review had, essentially, three sources of data. First, it commissioned a survey of 280 successful personal injury cases from around the country.²⁷ For each case, the survey records the damages awarded, the costs awarded excluding any success

²⁷ Jackson, Preliminary Report, Appendix 1a

fee and the costs including any success fee. Secondly, the Review had figures from the Compensation Recovery Unit (presented in slightly fuzzy graphical form) that record the number of successful and unsuccessful claims in personal injury cases over each of the years 2005-6 to 2008-9, broken down by subject matter of claim, and calculating the success rate by year and type.²⁸ Thirdly, the Association of British Insurers made available to Jackson LJ the result of a study it had commissioned from Frontier Economics. The study examined 15,000 personal injury cases dealt with between March 2005 and April 2007, information on which was supplied by insurance companies. The Jackson Review published ABI/Frontier Economics' Report accompanied by a hostile review from the Association of Personal Injury Lawyers.²⁹

3.33 - There are, of course, problems with each of the three sources. The 280 case survey only counts cases that have come to trial, and so, because success fees tend to be much higher for cases won at trial than for cases settled earlier (perhaps four times higher), it should be used with care as a predictor of what will happen in cases that do not come to trial, which is the overwhelming majority. Another limitation is that it omits to record what each case was about, and so we cannot differentiate between cases with different chances of success. Furthermore, it does not distinguish between general damages and other damages and it fails to record whether a case was funded by a CFA or by some other means, although we might make the assumption that where the costs column shows the same figure as the costs plus uplift column, the case is not a CFA case. If we make that assumption, the 280 case survey becomes a 154 case survey of CFAs. As for the CRU figures, they also fail to distinguish between CFA cases and non-CFA cases. Finally, both the CRU figures and the ABI study are published in summary form only and no case-by-case data are provided.

3.34 - Let us begin with the 280 case survey. If we take only the 154 cases that we are sure are CFA cases, because they include an uplift payment, we can add 10% to the damages and calculate 25% of the resulting amounts for each case, to give us a maximum amount that could be offered as a claimant success fee under Jackson. (In practice the amounts would be even less than these because only general damages count). We can then compare that figure to the uplift in each case and ask the question, in how many of these cases would the maximum new uplift exceed the old uplift? If the maximum new uplift exceeds the old uplift, a deal is possible to bring the lawyer to take that kind of case again. If the old uplift exceeds the maximum new uplift, no such deal would be possible and the case would not be taken.

²⁸ Jackson, Preliminary Report, Appendix 25

²⁹ Jackson, Preliminary Report, Appendix 28

3.35 - The answer to that question is that the maximum new uplift exceeds the old uplift in only 21 of the 154 cases. That is to say that, if there is no lawyers' surplus to eliminate, no deal would even be possible to induce lawyers to take the case in at least 83.6% of the cases.³⁰

3.36 - It is, of course, impossible to know how much surplus there is to be eliminated in any particular case, and perhaps the optimists are right to think that, even though 4 out of 5 cases would end up with no lawyer to take them if there were no surplus to eliminate, the surpluses are so large that all those cases would come back in. The size the surpluses would need to be for that to be the case, however, can be estimated by looking at the average gap between old and new uplifts in the 133 no-deal cases. That average gap is £2766.52. Even if lawyers were being paid £1000 per case more than the amount necessary to induce them to take the case, 125 of the 133 cases would still find no lawyer to take them.

3.37 - The size of the problem can also be seen by asking what happens if the limit on the proportion of damages claimants might be allowed to offer as a success fee is permitted to rise. If the limit rises to 50% of damages, 118 cases would still be left without a lawyer, and the average gap would fall only to £2071. Even if the maximum success fee were to rise to 100% of damages, so that claimants would be left with nothing, 69 cases would still be without a lawyer, with an average remaining gap of £1400.

3.38 - Looking at the 21 cases in which a deal is possible, although not all of them are high value cases, the average damages award was more than twice the average for the 154 cases as a whole (£12,508 as opposed to £5,115). Because the numbers of cases concerned is low, perhaps too much reliance should not be placed on this result, but it is certainly striking enough to deserve further investigation.³¹ It is also interesting how little difference the 10% increase in damages makes. Running the same analysis without the 10% increase yields 18 cases in which a deal would be possible instead of 21.

3.39 - An additional point is that the 154 case sample does not include any very high value cases. The highest value case is £60,000. In very high value cases, of over £250,000 for example, where the bulk of damages are often for future care, the 10% uplift will apply only to a very small part of the total damages. There is some evidence from a claimants' side

³⁰ Given that $n=154$, the 95% confidence interval lies 5.8 percentage points either side of 83.6%. It should be noted that the 95% confidence interval for other estimates of proportions from the 154 sample will be of the same order, viz. in a range of about 4-8 percentage points either side.

³¹ For what it is worth, the difference in damages between all the CFA cases in the survey and the CFA cases in which a deal would be possible is statistically significant at $p=0.1$, but not at $p=0.05$, using a one-tailed test.

law firm that these kinds of case will also become less attractive to solicitors under Jackson's proposals.³²

3.40 - The 280 case survey deals only with cases that went to trial and does not differentiate between different kinds of case, but we can use the CRU and ABI figures to gain some purchase on those questions. The CRU figures give an estimate of the success rate in road traffic accident cases (RTAs) of around 90%, and an average of about 66% for all other types of personal injury case. The ABI figures give success fees of about £420 for RTAs (taking only those cases that are funded by CFAs), £720 for industrial injury and disease cases and £750 for public authority and products cases (assuming that all such cases are funded by CFAs – to the extent that they are funded without uplifts, those figures will be higher for the CFA cases alone). That compares with an average uplift of about £3,600 for the 154 cases, a difference presumably explained by the higher success fee levels paid in cases that win at trial. Damages were also lower than in the 154 cases, £3,453 for industrial injuries and disease, £3,813 for public authority and products liability, and about £4,200 for RTAs, as opposed to £5,115 in the 154 cases.

3.41 - Although the lack of access to the raw data makes analysis difficult, we can draw some conclusions from the averages that we do have. In industrial cases, a claimant in an average case will be able to offer up to £1049 (25% of average damages enhanced by 10%) as an uplift, but the uplift will only be worth, on average, 66% of that figure to the lawyer, because it is only paid to the lawyer if the claimant wins. Hence the maximum uplift that can be offered under Jackson in such cases will be worth £692 to lawyers. The equivalent figure for public authority and products cases is £626 and for RTAs £1040.

3.42 - Those figures need to be compared to the current average uplifts, also discounted by the chances of success. They are £457 for industrial cases, £413 in public authority and products cases and £378 for RTAs.

3.43 - These figures look better for the Jackson scheme than the 154 case survey, at least for the average case. In industrial cases, for the average case to be taken by lawyers (on the assumption of no surplus), they will be looking for the £457 they have lost. Claimants will be able to offer up £692. A deal is possible. The same is true in the other types of case, and by a very wide margin in RTAs (£378 vs £1040). These figures might be taken to suggest that the Jackson scheme will work better for cases that do not go to trial than for those that do and better for RTA cases than for other types of case.

³² Stewarts Law, 'Lord Justice Jackson's Review of Civil Litigation Costs: Final Report – A response by Stewarts Law (2010). I am grateful to Richard Lewis for drawing my attention to this report. See also Lyons, 'Jackson – An Initial Response' [2010] J Personal Injury Law 74.

3.44 - But average cases are not all cases. There will be a distribution of cases around the average. It is entirely possible that there will be cases characterised by some combination of lower damages and higher current success fees in which a deal will not be possible under the Jackson scheme. It is far from clear how that distribution would work out, but if we assume that it is distributed normally (a reasonable assumption given the number of observations) and that the standard deviation of the distribution bears roughly the same relationship to the average as in the 154 case survey, we can make an estimate. On that basis, we still end up with a situation in which about 18% of cases will have a gap between what the claimant can offer and what the lawyers will be looking for, a gap that means that no deal will be possible.

3.45 - So far we have only been considering the possibility of deals, but even if it is possible to make a deal, negotiations might still fail, a phenomenon affecting all potential deals, but with particular risks in the legal context. For example, the more claimants and lawyers have to negotiate about, the greater the chance that they will not reach agreement, simply because of the additional costs of the negotiations themselves. The Jackson reform moves from a situation in which claimant and lawyer have very little to negotiate about (only the possible absorption by the lawyer of ATE and disbursement costs) to a situation in which they have to negotiate the value of a success fee. The complexity of the post-Jackson arrangement, with one version of the price (disbursements) in play only if the claimant loses, and the other version (the success fee) in play only if the claimant wins, might itself cause deals to fail.

3.46 - Transactions costs rise with the extent that claimants are expected to shop around. The emotional wear and tear of hawking a personal injury case around from lawyer to lawyer is high in any event, but rises with the chance that the first lawyer the claimant contacts is unwilling to take the case. Another factor to consider is that search costs might rise as a result of different lawyers viewing the same case differently, not because they see the risks and costs of the case differently but because they are following different (equally legitimate) business strategies about the combinations of risk and reward that they are looking for.³³

3.47 - So what have we learned from the data? The 280 case survey indicates that the Jackson plan is likely to have a dramatic effect on CFA cases that presently go to trial. Lawyers will be unwilling to take a very large proportion of such cases, perhaps 80% of them. The situation is different for cases that are not expected to go to trial, especially road traffic cases, but there is still a substantial risk that up to a fifth of cases will find no lawyer to take them. A shortfall of that extent would almost certainly outweigh any increase in cases taken arising from more cases

³³ See Kritzer, 'Risks, Reputations and Rewards: Contingency Legal Fee Practice in the United States' (Stanford University Press, 2004).

being offered by claimants encouraged by the effective reduction in price.³⁴ But, in addition to the problems arising from the shortfall itself, there would be problems arising from the difference in effect on cases that might go to trial and those that are not expected to go to trial. Difficult cases, those with higher costs to take or lower probabilities of success,³⁵ would tend to be weeded out, and defendants would gain new bargaining leverage from the increased unwillingness of claimants' lawyers to go to trial. The effect of that greater bargaining power is likely to be a reduction in damages awards in all cases, which will have the further effect of reducing what claimants can offer by way of success fees and thus lead to a further loss of cases lawyers will be prepared to take.

Distributional Concerns

3.48 - Another set of questions surrounds the issue of who benefits and who loses from the Jackson plan. There are two aspects to the issue: who benefits from the deals that will be made; and who wins and who loses from the deals that will not be made.

3.49 - On the first aspect, it can usually be assumed that where two parties make a deal, both benefit to some degree, otherwise they would not have made the deal. But there is the question of how satisfied claimants will be with the arrangement at the end of the process, as opposed to at the beginning. Time inconsistency is a well-known phenomenon, in which people change their minds about the value of a future benefit as they get nearer to it in time.³⁶ It is entirely possible that claimants who readily agreed to sacrifice a quarter of their damages at the time they hired their lawyer will end up bitterly regretting having done so as they approach the payment of damages. This effect might be especially strong in personal injury cases as claimants learn more both about the effects of their injury and the inadequate extent of the damages.

³⁴ Indeed, if the price elasticity of demand for legal services is about 0.25, even if the initial price reduction by the abolition of ATEs amounts to about 40% (which it might be on the ABI figures), any reduction of more than 9.1% in the overall number of cases taken will outweigh the initial price reduction. Note that if claimants' lawyers absorb all the ATE and disbursement costs, the price reduction is zero, because the effective price both pre- and post-Jackson is zero. For the price elasticity of demand for legal services, see e.g. Griffiths, 'Review of F Tulder and S Janssen, 'De prijs van de weg naar het recht (The Influence of Price on the Use of Legal Services)' and A Klijn (with the assistance of G Paulides), 'Duurder recht, minder vraag? (The Price-elasticity of the Use of Legal Services)' (1989) 3 De Economist 137.

³⁵ The Stewarts Law report (fn 32 above, p 2) estimates, for example, that it would take only cases with a chance of success of 77% or higher.

³⁶ See fn 24 above.

3.50 - There is also the question of where actual deals will be made in the range of possible deals. The optimistic view is that competition between lawyers will help claimants to make equitable deals. The problem is that claimants suffer massive informational disadvantages compared to lawyers. The consequence is that consumer surpluses are likely to be low and producer surpluses high. Of course, dissatisfied claimants will be able to apply to a court for an assessment of the success fee, with a view to driving down their lawyer's surplus and driving up their own, but that would involve extensive further costs, including going to another lawyer, and is therefore unlikely to have much of a bearing on the negotiations between claimants and their lawyers.

3.51 - As for the distributional consequences of the deals that are not made, the obvious losers are claimants, whose cases are very much less likely to succeed if not taken up by lawyers, if indeed they are taken up at all. The winners are defendants, and, at least in the short term, those who insure them. If it is correct that RTA cases are the ones most likely to proceed on the basis of post-Jackson claimant success fees, it follows that the defendants most likely to benefit are those in other types of case: employers, manufacturers of products, public authorities and the medical profession.

Will 10% be enough?

3.52 - Perhaps the most important factor in determining the distributional consequences of the Jackson proposals is whether claimants will end up with lower overall levels of compensation. Plainly, the claimants whose cases are dropped who otherwise would have won, or who would have won more if their lawyers had been prepared to go to trial, will be losers. But what about claimants whose cases do proceed but who pay success fees out of their damages. Will the 10% increase in their general damages be enough to compensate them for the deduction of the success fee, or will they end up paying more than the 10% out of their damage awards?

3.53 - We can return to the available data and ask what it says about that question. What we can do is re-run the analysis we made of claimant success fees limited to 25% of damages with claimant success fees limited to 10% of damages and see what difference that makes. If we look at the 154 cases, the effect of a 10% limit is that the number of cases in which a deal is possible, assuming no surplus, drops from 21 to 3,³⁷ with an average shortfall in the remaining cases of £3147. Interestingly, the 10% increase in damages makes no difference to the number of cases in which deals are possible.

³⁷ This difference is statistically significant at $p=0.005$.

3.54 - Looking at the ABI and CRU figures, the maximum amounts claimants can offer if they were limited to 10% of damages, discounted for the probability of winning, would be £251 for industrial cases, £277 for public authority and product cases and £416 for RTA cases. Recalling that average pre-Jackson success fees were £457 for industrial cases, £413 in public authority and products cases and £378 for RTAs, although deals would be possible (just) in the average RTA case, they would not be possible in the average industrial case and the average public authority or products case. On the rough assumptions about the distributions and the standard deviations we used previously, plus the assumption that about 45% of CFA cases are RTA cases, in roughly half of all cases a deal would not be possible based on an uplift limited to 10%.

3.55 - We can therefore be reasonably sure that the 10% increase in damages will not be enough in itself to induce lawyers to take a large proportion of the cases that they take now (or a similar proportion of any new cases generated by the full Jackson price reduction for claimants). On the basis of the 280 case survey, it is reasonable to suspect that in cases that might come to trial, not only will 4 out of 5 cases not find a lawyer at all, but in those that do find a lawyer, more than 85% will end up with lower net compensation than they would have received pre-Jackson. For cases not expected to go to trial, about 1 in 5 cases will not find a lawyer at all, but a further 30% will find that their damages net of the success fee are lower than they would have been pre-Jackson. And all this is before the further effects of the reductions in awards because of the improvement in the bargaining position of defendants arising from the reluctance of claimants' lawyers to go to trial.

3.56 - One can see from these approximations how it is possible to say that a clear majority of claimants who find a lawyer will probably be better off under the Jackson proposals, but it is also the case that, taking into account the number of claimants who do not find a lawyer at all, around half will be worse off, including nearly all whose cases would now come to trial.

Jackson as Policy

3.57 - There are two ways of conceiving of the effect of the Jackson reforms. One way is to think of it as resulting in a reduction in access to justice, as measured, admittedly crudely, by the number of cases lawyers take. If around 20% of cases now taken by lawyers are turned away, including 80% of those thought likely to go to trial, access to justice will have been restricted. Another way to think of the consequences of the Jackson reform is as creating a gap, or a greater gap, between the number of claimants willing to take on a case at the prevailing price and the number of cases lawyers are willing to bring at the fees offered.

3.58 - In any event, the only techniques available for remedying the situation are raising the price faced by claimants, to drive down the number of claimants willing to proceed, or increasing fees for lawyers, to expand the number of cases lawyers are willing to take, or some combination of the two. Measures in the first category might include, for example, reintroducing forms of two-way cost-shifting and increasing court fees. Measures in the second category might include allowing base fees to rise, either directly, through regulatory change, or by allowing cost courts to take into account the existence of the gap created by the reform in deciding what counts as 'proportionate'. Lifting the 25% cap on claimant success fees might be seen as falling into both categories.

3.59 - The Jackson reform thus presents political risks for any government that adopts it. Complaints will rise from disappointed claimants and, although repeat defendants (employers, doctors, public authorities), and those who insure them, will be pleased by the reduction in the number of cases brought, it will be difficult to present that reduction as anything but an attack on the interests of victims. Similarly, the disproportionate discouragement of cases that might go to trial will greatly benefit repeat defendants, not least by considerably increasing their bargaining power over reluctant claimants' lawyers and so eventually producing lower damages settlements in all cases. The defendant lobby will be happy, but it will be difficult to disguise the burdens being imposed on claimants.

3.60 - Of less interest to defendants, but still a problem for policy-makers, is the reduction in compensation experienced by claimants who find that, to persuade a lawyer to take their case, they have to offer more in success fees than they will receive in enhanced damages. In the few cases left in which a lawyer can be found willing to go to trial, the vast majority of claimants will find themselves in that position. Even if it is true that, looking at cases not expected to go to trial, a majority of claimants who manage to find a lawyer will be able to do so for less than the increase in damages, that still leaves a considerable number of people – perhaps 150,000 people a year – worse off. It is possible that these claimants will not notice that they are worse off, because they are one-shot players in the legal system and have no previous experience with which to compare their current experience, but it is also possible that, because of widespread time inconsistency, claimants come to resent greatly having to give up any part of their compensation.

3.61 - In terms of public expenditure, a reduction in the number of cases taken might result in some reduction in pressure on court administration, but if the policy of setting court fees to recover the full costs of the system continues, no net reduction in spending will result. To the extent that there are economies of scale in the court system, a reduction in the number of cases might even lead to a need to increase court fees rather than to reduce them. Outside the Ministry of Justice, however, there might be adverse public expenditure consequences. The Department for Work

and Pensions and the Department of Health, for example, collect over £150m a year through the Compensation Recovery Unit, which is responsible for enforcing the provisions under which defendants reimburse the state for social security and medical costs incurred in supporting the claimant.³⁸ If half of all the cases the CRU deals with are CFA cases (the rest being mainly RTA cases funded differently), a 20% drop in the number CFA cases lawyers take would mean, assuming that there is no change in success rates, a 20% reduction in the number of successful cases, which would in turn threaten a fall in CRU revenues of up to 10%, or £15m a year. That loss would offset any savings arising from reductions in successful claims against public authorities. In addition, fewer cases will affect VAT receipts and reduce income tax receipts from lawyers.

3.62 - As for possible corrective measures, price increases for claimants might close the gap but would do nothing to restore access to justice. Base fee increases for claimants' lawyers will be unpopular with everyone except claimants' lawyers. That leaves lifting the 25% cap as the only policy response that achieves the objectives of increasing the number of cases taken without increasing base fees. But the fairness concerns that led Jackson to propose the 25% cap will still exist. The bargaining position of most claimants is poor and unregulated or weakly regulated bargains will inevitably favour lawyers. In any case, the 154 case survey indicates that even an increase in the maximum claimant success fee to 50% would still threaten to leave two thirds of cases that currently go to trial without a lawyer.

3.63 - One suspects that the ultimate consequence of the Jackson plan, after a period of complaint and perhaps an ineffective increase in the cap to about 33%, will be the adoption of a tacit policy of increasing base fees, a policy which will, in effect, demonstrate the inherent difficulty of the aim, expressed by Jackson LJ in the two sentence foreword to his final report, both 'to control costs and promote access to justice'.³⁹

3.64 - The position of the government, at least as expressed in the impact assessments attached to the Consultation Paper, is rather more radical than that of Jackson. The government sees a reduction in the number of cases as a desirable outcome in itself and presumably believes that there will be no need for any corrective activity. It assumes, without evidence or argument, that 'currently too many cases are being brought forward which are either relatively less meritorious or where the amounts at stake are disproportionately small compared to the costs of pursuing

³⁸ For the relevant powers, see Social Security (Recovery of Benefits) Act 1997, Road Traffic (NHS Charges) Act 1999 and Health and Social Care (Community Health and Standards) Act 2003. For the number of cases and amounts recovered by the CRU, see <http://www.dwp.gov.uk/other-specialists/compensation-recovery-unit/performance-and-statistics/performance-statistics/>.

³⁹ Jackson, Final Report, i.

the case.⁴⁰ The question entirely begged is 'too many for what?' Measuring the value of a case to the parties simply by looking at 'the amounts at stake' is crude and inaccurate,⁴¹ so that there is no guarantee that the new system would only affect cases that the parties themselves value less highly than their joint costs. More importantly, as the impact assessments also show,⁴² the policy of reducing the number of cases rests on a further assumption that all cases are zero-sum games that generate social costs but no social benefits apart from a difficult-to-quantify sense of 'fairness'. Civil litigation is an enforcement mechanism for the underlying substantive legal rules, and if those rules are justified in terms of their social costs and benefits, enforcing them is also potentially justified. The Ministry of Justice is assuming, for example, that civil litigation about accidents at work has no cost-justified effects in terms of making workplaces safer.

A Fundamental Re-think of How to Regulate CFAs?

3.65 - The central feature of no-win-no-fee arrangements in a regime in which losing defendants pay winning claimants' costs is that the party who pays legal fees, the defendant, is not the party who agrees them. There is therefore no market pressure on fees. The prices paid are entirely regulated prices. The Jackson approach is to try to introduce some element of market pressure into part of what claimants' lawyers receive through the mechanism of the unrecoverable claimant success fee. The problem is that the resulting market is itself an unsatisfactory mixture of market and regulation.

3.66 - One might conclude that it would be better to abandon one or both of the characteristics of a CFA system – no-win-no-fee or cost shifting. Abandoning the former would take us back to a situation in which losing claimants had to pay at least their own lawyers' fees. Market pressure would return, but at the expense of access to justice. Abandoning cost-shifting would take us to the American rule that each side bears its own costs, which relies almost entirely on contingent fees and before-the-event insurance to provide access. That has its attractions in terms of market pressure, but would offend those who believe that it is unjust for successful claimants to have to bear the cost of bringing an action.

3.67 - If we are to retain CFAs, however, it would be sensible to start with the assumption that all claimants' lawyers' fees in a CFA system have

⁴⁰ See eg Ministry of Justice, 'Overarching Jackson Proposals' (IA 044, 15/11/2010) p 8

⁴¹ See para 3.3 above.

⁴² 'Overarching Jackson Proposals', p 11

to be regulated and then to think about what would be the best way to regulate them, rather than to rely on a haphazard mixture of court decision and fixed fees. The problem is much closer than seems to have been realised to the problem of how to regulate the prices charged by privatised water companies and railways. In those cases, the problem is monopoly. In CFAs, the problem is not monopoly but lack of voluntarily agreed prices, but from the point of view of a regulator the situations are very much alike. There is a structural market failure that leads to a lack of market pressure and the question is how to set regulated prices that take the place of market pressure.

3.68 - One of the standard results of the analysis of regulated prices is that there is a trade-off between two of the usual aims of regulation: reducing costs and reducing producer surpluses.⁴³ Pursuing one gets in the way of pursuing the other. For example, one way of setting regulated prices is simply to set a maximum price without reference to the costs faced by the producer. Because the producer keeps any difference between the set price and its own costs, this method results in the maximum incentive to reduce costs, but it does nothing about the issue of who gets to keep the surpluses. On the other hand, setting prices by looking at the costs faced by the producer and limiting the producer to covering those costs has the effect of transferring the producers' surpluses to consumers, but it results in no incentive to keep costs down. It is one of the common delusions of regulators that they can set prices in a way that both perfectly removes producer surpluses and provides perfect incentives for cost control. Perfection in both simultaneously is impossible.

3.69 - Price cap regulation and cost-of-service regulation have a tendency to converge in so far as whenever regulators revise a price cap it is difficult to prevent their trying to remove producers' surpluses, but between revisions, the two forms of regulation are different in their effects. Price cap regulation results in maximum pressure to reduce costs, but it also provides incentives to reduce quality, including incentives to select out difficult or otherwise particularly expensive customers ('cream-skimming' or 'cherry-picking'). Cost-of-service regulation has advantages in terms of providing incentives for investment⁴⁴ and quality control.

3.70 - It is not clear, however, that all these advantages and disadvantages count for much in the CFA context. Law firms are not capital intensive in the ordinary sense. It might be relevant that law firms

⁴³ See eg Laffont and Tirole, 'A Theory of Incentives in Procurement and Regulation' (MIT Press, 1993); Armstrong and Sappington, 'Recent Developments in the Theory of Regulation' in Armstrong and Porter (eds) *Handbook of Industrial Organization*, vol 3 (North-Holland 2007) pp 1557-1700; Newbery, (2002), 'Rate-of-return regulation versus price regulation for public utilities', in Newman (ed), *The New Palgrave Dictionary of Economics and the Law*, vol 3 (Palgrave, 2002) and Cowan, 'Price-Cap Regulation' (2002) 9(2) *Swedish Economic Policy Review* 167-88.

⁴⁴ See eg Newbery, fn 43 above.

need to invest in human capital in the form of trained lawyers, but they have no need for expensive machinery. The investment incentive advantage of cost-of-service regulation is therefore not particularly important. As for quality, the oddity of the no-win-no-fee situation is that the defendant, who is the only party who ever pays for claimants' lawyers, would prefer the claimant's lawyer to be poor, so that it is difficult to see how cost-of-service regulation could out-perform price cap regulation in that respect. Quality concerns have to be dealt with by a combination of lawyers' enhanced incentives to win under no-win-no-fee and a separate regulatory system concerned with standards and ethics. Concerns about the tendency of price cap to select out difficult cases are, however, clearly applicable.

3.71 - Current regulation of legal costs is (as is the case in many regulatory regimes) a mixture between the two approaches, but with a heavy bias towards cost-of-service regulation. There are some aspects of price cap regulation in the fixed fee regimes, but the rules applied by costs judges are almost all in the nature of cost-of-service regulation – for example setting fees using hours worked, hourly rates, the level of specialisation required and even office rents (in the form of geographical factors). It is not surprising, therefore, (although Jackson and most commentators seem surprised) that the current regime is not very good at keeping costs down. It is an inherent feature of cost-of-service regulation that it is weak at creating incentives to reduce costs.

3.72 - The first thing that must be done if the CFA system is to be retained is for conscious decisions to be taken about whether the aim of the system is to control total cost or to control the profits lawyers make at the expense of litigants. And if the answer really is 'a bit of both', policy-makers should ask themselves precisely what forms of cost they are prepared to allow to drift upwards for the sake of redistributing surpluses from lawyers to litigants. For example, if firm specialisation is allowed as a form of cost pass-through, the effect will be to allow that form of cost to drift upwards. The same applies to allowing higher fees to firms based in expensive cities, such as London, on the ground that their office rents are higher.

3.73 - Elements of cost pass-through also reduce the incentive to innovate – in terms of new business models or the use of new technology, for example. Others might see that lack of incentive to innovate as protection against a decline in quality, against for example the drift towards using lawyers with lower levels of experience or qualification to carry out work previously done by more senior lawyers. The introduction of fixed fees in legal aid, for example, has been criticised for encouraging just such a drift. But one cannot ignore the opposite risk that cost-of-service regulation leads to complacency.

3.74 - Another crucial aspect of the problem of CFAs is to recall which litigants cost-of-service regulation benefits. In standard regulation

problems, there is only one set of 'customers' who must pay the regulated price (although there might be subsets, such as industrial and domestic consumers). In the CFA problem, however, there are two very different sets of consumers, claimants and defendants. To the extent that the system preserves the idea of no-win-no-fee (for the sake of access to justice), the issue of the redistribution of lawyers' surpluses to litigants concerns transfers not to claimants but to defendants. In other words, cost-of-service regulation in the CFA context is about reducing lawyers' profits and transferring them to defendants in the form of reduced liabilities to pay. It is not concerned with the welfare of claimants.

3.75 - Policy-makers therefore must decide whether, and to what extent, their priority is minimising the degree to which society devotes resources to litigation or benefitting regular defendants (employers, doctors, public authorities) at the expense of claimants' lawyers. If it is the former, they should move in the direction of simple price cap regulation – even simpler than the current fixed price regime. If it is the latter, they will continue with cost-of-service regulation.⁴⁵

3.76 - But policy-makers have another decision to make, namely how many claimants they want to be able to bring cases. The quantity of litigation demanded under a CFA system is essentially arbitrary. It depends on prices almost entirely created by regulation. Regulators can change the maximum number of willing claimants by increasing or decreasing the costs faced by claimants if they lose.

3.77 - But once the maximum number of claimants has been determined, policy-makers then have another, more constrained, decision to make, namely what proportion of that maximum to satisfy in terms of being able to find a lawyer. If they want to satisfy the maximum proportion possible they have to set fees accordingly – either a simple price cap that covers the most expensive case (in terms of risks and rewards) that the regulators want to see taken, or cost-of-service regulation that has the same effect.⁴⁶ If they are content to see a lower proportion of clients go without lawyers, they can set a lower price.

3.78 - It is at this point that cost-of-service regulation starts to have political attractions, because setting a simple price cap to ensure that the regulators' marginal case is taken will often mean a price cap set so high that it would visibly deliver very high profits to lawyers. Cost-of-service regulation, especially case-by-case, tends to disguise higher fees and can be explained as removing surpluses. But if regulators go in that direction,

⁴⁵ Another point is that the credibility of regulators, and in particular their independence from politics is very important for effective regulation (see Armstrong and Sappington, fn 43 above). Currently, the cost judges are independent, but the CPRC is subject to significant political direction.

⁴⁶ Cf Bernstein and Sappington 'Setting the X factor in price-cap regulation plans' (1999) 16 Journal of Regulatory Economics 5-25.

they cannot at the same time claim that they are setting up maximum incentives to reduce total costs. Policy-makers might therefore want to look at other methods of dealing with the problem of deciding which cases to allow to be selected out, methods that might be combined with price cap regulation. For example, they might want to consider creating a public service obligation, either on lawyers generally or just on those who offer CFAs, to take on difficult cases in addition to the cases they accept on business terms. Such an obligation could take the form of a norm for pro bono activity, or an obligation to make a financial contribution in lieu of fulfilling such a norm. Its justification, especially for imposing it on CFA lawyers, would be that the CFA system frees lawyers from any market discipline in setting fees, so that it is reasonable to expect them to pay an entry fee, in the form of public service, to be allowed to use it.

3.79 - Jackson, for all its thoroughness and ingenuity, was not a fundamental review of how to regulate legal costs, or even a fundamental review of how to regulate costs in CFA cases. A fundamental review would think about the objectives of regulation and the structures for delivering those objectives from scratch. Perhaps the time has now come to conduct such a review.

Chapter 4

ALTERNATIVES TO JACKSON: THE EXAMPLE OF BEFORE-THE-EVENT INSURANCE

Richard Lewis^{*}

4.1 - This chapter looks at the Jackson report through the lens of but one of its chapters in order to make wider points about the problems the report identifies and the solutions it proposes.¹ Although the focus is upon before-the-event insurance (BTE), the effect of reforming this particular means of obtaining legal representation could have wide repercussions upon the litigation of personal injury claims. Whether extending BTE could lead to an increase in access to justice is a question which may divide readers; whether changing BTE could provide a more workable solution than some of those put forward by Jackson may provoke a more favourable response.

How costs have shifted

4.2 - Following the election of a new Government intent upon making substantial cuts in public expenditure, it would not be realistic to expect any increase in public funding to enable civil cases to be litigated. Legal aid for personal injury claims already seems to be a relic from the remote past, and there is no suggestion that it should be revived. Legal aid in personal injury may indeed have cost the Treasury little (partly because of the welfare benefits that were recovered from insurers), but the apparent exponential increase in expenditure made it an easy target. Even if legal aid had continued in place, there is good reason to believe that it would now be a vestige of its former self. The current prescribed rates for assistance do not meet expenses, and financial eligibility has collapsed to

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¹ For more general reviews see AS Zuckerman, 'The Jackson Final Report on Costs – Plastering the Cracks to Shore up a Dysfunctional System' (2010) 29 (3) Civil Justice Q 263; contrast M Lyons, 'Jackson – An Initial Response' [2010] J Personal Injury Law 74.

about 36% of the population.² A former President of the Association of Personal Injury Lawyers (APIL) notes:

In effect 'public funding' is now a 'no win, lower fee' conditional fee agreement for the socially excluded only, but without a success fee for taking the risk of losing.³

He suggests that by now, in an unreformed system, solicitors in high value cases would have been forced to fund litigation by using contingency fees with clients paying lawyers from the damages they were awarded. As for the mass of low value claims, solicitors would have abandoned the work and left it to unqualified claims assessors. We would have a very different tort system.

4.3 - If, therefore, no increase in public expenditure is on any political agenda, we must turn to private funding if we seek to make it easier to obtain civil redress. The basic shifts in the economic burden of personal injury litigation in recent years are clear: the removal of legal aid transferred costs from the state to claimants; the introduction of conditional fee agreements (CFAs) with recoverability of success fees and after-the-event (ATE) insurance premiums, in effect, transferred the costs to insured defendants; and now if, as Jackson proposes, success fees and ATE are to be removed from the equation then both claimants and their lawyers will run increased risks. Claimants' fears of having to meet defendants' costs will be reduced by qualified one way cost shifting, and their fears of having to pay their own solicitors' success fees are supposed to be offset by an increase in general damages.⁴ With these proposals in the background, how ought we to view the possibilities for BTE?

4.4 - In his preliminary report Jackson was enthusiastic about BTE, tentatively concluding that promoting its substantial extension would be in the public interest. However, eight months later this support evaporated and his final report is largely non-committal. He makes no recommendation either for or against the use of BTE in personal injury cases, although as an add-on to household insurance he considers it a beneficial product which should be encouraged. He notes that, as with all other insurance, it would enable the many to pay for the few. However, overall he gives little space to BTE, devoting only nine of his 371 page report to the subject and making only one recommendation about it out of over a hundred made in total. Why did he not consider in more detail the

² This is actually a 7% increase compared to two years previously, but this reflects only a downturn in the economy not an increase in eligibility rates. See Jackson chapter 7 para 3.1.

³ D Marshall, 'A Short History of the Costs Wars' (2010) 20 (4) APIL Focus 24.

⁴ But see the empirical analysis carried out by a leading London law firm of its cases exceeding £250,000 showing that claimants in these serious injury cases would lose on average £47,000. J Chamberlain, 'Stewart's Law Response to Jackson on Costs' <http://www.stewartslaw.com/stewarts-laws-response-to-final-report-by-lj-jackson.aspx>.

possible extension of BTE in relation to personal injury especially following his radical proposals to change existing sources of funding? Before answering this question, we shall look briefly at the remarkable growth of BTE and the type of personal injury cases that are presently being litigated.

The development of BTE in an expanding claims market

4.5 - Although BTE has been widely used in other countries for many years, it was first sold in the UK only in 1974.⁵ There had been little demand for it partly because people were often unaware of the risk of incurring legal costs and, in any event, there was a competitor - the protection offered by legal aid. Insurers also faced difficulties in pricing the insurance when the cost of litigation was much less predictable in the UK than in other countries. Given the relatively few years during which BTE has been offered, it is remarkable that eligibility for its benefits has expanded so rapidly: almost 3 in 5 adults now have some form of this insurance.⁶ Over 18 million drivers hold it as part of their motor insurance, and 14 million householders as part of their buildings and contents insurance. In total these number about 22 million people.⁷

4.6 - In addition, about 7 million workers are entitled to benefits resulting from their trade union membership. This is not strictly a form of BTE but instead is a stand alone cover for personal injury utilising the ATE and success fee regime offered by CFAs. Although the number of people in trade unions has declined, unions have extended their personal injury services to the family of each member so as to cover accidents and diseases away from the workplace. This represents a substantial potential increase in access to the legal system. It can be argued that union members and their families do not need BTE in personal injury cases.

4.7 - The wide penetration of the market by BTE has been achieved largely because it has been sold as an additional benefit to be included in existing motor liability or household insurance. In effect, there has been a great deal of inertia selling. Few people opt to take out stand alone BTE policies, but they commonly accept legal expenses cover as part of a wider package. A factor which may have led to the more recent growth of BTE has been the attempt by certain composite insurers to pre-empt the

⁵ AE Holdsworth, 'The Experience in England' in W Pfenningstorf and AM Schwartz (eds), *Legal Protection Insurance* (American Bar Foundation, Chicago, 1986) 14 and M Kilian, 'Alternatives to Public Provision: The Role of Legal Expenses Insurance in Broadening Access to Justice: The German Experience' (2003) 30 (1) *J Law and Society* 31.

⁶ FWD, 'The Market for "BTE" Insurance' (Ministry of Justice, 2007) para 3.3.

⁷ Mintel, 'Legal Expenses Insurance' (Mintel, April 2008).

possibility of claimants seeking expensive assistance from solicitors operating on a CFA and ATE basis. For whatever reason, the growth of BTE coverage has been remarkable.

4.8 - With the growth of BTE there has been an increase in the number of claims brought for personal injury, although this must not be taken to imply that there is a clear causal connection between the two. In fact the increase in claims has been very uneven over the years, and has been much misunderstood. There is a popular misperception that a 'compensation culture' attitude in the last ten years or so has led to a sustained increase in the number of claims. In fact, in 2008 claims were roughly at the same level as they were seven years earlier: the statistics deny any suggestion that the introduction of CFAs in 2000 led to a 'have a go' world and an increase in litigation.⁸ The comprehensive figures from the Compensation Recovery Unit I discuss elsewhere show that there was no such increase in claims in the early years of this new millennium.⁹

4.9 - However, it is true that claims have risen by ten per cent in the last two years. More importantly, it is also true that in the last forty years or so claims have increased substantially: they have more than tripled from an estimated 250,000 in 1973 to 861,000 in 2009-10,¹⁰ and represent one claim each year for every 73 people in the country. Motor claims have increased at almost twice that overall rate rising from 102,000 to 674,000. They have increased by 22 per cent in the last two years. With the continuing decline in work accident claims, motor cases now constitute 78 per cent of all the claims made. BTE is thus operating in a much expanded litigation system from when it first began, and the number and proportion of motor claims has risen very considerably. If any reform were specifically directed at road traffic accidents it could have a major effect upon the system overall. Jackson should have concentrated his attention in this area.

⁸ Better Regulation Task Force, 'Better Routes to Redress' (Cabinet Office Publications, London, 2004); A Morris, 'Spiralling or Stabilising? The Compensation Culture and Our Propensity to Claim Damages for Personal Injury' (2007) 70 *Modern Law Review* 349.

⁹ R Lewis, A Morris and K Oliphant 'Tort Personal Injury Claim Statistics: Is there a Compensation Culture in the UK?' (2006) 14 *Torts Law Journal* 158 and [2006] *J Personal Injury Law* 87; J Hand, 'The Compensation Culture: Cliché or Cause for Concern?' (2010) 37 *J Law and Society* 569.

¹⁰ The current figure is published by the Compensation Recovery Unit www.dwp.gov.uk/other-specialists/compensation-recovery-unit/performance-and-statistics/performance-statistics/. The 1973 figure was estimated by the Report of the Royal Commission on Civil Liability and Compensation for Personal Injury (chairman: Lord Pearson, cmdn 7054, 1978) vol 2 paras 59 and 63.

The potential reform

4.10 - The suggestion considered here is that there could be an extension of legal advice if, when forced to purchase insurance against liability in tort, every motorist were also required to take out BTE as an addition to the policy. The insurance would benefit not only the policyholder and the passengers, but also any pedestrians or other road-users injured by the insured vehicle. The mechanism for effecting the change – compulsory third party insurance against motor liability – already exists. As others have often noted,¹¹ it would be relatively easy to build upon it. By doing so access to justice could be secured for three out of four claims presently brought.

4.11 - A proposal along these lines was included as part of wider reforms put forward by the Bar's Contingency Legal Aid Fund (CLAF) Group. However, the Group proposed that BTE be extended in a much more ambitious manner from that being discussed here. The CLAF scheme sought to include not only motorists but also employers and occupiers and others. These latter groups would each insure respectively for the benefit of those injured at work, or on premises, or elsewhere. Even those injured in hospital would be covered. In addition, the Group suggested that protection could be extended to include, for example, those suffering a loss as a result of the act of a person required to have professional liability insurance cover. According to the Group the overall result would be that

... access to justice for the general public would be increased at no cost to the taxpayer and with none of the disadvantages inherent in CFAs and many additional advantages.¹²

However, not only is this a very much broader and more complex scheme than that considered here but it is also based on mistaken assumptions. For example, it is not the case that occupiers must insure as a matter of law. Instead of supporting this broad scheme, the suggestion here is that consideration be given to a road traffic case scheme only, albeit with many of the same goals in mind.

4.12 - The main advantage of a motor scheme would be that those injured will have ready access to legal advice and a fund to cover their costs should their case fail. (Union members and their families, being already protected, could be excluded from the compulsion to purchase BTE separately.) There would then be less need than at present to

¹¹ P Bartrip, 'No-fault Compensation on the Roads in Twentieth Century Britain' (2010) 69 Cambridge LJ 263. Lord Neuberger MR recently has argued that no-fault should again be examined by policymakers if we fail to achieve proportionate costs in personal injury litigation: www.judiciary.gov.uk/docs/speeches/mr-piba-conf-march-2010.pdf.

¹² www.barcouncil.org.uk/assets/documents/CCF%20Paper%202%20April%202009.pdf at para 123 ff.

arrange unsatisfactory or expensive funding such as loans to claimants to cover the cost of their disbursements. Nor would there be the same need to resort to what would be an excessively complicated post-Jackson CFA world. As an example of that complexity we are asked to accept that claimants will make reasoned choices between law firms based on their competitive marketing of success fee levels. This is hard to imagine. Indeed, in a key sentence in the report, Jackson admits that there would be difficulties in devising such advertising. Instead he sees the future as inevitably involving claims brought on a contingent fee basis:

Clients will no doubt find it easier to grasp the concept of a deduction of a percentage of their damages and solicitors will find it easier to advertise on that basis.¹³

The difficulties involved in Jackson's proposal for a regulated system of contingent fees are not discussed here. However, that proposal is a major alternative with which the possibilities for BTE should be compared.

4.13 - Following an increase in ready access to legal advice, the second advantage claimed for the BTE proposal is that the system would be more efficient than at present because the costs of pursuing the case would be more closely monitored by the claimant's side. Unlike claimants at present, BTE insurers would be directly affected by the costs of bringing the case. They would be able to sift claims, using a merits test to weed out those which should not be pursued further. They would then be able to channel claimants to those who specialise in providing the representation needed. A good comparator, from this viewpoint, is the way in which trade unions at present enable injured workers to gain expert advice from the handful of specialist firms to which unions direct cases. What are the flaws in such a comparison and where might the difficulties with an extension of BTE lie?

The difficulties

Choice of lawyer

4.14 - At present BTE limits the freedom to choose one's own lawyer because claimants are directed to use firms which are on its approved panel.¹⁴ These firms may be located a considerable distance from the claimant's home. Firms are selected for the panel after a closed bidding process intended to ensure that insurers are exposed to the lowest

¹³ Chapter 17 para 2.5.

¹⁴ . Blundell, 'Free to Choose? BTE Legal Expenses Insurance and Freedom of Choice' [2004] J Personal Injury Law 93.

possible risk. In return for limiting their costs and ensuring that the cases are dealt with efficiently, panel firms are guaranteed a flow of work from the BTE insurer. There are said to be strict service level agreements and audits of the work carried out. At present these firms also pay the insurer a referral fee for each case received. Many non-panel solicitors object to these features. However, one claimant lawyer has recently argued strongly that these criticisms are without foundation and merely reflect firms' own economic interests.¹⁵ Here it is suggested that, for several reasons, too much weight should not be placed upon the argument that BTE unduly limits the claimant's freedom to choose his solicitor.

4.15 - Firstly, it is doubtful whether many claimants in any event make informed choices when selecting their solicitor. In spite of extensive advertising, there is little useful information enabling them to discriminate between firms easily. Where guidance exists, in practice it is rarely used. Secondly, the freedom to choose is restricted in other situations and yet attracts little criticism. In particular, when workers take advantage of the legal assistance offered by trade unions they are similarly directed to specific firms. The restriction here is seen in a positive light because it enables the designated firms to establish particular expertise in the specialised cases referred to them. If (as is discussed below) BTE claimants were all to be represented as well as workers are by these trade union firms¹⁶ there would be little objection to their lack of choice. Thirdly, there is some recent evidence that BTE insurers have changed their view and are now more prepared to accept a claimant's choice of lawyer provided the firm is experienced in such work.¹⁷ Indeed this freedom is already supported in law, at least from when formal proceedings are issued.¹⁸ In spite of this, it must be recognised that injured people in practice are still encouraged to accept a panel solicitor even though it may not always be convenient for them to do so.

4.16 - Jackson is equivocal in his support of choice. On the one hand, he is prepared to support an amendment to the regulations to reinforce the right to choose from when a letter of claim is first sent rather than from when formal proceedings are issued. On the other hand, he qualifies this view by stating that this change is only to be made if its impact upon premiums would be modest. From what has been said above, the problem

¹⁵ . Harvey, 'Before the Event Legal Expenses Insurance - Why do so Many Seek to Close This Access to Justice Gate?' [2010] J Personal Injury Law 93. For an even more robust defence see P Smith, 'Panel Solicitors: the Legal Expense Insurer's Perspective' (2004) 14 (3) *Apil PI Focus* 15 - 16.

¹⁶ For the success of such specialist firms see H Genn, *Hard Bargaining: Out of Court Settlements in Personal Injury Actions* (Clarendon Press, Oxford, 1987).

¹⁷ J Rowley [2010] J Personal Injury Law C35. Contrast the evidence given to Jackson by the Law Society: Jackson Report chapter 8 para 6.2.

¹⁸ The 1987 Legal Expenses Directive (87/344) is supported domestically by the Insurance Companies (Legal Expenses Insurance) Regulations 1990 SI No 1159.

of choice may not now be as significant as some may suppose, although the pressure to accept a panel solicitor remains.

Quality of Legal Work

4.17 - There are fears that BTE lawyers will not represent their clients as vigorously as those operating on a different fee basis. The TUC states that their quality of service is suspect. In part this is because of conflicts of interest that may arise. For example, in litigation in 2001 it was estimated that Norwich Union could be both representing the defendant driver and funding the claimant driver in just over six per cent of all its claims.¹⁹ More generally, there is concern that BTE lawyers may be too ready to compromise a case at a low figure in order to avoid the possibility of defeat even though the case has a high chance of success. They thereby safeguard their own costs and ensure that there will be no call upon the resources of the BTE insurer. The result has been compared to third party capture whereby defendant liability insurers directly contact injured people and settle their claims at a low level, assisted by the claimants' lack of legal representation. This comparison may be unfair: an undue readiness to settle may affect firms litigating on fee bases other than BTE, including where a conditional fee is involved. Even within trade union firms, although under-settlement is not a feature, regular assessments are made of the merits of proceeding further with a case, and there is awareness of who is ultimately paying the bill. Contrary to these criticisms concerning the quality of service provided, one study concluded that overall there were distinct advantages in using panel solicitors as opposed to those arranged via claims referral companies.²⁰

4.18 - Although consumers value face to face contact with their lawyer,²¹ the BTE panel solicitor may be far removed from the area where the claimant lives and contact may be confined to mail and telephone calls. The physical distance between the claimant and his lawyer has been said to affect the quality of the work done, or at least the claimant's perception of the how well he is being treated. In their defence, insurers argue that cases are more efficiently dealt with by a specialised team able to use e-mail and telephone contact albeit at some distance from the claimant. This may be especially the case when dealing with the mass of low value RTA claims. However, in the few cases which involve serious injury the potential loss of personal contact could be important. The claimant could ensure that contact is possible by insisting upon choosing a local lawyer.

¹⁹ *Sarwar v Alarm* [2001] EWCA Civ 1401; [2002] 1 WLR 125.

²⁰ P Abram, 'In Sure Hands?' (University of Westminster, 2002).

²¹ J Robins, 'Shopping Around: What Consumers Want from the New Legal Services Market' (Jures, June 2010).

4.19 - Finally, there is concern that the financial limits set by the BTE policy may be too low, and this restricts the work that can be done for the claimant and, in particular, hampers the ability to take matters to trial. Commonly a policy may confine the insurer's liability to a ceiling of £50,000, and also excludes cover for certain types of claim such as clinical negligence or disease. However, these limits are much less significant here because they are usually sufficient for the mass of fast track motor claims of concern in this chapter. In addition, the level of cover could be increased by the insurer if there is a high chance of success. However, this may be only a theoretical option because these are just the cases where a speedy low cost resolution might be expected. Overall, as yet, there is no empirical evidence to support these various fears about the quality of work done in BTE cases.

Cost of Insurance

4.20 - At present the premiums for add-on BTE are exceptionally low, being only about £20 for motor and slightly less for household policies. By contrast, the typical premium charged for ATE in a motor case is about £350, and it is almost double that amount for other types of claim. Premiums for industrial disease cases are even higher costing £1,000 each. If we look at premiums for BTE in Europe the cost is much higher than in the UK because the scope of the insurance cover provided is much wider and costs are not recoverable. The typical premium for a stand alone policy is over £200. These figures are sometimes cited to illustrate the fear that the cost of BTE insurance could rise significantly if the present regime were to change. Although he gave no detailed figures, Jackson was persuaded that this might happen. There are several reasons for his fears.

4.21 - Firstly, if referral fees are abolished, as Jackson proposes, insurers would suffer a significant loss and this would have to be reflected in the premiums. The extent of the existing subsidy is unknown, although referral fees have been said to be the major source of BTE profit.²² However, the fee debate is far from closed and opinion on all sides is divided. At present it is very much in doubt whether these fees will indeed be abolished.²³

4.22 - Secondly, it is said that premiums may rise because, at present, insurers are not exposed to the true risks involved in providing BTE insurance and this could change. The argument is that, having bought the insurance only as an add-on to another policy, people are unaware of its existence and do not claim upon it. Attitudes could change if BTE were to

²² FWD, 'The Market for "BTE" Insurance' (Ministry of Justice, 2007) at 4A II 4.

²³ N Rose, 'Crunch Time on Referral Fees' [2010] 67 *Litigation Funding* 3.

be emphasised more as it would if it were made compulsory, and if other funding mechanisms were made less attractive, as Jackson proposes. Although this argument may have some force in connection with household insurance, it is much weaker if only motor insurance is considered. Following a road rather than a home accident an insured is much more likely to visit a solicitor who, in turn, is legally required to inquire of the client whether BTE insurance exists before other forms of funding are considered. If there is doubt, it is now standard practice to search for and examine the relevant policies. Because of this Jackson does not believe that ignorance of the cover which has been purchased is an obstacle to the use of BTE. Contrary to the limited exposure argument, therefore, it is suggested here that the take-up of BTE policies in motor cases does not leave insurers benefitting significantly from policies where there might be liability for costs but where indemnities are not being sought.

4.23 - There is second, stronger, argument supporting the claim that BTE insurers are not facing the true risks. This is that in many BTE cases the insurer merely passes on the claim to its panel solicitor, and thereafter it is dealt with on a CFA basis, with ATE being taken out. The risks of losing thus fall upon other than the BTE insurer. If it were otherwise it is said that BTE premiums would need to rise substantially. However, the extent to which CFAs and ATEs are being used when there is also BTE is uncertain although DAS, a leading BTE provider, is now said to require solicitors to act using a CFA. In theory it could be argued that there should be few such cases because the Court of Appeal considerably restricted the options in most cases where BTE was available, especially if the claim was for less than £5,000.²⁴ However, subsequent litigation resulting in a costs war over this decision has not clarified the position. If Jackson were implemented, success fees and ATE premiums would no longer be recoverable anyway, and recourse to BTE would then become more important.

4.24 - To date there has been no detailed empirical investigation into how BTE operates in practice, and how it is in fact financed. This means that no estimate can be made of the extent that premiums would have to rise if BTE were to be used in all road accident claims. Would insurers really be exposing themselves to a much increased liability for the unsuccessful cases? Given the present very high success rate of motor claims, the prospect of insurers being liable for costs is confined to a very small percentage of all actions brought. Limiting the reform of BTE to road traffic cases means that insurers would not be exposed to problematic claims such as those for disease or for clinical errors. Nor could they be

²⁴ *Sarwar v Alarm* [2001] EWCA Civ 1401; [2002] 1 WLR 125. However, the failure to inquire into BTE was ignored in relation to success fees, but not ATE, claimed under a CFA in a low value case in *Kilby v Gawith* [2008] EWCA Civ 812; [2009] 1 WLR 853. See J Rowley, 'Is it Too Soon to Reconsider Prematurity?' [2010] J Personal Injury Law 39.

sued for other than personal injury as happens in other European countries where claimants can even rely upon BTE to begin a class action in a commercial dispute.²⁵ Instead of an increase in costs, it could be argued that there would be savings and efficiencies produced by dealing with all RTA cases via compulsory BTE. Indeed at present Jackson notes that, in spite of the low premiums charged, BTE insurers in motor claims receive more money than they pay out. Their position would be further safeguarded by one way cost shifting. As a result, an affordable increase in the premiums collected from all drivers may be sufficient to fund the few failed claims that are brought. Overall, therefore, the rise in the premium required may be much lower than has been feared. Of course, because of the much larger group involved in paying these premiums, they would be substantially lower than those presently levied for ATE.

Conclusion

4.25 - As already noted, Jackson refused to make any recommendation either for or against BTE although initially he was attracted by the potential benefits arising from the wide ranging CLAF scheme. However, he specifically rejected the idea that BTE could be made a compulsory feature of motor insurance. The idea, he says, met with strong opposition.

4.26 - However, these opponents may not have had in mind the radical changes to funding contained elsewhere in the Jackson report. For example, in spite of the many problems of ATE, it has been thought reckless to remove it for those do not have BTE.²⁶ In addition, Jackson noted that there was significant support for an extension of BTE. Both the Forum of Insurance Lawyers and the Council of Circuit Judges were in favour of compulsion, whilst the Association of Personal Injury Lawyers supported the use of BTE provided that the freedom to choose one's own lawyer was not curtailed. The Conservative party, whilst welcoming Jackson's proposals, said that it would work with the Bar to improve the CLAF scheme and that it would discuss with insurers the extension of BTE.²⁷ This approach was further endorsed in a report for the Prime Minister by Lord Young who commented that extending BTE might be a fair solution to the problem of extending access to justice.²⁸ The Government has said that it would welcome a change of culture so that

²⁵ Case C-199/08 *Eschig v Uniqua Sachversicherung AG* [2009] ECR I-2085.

²⁶ N Kinsella, 'Evolution not Revolution' in J. Robins (ed), *Closing the Justice Gap* (Solicitors Journal, London, 2010).

²⁷ See the then Shadow Justice Minister's article, Henry Bellingham, 'Worth Fighting For' in J Robins op cit.

²⁸ Lord Young, 'Common Sense, Common Safety' (HM Government, 2010) p 22.

greater use is made of BTE but in its Consultation Paper on the reforms it does not mention the possibility of making such insurance compulsory.²⁹

4.27 - By confining the CLAF proposal to road traffic claims only, the provision of compulsory BTE for drivers would enable three quarters of all the tort claims made for personal injury to be litigated efficiently and with ready access to legal advice. In a post-Jackson world where success fees and ATE premiums are not recoverable, the provision of BTE to those who have no other form of cover offers an acceptable solution to what otherwise could be a very different (and perhaps contingent fee) world. The solution is not without its problems, but it merits a more detailed analysis than Jackson gave it.

²⁹ Ministry of Justice, 'Proposals for Reform of Civil Litigation Funding and Costs in England and Wales' (Consultation Paper CP13/10, Cm 7947, 2010) section 3.5.

Chapter 5

THE POLITICS OF JACKSON

*K D Ewing**

Introduction

5.1 - Lord Young of Graffham, who recently completed a report on the deregulation of health and safety laws,¹ is reported to have said that: 'People occasionally get killed. It's unfortunate, but it's part of life'.² Chilling comfort for the families of those who are killed at work. Workers like 23 year old Craig Whelan and his colleague Paul Wakefield, steeplejacks killed on 23 May 2002 in a fire at Carnaud Metal Box in Bolton.³ According to the testimony of Mr Whelan's mother, he had been employed at a company in Nottingham called Churchill's Ltd, which won a tender to demolish a chimney at Carnaud Metal Box. His company offered to do the job for £9,000, but other local companies, who had worked on the chimney in the past, were aware of the flammable residue inside the chimney and the dangers of using hot cutting gear and tendered for the demolition on the basis of only doing the work using cold cutting gear and taking the chimney down from the outside.

5.2 - Because of the amount of equipment needed their prices for the job were between £20,000 and £30,000. Metal Box chose the company with the cheapest tender, the company doing the job from the inside using hot cutting gear. Three company representatives issued a 'hot work' permit for the two men to go inside the chimney and cut it up using hot gear. These company representatives are said to have known that there were dangerous flammable chemicals on the inside of the chimney and that it was recommended to be demolished from the outside using cold cutting gear. They had confirmation of this in an e-mail from the manufacturers of the chemical, but they withheld this information from the employer of Mr Whelan and Mr Wakefield, and withheld it also from

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¹ See esp Lord Young, 'Common Sense Common Safety' (2010): http://www.number10.gov.uk/wp-content/uploads/402906_CommonSense_acc.pdf.

² *The Mirror*, 1 July 2010.

³ This account is drawn from <http://www.hazardscampaign.org.uk/fack/about/craigwhelan.pdf>.

the men themselves.

5.3 - When the two men carried out the hot cutting work, they were engulfed in a fireball, and they were both killed. According to the BBC report of the trial, 'The steel ropes attaching the cradle they were standing on melted in the heat and the men fell to the ground', it also being reported that 'It was an intense fire and once ignited the men stood no chance of survival'.⁴ A charge of manslaughter against three company representatives was dropped, the individuals in question being prosecuted for breaching unspecified health and safety legislation on the same grounds for which they had originally been charged with manslaughter. The defendants pleaded guilty to knowing the content of the chimney were unsafe and failing to pass on the information contained in the email from the manufacturers of the chemical. They were fined a total of only £17,000.⁵

The Decline of Regulation

5.4 - The families of Craig Whelan and Paul Wakefield are not alone. But before looking at the numbers of people killed and seriously injured at work, some perspective is called for. Occupational health and safety is pursued in a number of ways, in which the criminal law has a role to play alongside self regulation by employers and employees, and damages awarded by the civil courts for injuries or losses suffered as a result of a workplace accident. In recent years, all three strategies have been undermined by the acts or omissions of government, and it is within this context of declining protection at work that the Jackson Report is to be assessed.⁶ Before turning to Jackson, however, it is necessary to deal first with the factors that are making workplaces riskier places to be.

5.5 - The key regulatory authority is the Health and Safety Executive which has been the subject of strong criticism by parliamentary and other bodies in recent years. In an important report of the House of Commons Work and Pensions Committee published in 2008,⁷ it was recorded that the number of HSE inspectors overall 'has steadily decreased from 1,651 in 2003 to 1,389 in December 2007',⁸ though this was said to be an inflated figure because it included a number of HSE staff who were no longer employed as inspectors. With the decline in the number of

⁴ *BBC News*, 2 June 2004.

⁵ *BBC News*, 17 June 2004.

⁶ Sir Rupert Jackson, *Review of Civil Litigation Costs: Final Report* (TSO, 2010).

⁷ HC 246 (2007-08).

⁸ *Ibid*, para 97.

inspectors has come a decline in the number of inspections, with one witness calculating that the 41,496 inspections in 2006-07, 'equated to an inspection on average every 14.5 years for every workplace regulated by HSE, which compared to an average of every 7 years in 2001/02'.⁹ Evidence from a number of sources 'suggested that there was a correlation between the decline in the inspection rate and increases in fatal injuries',¹⁰ leading the Committee to recommend that HSE increases its enforcement activity in sectors where health and safety performance has not improved as much as others.

5.6 - These problems are more acute in some sectors than in others, with construction being particularly hazardous. In its 2008 report the House of Commons Work and Pensions Committee reported that 'in 2006/07, 77 workers were killed due to construction-related accidents, a 28% increase on 2005/06',¹¹ according to one of the witnesses before the Committee, there had already been 28 deaths in the first four months of 2007/08.¹² The Committee came back again to the question of resources and a decrease in the number of dedicated construction industry inspectors coinciding with a growth in the construction industry, and expressed concern that 'HSE's construction inspectorate is not adequately resourced to ensure the maintenance of health and safety standards in the construction industry', and was convinced that 'there is a correlation between inspection and safety standards', claiming also that 'the recent 28% increase in construction fatalities underlines the need for more resources'.¹³

5.7 - Perhaps just as depressing as the statistics was the government's response to the Committee's report.¹⁴ Although it claimed to 'welcome', 'the Committee's support for inspection as an important part of ensuring health and safety laws are adhered to', the government referred to 'research' which indicates that a variety of other factors are also influential in this respect'.¹⁵ These other factors are said to include 'the provision of advice and guidance', the government claiming that 'changes in employer motivation cannot solely be achieved through increased inspections', the prime factor governing 'whether there are fatalities, injuries or ill health at work' being 'the motivation of the employer'.¹⁶ In this vein the

⁹ Ibid, para 105.

¹⁰ Ibid, para 106.

¹¹ Ibid, para 124.

¹² Ibid, para 125.

¹³ Ibid, para 130.

¹⁴ HC 837 (2007-08).

¹⁵ Ibid, para 23.

¹⁶ Ibid, para 24.

government rejected the Committee's concerns about the construction industry, dismissing claims that 'a correlation can be drawn from one year's fatal accident figures and resources', and that its 'commitment to maintaining operational construction capacity is influenced more by longer term trends than a single year's statistics'.¹⁷

5.8 - Here the government also drew attention to the principles set out in the Macrory and Hampton Reports,¹⁸ which set a new agenda for regulatory activity, the latter in particular being charged with the impossible, namely reducing regulatory burdens on business without affecting regulatory outcomes. Under New Labour the HSE has had its budget squeezed, and according to a major and sobering academic study has been complicit in the failure to use its powers, pointing to a 'trend away from 'inspections and investigations', and a 'rapid decline in HSE enforcement action', including prosecutions.¹⁹ Indeed so serious is the decline in the regulatory role of the HSE and so consumed has it become by the rhetoric about regulation as a burden on business, that it is now 'unable to fulfill what it is tasked to do'.²⁰ With questions being raised about the number of injuries now being investigated, as well as about the likelihood of workplaces being subject to a spot inspection, serious concerns have been raised about the new strategies being pursued by the HSE in its enforcement of health and safety legislation.

Declining Levels of Enforcement

It is not only inspections that are important. So are prosecutions and convictions, though here too it was noted that there had been a general decline in the level of activity:

'whilst there has been an increase in the number of prosecutions and convictions brought by HSE in the last 12 months, there has been a downwards trend almost continuously since 1999/2000. HSE statistics for 2006/07 show that the number of 'informations laid' by HSE inspectors rose to 1,141 in 2006/07, from 1,056 in 2005/06 - the total of 1,141, nonetheless, remains the second lowest since 1999/2000'.

¹⁷ Ibid, para 32.

¹⁸ Ibid, para 25. See P Hampton, *Reducing Administrative Burdens: Effective Inspection and Enforcement* (HM Treasury, 2005) and R Macrory, *Regulatory Justice: Making Sanctions Effective* (Final Report, 2006).

¹⁹ S Tombs and D Whyte, *Regulatory Surrender: Death, Injury and the Non-Enforcement of Law* (Institute of Employment Rights, 2010).

²⁰ Ibid, p 2.

Similarly with convictions, the numbers having 'declined from 1,273 in 2002/03 to 848 in 2006/07', even though 'a robust system of prosecution and conviction is needed to enforce health and safety law and act as a critical deterrent to those inclined not meet their legal obligations'.

Source: HC 837 (2007-09), paras 162 - 4.

The Threat to Prevention

5.9 - A second limb of the British approach to health and safety introduced by the Health and Safety at Work Act 1974 is joint regulation between employers and trade unions in the workplace. By involving workers' representatives in the process of health and safety management, the expectation was that standards would improve. To this end, the Safety Representatives and Safety Committees Regulations 1977 provide that where there is a recognised trade union, the employer is required to consult with safety representatives nominated by the union, and to permit the safety representative to conduct health and safety inspections at the workplace.²¹ Safety representatives may also initiate a safety committee,²² and they enjoy certain rights to time off work to perform their duties and to undergo training in these duties.²³ The strategy which these measures embrace is a good one: unionised workplaces have higher standards of health and safety protection, it being pointed out in evidence cited by the DWP Select Committee that 'accident rates in UK manufacturing have been found to be significantly lower in workplaces in which unions appoint some members of health and safety committees'.²⁴

5.10 - It is an essential requirement of this strategy that there should be strong trade unions and strong trade unions in most workplaces, if the strategy is to be effective and comprehensive. And the time when the legislation was passed was one in which trade unions were at the peak of their strength in the United Kingdom, with membership rising and collective bargaining coverage stable at around 70% of the labour force (with another 10% or so covered by wages council orders). But although

²¹ SI 1977 No 500, reg 3.

²² Ibid, regs 3, 4.

²³ Ibid, reg 4(2).

²⁴ HC 837 (2007-09), para 202.

there has always been some resistance from employers, a more urgent concern is the decline in trade union density and collective bargaining coverage, which has implications for a wide range of employment related issues. So far as health and safety is concerned, the main implication is that there are fewer workplaces with recognised trade unions and consequently fewer workplaces with trade union based safety representatives or safety committees. Proposals to extend the role and powers of trade union safety representatives were made in evidence to the Committee along the following lines:

- safety representatives [to have] the right to inspect all premises where they have members, and those of contractors;
- specific duties on employers to respond to issues raised by safety representatives;
- a duty on employers to consult safety representatives on risk assessments;
- the establishment of statutory roving safety representative schemes; and
- a new statutory right for safety representatives to serve provisional improvement notices²⁵

5.11 - However, the Committee did not endorse any of these proposals, though it did refer to the recommendations of its predecessor Committee which had recommended 'empowering safety representatives to enforce health and safety law in the workplace as a means of improving health and safety standards'.²⁶ It also noted the government's limp response that 'empowering safety representatives would not lead to improved standards; that having increased powers would harm safety representatives' relationships with employees and employers; and that inspections require "professionally-trained health and safety inspectors who are independent of the interests in any particular case". The Committee also noted that the government had confirmed 'that this would not "be the right way to go".²⁷ But although failing to endorse proposals for a greater trade union role in workplaces where trade unions are not recognized, the Committee did nevertheless criticize the HSE for not doing more to promote the role of safety representatives, and called on 'the Minister to set out what steps he plans to take to enhance the role of safety representatives'.²⁸ And the response: 'The responsible Minister is

²⁵ Ibid, para 203 (proposals by Unite the Union).

²⁶ Ibid, para 204. The earlier report is at HC 1137 (2003-04).

²⁷ Ibid.

²⁸ Ibid, para 208.

taking forward a programme of visits and engagement with health and safety representatives and trade unions throughout this year'.²⁹

What is the HSE/C Doing to Promote the Role of Safety Representatives in the Workplace?

'54. HSE has a number of initiatives to promote the role of health and safety representatives and the benefits of involving workers, examples include dedicated web pages on its website for health and safety representatives, the provision of information and tools on manual handling for health and safety representatives training courses and the involvement of health and safety representatives in HSE's campaigns.

55. HSE has plans to publish a good practice guide later this year on worker engagement and on how to ensure a cooperative approach to health and safety management with workers and health and safety representatives.'

Source: HC 837 (2007-08)

5.12 - So what about non-unionised workplaces, governed by the Health and Safety (Consultation with Employees) Regulations 1996?³⁰ Here the HSE's website cheerfully advises employers that they 'can choose to consult employees directly as individuals, or through **elected** health and safety representatives (known as "representatives of employee safety" in the Regulations), or a combination of the two'. Indeed,

If you have a small business, or you have regular contact with all your employees, consulting with individuals is often effective. It gives everyone a chance to have a say in health and safety matters. However, consulting individuals is not practical for all businesses, and consultation through elected representatives may work better.³¹

But even where elected non union safety representatives exist, their powers are less than those of their trade union counterparts, while concern was expressed in evidence to the DWP Select Committee that

²⁹ HC 837 (2007 - 08), para 56.

³⁰ SI 1996 No 1513

³¹ <http://www.hse.gov.uk/involvement/1996.htm>.

'elected safety representatives, without union support, lacked access to independent guidance, training and development'.³² And despite the very limited nature of their duties there was also concern that employers were 'not fulfilling their duties under the 1996 regulations'.³³ Reference was also made to HSC acknowledgement that 'changes in the composition of the labour market have meant that too few employers properly involve and consult their workers on health and safety matters and too few employees feel able to come forward and take on health and safety responsibilities'.³⁴ Again, the Committee called on the government to address this problem, by giving employees 'the right to insist on consultation through elected health and safety representative', contending that 'the proper enforcement of these regulations is essential to safeguard the rights of non-unionised workforces'.³⁵

5.13 - But again the government simply refused to budge, responding weakly that:

The former HSC previously spent considerable time trying to establish a consensus with employers and trade unions for legal change, culminating in a discussion at its meeting in June 2007. In the event it was not able to achieve a consensus even for minor changes to the legislation, nor did it identify evidence that could demonstrate, at that time, a clear cost benefit for such changes.³⁶

But such inactivity is hardly surprising. This is the same government that resisted calls for better enforcement of the consultation requirements in the face of trade union complaints. One union had pointed out in evidence to the DWP Select Committee that there has never been a single prosecution because of the failure by employers to comply with the consultation obligations. This led the Committee to 'call on HSE to increase its efforts in taking enforcement action against duty holders who fail in their obligations to consult workers on health and safety matters'.³⁷ In a response that will by now be wearily familiar, the government said that it

considers that disputes between employers and trade unions or employees are normally best settled through existing machinery for resolving industrial relations problems. Prosecution by HSE should be seen as a last resort in

³² HC 246 (2007-08), para 211.

³³ Ibid.

³⁴ Ibid.

³⁵ Ibid, para 219.

³⁶ HC 837 (2007-08), para 58.

³⁷ HC 246 (2007-08), para 225.

these cases, as such action will not stimulate the trust required between employers and their workers to improve health and safety at work.³⁸

Death, Injury and Disease

5.14 - No wonder then that the workplace continues to be such a hazard for workers. In a brilliant report published by the Institute of Employment Rights, Liverpool University sociologists Steve Tombs and David Whyte point out that Britain's record of workplace safety is not among the best in the world as is sometimes claimed. On the contrary, according to Tombs and Whyte in *Regulatory Surrender: Death, Injury and the Non-Enforcement of the Law*, Britain was placed 30th out of 176 in the most recent Health and Safety Index in relation to occupational health and safety performance, and 20th out of 30 OECD nations. Within that overall setting, it appears that although the rate of workplace death, injury and ill-health have declined for most of the last 35 years, the rate of decline has slowed, with the Health and Safety Executive reporting that in 2007-08, 178 employees and 55 self employed people were killed at work. This is in addition to 28, 199 employees and 1,190 self employed workers who suffered major injuries, and 110,054 employees and 1,121 self employed workers who suffered 'reported over - three day injuries'.

5.15 - The problem with these figures, however, is that they are widely recognised to be 'a gross under-estimate' of the problem. At the present time, data are collected under the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 1995 (RIDDOR),³⁹ which place 'a legal duty on employers, self-employed people and people in control of premises to report work-related deaths, major injuries or over-three-day injuries, work related diseases, and dangerous occurrences'.⁴⁰ There are two major problems with these regulations, the first being the problem of under-reporting. with the HSE documenting '131,895 non fatal injuries to employees reported under RIDDOR in 2008-09',⁴¹ compared to 246,000 reported by the Labour Force Survey in the same year. Indeed Tombs and Whyte point out that despite 'various attempts to improve reporting levels', rates of mandatory reporting have recently been noted as being, again, in decline',⁴² being perhaps as low as 30%. But as they suggest, why should we be surprised? Failure to comply with this 'minimal legal requirement appears to carry with it 'no cost implications', Tombs and

³⁸ HC 837 (2007-08), para 59.

³⁹ SI 1995 No 3163.

⁴⁰ HC 246 (2007-08), para 268.

⁴¹ Tombs and Whyte, op cit, p 44.

⁴² Ibid.

Whyte noting also that failure with to comply with this most basic of duties reinforces wider concerns about the 'likelihood of the socially responsible corporation adequately self-regulating in terms of safety and health law'.⁴³

5.16 - The second problem in seeking to quantify the nature and scale of the problem of workplace death, injury and disease is the lack of reliable data. One problem, however, is that the list of reportable diseases is not exhaustive, though it does include:

- Certain poisonings;
- Some skin diseases such as occupational dermatitis, skin cancer, chrome ulcer, oil folliculitis/acne;
- Lung diseases including: occupational asthma, farmer's lung, pneumoconiosis, asbestosis, mesothelioma;
- Infections such as: leptospirosis; hepatitis; tuberculosis; anthrax; legionellosis and tetanus; and
- Other conditions such as: occupational cancer; certain musculoskeletal disorders; decompression illness and hand-arm vibration syndrome.⁴⁴

5.17 - This is said to be only a 'a relatively small list' of occupational diseases, which does not 'begin to capture the scope of occupational health scenarios', and that we really ought to look at a better, more general definition under RIDDOR'.⁴⁵ The fact that the data are 'flawed and incomplete' was acknowledged by the DWP Select Committee, which also reported that 'RIDDOR is not fulfilling its role', with the result that the HSE is failing in its duties to enforce obligations under the regulations'.⁴⁶ But although there is clearly an urgent need for the HSE to 'address the shortcomings in its data collection',⁴⁷ there is also a need to change the law. Related to the foregoing is the fact that RIDDOR refers only to occupational **disease**, but not also to occupational **illness**. According to Tombs and Whyte, on one calculation 'a recent HSE annual figure of 10,293 [deaths related to occupational illness] should be multiplied at least four times, to reach an estimate of 'up to 50,000 a year' deaths from work related illness'.⁴⁸ So far as non fatal work related illness is concerned, the Labour Force Survey is said to reveal that '1.2 million

⁴³ Ibid, p 45.

⁴⁴ HC 246 (2007-08), para 268.

⁴⁵ Ibid, para 269 (quoting evidence).

⁴⁶ Ibid, para 277.

⁴⁷ Ibid.

⁴⁸ Tombs and Whyte, op cit, p 44.

people who worked during the last year were suffering from an illness they believed was caused or made worse by their current or past work'.⁴⁹ According to the Work and Pensions Committee, an estimated 2.2 million people in 2006/07 were said to be 'suffering from an illness they believed was caused or made worse by their current or past work', of whom 646 000 of these were said to be new cases in the previous year.⁵⁰

5.18 - So who knows what are the real numbers of casualties of working in modern Britain? Even the CBI concedes the point:

There is no single source of ill health figures that can be relied upon. Even combining most available public sources, official HSE reportable diseases, claims for prescribed industrial diseases, self reported ill health, medically validated schemes for particular diseases all require considerable manipulation to contribute to a fair overview.⁵¹

However, the regulatory bodies seem to have been engulfed by a fog of complacency, with one regulator telling the DWP Select Committee that

the [Health and Safety] Commission did look again at the RIDDOR system recently but actually reached the conclusion that continuing the system as it was a better use of resources than trying to significantly alter it.⁵²

For its part, the government it seems has simply thrown in the towel, taking the view that 'complete reporting is not a practical proposition', and that 'as a consequence, it has always been recognised that RIDDOR occupational ill health data is only part of the occupational ill health picture'.⁵³ With no plans to improve or amend RIDDOR, this unsatisfactory situation is unlikely to improve, and we will remain ignorant of the true scale of death, injury and disease at work, and in no place to know if we are 20th or 30th among OECD states.

The Importance of Damages

5.19 - Although there is a great deal of uncertainty about the number of victims, one thing is clear: each victim knows that he or she is a victim. Already failed by the retreat of regulation and the declining influence of trade unions in the private sector in particular, for him or her damages assume an even greater role as an instrument of justice. But in order to

⁴⁹ Ibid, p 43.

⁵⁰ HC 246 (2007-08), para 252.

⁵¹ Ibid, para 275.

⁵² Ibid, para 272.

⁵³ HC 837 (2007-08), para 67.

bring a successful claim for damages, a worker has to establish liability on the part of the employer. This may by no means be straightforward, with the worker having to establish that the employer is at fault and that the employer's fault caused the worker's injury or disease. Sometimes the law does not recognize the worker's loss as being due to the fault of the employer, as most recently in the controversial *Johnston* case in the House of Lords,⁵⁴ where it was said by Lord Hoffmann that 'the development of pleural plaques, whether or not associated with the risk of future disease and anxiety about the future, is not actionable injury'.⁵⁵ But even where the injury is one which the law recognizes as giving rise to liability on the part of the employer, the worker may face multiple difficulties in recovering from employers and their insurers who do not typically operate on a charitable basis by readily admitting liability.

5.20 - The first problem then is that employers continue to deny liability and to avoid their responsibilities, putting the onus on the injured worker (or his or family) often low paid and often without significant means to commence legal action. Employers like Hadee Engineering Ltd in Sheffield, whose negligence led to serious injury on the part of Mark Downs, who was one of their employees. According to *Hazards* magazine, Mr Downs was 'left blind and with serious brain injuries when he was hit on the head by a five and a half tonne metal sheet'.⁵⁶ The report continues: the '39-year-old was crossing the factory floor . . . when the sheet, which was being manoeuvred in a tandem lift, swung out of position and knocked him against a steel skip'. As a result, Mr Downs was left 'blind and paralysed down his left side'; he has 'lost his sense of smell and taste'; he 'will never work again'; and he will probably 'require lifelong assistance'. The company nevertheless refused to accept full liability for the injuries that 'required a 16 hour operation to treat a deep skull fracture, brain contusions and a right sided haemorrhage, and multiple fractures to both eye sockets'.⁵⁷

5.21 - Cases of this kind are tragic, but not rare. Yet there was no prosecution by the Health and Safety Executive (HSE), and it was left to Mr Downs' family to seek damages by way of reparation for his loss. According to *Hazards*, the High Court sitting in Sheffield 'ruled that the employer was fully liable'.⁵⁸ *Hazards* also reported that Hadee Engineering Ltd was criticized by Mr Justice MacDuff QC 'for seriously breaching a number of health and safety regulations, including failing to properly

⁵⁴ *Johnston v NEI International Combustion Ltd* [2007] UKHL 39.

⁵⁵ *Ibid*, para 2.

⁵⁶ 'Once in a Lifetime', *Hazards*, No 110, April-June 2010: <http://www.hazards.org/deadlybusiness/onceinalifetime.htm>.

⁵⁷ *Ibid*.

⁵⁸ *Ibid*.

supervise the tandem lift, not carrying out a risk assessment, not holding a written method statement, operating without a banksman or supervisor and failing to properly train one of the crane drivers'.⁵⁹ Additionally, the court held that Mr Downs was entitled to '100 per cent of the final settlement for his injuries, *Hazards* speculating that 'the payout is likely to run to millions'.⁶⁰ But although Mr Down's solicitor is reported as having said that the accident was avoidable by following basic health and safety regulations' and despite the serious nature of the breach and their consequences, still the HSE refused to prosecute, preferring to stand by its original decision.⁶¹

5.22 - Yet while Mr Downs is only one of thousands of employees who suffer life-changing injuries at work, many others are injured on a much less serious scale. These are the workers who according to the statistics have suffered less than 'three day injuries', and who are documented as suffering minor or moderate injuries. The number of people in this category is probably incalculable, but for these workers as well damages plays an important part in seeking some semblance of justice for the harm they suffered. This brings us to a second problem with damages as an instrument of justice and a tool of prevention. This is the relatively low level at which damages are currently assessed, a reality that appears to be wholly elided in the misinformed claims about a 'compensation culture' in the propaganda war against health and safety, waged by those who have never seen the inside of most workplaces. So although it is sometimes claimed that as much as £10 billion is paid out annually in compensation, there are two caveats to note. The first is that pay-outs would not be so high if injuries were not so frequent or so serious, and the second is that any global figure of this kind (accurate or otherwise) is not reflected in individual awards of damages, which are remarkable in many cases for their modesty.

5.23 - The amount of damages for various forms of illness make sobering reading, at least as represented by a personal injury law firm, and it is all the more sobering for the fact that the figures appear to be represented as an encouragement for the injured to sue.⁶² Loss of an eye, for example, is assessed at £34,000, depending on the age of the claimant and the circumstances of the injury. Severe loss of hearing is assessed at £23,000, while the total loss of other senses is assessed at £17,000 (smell) and £13,000 (taste). Chest injuries vary from £2,000 (slight) to £77,000 (severe), and neck injuries from £2,000 (minor) to £77,000 (severe). Back injuries are in the same range – from up to £4,000 for

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² http://www.100percent-compensation.co.uk/compensation_awards.htm.

minor injuries to £87,000 for severe injuries, while shoulder injuries range from up to £2,000 to £25,000 (severe). Other injuries equally attract what look like modest sums by way of reparation – loss of both arms is assessed at up to £150,000, loss of one arm over £72,000, and severe arm injuries up to £67,000. Loss of both hands is assessed at only up to £100,000, and total loss of both legs at up to £145,000. And so it goes on, dismal figure after dismal figure – amputation of both feet, up to £100,000; amputation of all toes, up to £29,000. For those who suffer minor injury to these limbs, the reality here too is of relatively low sums recoverable.

The New Threat to Damages

5.24 - Alongside the need to establish fault and the limited nature of the damages recoverable is now a third peril. Sir Rupert Jackson is a judge of the Court of Appeal. He was appointed by another judge, the Master of the Rolls (Sir Anthony Clarke) to lead a fundamental review into the costs of civil litigation. Apparently, Sir Anthony was concerned at the costs of civil litigation and believed that the time was right for 'a fundamental and independent review of the whole system'. The man chosen to carry out this review was called to the Bar in 1972 at the age of 24, became QC in 1987, and a High Court judge in 1999. As such he was head of Technology and Construction Court from 2004 to 2007, until his appointment as a Lord Justice of Appeal in 2008. Sir Rupert was given responsibility as the sole author of the report, but was assisted by a small group of assessors drawn from the judiciary, the legal profession, as well as an economist. Under the terms of his appointment, Jackson was given 12 months to conduct the review, a deadline he kept, his weighty 557 page report being submitted on 21 December 2009.⁶³

5.25 - As explained in the preceding chapters, Sir Rupert made a number of far-reaching recommendations to reduce the cost of litigation. The problem, however, is that procedural law cannot be divorced from the substantive law, and costs fall fairly and squarely into the category of procedural law. Procedural law facilitates the bringing of claims, and depending on the nature of the procedures it may smooth the path or place roadblocks in the way. The same is true of costs which may either enable or disable the victims of industrial accidents, in the former case by ensuring that claims can be brought without the need to worry about funding the action, and in the latter case by discouraging claims because of an unfriendly costs regime. Given the implications of a large-scale review of costs in civil litigation, it seems inappropriate that the matter should be treated as a narrow technical issue for the resolution of a judge

⁶³ Sir Rupert Jackson, *Review of Civil Litigation Costs: Final Report* (TSO, 2010).

sitting alone. There are wider issues of public policy at stake with the Jackson proposals (which indeed strike at the very heart of the law of tort), and these ought at least to have suggested the need for a review panel which might well have been chaired by a judge, but which would also have included other stake-holders amongst its number.

5.26 - Such stakeholders would include the representatives of the victims of workplace accidents, notably trade unions and dedicated NGOs, as well as employers and insurers, and those with wider public interest concerns. It is true that Sir Rupert was assisted by a panel of seven assessors which included two judges, the head of strategic litigation at Beachcroft (one of the largest commercial law firms in the UK),⁶⁴ a partner at Irwin Mitchell (a law firm that does a lot of insurance funded claimant work), a representative of the Legal Services Commission, and the Aviva Professor of Insurance Studies at Nottingham Business School. These are all important voices, but it is curious that there was no one to speak directly for victims for whom damages are essential. It is also true that Sir Rupert consulted widely and that different interest groups were given an opportunity to present evidence to him. Indeed his terms of reference required Sir Rupert to 'seek the views of judges, practitioners, Government, court users, and other interested parties through both informal consultation and a series of public seminars'. But listening to what people have to say is not the same as giving them a voice, while the process adopted is one which encourages the weighing of evidence rather than its assessment.

5.27 - The latter point becomes clear when we turn from the process to the recommendations. Here the extent to which the report casually dismissed the concerns of trade unions and their lawyers is striking. It is true that the views of the latter were acknowledged. This is true, for example, in relation to one of the most fundamental points of the review which is the abolition of success fees,⁶⁵ whereby, based on the principle of polluter pays and along with ATE successful claimants may recover their full costs from the defendant or his or her insurers. According to Jackson:

A number of trade unions forcefully argue that recoverability for personal injury claims should continue. The trade unions are principally concerned about the personal injury claims of their members. They argue that damages for personal injuries are sacrosanct and no deductions should be permitted.⁶⁶

In the same vein, unnamed personal injury solicitors wrote to argue that the recoverability of success fees should be retained, 'in order to promote access to justice for injured claimants', with one claimant law firm arguing

⁶⁴ See www.beachcroft.co.uk.

⁶⁵ See para 1.16 above.

⁶⁶ Sir Rupert Jackson, *Review of Civil Litigation Costs: Final Report* (TSO, 2010), para 3.2.

forcefully and persuasively that

We cannot conceive why what can only be an insurance drive to abolish recoverability of success fees and ATE premiums should be given credence. Recoverable success fees and insurance premiums were the government's answer to doing away with legal aid in PI cases. To now make them non recoverable must mean that Claimants will end up having to make deductions from their damages. Why should a victim of someone else's negligence not get 100% of their compensation?⁶⁷

5.28 - These seem to be compelling arguments. So who was making the argument the other way? Predictably the insurance companies, contending simply that 'recoverability should end', with one major insurer suggesting that 'the success fee, capped, should be deducted from damages, excluding any damages referable to future care or future losses'.⁶⁸ The Jackson report does not provide the reasons given by the insurance companies to justify these assertions. It seems that assertion is a substitute for argument, and just as persuasive. But why were these views accepted? Sir Rupert decided that there were four major flaws in the recoverability regime, namely that

- it gives rise to anomalies and unintended consequences on a large scale (though none of the examples cited related to personal injury litigation);
- the claimant has no incentive in reducing costs (though why a wronged party should be constrained by a concern for the person who maimed him or her is unclear);
- the costs burden placed on the losing party is excessive and sometimes a denial of justice (though not as great a denial of justice as the claim that cannot get off the ground for lack of funding); and
- it provides an opportunity for lawyers substantially to increase their earnings by cherry picking winnable cases (a concern contradicted in some cases whereby 'trade unions and their solicitors are reimbursed the costs of unsuccessful actions by opposing parties in successful actions').⁶⁹

Salivating Insurance Companies

5.29 - One question is simply how the Jackson Review will affect people

⁶⁷ Ibid, para 3.7.

⁶⁸ Ibid, para 3.10.

⁶⁹ Ibid, para 4.4.

like Mr Downs, and the thousands of others who are injured at work, or who suffer disease or illness because of their work. Here it seems fairly clear that in an effort to reduce costs, the impact will be to ensure that injured workers are unable to recover to the full extent for the losses they have suffered as a result of their injury. This is partly because of the proposal for the abolition of success fees, and despite the ill conceived proposal that general damages should be increased by 10%, with the maximum amount deducted to be capped at 25% of damages. This it is optimistically claimed will 'ensure that claimants are properly compensated for personal injuries'.⁷⁰

Challenge to the Core Principle of Tort Law

'In order to ensure that claimants are properly compensated for personal injuries, and that the damages awarded to them (which may be intended for future medical care) are not substantially eaten into by legal fees, I recommend as a complementary measure that awards of general damages for pain, suffering, and loss of amenity be increased by 10%, and that the maximum amount of damages that lawyers may deduct for success fees be capped at 25% of damages.'

Source: Sir Rupert Jackson, Review of Civil Litigation Costs: Final Report (2009), p xvii (para 2.4).

5.30 - But how can it be proper compensation if the costs of recovery are to be shifted from the person causing the accident to the victim? In the case of the multiple non traumatic injuries, there is surely a danger not only that the injured worker will be unable to recover the full extent of his or her loss, but also that he or she will be unable to find anyone to take on the case in the first place. If the lawyer is to be capped at 25% of general damages, it is unlikely to be cost effective to take on any of the multiple minor injuries, with compensation being determined solely by the philanthropy of insurance companies in individual cases. The position was outlined by one commercial law firm as follows -

Defendants and their insurers will be most pleased, at least in respect of most personal injury claims. The radical recommendation is that the right to recovery of success fees and after the event insurance (ATE) premiums in litigation involving conditional fee agreements (also known as 'no win no fee agreements' - CFAs) be abolished. This will mean that in cases where the Claimant is on a CFA (this now being the case with most personal injury claims), the success fee charged by the solicitor (sometimes as high as 100%) and the ATE premium would be borne by the Claimant, not the Defendant, thereby eating into any damages recovered. As the abolition

⁷⁰ Ibid, p xvii (para 2.4).

extends to all types of civil litigation, this will inevitably curb such arrangements across the board, and be a disincentive to litigation funders, who presently look to recover these very items (which often involve substantial sums) from a successful Defendant.⁷¹

5.31 - Rawlinson Butler are not alone. On 25 March 2010, *The Times* reported the concerns of Nigel Tait of Carter-Ruck, famous not only for libel, but known also as 'a firm that is increasingly known for its work in representing Davids in their battles against Goliaths in the financial sector'.⁷² According to the report, Tait has 'acted for some 50 individuals in cases against banks and financial institutions in cases of mis-selling of financial products', and is concerned that 'If Jackson's proposals are implemented, fewer than 10 per cent of [his] clients would have been able to sue'. This is because 'abolishing success fees and the recoverability of the ATE premium will create, in the commercial arena, a system in which 'only the super-wealthy will have the means to sue — people won't want to chance their house in litigation against well resourced defendants'.⁷³ The point that Jackson will have 'a significant effect on the willingness of middle-income Britain to litigate' was echoed by the head of dispute resolution at Rosling King, who is reported as having said that the Jackson proposals to remove recoverability from a losing party 'will push that burden on to the claimant', to be paid out of the damages, eating away at recovery. As a result 'the litigation landscape [will be] a far less attractive place for most potential claimants and, as a result, justice far less accessible'.⁷⁴ If this is true of commercial disputes, how much more true is it of industrial accidents, where the unskilled low paid worker stands before the multinational company in all its glory?

⁷¹ <http://www.rawlisonbutler.com/news/the-jackson-review-on-litigation-costs--the-winners-and-the-losers>.

⁷² *The Times*, 25 March 2010.

⁷³ Ibid.

⁷⁴ Ibid.

The Political Power of Insurance

'The Association of British Insurers (ABI) is the voice of the UK's insurance, investment and long-term savings industry. It has over 300 members, which together account for around 90% of premiums in the UK domestic market. The UK insurance industry is the third largest in the world and the largest in Europe, helping individuals and businesses protect themselves against the everyday risks they face. It pays out over £230 million per day in pension and life insurance benefits and over £50 million per day in general insurance claims. The industry is an important contributor to the UK's economy: it manages investments of £1.5 trillion, over 20% of the UK's total net worth; employs more than 300,000 people in the UK alone; is the fourth highest contributor of corporation tax; and is a major exporter, with one-fifth of its net premium income coming from overseas business.'

Source: http://www.abi.org.uk/About_The_ABI/role.aspx.

5.32 - Little wonder the multinational insurance companies are salivating at the prospect of Jackson being implemented. In two recent speeches, the Jackson recommendations have been warmly welcomed by leading representatives of the British insurance industry, which claims to be the third largest in the world, and the largest in Europe. In a speech to the North East Group of Insurance Institutes at Leeds on 8 September 2008, James Dalton of the Association of British Insurers praised Jackson as 'a comprehensive, evidence-based and objective consideration of the civil litigation system as a whole', which took 'a pragmatic approach to addressing issues for both claimants and defendants'.⁷⁵ Dalton continued

The ABI has considered very carefully Jackson's recommendations and undertaken research to assess their implications. From our perspective, the net impact of Jackson will be a reduction in the costs of the civil litigation system and an increase in its efficiency. Although it would have been easy for the insurance industry to cherry-pick the parts of Jackson we prefer, we are not playing that game. The ABI's position on Jackson is very clear. We want to see the Jackson recommendations implemented as a package and in full. And we would like to see the government deliver this package in an ambitious but realistic time frame.

In combative style, Mr Dalton dismissed arguments that Jackson would lead to some cases not being taken by lawyers because they had a lower

⁷⁵ www.abi.org.uk/Media/Articles_and_Speeches/51704.pdf, p 4.

prospect of success, as being merely an argument in favour of continuing with the status quo, and that the access to justice argument used by claimant lawyers is 'little more than a smokescreen to divert attention from the real issues'.⁷⁶

5.33 - More recently still, Nick Starling - the Association of British Insurers' director of general insurance - has said that 'Liability claims managers have every reason to feel "optimistic"'. Speaking on the eve of Lord Young's report 'Common Sense Common Safety', Mr Starling is reported to have said that he was 'feeling quite cheerful', explaining that the 'judiciary is very much on-side' with Lord Justice Jackson's 'widespread package of proposals for civil litigation reform, which found favour with insurers'. According to the report, this judicial support for Jackson was evidenced by the Master of the Rolls calling the current system 'dysfunctional' at a recent event attended by Starling on the Jackson review, Starling noting also that such senior members of the judiciary were 'an extremely powerful voice that government will listen to'. Indeed, so confident is the insurance industry that Starling could speculate about the possibility of the government going even further than Jackson, encouraged with the equally employer friendly report on health and safety from Lord Young, another unelected official charged with responsibility to enquire into health and safety issues, this time having been appointed by the Prime Minister. All in all, it is a good time to be an insurer:

Mr Starling said he believed a combination of these recent reports, coupled with judicial support and government interest, will prove to be a 'big boost to what we have long been campaigning for'. He is confident Lord Justice Jackson's proposals will now be taken forward as a 'package, whole and not cherry-picked'.⁷⁷

Exercising the Political Power of Insurance

The ABI's Mission [is] [t]o provide leadership on issues bearing on the industry's collective strength and image and to shape and influence decisions made by the Government, regulator and other public authorities, within and outside the UK, in order to benefit the industry collectively.

This will be achieved on an active, collective and non-competitive basis by:

⁷⁶ Ibid, p 5.

⁷⁷ <http://www.claimscouncil.org/news/2010/10/21/abi-s-starling-claims-judiciary-is-on-side-with-jackson-review>.

Pro-active research, policy analysis and lobbying to secure improvement in the legal and regulatory framework.

Analysis and representations in response to initiatives from others which affect the industry.

Being recognised as a leading contributor to public policy thinking on issues relevant to insurance and financial services more generally.

Presenting a positive image of the industry to the media and other opinion-formers.

Providing leadership and guidance to the industry on issues which may affect its public image and reputation.

Maintaining staff of high calibre and relevant skills, working under the guidance of the Board and its committees, focussed on delivering the mission.

ABI will provide other services to member companies which benefit the industry collectively; which support the mission; which can be provided without diversion of resources from the core functions; and which cannot be done more effectively by any other body.

Source: http://www.abi.org.uk/About_The_ABI/vision.aspx.

Conclusion

5.34 - The main point of this chapter has been to highlight the fact that, substantial though it is, the Jackson Report is only one piece in a rather unappealing jigsaw. The overall picture is one of declining standards and the erosion of standards. The Jackson Review deals of course with costs in litigation other than that relating to health and safety at work. But it is in the latter impact that it will have a particularly significant impact, and as such it represents one of several threats to the rights of workers to safe conditions of work. Strategies of prevention are being undermined by the decline in the role of trade unions and their absence in many workplaces; strategies of regulation are being undermined by the policies on inspection and enforcement undertaken by the Health and Safety Executive; and strategies of compensation for victims are being undermined by proposals that victims should bear their own legal costs. In a one dimensional commitment to reduce costs (by no means an unmeritorious objective), there is no discussion in the Jackson report of how this can be seen to be fair to the victims, and indeed the enthusiasm with which the report has been greeted by the insurance industry speaks volumes for the recommendations. The prospect of inflating damages by 10% may help in

some cases, but, as Jackson himself acknowledges, while 'most personal injury claimants will recover more damages than they do at present', it is also true that 'some will recover less'.⁷⁸

5.35 - What is unclear is precisely which category of claimant will be better off and which will be worse off, though the point is made that the great majority of those who will be better off will be those whose claims settle early,⁷⁹ This in turn raises questions about whether justice will be undermined still further by injured workers pressured into settling on inferior terms because of the costs implications of not doing so. Indeed it is impossible to escape the conclusion that the risk of the victim losing up to 25% of damages to his or her legal advisor will be a powerful bargaining chip in the hands of employers and insurers pressing for a settlement. But to return to the most fundamental point, there is no attempt in Jackson to explain how economic efficiency can be justified in terms of social justice. Whatever may be the failings of the legal system and the costs of litigation, where is the fairness in compelling those injured because of another person's fault to be required to subsidise the employer and his or her insurer from the compensation awarded for the damage suffered? The reader will search in vain for an answer in either the Jackson Report, or in the more recent report on *Common Sense Common Safety* in which the Jackson Report was strongly endorsed by the Tory Lord Young of Graffham.⁸⁰

⁷⁸ Sir Rupert Jackson, *Review of Civil Litigation Costs: Final Report* (2009), p xvii (para 2.4).

⁷⁹ *Ibid*, para 5.4.

⁸⁰ See esp Lord Young, 'Common Sense Common Safety' (2010), p 22: http://www.number10.gov.uk/wp-content/uploads/402906_CommonSense_acc.pdf.

Chapter 6

CONCLUSIONS AND RECOMMENDATIONS

Conclusions

6.1 - This chapter presents the working group's conclusions and recommendations, the former being arranged according to the specific items in the group's Terms of Reference.¹

Consistency with fundamental principles of civil justice

6.2 - In a system that purports to give those injured by another's fault *full* compensation, is it defensible to 'raid' their damages to pay for their legal representation?

6.3 - Civil liability is not the only way of dealing with the problem of accidental injury. Many countries bar traditional actions for damages and grant compensation to the victims of accidents on a 'no fault' basis – workers' compensation in Australia, Canada, Germany, Japan and the United States can be cited as an example. In such systems, the extended class of those entitled to compensation – not just those injured by fault, but also those injured through no one's fault, or even their own – is traded off against the level of benefits paid. But injured persons still receive substantial compensation for their loss, not least because the money saved on lawyers' fees can be added to the compensation.

6.4 - Some members of this working group are attracted by such alternatives to traditional civil liability. We have different views as to what compensation entitlements injured persons would have in an ideal world. However, we agree unanimously that – under a liability system purporting to offer *full* compensation, tailored to the precise injuries the claimant has suffered – damages awarded to a successful claimant as compensation for injury should not be 'raided' to support ulterior goals. We therefore object in principle to the Jackson proposals, as their clear intention is to shift the burden of subsidizing unsuccessful claims from defendants and their insurers, who currently bear that cost because of the recoverability of

¹ See para 1.6 above.

success fees and ATE premiums², to claimants whose litigation is successful, as (under the proposal) the success fee will be deducted from their damages.³ This contradicts a fundamental principle of civil justice – the principle of full compensation for wrongful injury. Further, once it is accepted that the injured person's compensation can legitimately be raided to pay his or her legal fees, this will be the beginning of a slippery slope, with a clear risk that injured persons will be asked over the course of time to contribute more and more to their litigation costs, leaving them with less and less compensation for their injuries.

6.5 - In summary, the Jackson proposals are **inconsistent with a fundamental principle of civil justice** – the principle of full compensation for wrongful injury – because they entail the 'raiding' of damages recovered by successful claimants to pay for their legal costs. They would be the beginning of a slippery slope towards ever greater inroads into the compensation to which injured persons are legally entitled.

Real problems deserving solution?

6.6 - We believe that there is no adequate evidential basis for the Jackson Report's diagnosis of the deficiencies of the current system – especially the Report's claim that excessive costs may be attributed primarily to the use of CFAs. The evidence presented fails to substantiate the claim that the primary source of the problem of high costs is rent-seeking by claimant lawyers acting under CFAs.⁴

6.7 - We believe that the Jackson Report presents a misleading and partial account of the modern civil justice system, reporting anecdote and opinion as if it were fact, and exhibits a systematic bias in favour of evidence presented on the defendant's side when it contradicts that relied on by claimants. Evidence for this can be gleaned from, for example, the selective reference in the Final Report to district judges who shared Jackson's views, and the omission from that report of reference to contrary views expressed by other district judges, even though these were noted in the preliminary report.⁵ Other illustrations of contrary views noted in the preliminary report, but omitted from the final report, can also be given.⁶

² See para 1.10 above.

³ See para 5.27 f above.

⁴ See para 2.24 ff and Chapter 3 (passim) above.

⁵ See para 2.32 f above.

⁶ See para 2.33 f above.

6.8 - Additionally, the statutory sources the Report relies on to demonstrate the costs of civil litigation provide only a partial and often misleading picture, in particular because they attach undue importance to the tiny minority of cases (1% or 2%) that go to trial as opposed to the overwhelming bulk that are settled out of court.⁷ Conclusions drawn from the evidence of tried cases – which are necessarily more expensive than those that settle – are simply invalid in respect of the vast majority of cases.

6.9 - **In summary**, the evidential base for such a radical reform as Jackson proposes is entirely inadequate. The Jackson report presents **a misleading and partial account of the problems** requiring solution because it too frequently treats anecdote and opinion as if it were fact, and systematically prefers the evidence of the defence lobby over that favouring injured persons.

Impact upon access to justice

6.10 - Bearing in mind these inadequacies in the evidence about the operation of the current system of funding claims, and the impossibility therefore of knowing exactly what would be the impact of the Jackson reforms, if implemented, the Working Group attempted to assess the reforms' likely impact on the basis of the information (questionable as it sometimes is) in the Jackson report itself. Our predictions are based on the modeling elaborated by David Howarth in Chapter 3 of this Report, coupled with our own knowledge and experience. In the absence of fuller data, no more definitive analysis is possible.

6.11 - Our broadest concern is that the recommendations, if implemented, would have a significant adverse impact upon access to justice. Our conception of access to justice is essentially practical rather than theoretical or philosophical. To us, it means that people should have an effective and practicable means of resolving disputes and enforcing their legal entitlements, without being dissuaded by concerns of excessive cost. It should be obvious that the end is justice for both claimants and defendants.⁸ But this does not entail the application of exactly the same procedural rules to each. As is recognized in one of the most powerful passages of the Jackson Report, which we would strongly endorse, there is a significant asymmetry in the relation between personal injury victims and the insurers who are in practice defending their claims.⁹

⁷ See para 3.32 ff above.

⁸ See para 2.5 ff above.

⁹ Para 19.1.3. See further para 1.16 above.

6.12 - Notwithstanding this recognition of an important feature of personal injury litigation, our feeling is that the Jackson Report favours the financial interests of defendants over the interests of claimants in getting effective legal advice and assistance and proper compensation for their injuries. This is evident not just in the core Jackson recommendations on the CFA regime, but also in many other respects: this is one of Claire McIvor's themes in Chapter 2 of this report, where she draws attention in particular to the proposals relating to the principle of 'proportionality', fixed costs, and the small claims limit.¹⁰

6.13 - In summary, we believe that the Jackson proposals will have **an adverse impact upon access to justice** because they favour the financial interests of defendants over the interests of claimants in getting effective legal advice and assistance and proper compensation for their injuries.

Impact upon the availability of legal services

6.14 - In our view, implementing the core changes proposed by the Jackson Report creates a serious risk that claimants with genuine grievances will not be able to find a lawyer willing to take their case, especially claimants whose cases might need to go to trial. This in itself constitutes an unacceptable threat to access to justice. In Chapter 3, David Howarth develops an economic analysis of the consequences of implementing the Jackson recommendations. Though the empirical data that are publicly available are woefully deficient, the Report's own figures (contestable as these may be) testify to the risk that as many as one in five claims that are currently settled out of court would not, post Jackson reform, be pursued through lack of legal representation, and that the figure could rise to four out of five claims that currently go to trial. On the information currently available, it is not possible to be more precise – but it seems almost certain that the reform will reduce the availability of legal services, and hence impact adversely upon access to justice, at least to some extent.

6.15 - In summary, we believe that the Jackson proposals will **reduce the availability of legal services to injured persons** because legal and practical limits on what lawyers can charge will inevitably cause them to turn away clients they represent under the current system.

Winners and losers

6.16 - In our view, the Jackson proposals, if implemented, would effect an undesirable shift from a system of loss distribution (via liability

¹⁰ See especially para 2.36 ff above.

insurance or the self-insurance effected by large organizations) to a system where cost is concentrated on injured individuals.¹¹ Some injured persons will be dissuaded from claiming compensation at all – even though they have a strict legal entitlement to damages. Others will find it impossible to find a lawyer to represent them – and this includes those whose claims succeed under the current system.¹² Those who do still benefit from legal representation will have to contribute to its cost out of their damages, because the success fee they have to pay if they win is no longer recoverable from the losing party, but will be taken out of their damages instead. The Jackson Report proposes to set off this loss against a 10% rise in the damages for pain and suffering and loss of amenity, and to cap it at 25% of the claimant's loss (excluding future financial loss). But it is obvious – because 10% is less than 25%¹³ – that some claimants will lose out because of this, and perhaps a larger number than the Report predicts. (As the evidence for the Report's claim is not disclosed, it is impossible to say for sure.¹⁴) Further, the proposal seems likely to hit the most seriously injured the hardest, because it's their claims that take the longest to resolve (more is at stake), and where legal costs will be highest. These are the claims where the size of the success fee is likely to exceed the 10% Jackson Report 'bonus'. Further, in a serious injury case, the success fee is more likely to eat into damages for financial loss, which Jackson does not suggest should be increased, and this may well cause immediate hardship for those who have had to incur substantial debts between injury and settlement (eg in adapting their lives to their new conditions).

6.17 - We also anticipate that the unpredictable incentives¹⁵ in the proposed regime may ultimately prove detrimental to the provision of effective legal representation to injured persons, and to adversely affect the level of damages they recover. It can be predicted that the reforms would effect a change in the balance of bargaining power in the settlement process, as defendant insurers will be able to exploit claimants' awareness that their legal costs will be paid from their damages, and that the amount deducted will rise the longer that they hold out for more money (even if the sum offered falls far below a fair valuation of the loss). Ultimately, if injured persons are induced not to sue, or if they end up with lower damages because of less effective representation or the weakness of their bargaining position, this will negatively impact on health

¹¹ See paras 2.13 f and 2.18 above.

¹² See Chapter 3 above.

¹³ Plus the 25% is applied to the combined total of the non-pecuniary loss *and* the past pecuniary loss, not the non-pecuniary loss alone.

¹⁴ See para 1.18 above.

¹⁵ Cf para 3.47 on the knock-on effects of the Jackson proposals on claimants' bargaining power and hence the size of settlements.

and safety because the legal sanction for causing injury unlawfully will be reduced.¹⁶

6.18 - In summary, the Jackson recommendations, if implemented, will **benefit defendants at the expense of injured persons**, because some injured persons with claims that are currently recognized will find it impossible to find a lawyer to represent them, while those who do get legal representation will generally have to pay for it out of their damages. Those with serious injuries are likely to be the biggest losers. Additionally, the level of damages recovered is likely to be adversely affected by the unpredictable incentives in the proposed regime, and health and safety to suffer because of the reduced legal sanction for dangerous practices.

Alternatives

6.19 - In our view, the Jackson Report uses a sledgehammer to crack a nut. It too readily dismisses alternative approaches that are more proportionate responses to the problems that really exist. In particular, we think that further consideration should be given to an extension of before-the-event insurance and, especially, the possibility of making it a compulsory element of the motor insurance required under the Road Traffic Act 1988.¹⁷ We recognize that there are potential difficulties with this option - not least the need to coordinate it with other forms of advance protection against legal costs, eg as a benefit of trade union membership - but they may not be insurmountable, and the potential benefits are considerable. The advantage of BTE is that it has the potential to extend access to justice, by funding legal representation for injured persons, at very low cost. If their claim for damages fails, they won't be left to pick up the legal bill. BTE also provides a built-in mechanism for monitoring the incurring of legal costs on the claimant's side - one of the Jackson Report's chief concerns. Because road traffic accidents constitute nearly 4 out of 5 personal injury claims, making BTE a component of compulsory motor insurance could provide a simple and highly effective way of ensuring access to justice whilst at the same time guarding against possible abuses of the system that the CFA regime is perceived to encourage or at least to allow. It would do so without the across-the-board disadvantages of the Jackson proposals.

6.20 - In summary, the Jackson report **pays insufficient attention to alternative and potentially superior methods of containing civil litigation costs** (eg a mandatory BTE component of motor insurance, properly coordinated with other forms of advance protection against legal

¹⁶ See Chapter 5.

¹⁷ See Chapter 4 above.

costs) that address properly evidenced difficulties in a proportionate and focused manner.

Legitimacy of the process

6.21 - Beyond such substantive concerns, we also fear that the Jackson report would effect major changes in the civil litigation system by **a process of questionable legitimacy** in which a single judge¹⁸ was left to determine issues of significant political and social consequence on the basis of evidence very largely supplied by one party¹⁹ to a long-running and polarized debate – namely, the defence lobby, consisting largely of liability insurers – with insufficient independent verification.

Recommendations

6.22 - The above conclusions form the basis for the Working Group's two recommendations, which can be expressed briefly.

The proposed reforms to the CFA regime

6.23 - The core Jackson proposal to amend the CFA regime so that the lawyer's success fee is taken out of the injured person's damages should be rejected.

Going forward

6.24 - Because we accept that improvements could nevertheless be made to the current system, we recommend that Government should appoint a commission of inquiry, with representatives from all stakeholder interests, to gather and assess evidence about the costs of civil litigation, and to evaluate possible solutions to problems identified with it. As part of the process, insurers should provide unimpeded access to case files, subject only to redaction necessary to maintain the anonymity of persons concerned.

¹⁸ See para 5.29 ff above.

¹⁹ See para 2.31 (referring to data supplied almost entirely by liability insurers).