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law, less ordinary

Response of Browne Jacobson LLP (Solicitors)

Review of civil litigation costs – preliminary report

31 July 2009

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Introduction

Browne Jacobson LLP

Browne Jacobson LLP is a leading firm of solicitors in the Midlands, having offices in Nottingham, Birmingham and London, and clients throughout the country. The firm operates in all areas of civil litigation including personal injury, professional indemnity and corporate dispute resolution

Among its clients the firm counts the NHSLA, a number of national insurers, the Motor Insurers Bureau, Local Authorities, loss adjusters, charities and businesses of all sizes.

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Interest in the review

We believe that there is a crisis of confidence in the civil justice system. Continuing perceptions of a 'compensation culture'[1] coupled with the view that the claims process is unwieldy and expensive[2] cannot fail to cause the public to question the value of the justice system within which we operate.

The CFA/ATE system has contributed significantly to this erosion of confidence. The perception that anyone may bring a claim, for any loss or injury, at no cost or risk to themselves suggests a legal system in which the balance of rights and responsibility has been lost.

Our clients who are exposed to claims are rightly concerned that the cost of litigation is disproportionate to its value (in monetary or social terms, or both)[3]. There is a feeling that our legal system is governed more by the financial interests of its professionals (such as solicitors and barristers) than by the needs of its users.

As a result, the system within which we operate is frequently subject to criticism from the press, public, government and numerous other sources.

[1] Eg. Daily Mail 13 July 2009 "…Britain's burgeoning compensation culture…"
[2] Eg. Telegraph.co.uk 15 July " Former BBC presenter gets £600,000 legal bill after failed property case"
[3] It should be noted that many of our clients are public bodies whose claims costs are met solely at the expense of the taxpayer. Others are funded by the general public indirectly, for example through insurance premiums.

Lack of confidence in the system is also demonstrated by the numerous proposals from practitioners and interest groups to achieve reform in specific areas. The ongoing review of pre action protocols, the new process for sub-£10,000 RTA claims and the multi track code are examples of piecemeal attempts to address the failings of the system. Each of these projects has much to recommend it. However, the fact that they have been undertaken at all demonstrates a real lack of confidence in existing procedure and a need for a more wide-ranging review.

We do not question the overriding importance of access to justice. However, as Professor Zukerman notes[4], the legal system is a public service and its resources must be appropriately managed. It is open to every society to determine how resources are to be allocated in order to achieve access to justice. The evidence above demonstrates that the current system does not strike a satisfactory balance.

As solicitors, it is our responsibility to uphold the rule of law and promote administration of justice. Our response to the Preliminary Report of Lord Justice Jackson makes proposals intended to promote these ends.

Our justice system is being called into question and we consider it our role, together with other legal professionals, the Courts and the Government, to address this. Our aim should be to ensure that our legal system is fit for purpose and that access to justice is achieved in a way which satisfies those for whose benefit our legal system exists: its users.

The response

This response draws together views from all areas in which we operate and has been prepared on the basis of our own experience and discussion with our clients.

The response does not attempt to deal with each and every issue raised in the Preliminary Report. Rather, it focuses upon key areas in which we consider reform is most needed.

The response is not intended to represent the views of a single interest group. Our objective has been to propose practicable reforms which will achieve real benefits to all interested parties.

At appendix 1 we include an outline of a process which we have already implemented to deal with a particular group of personal injury claims. We consider that this effective dispute resolution process exemplifies many of the proposals which we put forward throughout this paper.

Appendix 2 deals with question raised at the Birmingham road show.

[4] "Litigation Management under the CPR – A Poorly used Management Infrastructure"

Summary

The problem

Costs should be proportionate, controlled and known in advance.

The powers required to achieve these goals already exist. However the Courts lack the will to use these powers effectively.

Funding and costs recovery

The CFA/ATE regime, coupled with a guarantee of 100% recovery of damages, currently serves to remove all risk from one party to a claim. The regime is also capable of being abused with 'cherry picking' of cases and routinely excessive success fees creating windfalls to legal advisors. The ATE market is adversely affected by this approach, resulting in low coverage and high premiums.

Compulsory BTE and self funding schemes may be unfeasible, given their cost.

One way costs shifting, to the exclusion of ATE insurance, is likely to reduce the cost of personal injury, clinical negligence claims, and professional indemnity claims, though there are a number of issues which must be addressed if this is implemented.

We believe that the CFA/ATE regime can also be significantly improved. In particular, we would support the following reforms:

- Encourage use of staged ATE, with premiums staged to reflect risk rather than merely procedural steps.
- Staged success fees.
- Better enquiries in relation to BTE and analysis of risk at the outset of claims

We make further proposals in other areas which will clarify levels of risk and so allow better control of success fees and ATE premiums.

Fixed success fees have been established in relation to certain categories of claim and have proved successful. Further research is required to:

- Determine whether these can be introduced for further categories of claim
- Establish whether the current fixed success fees are of an appropriate level
- Investigate the level of success fees and their effect more generally

Limiting costs

We consider that the small claims track limit for personal injury cases should be increased to the level applicable to all other claims. It may be considered appropriate to increase that limit to £6,500, in line with RPI.

Fixed costs ought to be introduced in relation to Fast Track claims:

- Initially for personal injury claims only (as data is available). Research should be commissioned in relation to other categories of claim.
- Historic claims costs should not dictate the costs matrix – the aim should be to reduce costs
- The scheme should fix both solicitor/own client costs and inter partes costs

In relation to multi track claims, we provisionally propose a scheme of costs budgeting, though we propose to make further submissions based on experience of the Birmingham costs management pilot, in which we are involved. We suggest:

- An opening budget for initial enquiries
- Subsequent pre action budgets to be agreed between the parties or established by application to the Court.
- Budgeting by the court on allocation and at subsequent case management stages
- No retrospective amendment of budgets

Under the current regime, it is appropriate that both parties are subject to a budget. However, if one way costs shifting is implemented then there will be no significant benefit to budgeting the costs of the paying party.

Procedural reform

Our focus is upon personal injury and clinical negligence claims, as these are areas in which reform is most needed.

The Pre Action Protocols promote front loading of claims. In many cases this results in early settlement. In those that do not settle it leads to increased costs. Key problems are a focus on complying with the directions rather than the steps required to achieve settlement, and duplication of pre-action steps at a post issue stage.

In relation to personal injury claims, we suggest:

- The new process for sub-£10,000 motor claims has potential to address these issues and is a step in the right direction
- The motor process should be a pilot for reform of the fast track process in other areas of personal injury, and beyond.

A simplified process may not be suited to all categories of claim. In other areas, case management, augmented by fixed costs and costs budgeting, must deliver appropriate control.

Clinical negligence claims have specific requirements. Procedural amendments which will ensure these are better addressed include:

- Extending time for service of the letter of response so as to avoid unnecessary proceedings
- Claimants to serve their liability evidence at an earlier stage
- Service of witness statements following exchange of expert evidence
- Requiring earlier quantification of a claim

Guiding principles

It is in the interests of all parties to litigation that costs should be proportionate, controlled and known in advance. The public are entitled to expect this of their legal system.

It is open to society to promote these ends by legislation which may fix costs, impose budgets, limit recoverability and/or determine funding arrangements. Examples of each already exist in our legal system.

Access to justice is an ambiguous term often used as a rallying cry where reform to the legal system is proposed. We are concerned that it is often forgotten that access to justice must extent to both claimants and defendants.

However, the entitlement to justice via the courts must necessarily be subject to procedural constraints which might include rules in respect of costs. Of course, a survey of other jurisdictions demonstrated a wide range of approaches to achieving justice. All too often ‘access to justice’ is relied upon by those seeking merely to protect their own vested interests.

We therefore suggest that all avenues discussed within the preliminary report (and, we dare suggest, within our own response) represent jurisprudentially valid options. Any appeal against reform on ‘access to justice’ grounds, without further explanation, should be taken lightly.

This review and beyond

The Civil Procedure Rules have delivered significant benefits over the last decade and it is now appropriate to seek to build on this success through further reform of the system. This review of the cost of civil procedure is a timely opportunity to address issues which have emerged since the introduction of the CPR.

However, a programme of ongoing review and reform will be appropriate. We specifically identify a number of areas where this is required within our response.

We consider it to be the role of the Civil Justice Council (in liaison with the CPR Committee, Government and other interest groups) to monitor and promote the development of our civil justice system.

We are concerned that numerous initiatives to reform civil procedure, backed by almost as many different interest groups, have emerged in recent years. While the initiatives themselves are sound, the lack of control from a central coordinating body leads to a risk of piecemeal reform.

We would suggest that following this review, the role of the Civil Justice Council should be reaffirmed, with an emphasis upon the Council's role of continually reviewing and improving procedural law.

The disparity between claimant and defendant costs

We were startled to read at paragraph 10.2 of the interim report that because of the different business models "insurance solicitors are bound to charge less than claimant solicitors." In our experience, particularly of the EL/PL and clinical negligence cases this is not the case.

In the first place just as Claimant solicitors have to prospect for work so do insurance solicitors. Tendering for new work had become extremely labour intensive, costing tens of thousands of pounds every time. Once a contract is secured substantial continuing investment is needed in terms of providing management information, added value (in terms of training, secondments and participating in insurers internal working parties and the like). Additionally we routinely pay third parties to audit our files as a quality control check in addition to our own supervisory systems.

Turning from investment to chargeable time we do find that very often there is more for us to do then the Claimant in preparing a case. Whether this be a tripping case for a local authority, a workplace accident or a hospital adverse incident. Our disclosure task is always a much more substantial obligation than the Claimants for obvious reasons. In terms of witnesses, again, we almost always have more to trace and proof than the Claimant. In addition to eye witnesses we generally have to speak with several employees whose job it was to either prevent or reduce the possibility of the incident or who have the responsibility for overseeing or devising relevant systems.

Finally although we do have educated clients they do require lengthy explanation of the issues because they wish to contribute to the strategy of the case and be in a position to give instructions that may be contrary to our advice! In consequence at least twice a year we prepare lengthy reports, (10 -12 pages are not uncommon) setting out the relevant facts, the progress of evidential investigations and the legal process. This will be followed by an analysis of liability (breach of duty, causation and limitation). Advice on quantum and reserving and finally, recommendation for the future handling of the case.

We do not know whether you have access to, or intend to commission research into the respective amounts of chargeable time that goes into a case by both the Claimant and Defendant. Similarly, are statistics available concerning the amount of investment time that goes into obtaining work in the first place?

Our own experience is that on both fronts an insurance lawyer's investment of time is at least as high as that of a Claimant.

Funding arrangements and costs recovery

We note that the terms of reference with regard to the review were as follows:

- Look at the way the present rules operate and how they impact on the behaviour of both parties and their lawyers.
- Establish the effect case management procedures have on costs and consider whether changes in process and/or procedure could bring about more proportionate costs.
- Have regard to previous and current research into costs and funding issues.

We have at the forefront of our minds when considering the Jackson report that any recommendation with regard to the civil justice system should ensure:

- That there is access to justice;
- That costs ought to be proportionate to the value of matters in dispute;
- That there needs to be certainty as to costs so that the parties in litigation know the likely costs that they will face.

In considering the various forms of funding and following discussions with our various clients and contacts we are firmly of the view that one size does not fit all. However, from speaking to liability insurers through to the NHSLA and to ATE insurers, similar concerns as to the current system arise. It is how to deal with these issues going forward and to tackle the same that will be critical in the smooth running of the court system.

In the first instance we need to look at the various forms of funding available and to consider some of the issues which have been raised in relation to these in the report.

BTE insurance

The report refers to the proposal from the Bar's CLAF group that compulsory BTE ought to be introduced covering a wide range of accidents. It is suggested that this ought to be of the B1 type, that is, that there is no CFA. On the surface this appears to be an attractive argument. However we have reservations about this being introduced.

First, the Ministry of Justice report from 2007 suggests that a free standing LEI policy would cost in the region of £240-£250. In the current economic climate and given the public's lack of appetite for purchasing insurance we have concerns that this would result in a greater proportion of motorists not taking out motor insurance. One needs to bear in mind that the MIB already estimates that somewhere in the region of 10% of cars are driven without insurance. Also, if one looks at the take up of household insurance this only runs at about 40%. We do wonder if the introduction of compulsory BTE of the B1 kind would simply result in an increased burden on the MIB.

Further if one looks at the operation of BTE insurance today one finds that many claims are sold on and then run on a CFA. The average cost of buying a claim seems to run at between £600 and £800. If insurance companies were not able to sell on claims then this cost would, we suspect, also be added to the cost of insurance, again making it more expensive.

However we do recognise that BTE insurance policies have an enormous role to play in the legal world. In particular we believe that these policies are invaluable to small and medium sized businesses since they offer access to legal services which may otherwise be prohibitively and unpredictably expensive and for essential areas of their business such as employment law, regulatory issues and debt recovery. We believe that these policies should be actively promoted and encouraged, in accordance with the recommendations of the MOJ. In clinical negligence, our experience is that solicitors conducting claims funded by BTE are more cost conscious than those acting on a CFA.

Self funding schemes

We are sceptical that self funding schemes are a viable option at present due to the need for an initial seed fund. Furthermore is not a CLAF or a SLAS simply legal aid by a different name?

Having spoken to our key contacts and insurers we believe that there must be the widest risk pool possible and we do not believe that self funding schemes will achieve this as there will always be a problem with adverse selection if there is a multiplicity of systems. Further is it fair to have a system whereby a successful party may not be able to recover their costs? We understand this would almost certainly be the case if the SLAS system were adopted.

One way costs shifting

We have examined our own statistics and those of liability insurers to determine the likely effect of one ways costs shifting in the personal injury and clinical negligence field. These suggest that one way cost shifting is cheaper than the current system. We believe that similar advantages may arise in relation to professional indemnity claims.

However, one way costs shifting is untested, and does raise its own issues:

- Ensuring that appropriate sanctions are imposed for unreasonable conduct, in particular failure to beat part 36 offers and unreasonable applications;
- The potential to open the floodgates to unmeritorious claims in light of the removal of costs risk to a claimant;
- A potential increase in fraudulent claims, in light of the removal of risk from litigation.

These issues may lessen the cost saving to be achieved through one way costs shifting if not addressed from the outset.

The effect of CFAs and after the event insurance

The Access to Justice Act 1999 changed the entire legal landscape, with parties being able to recover success fees and insurance premiums. The effect this has had is succinctly put by the Court of Appeal in *Callery v Gray* [2001] 1WLR 2112:

"*Including success fees in recoverable costs has the general effect of shifting from the legal aid fund to defendants, or their insurers, the costs incurred by litigants whose claims fail. In the first instance the claimants' solicitors shoulder the risks in relation to these costs, in exchange for uplift. But the fact that the uplift in successful cases is transferred to unsuccessful defendants results, if one takes a global view, in the burden of unsuccessful cases being (borne) by unsuccessful defendants"*

CFAs

We share the view expressed by many others that claimants' solicitors are "cherry picking" the best cases, particularly in clinical negligence and personal injury, and therefore the notion that success fees are necessary to subsidise the cases which fail is a fallacy.

In these areas, we also find that many claimant lawyers start the case on a private retainer or BTE, only converting to a CFA when supportive expert evidence is received. We are currently dealing with a clinical negligence case where the LSC withdrew funding on our pointing out the lack of merit in the claimant's case. The claimant has continued to pursue his claim as a litigant in person.

Despite approaching numerous solicitors, none will offer him a CFA until he has obtained a second expert opinion. He is dealing with this himself, with some difficulty and some pro bono help. Whilst this undoubtedly represents good business sense by the claimant lawyers involved, it undermines the notion that the CFA system necessarily provides greater access to justice.

At the other end of the spectrum are the claimant lawyers who are willing to offer a CFA at the outset. However, again there is a perception amongst liability insurers that they are being unfairly penalised. For instance there is a recent ruling that it is appropriate for there to be a 100% success fee in clinical negligence cases. How can that be a fair and accurate assessment in each and every case? We believe that the issue of costs should be at the forefront of the Judges' minds from the start to the finish of the case. We, together with our clients, wonder if the courts go through the appropriate matrix each and every time they are asked to assess costs where a success fee is being claimed. Perhaps further training of the judiciary is needed? This issue also came out at the road shows when the Jackson review was being discussed.

We are concerned by the level of success fees claimed, particularly in clinical negligence claims, and the apparent judicial tendency to regard clinical negligence litigation as so peculiarly complex and unpredictable that the highest success fees are mandatory and to disregard any need for budgeting or economy with regard to costs. There is scant recognition of the fact that the availability of the NHS complaints system, the culture of openness encouraged within the NHS and by the NHSLA and medical defence organisations, the increasing tendency of coroners to conduct thorough inquiries into medical deaths and often the availability of detailed serious untoward incident investigations carried out by NHS bodies, means that there is plenty of evidence available at an early stage which will inform and influence the outcome of the case. Conversely, there is little incentive for defendants to admit liability, as the courts have rarely been willing to entertain success fees staged to reflect this. The defendant knows that the costs already incurred on the CFA will be so prohibitive that on occasion he may as well take a chance and fight on, rather than offer early settlement. This needs to be addressed.

We suggest that either there should be no success fee until the defendant in a clinical negligence claim has had an opportunity to respond to the Letter of Claim in detail, or there should be an obligation to revisit the question of the success fee when the Letter of Response is received. Consideration should also be given to imposing a requirement that success fees be reviewed upon any admission, to ensure that they remain relevant.

The approach does not result in claimants being denied access to justice. As described above, it is not uncommon for claimant solicitors to refuse to enter into a CFA with an individual until a sufficiently strong prospect of success is shown. Our own approach is more equitable, in that it places all potential claimants on an equal footing at the outset, rather than denying justice to those who cannot afford to fund initial investigations. It also allows for success fees to be calculated at a point where risk can properly be assessed, ensuring fees more accurately reflect prospects of success in a particular claim. We have operated this system successfully with claimant lawyers, as described at Appendix 1.

Fixed success fees

Fixed success fees have already been introduced in relation to Road Traffic and Employers Liability (including disease) claims. In principle, there is no reason why fixed success fees cannot be introduced in relation to other categories of claim, particularly in the personal injury field.

However, the feasibility of such a measure can only be established if solicitors operating CFAs will provide the data required to undertake a statistical review of success fees.

Given the perception that success fees are in fact providing a windfall to certain solicitors, we would suggest that a broader review is warranted. Research should be commissioned in relation to the operation of the CFA scheme, to determine whether solicitors' recovery rates and success fees lead to a 'break even' result (as envisaged when the scheme was framed) or whether, as appears likely, significantly more is recovered in success fees than is lost on unsuccessful claims.

We would suggest that claimant solicitors acting in the personal injury field should be invited to provide anonymised data to researchers for the purpose of this research.

The research should aim to establish:

1. Whether there is sufficient consistency among claims to establish fixed success fees in new categories of claim;
2. Whether the overall effect of success fees is 'break even' or a windfall to solicitors;
3. If the result is a windfall, what action can be taken to redress the balance (for example a percentage reduction upon currently accepted success fees may be recommended);
4. Specifically, whether the existing categories of fixed success fees result in a windfall or shortfall and, if so, what change needs to be made to the fee scales.

ATE insurance

ATE premiums are particularly concerning in clinical negligence claims. We have analysed our settlements of such cases over a one year period from March 2008 and found that ATE premiums ranged from £1,500.00 to £57,000.00, often dwarfing the level of damages at stake.

If ATE is to remain, there are key concerns which need to be addressed.

First, there needs to be proper control of the level of premiums. The premiums often bear little relationship to the level of defence costs which realistically need to be insured against and are often massively disproportionate to the damages at stake. For instance we are aware of a personal injury claim which went to trial where the ATE insurance premium was £116,000 but where the damages being claimed were £20,000.

The first stage in controlling premiums will be to ensure ATE insurers have the information required to properly assess risk. Risk is a combination of prospects of success and financial liability if unsuccessful.

The introduction of fixed costs and budgets (proposed below) should permit risk to be assessed in much greater detail. However, this will only assist in controlling ATE premiums if relevant and accurate information is communicated to insurers by solicitors. Whilst we understand that it is a requirement of the policy that solicitors are under an obligation to supply all relevant information, both ATE insurers and liability insurers unfortunately still come across cases which realistically should not have been progressed.

There needs to be tighter costs management throughout the litigation process. If the case management process were used to better effect then costs estimates or budgets could be given at a very early stage and the Master or District Judge could ensure that the cost of the premium was calculated in accordance with the likely payment if the claim were lost. We would also suggest that an amendment to the Rules ought to be made requiring a Claimant's representative to obtain a Defendant's estimate of costs before obtaining ATE insurance. In default, the Claimant's representative ought to be prevented from recovering the ATE premium.

Having spoken to several ATE insurers we find that the majority are in favour of cost budgeting and/or capping. Liability insurers also are in favour of cost budgeting. In essence there should be no difference between the two sides. In both cases there are insurers who need predictability and certainty so far as costs are concerned.

When costs of an ATE premium are sought to be recovered, the receiving party should be required to state the level of cover that was sought and to provide details of any other relevant information supplied to the insurer in respect of risk.

Courts must be willing to scrutinise insurance premiums, to ensure that they are fixed at a reasonable level. Given that there is a move towards fixed costs generally we would suggest that in certain categories of cases it ought to be possible to set a level of premium appropriate to that class of claim. Perhaps this could be achieved by having a series of mediations between the interested parties? We would have thought that it would be feasible to set fixed premiums for most cases in the fast track claims limit.

So far as claims in the multi track are concerned, we would suggest that the courts have the power to investigate the level of the premium charged and to make a ruling as to whether or not that premium is excessive. ATE insurers should be prepared to disclose to the court their matrix as to how the premium has been calculated. If ATE insurers remain part of the legal landscape, then we would suggest that courts should be able to exercise a degree of control over their recovery in respect of premiums, where the premium is set at an excessive level. Where claimants or their representatives fail to provide relevant or accurate information to insurers then the claimant should be prevented from recovering the premium, without the court intervening to limit the insurer's recovery.

The ATE insurance sector is not yet a mature one, indeed most companies still do not have one completed year on their books. Speaking to ATE insurers, their concern is that there should be the widest risk pool available. A wider risk pool would allow ATE insurers to fully appreciate the risks involved in every type of claim. Over time as the market matures this will allow premiums to fall. One ATE insurer has indicated to us that he believes for certain categories of claim that this may allow premiums to fall by as much as 80%.

Recovery of costs by the defendant

A key difficulty with the current system is that litigation pursued with a no win no fee agreement in the personal injury field is seen as largely risk free for claimants, with more and more claims management companies promising claimants 100% of their damages.

This is a very recent phenomenon which has only arisen this century. Should damages be seen as sacred when a claimant is covered by this sort of agreement? They are not in any other type of funding agreement. Certainly, under the old CFA system 25% of the damages were capable of being attacked. There did not seem to be much criticism of that system. Furthermore if one looks at commercial litigation conducted under a CFA then some ATE insurers are only prepared to ring fence 50% of the damages.

We believe that if some of the damages were open to attack in the right circumstances then this would highlight to claimants that they can not and should not bring unmeritorious litigation. We also believe that it would be helpful in fighting fraud.

Similar issues would arise as a result of the low risk to claimants under a one way costs shifting regime. Of course, the essence of such a regime is that defendants should assume the risk in relation to costs. However, this should not extend to all costs incurred as a result of unreasonable actions by a claimant.

We suggest that in personal injury and clinical negligence claims a percentage of the general damages should be "at risk" so that a contribution to the defendant's costs can be made where, for example, an offer is unreasonably rejected. This would apply under the current regime of mixed funding or to any future regime, whether this is one way cost shifting or a CLAF/SLAS. It is important that the claimant has a financial stake in the litigation and this should encourage greater focus on the quantum of these claims.

Commercial litigation

We do believe that ATE has a role to play in commercial litigation. ATE coupled with a CFA is becoming increasingly used in relation to commercial litigation. For small to medium enterprises this can sometimes be invaluable as they struggle to afford legal advice, particularly in the current economic climate. Whilst BTE insurance can play a part at a reasonable premium, cover is not always available for every type of claim. For instance many BTE policies exclude the bringing of a contract claim if it does not relate to the Sale of Goods Act or the Supply of Goods and Services Act. Should a small company be prevented from bringing a claim just because it does not have the ready finances to fund it? We believe that it is in the interests of justice that CFAs remain and with the backing of an ATE policy for commercial litigation. For personal injury and many clinical negligence claims, ATE insurance will be the only viable option unless one way cost shifting is introduced or a CLAF/SLAS is created.

Limiting costs

We recognise that there are many legitimate ways of progressing a claim, and that, within the bounds of the CPR and Court Directions, Claimants should be entitled to determine how they wish to approach litigation.

However, this does not entitle parties to take a 'scattergun' approach to litigation, nor does it legitimise 'fishing expeditions'. In accordance with the Overriding objective, claimants must act in a way that is proportionate, expeditious and which saves expense.

Case management has a place in promoting these ends. However, management would have to become highly prescriptive and to commence at a very early pre-action stage in order to ensure appropriate control is maintained throughout litigation. Such case management would itself prove a costly exercise.

We consider that detailed assessment is also ineffective in controlling costs. It is slow, costly satellite litigation and in our experience costs judges are insufficiently robust when hearing costs claims.

A more effective means of promoting the Overriding objective may be to limit costs which parties may incur in relation to claims. This ensures that parties direct their efforts towards resolution of key issues, but permits them flexibility to approach litigation in whatever way they see fit.

Parties should know at an early stage what level of costs they may incur in a claim. It is then up the each party (and their advisors) to determine how these costs should be applied.

Particularly in the personal injury field, it will be important that any limit upon costs does not apply only to recoverability but also to a party's liability to his legal advisors. Solicitors should not be permitted to 'make up the balance of their costs' at their client's expense.

Exceptions might be made where solicitors agree with their client that additional costs will be incurred, subject to appropriate consumer protection measures. However, such agreements should not increase costs recoverable inter partes.

We believe this approach provides advantages to all parties to litigation:

- It controls claims spend by all parties to all claims, ensuring a level playing field.
- Parties know the exact cost of a claim in advance, and need not be concerned about spiralling costs.
- The ability to anticipate allows ATE premiums to be set at appropriate levels
- Claimant solicitors will be encouraged to be innovative and to provide an efficient service, to the advantage of their clients.

Small claims

The Small Claims Track is widely agreed to be an effective means of dispute resolution. Its low cost makes it financially accessible and a straightforward process ensures that a litigant in person is not overwhelmed when preparing a claim.

However the benefits of this track are denied to the majority of personal injury claims due to the restrictive £1,000 limit. Trend analysis of the JSB guidelines shows that only five categories of injury now fall within the track and in 2-4 years time the guidelines for all injury claims are likely to exceed the limit.

If the small claims track is to retain its relevance to personal injury claims, then the track limit for these claims must be increased.

We believe that the limit should be aligned with that applied in respect of other claims. There is nothing unusual about personal injury claims which warrants a lower limit. Indeed, a personal injury claim may often be far more straightforward than, say, a claim involving construction of contractual terms or professional negligence.

The public are aware of their entitlement to damages for injury, and, in broad terms, of the levels of award a court may make. However, we agree that improved guidance in relation to quantum will be beneficial. We would suggest that the Judicial Studies Board be invited to prepare a set of guidelines, similar to those already published, which focus upon sub- £5,000 claims.

It is arguable that the small claims track limit should be increased across the board. The £5,000 limit was set in 1999 and it is appropriate that it be reviewed. Tracking RPI, would suggest an increase to £6,500 at this stage. However, given the effectiveness of the track it may be that a broader range of cases can be dealt with as small claims.

The fast track

We believe that the reform begun by the introduction of the fast track should be completed by establishing a fixed (or predictable) costs regime for personal injury claims proceeding within it.

Costs should be staged in order to ensure they reflect the true costs incurred in claims and provide an incentive to defendants to settle claims early. It will be appropriate to reduce costs where an early admission of liability is made, to reflect the reduced investigation and evidential costs which will be incurred in these circumstances.

Research in relation to the existing predictive fees scheme demonstrates that some solicitors are prepared to issue claims merely to secure enhanced costs. We consider that a comprehensive fixed fee scheme for the fast track will reduce such conduct, but Judges must retain the power to impose cost penalties where such conduct is identified.

We have reviewed the personal injury costs matrix at page 205 of the preliminary report, which we believe forms a useful starting point for the creation of a fixed costs regime (though, prima facie, the reductions for admissions of liability appear low, given the significant reduction in work that will result from an admission). However, a new regime must not have the effect of freezing costs at their current, high level.

We are particularly concerned that the matrix results in costs which exceed damages for many categories of claim worth less than £5,000. We consider that this supports our view that in order to promote access to justice in a proportionate manner these claims should be dealt with under the Small Claims track.

In relation to other categories of personal injury claim, fixed costs should be agreed between interest groups through mediation once procedural reforms consequent upon this review are known. Whilst not without difficulties, mediation has proved itself an effective means of establishing costs regimes through its use in relation to predictable costs and, more recently, the new motor claims process.

The aim of the mediation should be to achieve a level of fixed costs which allow legal advisors to investigate and pursue claims appropriately, but which challenge the legal profession to find new, more effective ways of working so as to control the costs incurred in doing so.

The new costs regime should be reviewed after an initial period, in an exercise similar to that conducted by Fenn and Rickman in relation to the predictable costs regime. At that stage, it will be appropriate to consider whether costs can be reduced further to reflect developments in the way claims are handled and technology which will reduce claims costs.

For non personal injury claims we are sceptical that the requisite data exists as to the types and complexity of the claims that are caught by the fast track limit. We believe that further research is needed before a decision is taken to introduce fixed costs across the entire spectrum of claims.

In any event we believe that consideration needs to be taken of the different court rates across the country and whether fixed costs need to vary depending upon where the work is conducted (if so, then a possible precedent is available in the approach taken by the existing predictable costs scheme).

As an interim measure we would suggest that the question of benchmark costs is re-visited as we believe that many applications or issues can be categorised and a fixed amount allocated to them.

The multi track

The multi track caters for a broad range of claims, both in terms of value and complexity. Costs must be expected to vary accordingly. However, this does not mean that costs cannot or should not be controlled.

Analysing our recent clinical negligence settlements, we are struck by the disparity between different claimant firms when one analyses the average ratio between costs and damages. We would expect that, where a reasonable tranche of claims have been settled against a particular claimant firm, the average ratios would not vary significantly between firms, although they would inevitably vary considerably between individual cases.

However, when we analysed settlements of claims worth less than 50K over a year from February 2008 we found that most firms have an average ratio of 150% costs:damages but there are significant outlying firms, who average around 250%. It is difficult to explain why such differences should exist (the firms have similar profiles in terms of split between legal aid and CFA work), but it does suggest the need for better control. If these figures reflect different working methods or approaches to cases between firms , we do not see why defendants should have to pay for this.

As discussed above, case management alone is limited in its ability to control costs, though this might be improved through the proposals set out in the following section of this paper. Detailed assessment is not an effective means of controlling claims costs.

In light of the above, we welcome the re-opening of the debate in respect of the benefits of costs budgeting. We do not underestimate the potential difficulties in attempting to fix appropriate costs budgets in complex cases, or the potential for additional costs to be incurred in doing so. We recognise that, at an early stage, costs budgeting may give rise to satellite litigation.

However, an effective costs budgeting scheme might provide significant benefits including certainty as to costs exposure for all parties, reduced claim costs and a reduction in the need for detailed assessment. Such a scheme would also assist the courts and court users to understand issues and stages in litigation which tend to drive up costs, and to find ways of reducing costs in these areas.

Costs budgeting is undertaken at present, albeit to a limited extent. Parties to claims are already required to give costs estimates to the Court and the Practice Direction to CPR 43 – 48 (para 6.5A and 6.6) allows these to be taken into account when determining reasonableness of costs on assessment. Solicitors are also required to provide accurate costs estimates to their clients at the outset of litigation and to keep these up to date throughout.

More generally, practitioners (particularly those who regularly deal with multi track cases) are sufficiently familiar with the procedural steps of a claim, and the time involved in completing them, to be able to provide a reasonable assessment of likely costs.

We already have some experience of the costs management pilot being undertaken in the Birmingham Mercantile and Technology and Construction Court. It is too early to form a view as to its effectiveness, and we intend to prepare an addendum to this response when we are better able to provide a view upon the scheme.

Costs budgeting should apply to the entire lifecycle of a claim, including all pre action conduct. This will permit the Court to exercise control over costs from the outset. We would support introduction of an opening budget (to be fixed after analysis of costs data, but perhaps a few thousand pounds) to permit parties to undertake preliminary investigations.

Thereafter, it will be for the parties to either agree a further budget or, if they cannot do so, to apply to the court to have one fixed. This will require provision within the CPR for a new pre action application, and a new form of satellite litigation. However, we would anticipate that in most cases it should be possible for parties to agree an appropriate increase and in others an application on the papers will be adequate.

In all cases, parties should be encouraged to agree budgets where possible. In many cases this may be straightforward. For example, in the case of a complex clinical dispute, it may be clear to all concerned that in depth investigation is required and budgets might be agreed accordingly, with little information exchanged and little debate. Where there is a dispute, parties should exchange details of their proposed budget and if this does not permit agreement then it should be open to the parties to apply to the court.

Costs budgets may require amendment or review, for example where circumstances change. In some cases, it may not prove possible to set a budget for an entire claim and it may be necessary to budget for one stage, with provision for a hearing to set a further budget on completion.

With provision for an 'opening budget' courts should never find themselves in the unsatisfactory position of attempting to control costs retrospectively. Budgets should not be increased retrospectively save in exceptional circumstances as this would undermine the certainty and the proactive control of costs, which is the aim of budgeting.

Under the current rules of costs recovery it will be appropriate that all parties to a claim be required to submit costs budgets so that all parties are fully aware of their potential liabilities, and those liabilities are controlled.

However, under a one way costs shifting regime, the potential paying party will never recover costs. Requiring that party to take the procedural steps required to secure an appropriate budget will amount to wasted expenditure. Under a one way costs shifting regime, the paying party should therefore not be made subject to a budget.

It will nonetheless be open to the court, under its usual case management powers to require a costs estimate in appropriate circumstances, such as where the court wishes to compare that estimate to the other party's proposed budget.

Procedural reform

The focus of the CPR upon narrowing issues, early exchange of evidence and settlement of claims without trial amounts to an effective means of resolving civil disputes. The detail of the process (for example, the extent of disclosure required, use of joint experts etc) might justifiably be modified, and this may have the effect of achieving costs savings.

However, our primary concerns are that:

1. Parties and the courts are at risk of putting the process before its objectives;
2. The procedure is not adequately managed; and
3. The existing pre action and post issue procedures lead to duplication.

We deal with these issues below in the context of personal injury and clinical negligence claims, as our experience shows that these are the areas in which reform is most required.

Personal injury claims

We have little doubt that the personal injury pre action protocol encourages early settlement and has significantly reduced the number of claims issued. To this extent it has assisted in controlling the cost of claims.

The cost-controlling effect of the protocol has been enhanced by the introduction of predictable fees in respect of low value motor claims, though this has also opened up a lacuna whereby claimant solicitors can, and do, issue proceedings merely to enhance costs.

However, where claims are issued, the effect of the protocol is often to drive up costs. For example, pre action disclosure and exchange of expert evidence, is repeated under standard fast track directions which leads to delay in the resolution of claims, duplication of work and increased cost.

The new process which is to be introduced in relation to sub-£10,000 motor claims will remove this duplication in relation to a limited class of claims. As a result, it ought to be capable of delivering significant savings of time and expense. The process is capable of being rolled out to a much wider range of fast track claims and we would suggest that the motor model be treated as a pilot for broader reform of procedure for fast track personal injury claims.

Clinical disputes

The introduction of the Protocol for the Resolution of Clinical Disputes ("the Protocol") was intended to provide an opportunity to resolve Clinical Negligence Claims before litigation, avoiding the costs associated with legal proceedings. In our experience, many cases are resolved at an early stage, and we are told by our Clients that a significant percentage of claims are dropped before we are instructed, so doubtless the Protocol has achieved its aim to a large extent.

However, this success comes at a cost. It is apparent that litigation is increasingly front loaded. Our impression is that preparing the letter of claim is often the final step taken by claimants' solicitors before they issue proceedings, after they have carried out a detailed investigation and obtained expert evidence, and often it is done very close to that deadline.

Claimants' solicitors are rarely willing to divulge the basis of the claim or its value prior to service of the letter of claim and therefore in practice there is little opportunity to halt the burgeoning pre action costs. The letter of claim simply duplicates the particulars of claim or vice versa.

In our view either the Protocol needs to be strengthened so that there is a genuine opportunity to avoid issuing proceedings, or it should be abandoned. There is much to be said for the latter: often it simply adds a task which the parties must perform, at some expense, and real progress in the case is impossible until there is a dialogue between the experts much further down the line. However, it is impossible to know whether this would result in overall costs savings, since there have been a number of different factors since 1999 which have undoubtedly contributed to the exponential rise in claimants' costs. We suggest abandonment of the Protocol is worthy of further consideration and debate.

Irrespective of this, changes need to be made to the CPR and/or the Protocol in order to expedite delivery of the information which invariably provides the turning point in these cases. Currently there is too much emphasis on complying with directions which do not lead to resolution.

We suggest the following:

1. **Extending time for service of the Letter of Response to six months. Where proceedings are issued before the expiry of this period, there should be a presumption that the issue fee will not be recoverable inter partes**

   We increasingly find that the Letter of Claim is provided at a very late stage, and often proceedings have already been issued protectively or this step is taken whilst the defendant is preparing its Letter of Response. To some extent this reflects the increasing trend for claimant solicitors to "frontload" litigation, and to some extent this is helpful in bringing about early resolution of claims. However, it cannot be what was intended in introducing the Protocol, namely that there should be sufficient opportunity for parties to resolve their disputes prior to issue and service of proceedings. Often this is simply not possible because of the late arrival of the Letter of Claim.

   Whilst a Letter of Response can be prepared in many cases within the current three month timescale (particularly where there has been early notification of the claim and, perhaps, an internal inquiry), this is simply not possible in many cases, where expert evidence is needed from two or more experts to address the allegations. Six months represents a fairly ambitious timescale for many clinical negligence claims, but setting this as the default period would, we hope, lead to earlier provision of Letters of Claim and reduce costs, due to a greater ability to bring about pre-action settlement or discontinuance.

2. Requiring claimants to serve their liability evidence at a much earlier stage

Others have suggested (see paragraph 14.1 of the Preliminary Report) that the claimant's liability evidence should be served with proceedings. We would go further than this and suggest that it is served with the Letter of Claim, if the Protocol is retained.

We increasingly find that a substantial proportion of costs are incurred prior to issue of proceedings. Whilst we do, occasionally, receive badly thought-out Letters of Claim where the solicitor has failed, for example, to give any thought to causation, or has applied the incorrect legal test on breach of duty, most appear to be based on expert evidence. Indeed, we often find claimant solicitors will not offer claimants a CFA unless expert evidence has been obtained.

Yet there is no requirement to disclose this evidence until much later in the case, by which time (further) significant costs have been incurred on both sides. Expert evidence is determinative in most clinical negligence cases, and either an offer is made following receipt of such evidence (or following sight of the other side's evidence) or settlement is reached after an experts' meeting. It follows that bringing this stage forward will reduce costs which are incurred in complying with other directions. There are many cases where sight of a claimant's evidence alone would have led to settlement, and some where this would have exposed flaws in the claimant's case leading to abandonment much earlier on.

3. Postponing service of witness statements until the claimant's expert evidence has been served

This suggestion is inherent in our first proposal, above. It is suggested that there should be standard directions for clinical negligence cases (which could of course be varied by agreement or application). Currently most District Judges and High Court Masters order mutual exchange of factual witness evidence, followed, some weeks or months later, by mutual exchange of expert evidence.

A substantial proportion of defendants' legal costs are incurred in locating, interviewing and drafting statements for clinicians involved in clinical negligence cases. Most such doctors are below consultant level, and the training grades in NHS hospitals require them to move between different locations, and some doctors are simply working as locums. To some extent similar problems are experienced in tracking down midwifery and nursing staff and other professions ancillary to medicine.

Cases vary from those where the management which is criticised was entirely in the hands of one consultant, to those where there are numerous, extensive allegations, suggesting, for example, that evidence of the claimant's deteriorating medical condition was missed by numerous medical and nursing staff, all of whose evidence will be required if the case is to be defended.

Often they simply do not remember the patient and are commenting on the basis of the medical records and their usual clinical practice.

There are a few cases where factual witness evidence is determinative (for example the case involves a dispute about consent to an operation, where the defendant will say risks were warned of, though not documented, but such cases have become rarer with improved note keeping). These can be dealt with by variation of the standard direction. In contrast, preparation of factual witness evidence is a relatively low key part of the case for the Claimant.

Much of the time, the clinician's account of what was done does not lead to settlement or abandonment of the claim. Service of factual witness evidence is simply a procedural hurdle for the Defendant in order to reach exchange of expert evidence, which it is hoped will at last lead to a frank exchange about the real issues. The defendant's frustration about the costs involved in this process must be matched by claimants' frustration with the delay this inevitably causes.

It follows that costs will be saved if this stage can be postponed until the primary expert evidence has been served, which will be the case if the claimant serves his liability evidence with the Letter of Claim. If the statements alter the expert's view of the case, this can be dealt with by service of supplemental reports further down the line.

4. Requiring much earlier quantification of the claim

The Protocol requires claimants to describe their injuries, present condition and prognosis and "outline" financial loss incurred, with an indication of the heads of damage to be claimed and the scale of the loss, "unless this is impracticable" (paragraph 3.16). In our experience, information on quantum is rarely provided at this stage and often the schedule of loss served with proceedings is scant.

Whilst this may be understandable in cases involving injuries of the utmost severity, for example brain damage, where claims will easily run into millions of pounds, in other cases it is symptomatic of claimant lawyers who have failed to apply their minds to the question of quantum. Consequently, there is little prospect of an early settlement (because the claimant's solicitor will not engage in discussions about quantum) and many such claims are run with total disregard to the question of proportionality.

Defendant solicitors, in contrast, are obliged to estimate quantum realistically for reserving purposes from the outset of the case, and to keep that reserve updated. Whilst reserving may be required to some extent by the Legal Services Commission and by Before the Event Insurers, there is no such obligation on solicitors acting under a CFA, and the courts often condone a casual approach to quantum. On occasions there are features of the case which we alone could not have anticipated but which have an important bearing on quantum. Earlier disclosure would have led to different decisions about settlement of the case.

To some extent, a more robust approach to Part 36 Offers (such as that proposed by FOIL, table 10.1 of the Jackson Review) would alleviate this problem, but this needs to be complemented by a greater emphasis on earlier quantification, backed up by costs sanctions. The letter of claim should attach the Claimant's condition and prognosis evidence (which has to be served with proceedings in any event) and a core bundle of documents in support of the claim for special damages and future loss. The Claimant should be required to state the level of damages sought by way of a binding valuation in the letter of claim (which can only be varied by consent or with permission of the court at an early stage).

There will be cases which require a considerable amount of work, and expert input, in order to value them with any degree of accuracy. We anticipate that claimants will apply to the court in those cases for permission to defer valuation. Currently the Legal Services Commission seems reluctant to permit investigation of quantum in cases of maximum severity unless this is required by the court. However, this would at least mean that the issue is raised and considered at an early stage.

5. Introducing costs budgeting

We are concerned that there is little or no effective control of claimants' costs in clinical negligence cases by their lay and insurer clients and by the Legal Services Commission. Judicial costs management, as discussed in the preceding section of this response, is necessary

We favour a tariff system for clinical negligence costs, with a scale set according to value and/or complexity of the claim. This would prescribe a costs budget depending on the stage the case had reached, which could only be disapplied by consent or by application to the Court. We suspect this would result in some satellite litigation, depending on the level of costs set. However, such an approach would mean that costs efficiency and proportionality are key from the outset, for both parties.

We have analysed our own recent settlements to assess the impact of costs budgeting. We found that claimants' costs at the pre-action stage ranged from £2,250.00 to £57,500.00 over 20 cases (settled over a year from February 2008) which demonstrates, we believe, the widely differing approaches of claimant solicitors (and therefore a need for control of these costs) and the need for a tariff.

Appendix 1 – A dispute resolution process

The process below is one we have implemented in order to deal with a group of claims. It has been endorsed by Dame Laura Cox and has a 100 % success rate.

It will not be applicable to every claim, but may be a feasible means of dealing with many group actions.

It may also be applied to individual claims where a sufficiently large number of broadly identical claims occur. For example, panels of the type described below might convene on a regular basis in selected court centres to deal with specific types of claim.

The approach taken to costs formed a key part of the process. The process involves no costs risk to claimants and so success fees and ATE were not necessary while the process was ongoing.

Background

In recent years we have been handling a group of around 550 personal injury claims relating to allegations of misdiagnosis and inappropriate treatment by a medical professional. Through early investigations it had become clear that incidents of misdiagnosis had occurred. However, we were faced with the task of determining in relation to each individual claimant whether there was misdiagnosis, whether this was negligent and, if so, the extent of the injury which had resulted.

Had we attempted to deal with these issues through the normal court process then it would have taken many years to conclude all claims (not least because of the limited availability of experts in relevant fields) and the costs incurred would have been extremely high.

The process

We instead utilised a panel process, which is outlined below:

1. Parties prepare a bundle of medical notes and witness statements
2. Claimant attends upon an agreed panel of relevant medico legal experts (one in each field of relevance to the claim), with solicitors for both parties present
3. Panel reviews notes, questions claimant as necessary and provides a view on negligence, causation and injury
4. Note of meeting prepared and agreed between parties
5. Claimant prepares Schedule of Loss, with benefit of note
6. Parties then use note and Schedule to quantify claim
7. Once damages agreed, approval hearing with advice from Counsel, Note and Schedule in support of settlement

The process required a modified approach to approval, in that the place of the expert report was taken by the Note of the panel meeting, however, we were able to use an initial hearing before Dame Laura Cox to secure judicial approval of the process.

Should the panel process fail to secure settlement, then it remains open to the claimant to issue proceedings in the usual manner, however no claimants have taken this step.

Costs provisions

The following costs provisions were key to the success of the process. They ensured that the claimant was adequately protected and so had access to justice, without requiring the defendant to pay sums that were artificially inflated by, for example, success fees which did not reflect the risk to the claimant.

ATE insurance was avoided through use of this process:

1. The claimant solicitor was permitted to enter into a CFA at the outset, where claimants were not eligible for public funding and had no BTE insurance
2. The CFA would provide for a 0% success fee
3. No ATE cover would be taken out
4. At conclusion of the process regardless of outcome, base costs, VAT and disbursements (to be assessed if not agreed) would be paid by the defendant. Fixed costs were agreed with the two main claimant firms involved in the process.
5. Where the claimant did not accept the outcome of the process and issued proceedings:
    a. Costs to conclusion of the process would be borne by the defendant in accordance with paragraphs 1-4, above;
    b. The claimant would be permitted to enter into a new CFA providing for an appropriate success fee; and
    c. The claimant would be permitted to take out ATE insurance in respect of further work

Appendix 2 – Issues raised at the Birmingham road show

We address two particular questions which were raised in the course of the Birmingham road show below.

1. Do Defendant lawyers pay referral fees to their insurer clients, and if so, how much?

We have never paid or been asked to pay referral fees for our work by our insurer clients.

2. Should a recommendation be made to allow wider applications by Claimants pre action in order to prevent Insurers avoiding their protocol responsibilities?

There was vociferous complaint at the road show that insurers very often do not comply with their duty to respond, timeously or at all, to letters of claim. Sometimes, we are instructed pre action but often it will be our clients who handle protocol matters. Whilst we obviously cannot speak for the whole of the insurance industry we can say we have never known our clients to deliberately not comply with their obligations as a tactic to put off claimants.

Even in the best run claims department, there will be problems from time to time with work capacity and recruitment. Occasionally, we know that some of our clients do struggle with work loads. Whilst that is no excuse for not complying with protocols, it does perhaps give the lie to the suggestion that this is deliberate feet dragging. It is also fair to record that our experience is that on occasion the Claimant's representatives actions during the protocol period leave themselves open to criticism. It is not unusual for instance for the Letter of Claim not to provide all the necessary information so as to enable a claim to be investigated properly. This can include a failure to provide personal information about the Claimant, such as full name or date of birth, (frustrating attempts to retrieve files and records). Equally, by way of example, it can be matters such as being unable to identify a place on a particular highway that a tripping accident took place.

In terms of delay in responding pre action, whilst we recognise it is for the Claimant to decide whether or not to issue and serve proceedings following the expiry of the protocol period, or receipt of a Letter of Response, we do find, fairly regularly, that there are long delays before claims, which are ready to be litigated, actually commence. This can be particularly problematic in high value clinical negligence claims where an admission of breach of duty and causation has been made but the case cannot be resolved because the Claimants do not move on their quantum case. Unless they choose to issue and serve the Defendant simply has to wait, often for long periods. The delay undoubtedly causes additional frictional costs.

At the road show, a particular suggestion was made that Claimants be able to apply for an order that a putative Defendant do provide a protocol compliant Letter of Response within a timescale. We have two observations about this. First, if such an application were possible then it ought to be for both parties to make applications in relation to compliance. Second, we would be concerned about the potential for satellite litigation pre action, which could easily deflect the parties from the main job of either narrowing the issues or settling the case. We wonder if it would be better to await the impact of the Practice Direction on Pre action Conduct introduced in April which gives the courts specific powers to penalise parties for unreasonable behaviour pre action.

Finally, if consideration is being given to the reform of the pre action protocols we would like to suggest, in addition to our proposals above, the strengthening of the requirement for the Claimant to provide much fuller details of their case on quantum. In practice, we find that in the majority of cases, Claimant's representatives have spent a lot of time building their case on liability, but their preparations in respect of quantum are much further behind. Whether it be on the Claimant side or the Defendant's, our experience is that it is never good practice to allow consideration of the two to become too distantly separated. In terms of personal injury cases pre action, we often find ourselves in a position where following investigation the position on liability is not clear cut. For instance, much may turn on how witnesses will perform in the box or alternatively there may potentially be a causation defence. In these cases it is finely balanced whether we consider our clients will win or lose their case. If we knew whether the case we were facing was worth a particular figure or even within a range, it would make it much easier for a commercial view to be taken about the future for the case. If we more regularly knew how much it was that the Claimants case was worth then a much greater percentage of cases would settle by negotiation at the pre action stage, than presently do. Resolving liability before moving onto quantum is not always an attractive proposition for our clients.