



Proposals for the Reform of Civil Litigation Funding and Costs in England and Wales. Implementation of Lord Justice Jackson's Recommendations

Response by the Consumer Justice Alliance

About the Consumer Justice Alliance

The Consumer Justice Alliance (CJA) is a coalition of charities, victims' groups, insurers and law firms who have come together to highlight the impact of Lord Justice Jackson's proposals on civil litigation funding and costs. Since its inception, the CJA has engaged with a range of key stakeholders involved in the proposed reforms to civil litigation.

The CJA has consistently sought to champion the interests of the injured victim in the civil litigation process.

About this submission

The CJA welcomes the opportunity to respond to the consultation: *Proposals for the Reform of Civil Litigation Funding and Costs in England and Wales*. For the purposes of this submission, we have responded only to issues that are relevant to personal injury and clinical negligence claims, and which we believe will impact the ability of injured victims to seek access to justice. Where possible, we have answered questions/sections as they are set out in 'Annex A' of the Green Paper.

The CJA has serious concerns about the impact that Jackson's proposals, and those contained within the MoJ consultation, will have, not only on people who have suffered an injury, but on the public purse. There is no doubt in our minds that someone who has suffered an accident will find life much tougher under these proposals and that far from reducing public expenditure, there is a very real danger that the reforms would have the unintended consequence of increasing costs to the public purse.

We recognise that reducing costs is a key objective for the Government, but believe this can be achieved without wholesale changes to the current civil litigation system that will ultimately hinder the ability of injured victims to seek fair and reasonable access to justice. While no system can genuinely be described as perfect, the CJA believes that currently the balance between claimant and defendant works in ensuring access to justice. There may be problems with individual cases, but our concern is that the Government has failed in its consultation to recognise the valuable service that the current civil litigation system affords to injured victims.

The CJA would like to point to a recent report into the Government's proposals by Lord Oliphant and 10 other independent law academics. The report entitled "*On a slippery slope – a response to the Jackson Report*" agreed that implementing the recommendations would have "an adverse effect on access to justice". Concerningly, the panel also argued that in presenting the proposals Lord Jackson's Report "systematically prefers the evidence of the defence lobby over that favouring injured persons". The CJA opposes the unwarranted shifting of the legal cost-burden away from defendants and onto injured victims.

It is our intention in this submission to highlight how the reforms contained within the Green Paper will seriously impact the ability of injured victims to seek access to justice and ultimately increase the financial burden on the Government. At the same time we will put forward a series of practical policy proposals which will help the Government achieve its primary goal – namely reducing costs.

Introduction

Before tackling the list of consultation questions, the CJA would like to firstly examine the social and political environment which forms the backdrop to this Green Paper, namely the perceived 'compensation culture' set out in Lord Young's recent review of health and safety – which Young himself acknowledges is more a public perception than a reality. The CJA strongly refutes the idea that we live in an era of 'compensation' or that the current legal framework has led to an increase in litigation (and costs) in England and Wales. We are deeply concerned that the idea of a 'compensation culture' has been widely accepted by certain groups, particularly the media, and that this in turn has led to the dangerous and ill-conceived calls for a radical overhaul of the legal system which we see in this Green Paper.

Lord Young in his 2010 report "Common Sense, Common Safety" noted (Page 19):

"The problem of the compensation culture prevalent in society today is, however, one of perception rather than reality.....there is clear evidence that the public believes that the number of claims and the amount paid out in damages have also risen significantly."

Lord Young accepted that the "Compensation Culture" is the public's fear of a claim, which may curtail desirable activities (school outings, voluntary activities, amateur sporting events etc) but that this is not based on any reality which itself requires change.

In addition the CJA would like to point the Government to recent research which counters the notion of a compensation culture. This includes a recent survey conducted by Norton Rose entitled 'Risk, red tape and the compensation culture'. The survey found that, contrary to Lord Young's assertions, health and safety red tape is not having a detrimental impact on business, with 79% of employers

saying that current legislation has no impact on their business other than taking up management time, and that no more work needs to be done to lessen the administrative burden.

We would similarly point to the number of clinical negligence claims submitted to the National Health Service (NHS) since the introduction of Conditional Fee Agreements (CFAs). During the financial year 1997/98 6,711 PI injuries were notified to the NHS and in the year 2009/10 6,652 claims were notified. Given that recoverability of success fees and After the Event (ATE) insurance premiums were introduced in April 2000 these figures demonstrate that recoverability has not increased the number of claims. As we will highlight later in this submission, the current system actually ensures that there is a strong and effective filter operated by claimant lawyers and ATE providers who examine each case carefully before any claim is taken on. Between 70 % and 80% of all potential claims are rejected by this filter. Removing this filter through the proposed reforms will only serve to increase speculative cases, and the number of litigants in person.

The only areas where we have seen an increase in the number of claims is with Road Traffic Accidents (RTAs). The CJA believes that this increase is in part, if not mainly, due to the activities of insurers. It is common practice for insurers, on an accident being reported to them by their insured, to make contact with the third party and offer to deal with their claim direct without involving solicitors. It is also common practice for the insurers of non-fault victims to pass their insured's details, in exchange for a referral fee, on to claims management companies or solicitors who in turn make contact with the accident victim to offer the services of solicitors in pursuing a personal injury claim.

It is probably correct to say that over the past 10 years accident victims have become more aware of their right to claim compensation, and have found it easier to access legal representation and advice. This should not be presented as a social evil. Access to justice is not a meaningless phrase; it is at the core of the principle of the rule of law that everyone be bound by, and entitled to, the benefit of the law.

From the outset the CJA would also like to address the misconception that injured victims are regularly awarded huge sums of money in damages in what appear to be frivolous claims, and that they should be forced to have a financial stake at the outset of their case. Again this is a misconception. Damages awards are set by the courts and the Judicial Studies Board Guidelines, and are based on what the injured person needs to get his/her life back on track. Indeed the largest award that an injured victim could get is £250,000 and this is for severe brain damage as a result of which the victim is not able to move any of his/her arms or legs and is unable to speak. Other awards for injured victims range from £8,400 to £12,600 for dislocation of the shoulder and damage to the lower part of the brachial plexus causing pain in shoulder and neck, aching in elbow and sensory symptoms in the forearm and hand. Awards range from £7,000 to £15,200 for serious or multiple nasal fractures requiring a number of operations and/or resulting in permanent damage to airways and/or nerves or tear ducts and/or facial deformity.

Section 2.1 – Conditional fee agreements and success fees

Summary:

- The CJA does not agree that CFA success fees should cease to be recoverable from the losing party, under any circumstances;
- The abolition of recoverability would have a catastrophic effect on injured victims looking to get their life back on track following an accident/injury;
- Removing recoverability of CFA success fees will not drive down costs in individual cases, it will simply shift them from defendants to claimants;

- Capping success fees will mean that it is not commercially viable for solicitors to run cases with an approximate success prospect of between 50 and 59% (see Q7 – Q10 para 3 below), meaning that injured victims will not be able to access the legal representation they need;
- The removal of recoverability is likely to reduce the number of claims brought, and this will result in loss of revenue to the Government.

The following covers Q1-Q7: ‘that CFA success fees should no longer be recoverable from the losing party’, and should be taken in conjunction with our response under 2.3 below:

The CJA does not agree that success fees for CFAs should cease to be recoverable from the losing party, under any circumstance, and argues that reverting to a system of non-recoverability represents a backwards step to a system that did not work then, and will not work now. This was fully investigated and led to the changes implemented in the Access to Justice Act 1999. We are particularly concerned by two consequences that would arise from this proposal:

1) The impact on injured victims

The main impact of removing recoverability of CFA success fees would be that the injured victim, no matter what his/her financial circumstances, would have to pay a proportion of their legal costs out of the compensatory damages. The CJA does not think it is right or fair that injured victims should have to pay a proportion of their legal costs from their damages. Damages are calculated on the basis of the needs of the injured person, including any medical treatment and care needed, to ensure they are no worse off, but equally no better off, financially than they would have been if the accident had not happened.

Any reduction in damages would result in the injured person receiving an unfair settlement and there being insufficient money to make up for their losses. It must be remembered that the injured person seeking compensation is the innocent victim and therefore they should not lose out through

the fault of another, especially when, almost invariably, the person or company causing the injury has insurance or the organisation at fault has sufficient resources to pay the right level of compensation.

This consultation covers proposals to increase damages to mitigate this loss. We will respond fully to this point in Section 2.3; however it is important to make it clear now that this increase is not enough to mitigate such a loss in damages and will not work.

If injured victims do not receive full compensation, or worse, cannot make a claim then the following results are likely:

- Injured victims will still receive benefits and will still have treatment for the injury but the Government will not be able to recover the benefits and costs through the Compensation Recovery Unit (CRU) – leading to a significant reduction in the annual amount recovered which in 2009/2010 was £170 million. In Scotland there are proportionately 26% less CRU recoveries than in England & Wales equating to a value of over £40 million should this extend beyond Scotland.
- The Government could actually see a rise in numbers treated on the NHS if those who currently get treatment privately, funded by defendants, do not claim and instead go through the NHS.
- The Government will see a reduction in the amount recovered by way of VAT on legal costs and expert report fees and lower levels of Insurance Premium Tax (IPT) from liability insurance policies as a result of reductions in premiums; the CJA understands that in Scotland there are 37% fewer litigated cases, so if the income from these taxes is over £300 million p.a., and the number of claims brought were reduced by around 1/3, the loss of revenue could amount to over £100 million p.a.

The present legal system in Scotland is far from ideal as illustrated by Lord Gill who acknowledges in his recent Review of Civil Justice in Scotland that “questions of funding and expenses lie at the heart of many current controversies in civil justice”. He expresses concern about the extra burden on the courts that is caused by unrepresented parties bringing unmeritorious claims for low value cases and is in “no doubt that the limited recovery of expenses under the present Scottish system is a barrier to access to justice”. We do not wish to see such barriers in the rest of the UK.

2) The proposal will only shift costs, not reduce them

In his Review, Jackson suggests recoverability of CFA success fees has led to an imbalance between claimant and defendant. The CJA strongly refutes this idea. It is nonsense to suggest that an individual injured claimant has an unfair advantage over the defendant. Defendants are in the vast majority of cases insured, so that in practice the opponent is an insurance company with large resources. CJA members include campaign groups for injured claimants and their representatives, and can attest to the fact that they are invariably at a disadvantage. For the injured claimant the process of litigation is difficult, stressful and onerous, and in serious cases his/her future security and quality of life depends on the outcome of that claim.

Lord Jackson has suggested that because the CFA regime has been adopted by litigants who have the means to fund their claims on a standard basis, the system is flawed. This issue has of course been highlighted by the recent European Court of Human Rights decision in *MGN v UK* which was a privacy, not a personal injury case. It is true that CFAs have been used more widely than was originally intended, not only by claimants but by defendants including insurance companies. This should not however be used as a pretext to deprive injured claimants for whom it is the only effective funding mechanism available. Most injured people are of modest means or not of significant wealth.

Jackson also argues that recoverability has resulted in defendants paying excessive sums in respect of additional liabilities. Here Jackson states that recoverability means that claimants do not have any interest in keeping costs incurred under control, and that as a result success fees and ATE premiums are excessive. This is a common misconception, and it is disappointing that the Government appears to have accepted it. The reality is that the current system prevents excessive costs. CFAs actively incentivise lawyers to work efficiently, as under the current system they have no certainty that they will recoup the value of their work.

In fact, many ATE premiums are low, e.g. for a RTA, and therefore the vast majority of ATE premiums are in fact modest. Further, in the majority of personal injury cases, eg RTAs and accident at work claims the success fees are 12.5% for RTA and 25% for accidents at work. If the case goes to trial the success fee increases but the vast majority of cases do not go to trial and so success fees are fixed at low levels. Court rules provide for independent court assessment of all costs, including success fees and ATE premiums, paid by the losing party, and enable the court to disallow excessive or unreasonable costs claims.

The proposed reforms do not recognise that in all cases, it is entirely in the power of defendants to control costs. Early admission of liability and realistic early settlement offers enable defendants to settle claims at minimal costs. The fact that they have failed to control costs under the current system lies at their own door.

*The following covers **Q7-Q10** on success fees*

Lord Jackson has proposed a cap on success fees at 25% of damages recovered for past losses in an effort to mitigate the effects of recoverability.

The CJA believes that this represents a backward step. The intention of the 1999 legislation was to prevent the withdrawal of legal aid from denying access to justice by enabling solicitors to take on a wide range of cases on the basis that they could fund the losing cases from the winning cases. The

modelling in relation to success fees carried out prior to 1999 was that a 100% success fee was reasonable in a case with a 50% chance of success because of the two 50% cases; the fees recovered on the successful one would cover the fees lost on the unsuccessful one. Whilst risk assessment is never quite as straightforward as this, the logic was, and remains, sound.

Lord Jackson argues that many claimant lawyers “cherry pick” and take on only cases that have strong prospects of success. The Prime Minister has referred to lawyers being “only too willing to pounce on a claim for damages on the slightest pretext”. Either lawyers are running speculative claims or they are cherry picking. They cannot be doing both. The reality is that risk assessment is not an entirely straightforward process, particularly in areas such as public liability claims and clinical negligence. There are essentially four risk types, and for the purposes of this response we refer to them on the basis of their approximate prospects of success on the basis of an initial assessment by solicitors (and ATE insurers). The ranges used here, which are intended to describe the prospects of success at trial, are 80 – 100% claims, 60 – 79% claims, 50 – 59% claims, and less than 50% claims. These are obviously approximations rather than precise assessments. What the CJA knows to be true is that while most of the 80 – 100% claims will probably still be pursued and the less than 50% claims will still be weeded-out in the early stages, the 50 – 59% claims will not be pursued if the proposed reforms are implemented, and some of the 60 – 79% claims will either not be pursued or the claimant will find it difficult to find a solicitor to take on his or her claim. Very many meritorious claims that under our present system are successful at trial would on initial risk-assessment fall within the 50 – 79% ranges.

It should also be remembered that the majority of clients who approach solicitors to enquire about the possibility of a claim are advised either at the outset, or following initial investigations, that the solicitor cannot take the claim on as it does not have reasonable prospects of success. Clients are not charged for the work done, but it is a cost to the solicitors’ practice that is never taken into account in assessing success fees or in considering the cost involved in running a personal injury practice.

Introducing a cap would mean that it would not be commercially viable for solicitors to run 50 – 59% cases.

Section 2.2 – After-the-event insurance premiums

Summary

- The CJA does not agree that ATE insurance premiums should no longer be recoverable from the losing party across all categories of litigation;
- There is no alternative that provides the certainty for claimants or defendants that a robustly regulated ATE market does;
- Qualified one way costs shifting will not remove the need for ATE insurance (*please see separate response in Section 2.5*); the CJA believes that greater use of ATE and CFAs should be made by defendants.

*The following covers **Q11-18**: ‘that the ATE insurance premium should no longer be recoverable from the losing party’*

The CJA does not agree that ATE insurance premiums should no longer be recoverable from the losing party across all categories of litigation.

We have serious concerns about whether Jackson’s proposals for Qualified One Way Cost Shifting (see our separate comments under Section 2.5) will be sufficient to remove the other side’s costs risk, and so insurance will still be required - though we have concerns whether the ATE market would respond to providing such limited forms of cover including disbursement only cover. In any event, any premium would have to come out of a successful claimant’s damages and this will prove to be a significant barrier to taking legal action.

The CJA does not believe that there are other options available to provide protection against either opponents' costs or own sides' disbursements other than the continuation of ATE insurance where the premium is fully recoverable. There is no alternative that provides the certainty for claimants or defendants that a robustly regulated ATE market does. The premiums for ATE are fair and reasonable, and reflect risk.

Either party can take out ATE insurance, yet it is almost exclusively used by claimants. The CJA believes that greater use of ATE and CFAs should be made by defendants, as defendants already benefit from the claimants' policy. It should be noted that the major part of the premium paid by the claimant (indeed the larger part) relates to insuring their potential liability for the defendant's costs if the claim is lost. To that extent therefore, the insurance is of real and direct benefit to the defendant. For that reason alone recoverability should be preserved.

The ATE insurance market has developed in spite of the resistance shown by defendant insurers and despite the substantial losses associated with inexperienced underwriters of the former Claims Direct and TAG schemes. Competition amongst ATE insurers is strong and intense. ATE insurers compete in all areas - service, breadth of cover, security and level of premiums. Such premiums must be robust against challenge from defendants so market forces bring the premiums to an appropriate level.

ATE insurance premiums reflect the costs incurred by defendants in opposing the claimant's action. If defendants behaved better by offering settlement earlier then the relative cost of the ATE insurance would reduce.

Lord Jackson's proposal on the legal aid fund possibly covering claimant's disbursements is not viable in light of impending financial constraints on the legal aid budget. Whilst personal injury cases are already outside the scope of legal aid, clinical negligence cases, if removed from legal aid and transferred to the private sector, will need to be allowed to benefit from ATE premium

recoverability. This is particularly important given the high disbursement costs that need to be incurred in investigating clinical negligence cases.

ATE insurance will be appropriate not only in cases where no alternative funding is available, but also in circumstances where such alternative funding proves to be inadequate such as restrictive cover or low limits of indemnity applying.

The CJA believes that membership organisations should be treated no differently from ATE insurance in relation to the recoverability of premiums. Many of these organisations are non profit making and play a key role in maintaining health and safety in the workplace. They also become involved in bringing difficult test cases that benefit society as a whole. Nevertheless there should be a level playing field between ATE insurers and membership organisations providing similar cover.

Section 2.3 – 10% increase in general damages

Summary

- Damages in this country are already too low;
- The proposal to increase damages by 10% is insufficient and impractical.

The following covers Q19-20: ‘that there should be an increase in general damages of 10%’

Before considering the practicalities of introducing a 10% increase in general damages it is important to highlight that general damages in England & Wales are generally recognised by disinterested parties (e.g. 1999 Law Commission report) to be too low, and should be increased for that reason, but not as part of an exercise that is intended to be addressing legal cost.

Leaving aside the point that increasing damages will not achieve the objective of driving down costs, the CJA has, for the sake of brevity, set out the following reasons why we consider this proposal to be unworkable:

- Seeking to link general damages to costs in this way will be unnecessarily confusing for claimants; there is no logical connection in any sense between general damages and costs or success fees;
- The figure would be insufficient except in straightforward low value motor claims;
- The proposal to make the increase only in CFA cases would create injustice as well as confusion.

We also consider that the 10% uplift is unlikely in practice to be applied in negotiated settlements, which are of course the vast majority. General damages are set on the basis of a figure falling within a range (for example as set out within the JSB Guidelines) rather than being set at a specific figure, so it is unlikely that a specific 10% uplift would be applied except in the few cases where general damages are assessed by a judge.

Section 2.4 – Part 36 Offers

Summary

- The CJA supports changes to Part 36 Offers that will redress the balance between claimant and defendant;
- The CJA wishes to avoid a situation where more cases go to trial, at additional cost to the public purse, where an early and equitable settlement would be the appropriate course of action;

- The CJA believes that claimants, in the face of well funded defendants, should have recourse to ATE insurance to counteract under-settlement.

The following covers Q21-27: 'that Part 36 of the Civil Procedures Rules should be reformed'

The CJA supports the proposal to reform P36, which can of course be implemented simply by amending the Civil Procedure Rules and does not have to form part of this proposed package of reforms. The CJA agrees that there should be an attempt to redress the balance in favour of claimants, and that *Carver v BAA*, which introduced undesirable uncertainty into the process, should be reversed. In addition, the CJA believes the FOIL refinement is unnecessary.

We agree with the concern raised in paragraph 115, that as most cases, particularly where there is not a liability dispute, are settled without a trial, this reform would have limited impact, and may even have the undesired consequence of leading more claimants to go all the way to trial for the additional benefit. Consideration should be given to permitting claimants to apply to the court if defendants seek to accept their offer before trial for an order that the uplift be paid.

The potential disadvantage identified at paragraph 117 is valid, but if the claimant fails to make a P36 offer it is open to the defendant to make early P36 offer. In any event it has to be borne in mind that most claimants wish to settle their claims and receive their compensation as soon as reasonably possible, and claimants will not hold out on tactical grounds simply in the hope of being able to maximise the uplift on damages. We believe this is a theoretical rather than a real problem.

The aim of this proposal is stated to be to improve the equality of impact between the parties. It must be borne in mind in relation to Part 36 that a defendant with large resources, whether an insurer or the Government, can put considerable pressure on injured claimants to undersettle cases. Contrary to the theory underlying some of Lord Jackson's proposals, these claimants are very much at a disadvantage and most are very reluctant to run the risk of having to contribute to the defendant's costs, even where they are advised that the offer is too low and that they have

reasonable prospects of beating the offer at trial. It remains desirable that such claimants should be able to use ATE insurance to protect themselves against the risk where their lawyers advise that they have reasonable prospects of beating the offer.

Section 2.5 – One Way Cost Shifting

Summary:

- The Qualified One Way Cost Shifting (QOCS) model will not work. ATE insurance will still be required as claimants will still be at risk of having to pay defendants' costs;
- It ignores the significance of the need to fund the expenses (disbursements) that will be incurred as the claim progresses;
- It will lead to an increase in speculative legal challenges while genuine claimants will be put off because it brings uncertainty into the process.

The following covers Q28-Q35: 'that there should be a regime of qualified one way costs shifting in certain cases'

Jackson proposes that the recoverability of ATE premiums be abolished, and that a regime of qualified one way costs be introduced "in certain cases". It is proposed that the financial resources and conduct of all parties should be assessed at the end of the case and the Green Paper contemplates the following exceptions where costs must be paid by the claimant:

- **The claimant has been fraudulent** - this is often unclear. Faced with conflicting evidence, judges often have to decide they do not believe one party's evidence – is this fraud? If the defendant alleges fraud and the claimant drops its case, the claimant may be simply taking a pragmatic view. There will then need to be a trial on this issue simply to determine costs.

- **The claimant has behaved unreasonably** – this involves a review of the litigation procedures which have taken place. It often involves privileged issues of advice and discussions between solicitor and client – was the client advised to take that course of action?
- **The claimant is “wealthy”** - the defendant's conduct of a case (expenditure/offers) will be strongly influenced by whether or not it is going to recover costs. The defendant needs this information at the beginning of the case. How will the defendant obtain information from the claimant about his/her wealth?
- **The defendant is an uninsured individual or uninsured small organisation** (unless it appears they are wealthy) (Green Paper: Para. 145)
- **The claimant refuses a Part 36 offer** and recovers less at trial. (Green Paper: Para. 139).
- **The parties are on an equal financial footing** (Green Paper: Para. 137) – a further variation on some of the above formulas.

All of these require a myriad of procedures and reported court decisions to form a known body of rules. The “costs war” which has to date taken place between claimant and defendant is well documented and in relation to the introduction of CFAs has taken the best part of 10 years to bed down (Jackson Page 217 Para 2.2). It is important to note that court and appeals decisions take many years to distil into a coherent set of rules. These proposals will be sufficiently complex and open to appeal on individual issues, that the claimant and defendant time spent on distilling and operating them will be enormous.

Jackson proposes that these issues should be assessed at the end of the case. The Green Paper suggests possible refinements including the possibility of making a costs application at the outset but:

- An application at the outset cannot be made in relation to suggested fraud, unreasonable behaviour or Part 36 offers.
- If cost applications are to be made at the beginning of a case, the defendant needs to make enquiries about a claimant's wealth at the outset which will necessitate considerable additional administration on both sides in every single case.
- The above means that a claimant will still require an ATE policy, either to protect himself against a cost application being made early in the case (and the costs of that application) or against the risk that there may be an application at the end of the case. If so, then although a much lower premium may be charged, the administration costs of the policy are likely to be similar/identical to those at present and the ATE insurer will need to make at least some profit on the policy. This largely wipes out the only direct saving which Jackson would otherwise achieve (the administration cost and profit element of an ATE policy) - the cost has simply been transferred to the claimant.
- Since the claimant will not be entitled to recover the cost of this ATE policy, he must pay it himself out of his damages and will not therefore receive full compensation.
- The proposed costs procedure ignores the fact that the vast majority of PI claims are settled without the issue of proceedings, let alone trial. Cases are dealt with based on perceived risks and threats or concessions in correspondence. To say that QOCS will cause uncertainty is an understatement. The additional time spent on advising and corresponding (on both sides) regarding these rules across many hundreds of thousands of cases per year will be substantial.
- Applications for costs to be paid will inevitably be contested (they are very rarely agreed), so each will require a court hearing. The additional time and resources required by the courts will be substantial, as will the time spent by claimant and defendant representatives.

- Simplicity for the many thousands of straightforward cases involved is the best guarantee of low overall costs.

QOCS involves by definition a different cost rule for claimants and defendants but which party becomes the claimant/defendant may be uncertain. In general commercial disputes it may well be wholly arbitrary. In a motor claim where both vehicles are damaged/both parties injured, it will simply be a matter of who sues first. There will of course be claims and counterclaims for each party and rules could treat them differently but the costs of claim and counterclaim in disputes regarding liability are notoriously hard to separate.

ATE policies currently cover the claimant's disbursements. The Green Paper accepts that losing claimants (ie. injured people who are unable to recover compensation) must pay these themselves. This could be anything from £500 to many thousands of pounds (for counsel's fees etc) and appears unrealistic. The alternative suggestion in the Green Paper is to allow recoverability of an ATE policy which covers disbursements.

QOCS requires considerable legislation, with the consequential Parliamentary time involved.

The change to a position where claimants will no longer normally be liable to pay costs even when they lose must inevitably heighten defendant fears of litigation and be a major step towards the "Compensation Culture".

Section 2.7 – Alternative recommendations on recoverability

Summary

- The CJA believes that the current system provides the correct balance between claimant and defendant in ensuring access to justice while keeping costs to what is reasonable and necessary;
- The CJA does not take issue in the principle of fixed recoverable success fees and recognises that they work in certain cases;
- We have serious concerns that extending fixed recoverable success fees would severely impact upon injured victims' access to justice;
- The CJA believes that any limit on recoverability of ATE premiums would place an unfair and illegitimate burden on injured victims.

*The following covers **Q36-Q37**: 'alternative recommendations on recoverability and fixed recoverable success fees'*

The CJA's primary position will be clear from the remainder of this response: that it is not necessary or desirable to dismantle a system which is working well.

The CJA does not of course take issue in principle with the concept of fixed recoverable success fees in low-value claims. We acknowledge that they can work within schemes such as the low-value RTA scheme, and also exists in employer liability claims and possibly could be extended for some types of public liability claims.

*The following covers **Q38-Q39**: 'alternative recommendations on ATE insurance'*

The CJA believes that injured victims should not be responsible for paying ATE premiums, and that these should remain recoverable from the losing party. The Government's proposals would seriously disincentivise legitimate claimants from pursuing legal redress. The Legal Expenses Insurers Group (LEIG) has addressed the varying levels of impact non-recoverability would have on injured victims in

its submission to this consultation, and examined how certain alternatives might lessen their effects. Nevertheless, the CJA believes that any limit on recoverability of ATE premiums would place an unfair and illegitimate burden on injured victims.

Section 2.8 – Proportionality

Summary

- The CJA believes that no new definition of proportionality is required as adequate safeguards and precedent are already in place.

The following covers Q40-44: ‘that there should be a new test of proportionality of costs’

The CJA makes the following points on proportionality:

The matter of proportionality came before the Court of Appeal in the case of Home Office -v- Lownds (Home Office v Lownds [2002] EWCA Civ 365 (21st March, 2002)). In the case, Lord Woolf, who was Lord Chief Justice of England and Wales, gave a lot of consideration to the issue of proportionality and laid down a test which has been used very effectively ever since 2002.

The existing test laid down by Lord Woolf is that if the work can be shown to be reasonable and necessary, the work can be undertaken. This is an entirely sensible and proper test.

If work has to be done to protect the interests of an injured person, that work should be done and the lawyer acting for the injured person should not be prevented from doing reasonable and necessary work. The lawyers of the injured person not being allowed to do reasonable and necessary work restricts the proper preparation of the injured person’s case and of course the defendant insurance company does not have a similar constraint. The lawyers acting for the insurance company are entitled and allowed to do whatever work is reasonable and necessary and to be paid for it.

Therefore, if the injured person's lawyer cannot work in the same way, then there is an inequality of arms and a very clear unlevel playing field.

Furthermore, it is also simply nonsensical to prevent a lawyer from doing reasonable and necessary work on a person's legal case. Members of the public would further lose faith in the legal system if law was passed that prevents lawyers from undertaking reasonable and necessary work. Every lay person would expect to have a judicial system where the lawyers are allowed to undertake the reasonable and necessary work on a legal case. Further, under the European Convention on Human Rights the injured person has the right to fair representation, and to prevent the reasonable and necessary work on a legal case deprives the injured person of fair representation. There would therefore be a fundamental contravention of the injured person's human rights.

Section 2.9 – Damage Based Agreements

Summary

- The CJA does not oppose Damage Based Agreements (DBAs) as a last resort for certain claimants wishing to bring a claim.
- The CJA believes that in the vast majority of personal injury cases DBAs are not an appropriate form of funding.

The following covers Q45-53: 'that damaged-based agreements should be allowed in litigation'

The CJA believes that current methods of funding preserve the ability of claimants to keep 100% of their damages. The scope for the use of DBAs in personal injury claims is likely to be minimal for this reason. There may be circumstances where claimant and solicitor agree to this approach but it very unlikely that cases will proceed on this basis.

If the proposal were implemented, we do not consider they would require specific regulation or that the client be independently advised before entering into it. Solicitors are required to give clients their best advice on costs, and in doing so, when offering a DBA, would have to advise clients of alternative methods of funding their claims that could be used. In a personal injury claim, it is unlikely in practice that a DBA would be the best method of funding a claim unless no alternative was available.

Section 2.10 – Litigants in Person

Summary

- The CJA believes that the reforms, when taken in the round, will lead to an increase in claims brought under Litigants in Person and will result in increased costs to the courts and defendants.

The following covers Q54-56: ‘that a prescribed rate of £9.25 an hour recoverable by litigants in person who cannot prove financial loss should be increased to £20 an hour’

Under Qualified One Way Cost Shifting, there would undoubtedly be an increase in litigants in person. With recoverability withdrawn, people with cases with a 50-59% likelihood of success will not be able find a solicitor who is willing to take them on. Given the high burden of evidence required for even valid claims with an initially uncertain outcome, it is difficult to see how valid claimants could see any available avenue to pursue their legitimate case.

On the other hand, it is well known and well understood by clinical negligence solicitors that a significant number of people do become wrongly and unrealistically convinced - even obsessed - with the belief that they have become a victim of the medical profession “closing ranks” against them. It is many of these individuals who are likely to be encouraged under a one-way cost shifting

system. The fact that it is qualified will not deter them, because they believe they are behaving reasonably, and that the collusion of the medical profession is the only barrier to the success of their case.

Proposals to support the Government deliver cost reductions

Summary

CJA cost saving proposals:

- Extending the recovery of the NHS Charges Scheme;
- Making tax and NI recoverable as part of loss of earnings claims by the compensator on every claim to compensate the taxpayer for the losses suffered as a result of the injured person's incapacity for work;
- Making SSP recoverable in all claims;
- Solicitors instructed by the NHS and public authorities should enter into CFA to mitigate costs.

The following comments do not relate to specific question in the Green Paper but provide suggested proposals from the CJA on how to the Government might realistically reduce costs:

The CJA recognises that the Government is considering Jackson's proposals with a view that they will reduce public spending. The CJA believes that rather than seeking to do so by depriving injured people of access to justice and preventing them from bringing claims, the Government should consider how to reduce the cost to the taxpayer of injury caused by negligence or breach of duty.

With this in mind the CJA has put forward the following proposals:

Injured victims are treated by the NHS, and receive state benefits and local authority care. If they have private health insurance (PHI), the insurer recovers its outlay in full from the defendant, but the NHS has no similar right. Public money is already recovered as a result of individuals pursuing compensation claims. Statutory provisions currently allow recovery from the compensator of state benefits paid to the injured person. DWP figures indicate that the sum recovered in respect of benefits alone in 2009/2010 was £170 million. Employers in the public sector recover sickness benefits paid out to employees from the compensator. This income would be lost or reduced if fewer people were able to pursue compensation claims.

The CJA proposes that the existing Recovery of NHS Charges Scheme be extended so that *all* public expenditure, so far as it can be attributed to an accident, be recoverable from the defendant's insurance company.

We suggest that:

- All ambulance, hospital and medical costs of any kind including the cost of GP treatment, be recoverable from the defendant company, up to and after the claim is settled;
- Other emergency services - police and fire authorities - be entitled to recover their costs from the defendant company;
- Care and accommodation costs borne by local authorities, the NHS or social services or paid through the benefits system (including Housing Benefit) be recoverable.

The CJA is also calling on the Government to consider introducing legislation either to require defendants to reimburse gross (inclusive of tax and National Insurance) earnings rather than net earnings on every claim to take into account the loss to the taxpayer from the fact that loss of earnings are calculated net of income tax and National Insurance contributions. We would similarly

urge Government to review legislation that will enable it to recover other public costs of accidents, such as police call-out charges, and the full cost of HSE investigations.

We look forward to talking to the Government further on this issue.

Conclusion

For the sake of brevity the above points address only the proposals the CJA considers the most dangerous and most relevant to injured claimants. This is a complex area, which of course extends beyond personal injury. Lord Justice Jackson's report ran to nearly 600 pages and the MoJ Green Paper runs to 100 pages. Further, there is a degree of overlap between the impact of proposals for reform of civil litigation funding and the impact of the proposals for the reform of legal aid.

The CJA believes the proposals are misguided and ill-considered, and that it would be a grave mistake to rush through reforms in an area of such complexity, that could have a major impact on civil justice and the public purse, without full consideration of the consequences.

The MOJ proposals have been put forward against the background not only of issues relating the legal costs, but also of the perceived "compensation culture" addressed in Lord Young's recent report. There appears to be a perception that the issues relate to trivial, frivolous claims. That is simply not the case. These reforms will affect a wide range of claimants including those who have suffered catastrophic brain or spinal injuries or been the victims of serious medical accidents. If these reforms are implemented, some of those who now pursue claims will be unable to do so, and others will be able to do so only at considerable personal risk and cost. These are among the most vulnerable members of society.

Claimant law firms can currently run difficult and complex cases at high risk that they will not be paid, solely on the basis they can make up the losses on those cases by success fees on other cases. They will not be able to take those cases on if prevented from charging reasonable success fees.

Legal aid will not cover the cost of those cases so injured victims will have nowhere to go and will be denied access to justice. Furthermore the state will have to bear the full cost of their treatment and care, in some cases for the rest of their lives. Shifting the cost of their care from insurance companies to the taxpayer does not achieve the objective of saving public money; it will in fact increase public expenditure.

The principle that a liable defendant should pay for the injury and consequential losses suffered as a result of his negligence is a good one; drivers, employers and occupiers of land insure themselves against the risk of claims. It is reasonable that the insurance should cover the full cost, including the cost of all medical treatment and care, whether it is provided privately or at the expense of the taxpayer.

CJA members

ARAG Legal Services

AvMA – Action against Medical Accidents

BIRST – Brain Injury Rehabilitation Support Therapy

Box Legal

CADD – Campaign Against Drinking and Driving

CBIT – Child Brain Injury Trust

CO Awareness

Elite Insurance

Gadsby Wicks Solicitors

Glynns Solicitors

Harris Fowler Solicitors

ProLegal Solicitors

SCARD – Support & Care After Road Death & Injury

SIA – Spinal Injuries Association

SSIT – Southern Spinal Injuries Trust

Wixted and Co. Solicitors

Minster Law

The CJA also has a number of affiliate members – these include:

QLP Limited

Bakers Personal Injury Lawyers

Minards Pavlou

Bindmans

Tozers