LORD JUSTICE JACKSON'S RESPONSE TO MINISTRY OF JUSTICE CONSULTATION PAPER CP 13/10

INDEX

1. INTRODUCTION

1.1 The Consultation Paper and this Response. I welcome the Government's Consultation Paper CP 13/10 and the detailed consideration which has been given to the proposals advanced in my Final Report ("FR"). The purpose of this Response is (a) to engage with some of the important issues raised by the Government and (b) to address the formidable arguments being publicly deployed against the FR proposals. Also I am concerned to prevent errors occurring in the process of translating the FR proposals into primary legislation, not least because I shall carry some personal responsibility for the reforms. This Response sets out further information gathered over the last year. It also sets out my final views on the issues which are the subject of consultation, in the light of the analyses and debates which have taken place since publication of the FR. This Response is intended to be constructive and I hope it will assist the Government in reaching decisions on civil justice issues.

1.2 This response is being placed on the Judiciary website for two purposes: first, so that the dialogue between the Ministry of Justice and myself is conducted in an open and transparent manner; secondly, so that other consultees, especially those who take a different view, can see what I am saying and consider it before the 14th February deadline for consultation responses.

1.3 Abbreviations. In this response:
"ATE" means after-the-event insurance.
"CFA" means conditional fee agreement.
"Consultation Paper" means the Ministry of Justice's Consultation Paper CP 13/10 (November 2010) "Proposals for Reform of Civil Litigation Funding and Costs in England and Wales".
"FR" or "Final Report" means Review of Civil Litigation Costs Final Report.
"Legal Aid Consultation Paper" means the MoJ's Consultation Paper CP 12/10 (November 2010) "Proposals for the Reform of Legal Aid in England and Wales".
"MoJ" means Ministry of Justice.
"PR" means Review of Civil Litigation Costs Preliminary Report.
"QOCS" means qualified one way costs shifting.
"Recoverability" means the ability to recover success fees and ATE premiums from opposing parties.

1.4 Citation of PR and FR. In citing paragraphs of the Preliminary Report or the Final Report I shall use the convention of chapter number followed by paragraph number. Thus "PR para 5.3.5" means Preliminary Report chapter 5, paragraph 3.5; "FR para 10.4.17" means Final Report chapter 10, paragraph 4.17.

1.4 My role since publication of FR. The Final Report was published on 14th January 2010. Since then I have served as a member of the Judicial Steering Group, which oversees implementation of the FR proposals on behalf of the judiciary.[1] Contrary to my original intention, I have remained immersed in costs issues throughout 2010 and my sitting commitment has been slightly reduced to allow time for work on implementation. I have also attended innumerable conferences, seminars and meetings, in order to give lectures on particular aspects of the proposals, to answer questions and to listen to the views of others. Many of these debates have been robust, to say the least.[2] As the debates have proceeded and further evidence has accumulated, my views on the main issues have become firmer.

1.5 Further calculations of Professor Fenn. Since publication of the Final Report Professor Fenn has done further calculations re the effect of the package of reforms proposed. These calculations have been put onto the Judiciary website[3] and were presented in my lecture to the Legal Action Group on 29th November 2010. These calculations are set out at Appendix 1, paras 1 to 3.

2. CONDITIONAL FEE AGREEMENTS AND SUCCESS FEES (Consultation Paper, section 2.1, pages 18-29)

2.1 The rationale for recoverable success fees. The theory underlying recoverability is that in any cohort of cases where the claimants' solicitors are acting on CFAs, there will be some winners and some losers. The success fees recovered from defendants in successful cases will cover the claimants' costs in unsuccessful cases. Thus the defendants will end up paying the entirety of the claimants' costs in every single case, regardless of outcome, and the claimants will pay nothing in any case (win or lose).[4] This regime has many flaws,[5] some of which have become more starkly apparent over the last the year.

2.2 The theory is flawed. First, why should defendants collectively have to pay not only the costs of claimants who win but also the costs of claimants who lose? No other country in the world has such an unusual system. This regime can be, and is, used by all manner of litigants, who have no conceivable need for such bounteous

[1] See para 264 of the Consultation Paper.
[2] For example, at a conference organised by the Law Society's Civil Litigation Section on 23rd February 2010 my report came in for strong criticism from some quarters. A solicitor in the audience (to some applause) castigated my proposed reforms as "tyrannical". Throughout 2010 there have been forceful attacks on the FR, both at meetings and in articles, sometimes emanating from those with a vested interest in the present arrangements. However, no rational argument has been put forward to dissuade me from the FR recommendations.
[3] See http://www.judiciary.gov.uk/media/speeches/2010/jackson-lj-handout-29112010
[4] There is a modification in large commercial cases, where the CFAs often provide for "no win/low fee". These arrangements can be even more lucrative for lawyers.
[5] See FR chapter, chapter 10.

support from their adversaries. In addition to the examples cited in FR chapter 10, I would now add (a) international finance companies suing the Civil Aviation Authority, (b) large contractors suing public authorities in procurement disputes (c) construction companies in ordinary commercial disputes. It is inappropriate that bodies such as these should be able (indirectly and through the mechanism of recoverable success fees) to have their litigation costs paid by the other side in every case, regardless of who wins. Such organisations can well afford to pay their own costs when they lose.

2.3 The practice is flawed. Secondly, as pointed out at FR para 10.4.17, the present CFA regime presents lawyers with an irresistible temptation to cherry pick. Of course, there are some lawyers who honourably ensure that they take on enough losing cases in order to "spend" the success fees gained from successful cases. But there are many lawyers who do not. Over the last year I have heard numerous accounts of solicitors or counsel who run safe cases on CFAs and make a handsome profit from the process. For example, a solicitor from a claimant firm doing mainly employers' liability cases recently admitted to me that his firm wins about 98% of cases in which proceedings are issued. A London QC recently stated that he had done 10 CFA cases and won all of them. A partner in one city firm tells me that the firm does CFA work because it sees this as a means of generating substantially increased profits, not charged to its own clients. Many similar accounts (always non-attributable) have reached me. The experience of the Association of Law Costs Draftsmen is to the same effect.[6] This state of affairs is hardly surprising, because in any sector work tends to follow the most remunerative path. Obviously the financial records of solicitors and counsel are confidential. However, from all the information which has come to me over the last year, I deduce the following. First, the present regime is being used (perfectly lawfully) to generate disproportionate profits for a significant number of CFA lawyers.[7] Secondly, and in consequence, this imposes an excessive costs burden on the general public.

2.4 Thus the elegant balance, which is assumed by the model described in para 2.1 above, is not achieved in practice. In a typical cohort of claimant cases run on CFAs, the defendants end up paying *substantially more than* the claimants' costs of every case, regardless of outcome. The inflationary effect of CFAs upon costs can be seen from FR paras 2.2.8, 2.2.14 and 2.2.17.[8]

2.5 At a time when public funds are scarce, it may be thought inappropriate to impose upon the National Health Service, local authorities, government departments, police authorities, other public authorities, small companies, motorists and many others the huge burden of paying "success fees" on top of the proper costs of litigation.

2.6 The Government's proposal to abolish recoverability of success fees. I therefore welcome the provisional view indicated by the Government that recoverability should be abolished.

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[6] "The whole CFA regime has been a disaster ... Many solicitors filter out risky cases and take on safe ones with, nevertheless, attractive success fees. Many solicitors have made substantial profits out of the CFA regime, at the expense of the man in the street." PR para 10.14.6

[7] It would be helpful to know whether, after enquiry, either the Chairman of the Bar or the President of the Law Society seriously dispute this proposition.

[8] The figures are in FR appendix 1, tables1 to 8. For cases which settled, see table 10.

2.7 Areas of concern indicated in the Consultation Paper. The Government identifies in paras 69-70 of the Consultation Paper three areas of concern where some element of recoverability might be retained, namely (i) judicial review; (ii) housing disrepair, (iii) complex personal injury or clinical negligence claims. I shall address these three areas separately.

2.8 (i) Judicial review. There is no need for recoverable success fees in this area. First, legal aid will remain available for the most important judicial review cases.[9] Secondly, as long as provision is made for the adverse costs risk[10] solicitors will be willing and able to take on meritorious judicial review cases on CFAs without recoverable success fees.[11] The solicitors will either charge no success fee or they will agree a success fee which is within the client's means. I have sat for many years as a judge in the Administrative Court and do not accept the proposition that judicial review claimants generally are unable to make any contribution to their own costs. Although special provision must be made[12] for genuinely impecunious claimants, in most judicial review claims it is desirable that both parties should have a financial stake in the litigation. This serves to deter frivolous claims and promote responsible litigation conduct.

2.9 (ii) Housing disrepair. The majority of housing disrepair claims are brought on legal aid, not CFAs.[13] Legal aid will remain available for the most important housing disrepair cases.[14] Where legal aid is not available, CFAs could still be viable without recoverable success fees. The tenant's main concern is to secure that repairs are carried out. If the solicitors insist upon receiving a success fee in addition to the proper costs of the litigation, that could (by agreement between solicitor and client) be capped at a high percentage of any general damages recovered.

2.10 (iii) Complex personal injury or clinical negligence claims. Many complex personal injury claims present little or no risk on liability, so there is no need for a success fee at all in such cases.[15] So far as quantum is concerned, there is no reason why the Part 36 risk should be borne by the defendant. On any view, that should be a matter between the claimant and his own solicitors.[16] Where there is genuine need for a CFA, I adhere to the view that a scheme whereby (a) general damages are increased, (b) the rewards for effective claimant offers are increased and (c) the client has a limited liability to pay a success fee out of damages is the best way forward. Another option for complex personal injury or clinical negligence cases will be contingency fees, as discussed in FR chapter 12. I do not accept that these arrangements will either (a) deny access to justice for claimants who have strong claims or (b) make it uneconomic for solicitors to act in such cases.

2.11 An argument which has been urged at many meetings over the last year is that

[9] See paras 4.95 to 4.99 of the Legal Aid Consultation Paper.
[10] As to which see below.
[11] See PR para 36.3.8, FR paras 30.2.18, 30.3.1 to 30.3.3, 30.4.10.
[12] And can be made – see above.
[13] See the submissions of the Housing Law Practitioners' Association quoted in FR para 26.4.1.
[14] See para 4.78 of the Legal Aid Consultation Paper.
[15] See e.g. *Pankhurst v White* [2010] EWCA Civ 1445.
[16] See FR paras 10.5.18 to 10.5.21.

solicitors will stop taking on "risky" cases. I view this argument with scepticism because (with certain honourable exceptions) claimants with risky cases are already unable to find CFA solicitors. Indeed one of the arguments which is repeatedly urged in support of the present regime is that ATE insurers see to it that only very strong cases are pursued on CFAs. One substantial claimant clinical negligence firm examined its records over the period April 2004 to June 2009 for the purposes of the Costs Review. It found that there was not a single CFA case which had been lost at trial or dropped at a late stage. When one looks at the various statistics,[17] it can be seen that the vast majority of claims recorded as "unsuccessful" are dropped at a very early stage.

2.12 Traditionally, the more risky clinical negligence cases have been supported by legal aid. According to the NHSLA statistics, cases supported by legal aid have a lower success rate than those funded by any other means.[18] The question whether legal aid should be retained for clinical negligence is the subject of a separate consultation, upon which it is not my function to comment in this paper.

2.13 Conclusion. The reality is that the present CFA regime incentivises the bringing of strong claims, but at disproportionate cost and in an environment where the claimant has no interest in controlling costs. The reforms proposed in the FR will also incentivise the bringing of strong claims, but at proportionate costs and in an environment where the claimant has an interest in controlling costs.

2.14 In my view, recoverable success fees are the worst possible way to tackle the problem of funding litigation, for all the reasons set out in FR chapter 10. Furthermore, the existence of recoverable success fees adds a layer of complexity (and therefore cost) to the civil process. The mass of rules and case law which surround recoverable success fees form a jungle, which should be cut down and cleared. The alternative course which is advocated by some, namely to keep recoverable success fees with sundry restrictions and qualifications, will simply make matters worse. There is now a pressing need to simplify civil procedure, rather than weave in yet more complexity.[19]

2.15 In so far as particular categories of litigant need financial support in order to bring or defend claims, other measures should be taken which are (a) simpler, (b) less expensive and (c) targeted upon those who merit support. Those measures are set out in the Final Report and further addressed in this paper.

2.16 Answers to questions. Accordingly my answers to the questions posed on pages 28-29 of the Consultation Paper are:
Q. 1: Yes.
Q. 2: Not applicable.
Q. 3: No.
Q. 4: This would be better than the present regime, but I could not endorse it.
Q. 5: No.
Q. 6: Not applicable.

[17] For example, those in PR appendices 12, 22 and 23, discussed in PR chapter 11
[18] See PR para 11.4.2.
[19] See FR paras 4.3.2 to 4.3.6 at pages 43-45.

Q. 7: Yes, provided that it is not recoverable from the other side.
Q. 8: Yes.
Q. 9: 25%.
Q. 10: It should be binding in all cases.

3. AFTER-THE-EVENT INSURANCE PREMIUMS (Consultation Paper, section 2.2, pages 30-35)

3.1 The principal purpose of ATE – protection against adverse costs. The principal purpose of recoverable ATE premiums is to protect the insured party (usually but not always the claimant) against liability for adverse costs. The claimant recovers costs[20] if he/she wins, but has no liability for costs if he/she loses. If the claimant wins, the defendant pays an enhanced premium;[21] if the claimant loses, the insurer picks up the tab. Thus, the theory runs, in any cohort of cases where the claimants have ATE cover, the defendants will end up paying the claimants' disbursements in every case, regardless of outcome.

3.2 This is about the most inefficient and expensive form of one way costs shifting that it is possible to devise.[22] In any cohort of cases where claimants have ATE, the defendants are in a far worse position than they would be if they were never entitled to recover costs from the other side – win or lose. The inefficiency of this form of one way costs shifting is illustrated by the Personal Injury Bar Association's submissions, which ironically were advanced in support of the current regime.[23] It is also illustrated by the Law Society's recent *Response*.[24]

3.3 Furthermore, there is the anomaly that well resourced parties are entitled to take out ATE insurance and conduct risk free litigation against their adversaries. The "super claimants" referred to in FR para 10.2.9 are one example.[25] Also construction practitioners tell me that this practice is becoming increasingly common in their field, sometimes with ATE premiums approaching 100%. There is no reason why, in litigation between (say) two contractors, one side should be at no risk of adverse costs and the other side should be at massively increased risk.

3.4 I therefore welcome the Government's indicated intention to abolish recoverable ATE premiums and to replace these by a more rational form of one way costs shifting in appropriate cases.

3.5 The subsidiary purpose of ATE – paying disbursements. The second function of recoverable ATE premiums is to protect the insured party (usually but not always the

[20] Generally a multiple of his/her costs, because there will also be a CFA.
[21] Enhanced, because nothing is payable to insurers if the case is lost; ie the premium is itself insured.
[22] This is graphically illustrated by (i) the figures provided by the Medical Protection Society (FR paras 19.2.6 to 19.2.7) and (ii) the figures supplied by insurer X (PR paras 25.2.3 to 25.2.7).
[23] See FR paras 9.3.4 and 9.3.5.
[24] *Review of Civil Litigation Costs Final Report: Response by the Law Society*, October 2010: "There can be no doubt that ATE premiums are a major contributor towards legal costs over which solicitors have no control. … There appears to be a substantial lack of transparency in the ATE market" (page 21); "The price of ATE insurance is currently prohibitive" (page 22) Despite these observations, the Law Society seeks to support the present regime.
[25] Commercial organisations who perfectly lawfully exploit the present rules to crush their opponents.

claimant) against liability for his/her own disbursements. If the claimant wins he/she recovers disbursements from the other side. If the claimant loses, the insurer pays the disbursements plus an enhanced ATE premium.[26]

3.6 The Government suggests as a possible refinement of the proposed reforms that ATE premiums should continue to be recoverable in so far as they relate to the claimants' disbursements. In my view this should be rejected for three reasons:

(i) The basic premise that losing claimants should collectively have their disbursements paid by defendants is questionable. Why should the Birmingham City Council or the Ministry of Defence or the National Health Service (to take just three examples of bodies whose overstretched resources have recently been in the news) not only pay the disbursements of claimants who win but also pay the disbursements of claimants who lose? No other legal system in the world imposes such an odd requirement. Losing claimants comprise (a) those who abandon their claims before issue and (b) those who issue proceedings and subsequently discontinue or fail. It is a gross waste of public money that these claimants – however wealthy they may be – should collectively have their disbursements met by the tax payer or council tax payer.

(ii) There is a strong case for saying that losing claimants[27] or their solicitors should meet their own disbursements – as happens in Scotland and indeed in every other jurisdiction outside England and Wales. Personal injury cases seem to be causing particular concern in the present consultation. But disbursements in the vast majority of unsuccessful personal injury cases are well within the means of claimants and their solicitors: see FR paras 19.5.3 to 19.5.8.

(iii) If contrary to my view, the Government decides that losing claimants should still have their disbursements paid out of public funds, then the present ATE regime is an extremely inefficient and expensive way of achieving that result. Under the present regime defendants pay (a) the claimants' disbursements in respect of unfounded claims and (b) the profits and administration costs of the ATE insurers, their agents and any other middlemen who may be involved. A much better and cheaper way of achieving the policy objective would be to provide legal aid for such disbursements. The legal aid authority would (a) control the level of disbursements[28] more effectively than ATE insurers and (b) focus this resource on those claimants who really merit such support.

3.7 Para 90 of the Consultation Paper refers to the retraction of legal aid. At the present time, however, legal aid is still available for clinical negligence cases. The MoJ is currently consulting on a proposal to exclude clinical negligence from the scope of legal aid.[29] May I suggest that consideration be given to retaining legal aid for reasonable pre-litigation disbursements in clinical negligence cases? This would at least establish whether the claimant has a case worth pursuing. If it turns out that there is a good case, then the legal aid fund would have a first charge upon any

[26] Enhanced, because nothing is payable to insurers if the case is lost; ie the premium is itself an insured disbursement.
[27] Or their trade unions (as always happened before 2000 in union cases) or legal expenses insurers
[28] By providing scales of remuneration under regulations
[29] See paras 4.163 to 4.169 of the Legal Aid Consultation Paper.

damages and costs recovered. I do not have the means to cost this proposal, although no doubt the MoJ can do so. I doubt that it would make a significant inroad on the savings to be achieved by withdrawing legal aid from clinical negligence claims.

3.8 Section 30 of the Administration of Justice Act 1999: Membership Organisations. There is a helpful summary of this regime in paras 92 to 94 of the Consultation Paper. I agree with the Government's view that any changes to the recoverability of ATE premiums ought to apply equally to the arrangements for Membership Organisations.

3.9 Answers to questions. Accordingly my answers to the questions posed on page 35 of the Consultation Paper are:
Q. 11: Yes.
Q. 12: Not applicable.
Q. 13: Not applicable.
Q. 14: No.
Q. 15: Not applicable.
Q. 16: Not applicable.
Q. 17: See paras 3.6 and 3.7 above.
Q. 18: Yes.

4. THE 10% INCREASE IN GENERAL DAMAGES (Consultation Paper, section 2.3, pages 36 to 39)

4.1 The Government indicates acceptance of the recommended 10% increase in general damages for personal injury, nuisance and other civil wrongs to individuals, but raises a number of issues for consideration.

4.2 Method of achieving the adjustment. The Consultation Paper states at para 97: "adjustments to the level of general damages have hitherto been regarded as a judicial issue for the courts rather than the Government". I agree and have not included this item in the list of reforms requiring legislation.[30] It will be recalled that in so far as the Law Commission's recommendations[31] for increasing personal injury damages were accepted, those increases were implemented by means of a guideline judgment handed down by a five member Court of Appeal, presided over by the Master of the Rolls: see *Heil v Rankin* [2001] QB 272. The same procedure could be adopted for implementing any future increase in the level of general damages.

4.3 Possible refinement. The Government proposes as a possible refinement that the 10% increase in general damages should apply only in CFA cases and that it should be paid as success fee to the solicitors. Whilst I understand the thinking behind this refinement, I would be strongly opposed to it and would see this as undermining the whole structure of my reforms. I say this for four reasons, as set out in paras 4.4 to 4.8 below.

4.4 First, there is a strong argument to the effect that general damages are already too

[30] See FR page 472.
[31] Contained in Law Commission Paper No 257 "Damages for Personal Injury: Non-pecuniary Loss" (1999).

low.[32] The present reform project provides a golden opportunity to raise the level of general damages by 10% across the board. It is significant that the Association of British Insurers (whose members will be paying the increased damages) accepts the appropriateness of an across the board 10% increase as part of a balanced package.[33] In the ABI's view, the beneficial effect of the total package of reforms upon litigation behaviour makes the (otherwise unwelcome) damages increase acceptable. So this recommended reform has the unusual feature of both being beneficial to claimants and acceptable to defendants.

4.5 Secondly, an across the board increase of 10% in general damages will (despite the abolition of recoverability) leave the great majority of personal injury claimants better off. See Appendix 1, which comprises Professor Fenn's calculations plus my analysis. This was presented in the Legal Action Group 2010 Annual Lecture.[34] On the other hand, if the Government's proposed refinement is adopted, (a) no claimant will be better off, (b) some claimants will be worse off and (c) all the extra money will go straight to lawyers.

4.6 The fact that the majority of claimants will be better off under my proposals is an important feature of the package. This fact also makes it surprising that claimant representatives are so strongly opposed to the recommendations.

4.7 Thirdly, it is wrong in principle that claimants should recover more by way of damages **or** costs, because they choose to fund their litigation by means of CFAs rather than some other method. This creates perverse incentives. It sets England and Wales on a different course from the rest of the world. It means that instead of getting rid of the conceptual carbuncle of recoverable success fees we retain it with additional complications.

4.8 Fourthly, one of the vices of the present regime (which has resulted in unacceptable levels of costs) is that CFA claimants have no financial stake in the litigation and no interest in the costs being incurred on their behalf. My proposed package of reforms will put an end to this state of affairs. The Government's proposed refinement will not.

4.9 Is a 10% increase high enough? It has been suggested that in some instances a 10% increase in general damages will not be sufficient to cover an appropriate success fee (see Consultation Paper para 101). The example cited is that of catastrophic personal injury cases. The first point to note is that many catastrophic injury cases involve no risk whatsoever on liability. There may be a Part 36 risk if the defendant makes an adequate settlement offer which the claimant rejects, but there is no rational justification for making the defendant pay any success fee referable to that risk.[35] I do accept, however, that some personal injury cases (primarily clinical negligence) involve complex issues on liability. I will focus on these cases in the next paragraph.

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[32] See e.g. PR para 10.15.2.

[33] At a number of conferences this year the ABI's representative has made it clear that they accept the 10% increase in general damages, subject to the proviso that the rest of the FR proposals are implemented as a package and in full.

[34] See http://www.judiciary.gov.uk/media/speeches/2010/jackson-lj-handout-29112010

[35] See FR paras 10.5.18 to 10.5.22.

4.10 There are many clinical negligence cases in which, despite their complexity, the claimant has a good case on liability.[36] Solicitors conducting such cases will (under my proposals) be able to deduct from damages success fees of up to 25% of general damages + past special damages. I do not accept that that this regime (a) makes it uneconomic for solicitors to conduct such cases or (b) would be unacceptable to claimants. This was precisely the regime that prevailed before April 2000 and was regarded as satisfactory for non-legally aided cases. This has been confirmed by well informed claimant representatives.[37]

4.11 Success fees will be highest in those few cases which proceed to trial. In those cases, however, the claimant can dramatically improve his position by making a Part 36 offer, reflecting the true value of his claim. If the defendant does not accept that offer, the claimant will make a substantially enhanced recovery[38] and will be well placed to pay the success fee.

4.12 The 100% per cent principle. The "principle" that damages are sacrosanct and that claimants must retain 100% of their damages without any deduction for costs is discussed and rejected at Consultation Paper paras 102 to 108. I agree with the reasoning set out in those paragraphs. Interestingly, this issue was discussed at a well attended conference of the Law Society's Civil Justice Section on 23rd February 2010, after there had been some debate on the Costs Review Final Report, but before I had left the meeting. The Chairman took a vote on the question: "As a matter of public policy should a successful claimant have his/her damages reduced in order to pay their own solicitor's costs incurred as a result of the negligence or other wrongdoing of a tortfeasor?" In response, 58% of the audience voted "yes" and 42% voted "no".

4.13 Trade unions. The position of trade unions should not be overlooked in this kaleidoscope of conflicting interests. Prior to April 2000 trade unions funded personal injury litigation by their members, recovering their costs in successful cases and meeting both sides' costs in unsuccessful cases. Since April 2000, however, the position has been reversed.[39] Trade unions, instead of funding personal injury litigation, now make a substantial profit out of the process.[40] No policy justification has ever been advanced for this substantial subsidy of trade unions by the general public through the mechanism of recoverability. The only justification which has been suggested to me informally is that it frees up more funds to spend on employment tribunal proceedings. If recoverability is abolished, unions will resume their historic function of supporting members' personal injury claims. This will further increase the number of "winners" from the package of reforms, because

[36] I have encountered such cases at the Bar and they generally settled at an early stage.
[37] See PR paras 16.3.1 to 16.3.2. See also the submissions of Association of Personal Injury Lawyers to Lord Woolf as recorded in para 25 of chapter 2 of Lord Woolf's Final Report on Access to Justice: http://www.dca.gov.uk/civil/final/index.htm
[38] If my recommendations for reforming Part 36 are accepted.
[39] See FR para 10.4.4.
[40] Obviously the figures are confidential to the unions concerned. However, some interesting information was recently provided by a union solicitor, who (at his request) came to brief me about personal injury issues from a claimant perspective. He cited the example of a trade union of modest size which used to spend about £250,000 per year in supporting members' personal injury claims. Now, however, through a combination of direct and indirect benefits that union makes a profit of about £200,000 per year out of the process.

claimants who are union members will recover general damages enhanced by 10%, whilst having legal costs covered by their unions. This will particularly apply to employers' liability cases (the first of Professor Fenn's graphs).

4.14 Answers to questions. Accordingly my answers to the questions posed on page 39 of the Consultation Paper are:
Q. 19: Yes.
Q. 20: No.

5. PART 36 OFFERS (Consultation paper, section 2.4, pages 40-45)

5.1 Increasing the rewards for successful claimant offers. Paras 111 to 114 of the Consultation Paper provide a helpful summary of my proposal to increase the reward for claimants, when defendants reject claimant offers but subsequently fail to beat such offers at trial.

5.2 Para 115 of the Consultation Paper raises a concern that this measure may not be effective because only a low percentage of multi track claims are resolved at trial. I do not share this concern, because once a claimant offer has been rejected, any subsequent settlement negotiations will be conducted under the shadow of that unaccepted offer. In other words, if the claimant's offer was well judged his/her subsequent negotiating position will be strengthened.

5.3 Having listened to debate about Part 36 at numerous seminars and meetings over the last year, I support both the modifications discussed in para 116 of the Consultation Paper. I would suggest the following scale:

Total damages + value of non-monetary award	Percentage increase
Up to £500,000	10%
£500,001 to £1 million	£50,000 + 5% of excess over £500,000
Above £1 million	£75,000 (with no further increase)

The court must retain a discretion to award less than this sum, if it would be unjust to award the full amount (i.e. the same test as governs the existing rewards for successful claimant offers).[41]

5.4 Concern is expressed at para 117 of the Consultation Paper that the proposed standard uplift may not sufficiently encourage early settlements; the claimant could gain the same benefit by making an effective offer just before trial. Whilst I understand this concern, there are already other incentives for early settlement. Furthermore, even in the run up to trial there are still savings (in terms of costs and judicial resources) to be achieved from settlement, so that settling continues to be desirable. Finally, if the claimant is on a CFA, the success fee will be highest in cases that go to trial, so the increased sum awarded will assist the claimant to meet that success fee, if his/her reasonable settlement offer is rejected.

5.5 A separate point is raised in para 117 of the Consultation Paper, namely that the

[41] See CPR rule 36.14 (3) and (4).

increased reward may not be appropriate if the claimant's offer relates only to liability. This is a difficult point, which has not been discussed at the various meetings that I have attended over the last year. My present tentative view is that where the claimant makes an offer on liability which is not accepted but is subsequently vindicated (e.g. to settle on the basis of 25% contributory negligence), the increased reward should still be given. However, the views expressed in consultation by claimant and defendant representatives will be important on this issue.

5.6 It should be noted that in each of the situations discussed in the two preceding paragraphs the court will retain a discretion to award less than the prescribed uplift if, in all the circumstances, it would be unjust to award the full amount.

5.7 Reversal of *Carver v BAA plc*. There is a helpful discussion of this proposal at paras 119 to 124 of the Consultation Paper. The Government notes the arguments for reversing the effect of *Carver*, but is concerned that this may be seen as endorsing the principle that parties can press on to trial even where their positions are very close. I do not share this concern. If the parties' positions are close there is already a strong incentive to settle, because whichever party is vindicated will gain a substantial reward under Part 36, at the expense of the other party.[42] The risks of pressing on in that situation are almost invariably perceived as overwhelming.[43]

5.8 A possible refinement is suggested at paras 125 -127 of the Consultation Paper. I can see the logic of this proposal (indeed it was canvassed in my Preliminary Report) but I do not believe that it should be adopted, essentially for two reasons:
(i) It introduces further complexity into the rules, at a time when we should be looking for greater simplicity.[44]
(ii) The simple approach of penalising whichever party fails to beat the other's offer, creates certainty and provides more than sufficient incentive to settle. No-one is going to risk a massive financial penalty in the hope of obtaining a few more £s in damages, alternatively in the hope of shaving a few more £s off the settlement, as the case may be.

5.9 One important point to note, which is not specifically picked up in the Consultation Paper, is that if there is to be any free standing supplement to the claimant's damages or other award, legislation will be required. The Rule Committee cannot amend substantive law. See item 9 in the list of legislation required.[45]

5.10 Answers to questions. Accordingly, my answers to the questions posed on page 45 of the Consultation Paper are:
Q. 21: Yes.
Q. 22: Yes, for the reasons set out above and in my Final Report.
Q. 23: Yes, for the reasons set out above.
Q. 24: Yes, as set out in para 5.3 above.
Q. 25: Yes.

[42] This will be even more the case if my recommendation is accepted for enhancing the rewards for successful claimant offers.
[43] I say that having often at the Bar advised clients on settlement negotiations, during a period when no-one was cushioned by recoverable ATE premiums.
[44] See FR paras 4.3.1 to 4.3.5.
[45] FR page 472.

Q. 26: Yes.
Q. 27: No.

6. QUALIFIED ONE WAY COST SHIFTING (Consultation Paper, section 2.5, pages 46-57)

6.1 There is a helpful summary of the FR proposals for qualified one way costs shifting ("QOCS") at paras 128 to 137 of the Consultation Paper, followed by discussion of a number of specific issues to which those proposals give rise. I shall address those issues separately.

6.2 QOCS and Part 36. The difficulty suggested at para 140 of the Consultation Paper does not arise. If the defendant makes a derisory offer and subsequently wins on liability, the claimant will still be protected by the proposed QOCS rule. He will not have received any damages out of which he could meet an order for costs. The "modification" suggested in para 141 of the Consultation Paper is already inherent in the draft rule proposed at FR para 19.4.7. The damages received by the claimant form part of his "financial resources". The claimant cannot be treated as having acquired any larger sum when the court comes to apply QOCS.

6.3 Insufficient certainty? Concern is expressed in para 142 of the Consultation Paper that claimants will have insufficient certainty under the proposed QOCS rule and might still feel the need for ATE insurance. I do not agree. Precisely this form of words has been in use for legal aid cases over the last half century and it has always been regarded as providing sufficient certainty, even when the financial limits for legal aid were more generous than in recent times. I do accept, however, that my proposed rule will need to be backed up by regulations, as is the case with section 11(1) of the Administration of Justice Act 1999 and its predecessor provisions. The drafting of such regulations will be a matter for detailed work, if and when the recommendation for QOCS is accepted in principle.[46]

6.4 The refinement suggested at para 143 of the Consultation Paper. I understand the thinking behind this proposal for an early costs setting hearing. My concern, however, is that it will generate much satellite litigation – in other words that the extra costs generated by the process will outweigh the benefits. At the outset of litigation there will be a strong temptation for the parties respectively to make and oppose such applications, even though most cases will ultimately settle without any costs being sought from the claimant.[47] A further difficulty is that it is impossible to foretell at the outset of litigation what conduct issues will arise. There is therefore a danger of two separate "costs" hearings taking place, which would cause even more expense.

6.5 The suggested refinements at paras 144 to 146 of the Consultation Paper. These paragraphs suggest a number of refinements which may have some merits in isolation, but collectively they will add too much complexity. The proposed rule contains sufficient flexibility to deal with all these matters. In my view, both the rule and the

[46] Colin Stutt (my former assessor, who was closely involved with drafting the existing regulations) would be willing to assist the MoJ with the detailed drafting work.
[47] According to experienced practitioners, this is what has happened with protective costs orders in judicial review cases: see FR paras 30.2.10 and 30.3.1.

supporting regulations must be kept as simple as possible.

6.6 Parents and spouses/partners. I agree with the approach suggested in para 148 of the Consultation Paper.

6.7 Should QOCS be limited to CFA cases? This issue is explored in para 150 of the Consultation Paper. In my view QOCS should definitely not be so limited. First, CFAs (unlike legal aid) are not means tested. Some immensely wealthy individuals and indeed some prosperous companies take out CFAs. So the presence of a CFA is not a badge which identifies litigants who merit special protection. Furthermore, any restriction of QOCS to CFAs would simply incentivise the use of CFAs. Finally, there is no need for any such restriction. The proposed QOCS rule as drafted provides protection for those who need it, but not for others. I accept that, as with any rule, there will be difficult borderline cases. It will be the function of regulations to produce as much clarity as possible in this area. Nevertheless, the "borderline" problems which will be caused under QOCS pale in comparison with the difficulties which the present ATE regime creates.

6.8 Low value cases. I agree with the statement in para 152 of the Consultation Paper that QOCS should not be limited to low value cases.

6.9 QOCS in types of litigation other than personal injury. Paras 153 to 167 of the Consultation Paper contain a helpful discussion of which areas outside personal injury litigation might merit QOCS. This raises wide policy considerations, which must be a matter for Government. My own opinion on these questions (which are pre-eminently matters for ministers rather than judges to assess) are already set out in FR chapter 9 and in the chapters dealing with individual categories of litigation. This is an area where the responses to consultation will be particularly important, as indicated in FR para 9.5.10.

6.10 Should QOCS be confined to individuals? The Government inclines to the view that QOCS should be confined to individuals, but notes the problem that some organisations are not well resourced. My own view is that QOCS should not be expressly limited to individuals. The formulation of the proposed QOCS rule automatically has the effect that well resourced organisations will have no protection against adverse costs.

6.11 Answers to questions. Accordingly, my answers to the questions posed on pages 56 and 57 of the Consultation Paper are:
Q. 28: Yes.
Q. 29: Yes.
Q. 30: Yes, to the extent indicated in my Final Report.
Q. 31: As set out in my Final Report.
Q. 32: QOCS should apply to all claimants, however funded.
Q. 33: No.
Q. 34: No.
Q. 35: Not applicable/ No.

7. OTHER ISSUES THE SUBJECT OF THIS CONSULTATION

7.1 On the other issues raised in the Consultation Paper, I have little to add to my Final Report.

7.2 Alternative recommendations on recoverability.[48] I agree with the Government's view[49] that these issues do not arise, because the primary recommendations are the way forward. The practical difficulties which the Government identifies only serve to emphasise the necessity for a radical and uniform approach, namely abolition of recoverability.

7.3 Proportionality.[50] I see good sense in the Government's suggested refinement.[51]

7.4 Contingency fees.[52] I see the force of the Government's argument that contingency fee agreements require no greater regulation than CFAs. This point has been made at a number of meetings over the last year. It will be interesting to see the outcome of consultation on questions 46 and 47.

7.5 Litigants in person.[53] The point has been made at a number of recent meetings that my figure of £20 per hour for litigants in person is too high. I see force in the Government's arguments for £16.50.

8. OTHER PARTS OF THE FINAL REPORT

8.1 There is obvious good sense in the Government's decision to tackle the issues identified in section 2 of the Consultation Paper first. The Government touches upon other parts of the Final Report in section 3 of the Consultation Paper, without posing any questions. I hope it will assist if I comment briefly on these matters.

8.2 Referral fees.[54] On this issue I am in agreement with the Law Society, whose views are quoted in Appendix 1. I am also in agreement with the Bar Council, which issued a similarly trenchant statement on 23rd December 2010.[55] The fact that such huge referral fees are paid, even in low value personal injury claims, is indicative of the surplus funds which have been sucked into such litigation, without being used actually to prosecute the cases. An important part of any reform package must be to cut out middlemen who add no value to the process.

8.3 Fixed recoverable costs.[56] I welcome the Government's indication that this is currently under serious consideration. Professor Fenn has done a great deal of

[48] Consultation Paper paras 175-210
[49] Consultation Paper para 175
[50] Consultation Paper paras 211-219
[51] Consultation Paper para 219
[52] Consultation Paper paras 220-237
[53] Consultation Paper paras 248-252
[54] Consultation Paper paras 255-258
[55] "Referral fees represent an unwarranted and unjustifiable threat to the public interest in the efficient and effective provision of legal services to consumers. They should be prohibited."
[56] Consultation Paper paras 259-260

detailed work which underlies the recommendations in FR chapter 15. It is important to make use of this work whilst the data, on which that chapter is based, are still fresh. I have not done the further work foreshadowed in FR paras 15.5.30 and 15.6.15, in view of the MoJ's indication that fast track fixed costs were not to be included in the first stage of the implementation process.

8.4 If the Government adopts the package of recommendations for reforming CFAs, recoverable success fees must of course be removed from the present matrix of fixed costs and from any future extended matrix of fixed costs. See FR chapter 17, which deals with the integration of (a) fast track fixed costs and (b) ending recoverability.

8.5 Costs management and case management.[57] The judiciary is taking the lead on these matters, as indicated in para 263 of the Consultation Paper. In addition to the pilots mentioned in that paragraph, the proposals for docketing and specialisation of judges[58] have been the subject of a pilot at the Leeds Court Centre since 1st November 2010. Also work is now being put in hand under the direction of HH Simon Grenfell on the development of standard form case management directions, to be available on line.[59] I express my gratitude to the MoJ and HMCS for the support which they are giving to these various initiatives.

8.6 Clinical negligence.[60] I welcome the decision of the NHSLA to obtain independent expert evidence on contested claims at an earlier stage, in accordance with the recommendation made in FR chapter 23. It should also be noted that a recommendation in that chapter for amendments to the Pre-Action Protocol for the Resolution of Clinical Disputes was implemented on 1st October 2010.

8.7 In relation to the late provision by health authorities of medical records required for litigation, I understand from the Information Commissioner that (contrary to the suggestion in para 277 of the Consultation Paper) this is not the kind of matter which his office would handle, or indeed could handle within a realistic time scale.[61] Perhaps, therefore, my recommendation in relation to this aspect might be given further consideration.

8.8 Intellectual property.[62] In relation to para 282 of the Consultation Paper, it should be noted that the limit which has been recommended (but not yet implemented) for financial remedies in the Patents County Court is £500,000. In relation to para 283 of the Consultation Paper, a sub-committee of the Patents County Court Users Committee has recently put forward proposals for dealing with small claims and fast track cases in the Patents County Court.[63] The Judicial Steering Group will discuss these proposals with the MoJ.

8.9 Matters requiring legislation. In addition to the matters identified in the

[57] Consultation Paper paras 263-264
[58] Contained in FR chapter 39
[59] As recommended in FR para 39.5.3
[60] Discussed in paras 277-280 of the Consultation Paper
[61] This kind of situation is not one for which the Commissioner's civil monetary powers were intended.
[62] Consultation Paper paras 281-283
[63] As recommended in FR chapter 24

Consultation Paper or discussed above, the following recommendations will require legislation, if they are to be implemented:[64]

(i) Abrogation of the common law indemnity principle (a matter about which the Government is not "currently persuaded").

(ii) Permitting pre-action applications in respect of breaches of pre-action protocols.

(iii) Permitting pre-action costs management by the court.

(iv) Permitting the proposed reconstitution of the Patents County Court.

(v) Amending section 68 (1) of the Senior Courts Act 1981 to enable district judges to sit in the Technology and Construction Court.

8.10 If legislation is going to be promoted this year to deal with the main reforms arising from the Final Report, it may be sensible for the Bill to include other matters which depend upon primary legislation, in so far as those recommendations are accepted. I doubt that Parliamentary time would be found for a second bill on civil justice reform to pick up residual matters.

Rupert Jackson 14th January 2011

I have read through this Response written by Lord Justice Jackson and I agree with it.

Peter Hurst, Senior Costs Judge 14th January 2011

[64] See the list of primary legislation required on page 472 of the Final Report

APPENDIX 1

RUPERT JACKSON'S HANDOUT FOR THE LEGAL ACTION GROUP ANNUAL LECTURE ON 29TH NOVEMBER 2010 (laghandout3)

Professor Fenn's analysis

Following publication of the Civil Litigation Costs Review Final Report, Professor Fenn has done some further calculations re the cumulative effect of the following reforms:

- End recoverability of success fees and ATE premiums.
- Introduce one way cost shifting
- Increase general damages by 10%.

Professor Fenn has analysed a sample of 63,998 personal injury cases. These range from low value fast track claims to high value multi-track claims. However, the majority of all PI claims and therefore the majority of claims in Professor Fenn's sample are lower value.

It can be seen from Professor Fenn's graphs on the following pages that 61% of claimants will be better off and 39% of claimants will be worse off, if the above reforms are implemented.

My analysis of combining the above measures with other reforms recommended in the Final Report

The next question to consider is what will be the consequence of two further reforms, viz (i) de-regulating success fees and (ii) banning referral fees.

At the moment success fees in PI cases are fixed at the levels set out in CPR Part 45. If those success fees are (a) de-regulated[65] and (b) payable by the clients rather than opposing parties, the effect will be to create competition between solicitors on the basis of which firms charge the lowest success fees. The effect will be to drive down success fees below their present levels.

The Law Society strongly recommends that the payment of referral fees should be banned. At page 31 of its Response to my Final Report the Law Society states:

[65] Subject to an upper limit of 25% of damages, excluding damages referable to future losses

> "The Law Society's view is that referral fees should not have a place in legal work for the reasons that Jackson LJ indicates in his report. We believe that they add costs and place incentives on solicitors to provide a lower level of service to their clients. The Society believes that they should be prohibited for all involved in the process, including solicitors, other legal service providers and anyone else involved in the claims process. The Society relaxed the rules under pressure from the OFT and remains uncomfortable with that decision."

At the moment a large part of the costs paid to PI claimant solicitors (sometimes more than 50%) are sucked up in referral fees. This is not a sensible proportion of gross income to devote to marketing. The referrers add no discernible value to the claims process. Once solicitors are freed from the burden of paying referral fees, funds will be freed up enabling them to charge lower success fees. Thus the beneficiaries of competition between solicitors will be the injured claimants, rather than referrers (claims management companies, BTE insurers etc) as at present.

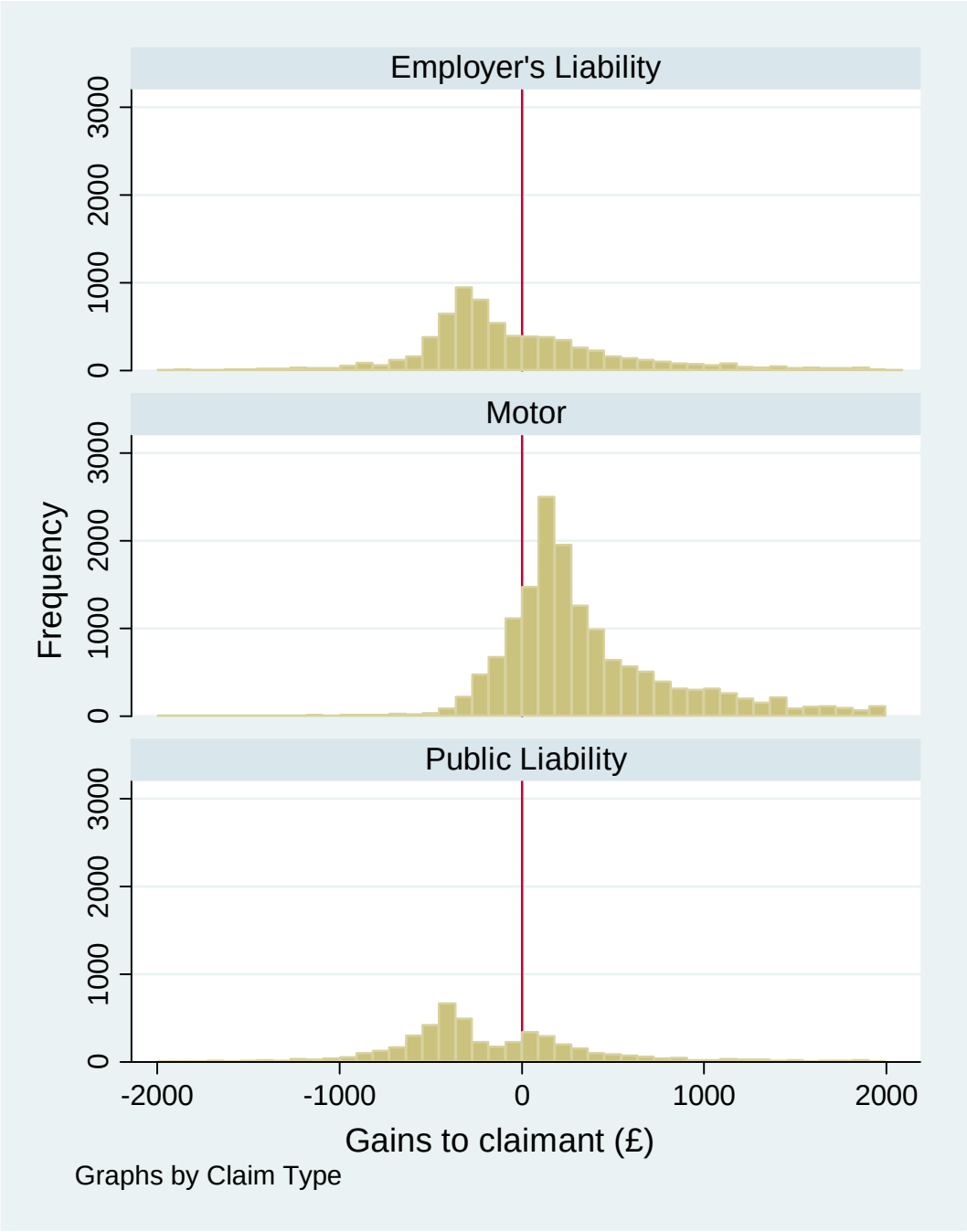
In my view, the combined effect of all the proposals in the Final Report will be to drive down success fees to significantly lower levels than those prescribed in CPR Part 45.[66]

Thus if the whole package of recommendations in the Final Report is implemented, far more than 61% of all PI claimants will benefit as a result of the reforms and far fewer than 39% will lose out as a result of the reforms.

Rupert Jackson 29th November 2010

[66] See the reasoning in chapter 17 of the Costs Review Final Report

Gains and Losses arising from the combination of an additional 10% on damages, one way cost shifting, and non-recoverable success fees/ATE premiums[67]



[67] ATE premiums for disbursements only (estimated)

Total RTA, EL and PL combined