REVIEW OF CIVIL LITIGATION COSTS

A response by the Association of Personal Injury Lawyers

30 July 2009

The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers with a view to representing the interests of personal injury victims. The association is dedicated to campaigning for improvements in the law to enable injured people to gain full access to justice, and promote their interests in all relevant political issues. Our members comprise principally practitioners who specialise in personal injury litigation and whose interests are predominantly on behalf of injured claimants. APIL currently has around 4,300 members in the UK and abroad who represent hundreds of thousands of injured people a year.

The aims of the Association of Personal Injury Lawyers (APIL) are:

- To promote full and just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise;
- To provide a communication network for members.

APIL welcomes the opportunity to provide continuing input to the civil costs review. Given the experience of our members we have sought comment from our full membership before preparing this response. In addition we consulted with our executive committee and past officers.

Our response deals will all questions posed in the paper relating the personal injury law.

Any enquiries in respect of this response should be addressed, in the first instance, to:

Abi Jennings
Head of Legal Affairs
APIL
11 Castle Quay, Nottingham NG7 1FW
Tel: 0115 958 0585; Fax: 0115 958 0885
e-mail: abi.jennings@apil.org.uk

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- Proportionality must be related to issues and not to the value of the claim, if the injured person is to retain his right to bring a claim;
- Fixing costs only strengthens the position of the insurer and increases an inequality of arms;
- Unreasonable defendant behaviour is one of the biggest causes of disproportionate costs;
- The courts should be funded by the taxpayer;
- Before the event legal expenses insurance should be transparent and should be provided without the accident victim being denied access to a solicitor of their choice from the outset of their claim;
- CFAs work to deliver access to justice;
- The continued use of the indemnity principle leads to confusion and allows technical challenges by insurers;
- We do not support the introduction of a CLAF or SLAS as they would rely on a deduction from an injured persons damages and we cannot support this;
- We do not support the implementation of damages based contingency fees;
- The small claims limit should remain at £1,000;
- One way costs shifting, where a claimant is never at risk on costs merits further consideration;
- The removal of the ban on referral fee payments has brought about increased fee levels, a lack of transparency and conflicts which must be addressed;

- Claims process reforms for RTA claims need to be given time to become established before any consideration of expansion into other areas;
- General damages assessment tools are inflexible and do not effectively assess the effect of the loss on an individual;
- We do not support a no cost regime;
- A lack of sanctions in the protocols make it necessary for pre-action applications for disclosure to ensure a claim can progress;
- Through proper case management the courts could investigate non compliance and narrow the issues early on;
- A simple pre-action application similar to the show cause procedure would help narrow the issues;
- Special judges and docketing would improve case management;
- We do not support binding defendants to joint expert reports;
- Sequential exchange of experts evidence on liability is wrong;
- We do not support the suggestion that there should be a presumption that a single joint expert should be instructed with regard to quantum;
- Defendants should not be able to issue proceedings;
- Increased use of court technology such as e-mail and telephone conferencing would make communication more efficient;
- ADR is not a universal panacea;
- Cost capping is one of a number of tools available to the court and should continue to be used only in exceptional circumstances;
- Success fees and ATE insurance premiums should remain recoverable;
- Cost management should already be a feature of or in addition to case management;
- Summary assessment on interim hearings works adequately but it is not satisfactory for fast track trials;
- The rules governing detailed assessment need to be changed to ensure swift resolution.

2 APIL vision

2.1 Cornerstones of the system

It is essential that we maintain individual human rights and prevent injury where possible through social responsibility. Negligent actions will unfortunately happen and when this occurs we must have a system that provides access to care, rehabilitation and full redress to ensure, so far as possible, that the injured person is put back into the position that they were in before the negligence occurred.

APIL believe that the foundations of our civil justice system should be:

- Right to bodily integrity
- Access to justice for all in our society
- Protection of those who have been injured by the negligence of others
- Tortfeasor/polluter pays
- Full care and redress for the injured party
- Speedy and fair resolution
- Public confidence in the civil justice system
- Proportionality to issues and not damages

When considering reform it is essential that we do not depart from the principles at the centre of tort law and the compensation system in this country. Whilst efficiency of process is important we must not lose sight of what is at the heart of our compensation system, namely the injured person, someone who has been needlessly injured through no fault of his own, the person whom the law in England and Wales protects. Personal injury law is one of a limited number of areas of law (defamation and discrimination being the other two) where personal integrity is at issue, it is paramount therefore that any reform in this area is treated with care.

Personal injury law is unlike any other. Most defendants are covered by insurance and claims made against them are dealt with by major multi-national enterprises which are massively resourced. The claimant is an individual. There is a David and Goliath struggle between the injured person and the commercial enterprises of modern insurers. It is essential that those injured should not be treated as commodities or commercial

transactions. The aims of the insurance industry are at odds with this. They are absolutely committed to reducing this debate to an issue about cost and process with little or no consideration for the fact that the system should be about delivering access to justice for injured people. Their professional duty and responsibility is to their shareholders whilst claimant lawyers have a professional duty to act in the best interests of their clients[1]. The insurers' over-riding duty to their shareholders explains their ceaseless efforts to inhibit the right of injured people to obtain full and proper redress through effective legal representation. Insurers will not stop until they have stripped the injured person of access to independent legal representation.

It is often overlooked that an injured person can only succeed in recovering damages if they can establish that another person is legally liable. It is noteworthy though that the insurance industry seek to advance the cause of wrongdoers, the defendants, in a way that would not be acceptable in the criminal field. It is fundamentally wrong to suggest that there should be an even-handed approach to the interests of the victim and the "interests" of the defendant.

2.2 Working for Injured people

Dealing with personal injuries is unlike dealing with any other area of the law. The same can be said of the relationship between a specialist personal injury lawyer and an injured person. The relationship is involved and complex. Not only will the lawyer advise and guide on redress by providing advice on prospects of success, rehabilitation and quantification of the claim, but they also often provide much needed emotional support to the injured person at a time when their life has been turned upside down and the future can seem uncertain. There is far more to the relationship than a simple business transaction and it is this element of the relationship that sets it apart from any other. Injured people are not commodities.

An accident can turn a person's life upside down.

[1] Rule 1.04 Solicitors code of conduct.

A claimant was involved in a head on collision at high speed. He describes the worst part of the event as:

"Seeing that thing coming towards me and not being able to do anything about it… It's just a split second and it's done".

"I thought, 'This is it!' There was nothing I could do, it happened so quick".
"It was like as if everything had stopped still – there was no sound – nothing."

"My first instinct was to get out of the car. I couldn't open the door. I undid the seatbelt, it felt like the whole of this thigh was like jelly – I couldn't stand up. I assumed I'd broken it".

"A man comes over, and says `Just stay with us`. It's quite funny really because he says `I'm a doctor` and then bursts into tears`".

When I feel faint, I think I'm dying."

"The next thing I know the ambulance is there.… My wits were coming back then".

"The man who caused the accident is standing behind me with a grin on his face. Like it was nothing to him".

"When the verdict was passed in court, he looked round and smiled at his friend, paid his fine on his credit card and walked out. I'm thinking `Where's the justice in that?`".

Injury can turn people's lives upside down. When this happens they are looking for reassurance that the solicitor can assist them with obtaining treatment; this could involve surgery, physiotherapy or psychotherapy and resolving financial difficulty by providing employment and/or benefit advice[2].

[2] See appendix one

2.3 Policy questions

2.3.1 Deductions from damages

Damages are purely compensatory and therefore APIL believes that it is fundamentally wrong that costs should be paid out of them. We believe in the principle of polluter pays. It is this principle that allows an injured individual to challenge the large insurance companies. A claim for damage is not a windfall but an attempt to restore the person, as far as possible to their pre-accident status, by those that have been negligent (to the extent that money can do this). Why then should the defendant and their insurance representative be given a rebate by not fulfilling their obligation.

It is a fundamental rule of law that an injured person is only able to claim a net loss, this prevents double recovery. In respect of future losses this principle applies too. It is only the actual potential losses and the needs of the injured that are recoverable. With regard to future losses the discount rate is 2.5 per cent, currently an investment of around 6 or 7 per cent gross return needs to be found to ensure that their compensation keeps pace with inflation. Presently this is impossible.

In addition to these problems claimants with accommodation needs are also prevented from full recovery of accommodation costs[3] and in effect would have to borrow from other heads of damage.

All these problems coupled with the Law Commissions recommendation that damages for pain suffering and loss of amenity are too low, mean that it is totally unsatisfactory for costs to be deducted from damages also.

2.3.2 High costs

Insurance companies routinely claim that costs in personal injury claims are too high.

[3] Roberts v Johnston [1989] QB 878

APIL believes that proportionality must be related to issues and not to the value of the claim, if the injured person is to retain his right to bring a case. The experience of our members is that insurers often play "commercial hardball" with vulnerable victims. They pressurise them wherever and whenever possible, by refusing interim payments, refusing to engage in discussions on rehabilitation, failing to agree medical experts and generally dragging claims out. They argue that this is maximising their bargaining power. The injured person would see this as insurers abusing their already dominant position. On conclusion of a claim (excluding part 45.7 predictable costs claims) a bill will be drawn and sent to the defendant for consideration. In the majority of cases the defendants negotiate settlement of these costs but sometimes only after considerable delay. Cases where agreement cannot be reached will be subject to assessment by the court. An experienced costs judge will determine what is reasonable and proportionate. We therefore fail to see how costs can be described as disproportionate.

2.3.3 Recommendations for reform

We strongly oppose fixed costs in litigation. Injured people are up against large corporate entities and fixing costs will in our view only help increase their strength and power. We believe that by and large our system works well. Most complaints arise from marginal cases around which a new process should not be developed. Costs are in the most part agreed or assessed as reasonable. We do not therefore believe that extensive reform is needed. Minor changes to assist with the management of cases would benefit both parties. In our paper we make recommendations for:

- Removal of the indemnity principle ;
- Fixing of success fees in all personal injury work;
- Robust cases management through development of show cause procedure;
- Increased use of technology in issued cases;
- Development of early interim payments on costs rather than current summary assessment procedure;
- Amendments to Part 47 of CPR (detailed assessment.)

3 Funding of civil litigation

3.1 Proportionality

APIL believes if the civil justice system is to ensure access to justice then the system must allow cases to be run on the basis that an injured person has a right to bring a claim which is proportionate to the issues and not the value of the claim. This is provided for in part 1 of the Civil Procedure Rules.

In every claim for personal injury the burden of proof rests with the injured person. Nothing about a case is presumed and the individual will have to prove each element of his claim, the facts of his case, duty of care, breach of duty, causation and quantum. There is no level playing field between a claimant and defendant insurer. It is essential in these cases that the innocent victim should have the right to fight the claim, which has, after all arisen out of the negligence of another.

Defendant behaviour is one of the biggest causes of disproportionate costs. Defendants routinely fail to act proactively in cases and take liability points which they ultimately do not pursue. This bumps up costs.[4]

The case studies appended are typical of many of the problems faced by claimant lawyers on a daily basis. It is typical of the reactions of defendant insurers and their lawyers – failing to comply with the protocol and requiring the claimant to prove each and every aspect of the claim. APIL believes, that it is only right therefore that cases are assessed on issues and not value.

3.2 Court Fees

3.2.1 Is it wrong in principle that the entire cost of most of the cost of the civil justice system should be shifted from taxpayer to litigants?

[4] See appendix two, three and four.

We do not support the Government's policy of full cost pricing when setting court fees. We believe the civil court system should be funded by the taxpayer, with a contribution from court users, as providing access to the courts, and therefore to justice, is fundamental for a fair society.

Personal injury victims who make court claims do not do so on a whim. They do not use the court voluntarily – they do so because they feel they have no other choice. Often claimants cannot afford to fund court fees because they are financially insecure as a result of the injuries caused by the defendant's negligence.

Our society is one in which a person who is injured through another's negligence can rightly claim compensation for his losses from the tortfeasor. We must ensure that we have a system in place which ensures that any such claims can be fairly heard, and that such a system can be accessed by all who need it, not just those who can afford it[5].

High court fees inhibit access to justice. The argument that the level of the fees is not a bar to people making a court claim because those fees are paid by solicitors or ATE premiums is misconceived because:

1) those forms of funding are not universal, and some clients may therefore have to fund court fees privately; and
2) of those solicitors who are able to fund court fees, many rely on an overdraft or other credit facilities to do so. Relying on ATE or solicitors' credit to fund court fees pushes up costs which ultimately have to be paid for, either in premiums, or in the solicitors' charges.

This problem could be alleviated in part by changing the timing of payment of court fees. In personal injury cases defendants usually pay the claimant's costs, including any court fees. We therefore propose that the hearing fee becomes payable after the trial, when the identity of the party who is ultimately liable for the costs of the case is clear. The court can recover the fees due directly from that party. If implemented, this would eliminate one of

[5] This paragraph is taken from our response to the MoJ's February 2009 consultation regarding fees in the Supreme Court

the difficulties associated with one way costs shifting, which we discuss elsewhere in this submission.

3.3 Legal Aid

3.3.1 What aspects of legal aid which have a direct connection with costs.

We note Lord Justice Jackson's comments that legal aid in effect operates as a banker, providing payments on account as a case progresses, and as an insurer, by guaranteeing a minimal level of remuneration if the case is lost[6]. While we observe it is a banker and insurer, it is for different reasons: legal aid acts as banker to pay disbursements and as insurer to protect against liability for the other side's costs. These are the most significant obstacles to obtaining access to justice today. These obstacles have been partially overcome through the use of CFAs with success fees and after the event insurance (ATE). This regime was introduced to ensure that access to justice was maintained after the withdrawal of legal aid.

3.4 Before the event insurance (BTE)

3.4.1 APIL's analysis of BTE

APIL supports the provision and use of before the event (BTE) legal expenses insurance (LEI) provided injured people are not denied access to a solicitor of their choice and are not penalised for choosing their own solicitor from the outset of their claim.

There is a total lack of transparency in many LEI products, premiums are often unrealistically set and do not fully underwrite the potential outlay. People pay around £15 for the policy believing that it will indemnify them fully. BTE insurers charge large referral fees to their panel firms, which many individuals who bring a claim are not aware of. We also hear of hidden agreements between the panel firms and insurers where a firm will not

[6] Para 4.3, Chapter 12, Part 4 of LJ Jackson's preliminary report

claim against the insurance policy if unsuccessful. Little or none of this is often declared and can compromise the independence of the solicitor handling the cases.

In 1990 the EC Directive on Legal Expenses Insurance (87/344) was incorporated into the law of England and Wales in the Insurance Companies (Legal Expenses) Regulations 1990. It adopted the wording of the Directive in its entirety in Regulation 6, "*Where under a LEI contract recourse is had to a lawyer …… to defend, represent or service the interest of the insured in any enquiry or proceedings, the insured shall be free to choose that lawyer (or other person)*". The word 'proceedings' was interpreted by the then insurance ombudsman to mean that the consumer could only have the freedom to choose his lawyer when court proceedings are issued. This interpretation of proceedings coupled with the BTE providers desire for income from referral fees has meant that injured people are put under considerable pressure to go with a panel firm even when it may not be in the best interests and not the solicitor of their choice.

We repeatedly see copies of letters that have been sent to claimants by their BTE providers making claims such as "our panel solicitor can deal with your claim, more efficiently and effectively". It is also suggested by one leading BTE provider that if a claimant wishes to use a firm of their choice it will "inevitably delay the progression of your claim" as they will have to check the firm's infrastructure before they confirm whether funding is possible under the policy. These are statements which are used by BTE providers to ensure they capture as many claims for their panel firms as possible which in turn generates income for insurers through referral fees being paid to them by their panel firms. These statements often alarm and/or confuse individuals wishing to bring a claim as they are often first time users of the justice system and unused to legal procedure and who, as a result of the accident in which they have been involved, are under immense pressure.

It is also essential that the LEI cover provides sufficient levels of indemnity to fund a claim (we touched on this above). The levels of cover must be sufficient to cover the cost of investigation and pursuing a claim to conclusion. This may include commencing proceedings and conducting a trial. The terms of any LEI policy should not be so restrictive on a solicitor so as to prevent them being able to properly pursue a claim on

behalf of an injured person. A further problem with BTE currently is that policy cover can exclude certain types of civil claim, for example clinical negligence claims and disease claims.

In addition to the issues raised above there is also the difficultly of tackling the low level of public awareness over LEI polices, levels of indemnity required and freedom of choice.

3.4.2 Compulsory BTE recommendation from Bar's CLAF group

APIL believes that if the Bar's CLAF recommendation for compulsory BTE is to be seriously considered the issues highlighted above must be addressed first.

Research conducted by FWD thinking communication in July 2007[7] indicates that there are comparatively few underwriters of legal expenses insurance; that most parties offering products are in fact intermediaries; and that the underwriting model has been affected by the payment of referral fees and common disputes over the free choice of lawyer, which costs insurers more. If the Bar's CLAF recommendation is to be developed legislators need to take in to account some of these "key areas of difficulty"[8] and ensure the market is regulated properly.

The report also draws attention to the importance of ensuring that claims need to be "viewed independently" and properly regulated so that "conflicts of interest do not occur" particularly in light of the changes brought in by the Legal Services Act. This is highlighted in the context of one insurer (or its subsidiary companies) insuring two policy holders and the insurer or a law firm owned by it acting for both policy holders in respect of the same accident. There would therefore need to be a balance between the interests of liability insurers, legal expenses insurers and the injured person.

If the BTE market is to be developed consideration needs to be given to families with limited budgets. These families may have low income but still not be eligible for legal

[7] The Market for 'BTE' Legal Expenses Insurance, prepared on behalf of the Ministry of Justice.
[8] Ibid page 56.

funding from the Legal Services Commission either because of the nature of the claim or because of their means. They may also choose not to buy an add-on BTE policy because of cost and will therefore need to find alternative routes to justice. The FWD report suggested that because of the cost of BTE, as an add on, people with limited incomes will not purchase it and therefore other forms of funding including ATE may still be required.

3.5 After the event insurance (ATE)

APIL believes that after the event insurance is an essential part of ensuring access to justice and should be retained. (See section 7.8 of our paper on ATE and success fees.)

3.6 Third Party Funding

Third party funding can be beneficial to claimants where there is no other method of funding available. This type of funding is, however, currently unregulated and unlawful in personal injury claims. It is essential that if this type of funding is to be allowed that appropriate regulation is put in place to protect the injured person and the Solicitors Regulation Authority amends its Code of Conduct to permit their usage.

3.7 Conditional Fee Agreements (CFAs)

3.7.1 Are CFAs in the present form satisfactory?

Funding is critical in determining the extent to which the injured and bereaved can pursue personal injury claims. Conditional fee agreements (CFAs) are now the main funding mechanism for personal injury cases following the removal of legal aid and consumers have come to recognise the "no win no fee" slogan.

APIL campaigned robustly against the removal of legal aid; however, we have since supported the introduction of CFAs and sought to make CFAs work to deliver access to

justice. They provide injured people without the benefit of legal expenses insurance or other funding options to pursue their claim[9].

Genuine concerns were raised prior to the implementation of CFAs, for example that access to justice may be affected and that CFAs would be unviable for claimant firms because, if they did not win, they would not get paid. APIL believe that through the hard work and determination of claimant lawyers and their representative bodies, to implement success fees and introduce ATE insurance that CFAs now work. We strongly disagree with the suggestion that CFAs are pernicious, and whilst we do not hold data on CFAs our members have not reported to us that there are any significant problems with conflicts of interest between the client and the legal representative. In many ways CFAs encourage a good professional service for injured clients. A 100% up lift at trial gives the claimant lawyers the incentive to pursue a claim until a reasonable offer is made by the defendant and reflects the risks involved in reaching trial.

Any system of CFAs must, in APIL's view:
• Be simple and easy to use;
• Be adequately and appropriately regulated;
• Have appropriate consumer protection; and
• Provide for the recovery of additional liabilities

With the present CFA system, this is what we have, with the exception of the issue of indemnity principle which allows technical challenges to continue (see below). We believe that access to justice is largely served by the healthy funding options that are currently available. We do, however, recognise that there are some areas which do need further consideration namely collective actions and appeals and our comments on these issues are detailed later in this paper.

One reform that is required and for which APIL has consistently campaigned is the removal of the indemnity principle. We believe that since the introduction of CFAs the continued use of the indemnity principle has lead to confusion and allowed technical

[9] See appendix five

challenges by the defendant insurers. Our members report that paying parties habitually look for any breach of the principle to avoid their liability for costs and indeed the indemnity principle has lead to widespread technical challenges and satellite litigation in recent years.

Technical challenges are not for the benefit or protection of the injured person. Instead, if successful they act as a windfall for insurers on cases where claimant solicitors have successfully pursued a claim to conclusion and for which they should be paid at a fair rate.

As we have said above, as the CFA system has developed the public increasingly expect to be able to bring claims without being liable for the cost, regardless of whether they win or lose. In most cases claimants are not charged anything for the cost of bringing a claim because their lawyers waive any claim for costs which is not recovered from the opponent. But solicitors cannot provide their clients with this assurance at the outset of the claim because to do so would breach the indemnity principle and risk the claimant's solicitor being unable to recover any costs from the defendant. The 'CFA Lite' regulations[10] introduced in 2003 (now abolished) sought to dis-apply the indemnity principle from appropriately drafted CFAs. However the wording adopted was insufficiently clear for the Law Society to be able to publish a model CFA and in a climate where CFAs were routinely challenged there was a very low take up of this variant.

There has been concern expressed in some quarters that the removal of the indemnity principle would abolish the only mechanism in litigation which controls costs. We do not agree with this argument. We have guideline hourly rates and detailed assessment which would ensure that fair and reasonable costs are allowed exactly as they are at present. Under the legal aid scheme, the courts regularly determined reasonable hourly rates for the assessment of costs to be paid by the loser, notwithstanding the absence of any agreement with the client and the absence of any link between the rate paid by the loser and those paid by the Legal Aid Board.

[10] The Conditional Fee Agreement (Miscellaneous Amendments) Regulations 2003 ("CFA Lite")

Abrogation of the indemnity principle for personal injury claims would allow the development of a simpler CFA, which would be easy for solicitors to use and for clients to understand and difficult for insurers to unreasonably challenge. This would help reduce satellite litigation in this area and thus save court time and cost.

3.8 Conditional Legal Aid Fund (CLAF) & Supplementary Legal Aid Scheme (SLAS)

3.8.1 The CLAF Group's proposal for CCFs

We do not believe that the Bar's CLAF group proposal for Charitable Contingent Funds (CCFs) should be introduced.

It takes time and therefore costs money, to resolve personal injury disputes. It is our fundamental view that the tortfeasor should pay to put the victim, so far as possible, in the position he would have been in had the wrong not occurred. This includes paying for the victim's legal costs to recover the due damages, so that the victim can receive their damages intact.

Suggestions for a SLAS or CLAF rely on a deduction being made from a successful claimant's damages to enable other claims (which may or may not be successful) to proceed. It would result in claimants receiving less, and defendants having to pay out less (as they would not need to pay out after the event insurance premiums or success fees), thus essentially shifting the cost of personal injury litigation from the tortfeasor to those unfortunate enough to be injured and to the taxpayer through the welfare state because the shortfall in damages would result in some claimants not being able to secure their needs in any other way.

Our further concern is that general damages would have to be increased substantially, over and above the previous recommendation of the Law Commission, to ensure

claimants do not have to pay the price for the negligence they have suffered. (See section 3.9 of our paper.)

Damages often include money to replace that which the injured person has not, and will not, be able to earn, funds to pay for future medical and care costs, and specific allowances to enable the injured person to live, so far as possible, in the way he did before the injury occurred. It simply is not appropriate to take part of these to pay for costs which the tortfeasor caused to be incurred.

Not only is taking part of an injured person's damages grossly unfair, it is contrary to the aim of insurance, which is an established way of spreading the cost of protecting against risk.

In addition to principled objections to a CLAF or SLAS, we question whether such a fund would actually reduce costs, as opposed to shifting the cost of cases from the insurance industry to the injured person. The Bar's CLAF group reasons that "not for profit" bodies would operate a CLAF and pay its lawyers on a non-contingent basis, thus making them "disinterested" in the outcome of cases.

We believe the fact that the body administering the CLAF would be a "not for profit" organisation is misleading. Any such body would still have to pay lawyers' commercial rates.

There are two schools of thought with regard to a solicitor's interest in a case when a case is run on a CFA. We do not believe that either operate in practice to create a conflict between a solicitor and his client, but set them out here because of the CLAF group's assertion that "disinterested" lawyers will save costs. Firstly, a solicitor may be tempted to settle a case earlier than a client is inclined to, in order to receive payment earlier. Secondly, and conversely, a lawyer may push a client to take a case to trial to receive a higher success fee.

In relation to these points, the first, although wrong in principle (and we stress we do not believe this does happen on a regular basis), would not drive up costs, indeed it would have the opposite effect. In relation to the second point, we know that the vast majority of personal injury cases settle before trial, where most recoverable success fees are less than 100%. Furthermore, if the defendant has made an offer to settle which is for more than the judgment, the solicitor will only receive his base costs up to the date of the trial and his success fee will accordingly be calculated on these lower base costs. How then can making lawyers "disinterested" in cases save costs?

3.8.2 Alternative proposals for setting up a CLAF or SLAS;

If it is believed that a collective fund could make efficiency savings, then we could support this provided it is funded by a levy paid by defendants in losing cases, which could replace the success fee and ATE insurance premium payable now. We do not, however, believe this is necessary given that CFAs are working well.

3.8.3 Objections to setting up a CLAF or CLAFs, beyond the CJC's argument.

We have set out above our principled objections to any scheme which deducts money from an injured person's damages.

In addition, we believe there may be two serious practical barriers to establishing a CLAF or SLAS. These are noted in Lord Justice Jackson's preliminary report but are of sufficient concern that we think they are worth setting out here.

Firstly, it would cost a significant amount of money to set up a CLAF or SLAS: in 1998 APIL calculated that it would cost £34 million to set up a CLAF for personal injury claims only[11]. More than ten years later, this figure is likely to have increased. Where would this funding come from?

[11] *Access to Justice with Conditional Fees, APIL response to the Lord Chancellor's consultation, 30 April 1998*) We also refer to this paper in our later submissions re collective actions

Secondly, any mutual fund will rely on enough strong cases entering the scheme. Such a fund can only operate if enough successful cases are operating under the scheme and generate enough money to fund unsuccessful cases, yet injured people with strong cases are likely to be unwilling to join the scheme if it means parting with some of the damages to which they are entitled. Those with weak cases who are unable to find other forms of funding, however, will be very keen to join the scheme.

3.9 Contingency fees

3.9.1 Should contingency fees be permitted in England and Wales?

APIL is against the implementation of damages based contingency fees. We believe that damages have been carefully calculated by the courts and are purely compensatory. The basis for this principle dates back to 1880. Lord Blackman in *Livingstone v Rawyards Coal*[12]*: "I do not think that there is any difference of opinion as to it being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get that sum of money which will put the party who has been injured or who has suffered, in the same position as he would have been if he had not sustained a wrong..."*.

This is a long standing principle of our legal system and we do not believe that it should be overturned to satisfy the insurance industry's claims that cost are too expensive and that this is the fault of the CFA system and claimant lawyers. Causing someone injury through a negligent act is expensive. An incident in which someone is catastrophically injured can mean specialist nursing care 24 hours a day for the rest of his life. Adaptations would need to be made to a home and the possibility of that person working again would be unlikely. An individual whose life is ruined in this way deserves full compensation without deduction.

[12] (1880) 4 App Cas 25

The polluter pays principle is fundamental to personal injury law as it allows an injured individual to take on a large insurance company. It is not in the interests of justice or fairness for costs which have arisen from the negligence of the wrongdoer to be paid by the innocent victim. We were concerned to read in the Civil Justice Council's research paper on contingency fees[13] that if a contingency fee system were implemented in England and Wales there would be "some risk of diminution in overall levels of access to justice for claims where the main remedy is compensation".[14]

Our further concern is that if damages based contingency fees are to be seriously considered for introduction in this country, general damages would have to be increased substantially, over and above the previous recommendation of the Law Commission, to ensure claimants do not have to pay the price for the negligence they have suffered. The Law Commission has considered damages for personal injury on a number of occasions in the last 20 years. In January 1996 the Commission published a Consultation Paper (No. 140) Damages for Personal Injury: Non-Pecuniary Loss. This was followed by the publication of the Commission Report (No. 257) on 19 April 1999. Included was a recommendation that the level of damages for non-pecuniary loss for personal injuries should be increased. The recommendation was set out in the Summary of Recommendations contained in the report in the following terms:

"(1) Damages for non-pecuniary loss for serious personal injury should be increased
We recommend that:

- (1) in respect of injuries for which the current award for non-pecuniary loss for the injury alone would be more than £3,000, damages for non-pecuniary loss (that is for pain and suffering and loss of amenity) should be increased by a factor of at least 1.5, (ie: 50%) but by not more than a factor of 2 (ie: 100%);

[13] "Improving Access to Justice", Contingency Fees. A Study of their operation in the United States of America. A Research Paper informing the Review of Costs. November 2008. Authors Professor Richard Moorhead, Cardiff Law School, Cardiff University, Senior Costs Judge Peter Hurst. Editor Robert Musgrove. Page 6

[14] Ibid

- (2) in respect of injuries for which the current award for non-pecuniary loss for the injury alone would be in the range £2,001 to £3,000, damages for non-pecuniary loss (that is for pain and suffering and loss of amenity) should be increased by a series of tapered increases of less than a factor of 1.5 (so that, for example, an award now of £2,500 should be uplifted by around 25 per cent).

- (3) Finally, if the increases recommended by us are not implemented until over a year after publication of this report, the recommended increases should be adjusted to take into account any change in the value of money since the publication of this report. (paragraphs 3.40 and 3.110)"[15]

The report recommends that the proposed increases would be best achieved by the higher courts exercising their powers to issue guidelines in a case or series of cases. This however, has not yet been done. The Court of Appeal in *Heil v Rankin* [16]and other cases, failed to fully implement the Law Commission's recommendations. After considering all relevant factors, including levels of award in other Member States, increased life expectancy, the evolution of medical science, NHS resources, increased earnings, inflation and the manner of pleading special damages, it decided it was the awards for catastrophic injuries which were in most need of increase and, at the highest level, that increase should be approximately one third. Awards presently below £10,000 were to remain untouched and awards between the higher and lower brackets would be subject to a downward taper.

The Commission recommended that, if levels of awards were not altered in line with the Law Commission's recommendations within a reasonable period (of say three years after publication of the report) legislation should be enacted to achieve this. This reform is long overdue and this must be borne in mind when considering damages based contingency fees.

[15] The Law Commission 257. Damages for personal injury: non-pecuniary loss. Item 2 of the Sixth Programme of Law Reform. Page 108 para 5.8
[16] [2000] 3 All ER 138

APIL believes that all funding agreements should be regulated to ensure the protection of the injured person. Funding is currently regulated by the Solicitors Regulation Authority and Bar Council which provide a code of conduct for lawyers, which include rules on cost.

APIL does not support the introduction of a CLAF or SLAS system as recommended in chapter 18 and 19. We do not support the introduction of any new funding system that makes a deduction from an injured person's damage.

4 Fixed Costs

4.1 Current fixed cost regime

APIL does not support the further extension of fixed costs into other areas of personal injury. We believe that fixed costs result in an inequality of arms between the injured person and the commercial insurer. Insurers are able to do an unlimited amount of work to defend a claim on the basis of principle but the claimant representative is unable to do further work because they will not get paid for it. We believe that this is inherently unfair. This could create an access to justice issue where the difficult cases are not taken on because of the amount of work involved and the claims simply cannot be run within the cost constraints. This was one of the arguments that we raised in the claims process discussion and why APIL believed that the threshold for cases included in this process should be limited to RTAs with a value of no more than £2,500.

We know only too well that the current system has problems. One of the major criticisms of the current fixed recoverable costs regime is that there has been no review of the regime since its introduction in October 2003 and as a result of this there is scepticism amongst our members that any fixed cost regime will be properly monitored and reviewed to keep pace with rising costs.

Predictable costs do not appear to have brought certainty and predictability to everyone involved in the claims process. Of course for many, the scheme works well, but since

problems with the scheme are reported to be rife the failings in the current system must be considered in light of the proposed reforms.

In spring 2008 APIL members were surveyed on costs issues. One unexpected outcome from the survey was the number who reported continuous difficulties recovering costs under the predictable costs scheme (CPR Part 45, Part II). A representative sample of the comments from the survey are set out in the appendix [17] but can be summarised as follows:

- Failure by losing party to promptly pay predictable costs;
- Failure to pay agreed damages;
- Continuous attempts to challenge the predictable costs claimed or aspects of them;

Despite the decisions in *Nizami v Butt*[18], *Kilby v Gawith*[19] and *Wetzel v KBC Fidea*[20] in which the basic fundamentals of the predictable costs scheme were challenged by defendants who failed in the attempt, such challenges appear to be continuing unabated.

4.2 Applying fixed costs to all fast track cases

APIL does not support the further extension of fixed costs to all fast track personal injury cases for the reasons given above.

There have been unrelenting calls from the insurance industry that claimant costs are too high. Fixing costs does not fix the amount of work involved. All litigation is different; no one case is the same. Cases can involve disputes on liability, causation and quantum. They

[17] Appendix six
[18] [2006] EWHC 159 QB
[19] [2008] WLR (D) 163
[20] 2007] EWHC 90079

can also involve complex special damages, foreign speaking clients, multiple defendants, children and patients, multiple experts, multiple injuries, multiple witnesses and inquests. These issues aside a case must be proved and this involves time and cost.

The amount of work involved also often depends on matters put at issue by the defendant. There can be complex liability arguments in all types of case including the lower value claims. If a defendant makes an issue of liability and he is proven wrong then the cost of the claimant lawyer in dealing with that issue must be met by them.

APIL's concern is that if costs are fixed and the process is uncertain and unpredictable there is a danger that the injured person will suffer as access to justice could be compromised. If a solicitor is restricted in the amount of work that he can do in order to prove the claimant's case a claimant will not necessarily get the rehabilitation or compensation his is entitled to.

There is a general view amongst defendants that it is the lower value personal injury claims that are not, in their words 'value for money' and there is the need for a personal injury market. This issue has been addressed by the Government drive to streamline the claims process.

Professor Dame Hazel Genn, who is a leading authority on civil justice, in her presentation at the Birmingham seminar made the point that she was not convinced by the data supplied by the judiciary or insurers as it was not representative. She recognised that the vast majority of PI claims involve lower damages and these claims have an irreducible minimum amount of cost which means that at the very lowest levels of damages, costs will be more than the damages recovered. This is due to the burden of proof and the need for claimants to prove their case, the requirements of the protocol and of securing the most basic evidence. She said every case regardless of value would incur a certain unavoidable cost.

In an attempt to tackle this, the Ministry of Justice has worked with APIL and other stakeholders to develop the claims process. The Ministry of Justice has said repeatedly

that the process would be limited to RTA claims because these make up 70 to 75 per cent[21] of all claims for personal injury. Given the high percentage of claims that this new process will cover reforms would not be taken forward in other areas until the new process had been reviewed and had had time to settle in. We therefore know that the claims process and the fixed costs under this process will deal with a large percentage of all PI claims. The development and implementation of any new process must be given time to become established and any teething problems ironed out before it can be considered suitable for expansion into other areas. We suggest that the process is monitored and reported on for three to four years before further cost fixing is considered.

Through the work lead by the Ministry of Justice, the less complex RTA claims have effectively been hived off into a streamlined system which has been costed with this in mind. The cases left outside the process are therefore, by their very nature, complex. Such cases will involve liability disputes and arguments on causation and a one size fits all approach cannot be applied. During claims process discussions the insurers suggested that there was the potential for 400,000 cases to be included in this new process. Based on a broad-brush calculation there is the potential for a basic saving of £270 million. This calculation does not include cases that would have been litigated under the old process because of a dispute on quantum but under the new process now fall to be dealt with by a paper or oral hearing. Savings there will be much greater for insurers and this has been achieved by tackling the system of which costs are just a symptom.

Insurers regularly argue that fixed costs are fair because they are based on a "swings and roundabouts approach". Under the new process all the "swings" have been removed and therefore what is left is the "roundabouts" ensuring fixed costs for these remaining cases are impossible to calculate with the current data that is available.

Given the recent increase in the fast track limit to £25,000 any work in this area will involve setting fixed fees for cases with a wide range of value and complexity. This could cause a potential access to justice issue with the potential for cases to be cherry picked, creating access to justice problems for those claims at the top end of the range.

[21] Page 38 Case track limits and the claims process for personal injury claims summary of responses.

We do not believe that the matrix included in the preliminary report is the solution for all the reasons given above. We have concerns about a number of the figures in the matrix as they do not seem comparable and we are therefore interested to know what data the matrices are based on. For example the figures suggested for disease work seem far too low compared to the employer's liability claims. This which would suggest that the data set is far too small. It is essential that the data sets are clear and transparent and large enough before this work can be properly considered.

There is a currently a significant lack of data for cases above £10,000 and unless this is urgently addressed it will simple not be possible to consider fixing costs over that value.

Procedural reforms are essential and will need to be implemented first. The current process does not drive behaviours and it is bad behaviour that can increase cost. If the protocols continue to lack teeth[22] then behaviours will not be improved and this will create problems for claimant lawyers working on fixed fees. If defendants continue to be allowed to routinely provide blanket denials without narrowing the issues[23] this will again create problems for claimants restricted by fixed costs as the work involved will not have been costed. One solution to this would be to develop exit points from the predictable costs regime developed to allow costs at large.

Serious consideration will also need to be given to excluding some types of claim such as employers liability long tail disease work. These are inherently complex with the added difficulties and problems of tracing an employer.

APIL has supported predictable costs where there is a predictable process. Such a system must have clear exit points, effective and responsive judicial case management and fixed costs for defendants.

[22] See our recommendations in paragraph 7.5
[23] See our recommendation for a show cause procedure appendix seven

4.3 Fixed cost regime above the fast track

4.3.1 Should costs above the fast track continue to be at large?

As stated above we object to the extension of fixed costs in any way and therefore do not believe that they should be considered for multi track work. Cases over £25,000 involve complexities and often catastrophic injuries, which are not suitable for a fixed cost regime.

5 Personal Injury Litigation

5.1 Small claims

5.1.1 Should the small claims track be increased?

We are disappointed that once again the small claims limit is under threat. The Ministry of Justice undertook a thorough review of the small claims limit as part of its work regarding streamlining the claims process for personal injury claims starting in 2006, and announced its decision in July 2008, which is only a year ago. It concluded that the limit should remain unchanged.

As a result of its work to streamline the claims process, the Ministry of Justice is set to introduce a carefully consulted upon and constructed claims process for road traffic accidents (which form the majority of personal injury cases) for cases between £1,000 and £10,000, and in which solicitors will be paid on a fixed fee basis. This is in response to calls for the system to be made more efficient. We do not think that we need to look at the process again at this early stage, before the new process has even been put in place.

Despite our belief that the small claims limit should not be discussed again, it is clearly under review in Lord Justice Jackson's report, and so we set out below why we believe the small claims procedure is not appropriate for personal injury claims. Our position has not changed since we submitted our response to the Ministry of Justices consultation. We strongly believe that the arguments we made are just as valid now as they were when that

response was written and, as such, many of the arguments contained in this section have been reproduced from there.

The Ministry of Justice's response to the relevant consultation question about the small claims limit says "The majority of respondents agreed that the small claims limit for personal injury claims should remain at £1000"[24]. The response goes on to say that those that agreed with this proposal were from a cross section of interest groups but the responses which disagreed were largely from local authorities (who are frequently defendants) or other defendants/insurers. In our view, this is a clear reflection of the fact that raising the small claims limit will benefit defendants/insurers at the expense of the claimant.

This view was also expressed by the then Lord Chancellor, Lord Falconer of Thoroton concurred with when he gave his speech to the APIL annual conference in 2007 and said that raising the small claims limit *"would solve the problem of high costs at a stroke. But it would solve it at the cost of denying a great number of people access to legal representation. Ultimately denying them access to justice….It seems that raising the limit will be to the advantage of the defendant, not the claimant. And more often than not, it is the most vulnerable that would suffer."*

The small claims procedure is designed to resolve disputes concerning issues such as a faulty fridge or other consumer matters, not one aimed at compensating a person for bodily injury.

Even for a relatively low value personal injury claim, the claimant needs to prove his case. This process is complex. To do this he not only needs to argue the facts of his case, but prove that the defendant owed him a duty of care, that the duty was breached, and that the breach of duty caused his injury. The claimant then has to be able to understand a medical report, put a monetary value on his injuries and assess his financial losses.

[24] P.7, MoJ response to Case Track Limits and the Claims Process for Personal Injury Claims consultation, July 2008

Furthermore, a claimant is unlikely to know about the rehabilitation that may be available to him.

Claimants in person accept offers of settlement that do not adequately compensate them for their injury as they simply do not know what their injury is "worth" or the potential long term effects they may suffer. Not only are general damages difficult to quantify but there is also the difficulty of assessing financial losses such as care and earning. If the small claims limit is raised, more claimants will have to try to settle their claims without legal advice. This will result in a significant number of claimants not receiving "proper"[25] levels of compensation. Unrepresented claimants receive lower damages in the small claims court than represented claimants[26]. In 2005, a survey of our members showed that the average increase from the defendants' first offer to the final settlement is 53.14 per cent[27].

More recently, APIL members have been letting us know of cases where the liability insurer has tried to settle the case directly with the injured person, often offering to handle the claim by, for example, getting a medical report or sometimes instructing their own panel solicitors[28] (known as third party capture) for far less than they are worth. These examples have shown up an appalling and apparent increasing trend of insurers approaching people direct and early, offering them far less than the proper amount of compensation.

A sample of cases, tabulated below, shows the increase from the defendants' first offer direct to claimant, and the final settlement reached with the aid of a solicitor. These increases are far higher than even 54 per cent:

Insurer	**Offer direct to claimant (£)**	**Final settlement through solicitor (£)**	**% difference**

[25] We use this term with the same meaning as Lord Justice Jackson has adopted, p.243 of his preliminary report, that which the courts would award in 2009.
[26] Hansard, column 1845W on 20 June 2007. In a written answer to a parliamentary question, Justice Minister Harriet Harman listed the damages awards made to represented and unrepresented claimants in the small claims track over the last ten years. On average, represented claimants received damages that were 20.79% higher than those awarded to unrepresented claimants.
[27] APIL membership research, analysis of responses published March 2005
[28] See appendix eight

Zurich	0	5,000	N/A
Quinn Direct	200	2,900	1350%
Saga	500	2,600	420%
Tesco	750	15,000	1900%
Quinn Direct	800	2,634	229%
Elephant	1,000	5,000	400%
Elephant	1,000	12,500	1150%
RSA	1,750	4,250	143%
Churchill	2,000	10,000	400%
Quinn Direct	2,000	11,000	450%

This is a small sample but one that illustrates the brazen approach which defendants and their insurers take to settling cases when injured people are not represented. If all those in the above ten cases had accepted the original offers, the insurers would have saved £61,684 in damages. The figures speak for themselves.

Not only would unrepresented claimants not have the necessary knowledge to prove their case, they may be put off by the thought of having to 'take on' a large defendant or insurer, and would not bring a claim. A 2005 MORI poll showed that 64 per cent of those surveyed would be unlikely to pursue a claim for personal injury without the help of an independent solicitor[29].

This is not surprising. If claimants do not have an independent solicitor there is an inequality of arms between the claimant and defendant. The latter is invariably insured and the insurer has vast resources to defend the claim. Even a relatively junior insurance company's claims handler is familiar with the personal injury process, having dealt with many other cases, and has the time to deal with cases as doing this is his job. Contrast this with an injured person, who has probably never been in this position before, and who may have to deal with the claim in his spare time, and the disparities become clear. Add to this the fact that claims handlers have the support of more experienced colleagues, and that an insurance company can afford high level legal representation if it chooses to do so

[29] MORI poll commissioned by APIL and carried out in February 2005

(irrespective of whether the costs of this may be recovered) and the need for the injured claimant to have legal representation in order to have a fair chance of taking his case against an insurer-backed defendant is obvious.

Pursuing a personal injury case through the small claims court system can be particularly difficult for a claimant if English is not his first language, if he is illiterate, or if he is not well-educated enough to be able to understand the small claims system. Injured people should be fairly compensated irrespective of their ability to bring a claim: for this to achieved, legal representation must be available to everyone.

Furthermore, a case with an apparent value of £1,000 or £2,000 should not be assumed to be straightforward or insignificant. The complexity of a case cannot necessarily be determined by its apparent value or the manner in which the injury was caused. Low velocity impact arguments in RTAs can often be of relatively lower value but the issues involved can be complex. Disease cases such as hand/arm vibration syndrome are another example of relatively low value cases which are never the less highly complex.

In addition, a relatively small sum of money can represent a significant amount of money to many people. Someone working 35 hours per weeks and earning the minimum wage of £5.73 per hour would have to work for three months to receive just over £2,000: this sum cannot be said to insignificant in this context.

We note Lord Justice Jackson's comments that increasing the small claims limit would need to be accompanied by safeguards for unrepresented claimants and seek to address the proposals for doing this.

One suggestion is to restrict the new limit to certain types of claim, and that the small claims procedure would therefore only be used for the most straightforward cases. This will not work as it is not known whether a claim is straightforward or not until it has concluded. Hindsight is a wonderful thing, and you can look back on a minor whiplash case where liability was not disputed and say the case could have progressed smoothly through the small claims court. You can also, however, look back on a case where liability

was not an issue and the injuries at first seemed minor to find that an admission has been withdrawn and the claimant has required back surgery. Given the nature of bodily injuries you simply cannot tell from the start of the case whether it will turn out to be complex or not.

Furthermore, this proposal is only a "safeguard" for those claims which would fall outside the small claims process, and provides no protection for those claimants whose cases would fall within it.

The second proposed safeguard is to introduce a software system to calculate general damages. We set out or views on this elsewhere in our response.

Finally, providing some form of legal advice is also suggested. We welcome this proposal, although to provide protection for claimants this would have to be more than minimal, and we therefore question what the distinction would be between a new small claims process in which claimants are represented and the current process.

5.2 One way cost shifting

5.2.1 Should there be one way cost shifting for personal injury claims?

A true one-way costs shifting system, where the claimant is never at risk on costs, could work for personal injury claims.

In order for one way cost shifting to work, several aspects of the costs system would have to change. APIL believes that the concept of a claimant not being liable for costs is an interesting proposal and merits further consideration.

If serious consideration is to be given to this proposal we would want to ensure that:

- Damages remain compensatory;

- The precise extent and/or circumstances in which the claimant could be at risk for costs (including risk on their own disbursements and adverse costs orders) is clear;
- ATE insurance is retained for the purpose of any residual risk and disbursements.

We believe that one way costs shifting would not remove the need for ATE. Claimants would still need to insure against the risk of incurring disbursements which can be substantial given the levels of court fees and expert fees.

APIL believes that ATE should be retained. If it were to be removed there would be serious repercussions for the injured person. Even a reduced premium income for insuring for a potentially lower value risk, i.e. insuring against the risk of disbursements, would affect the ATE insurance market. This may be detrimental to the whole ATE market: the ATE market is currently open to all types of litigation, but it is accepted that the majority of take-up is from the personal injury field and a loss of some of the premium income would make the remaining ATE insurance market difficult to sustain, with the knock-on access to justice effect that would have.

5.2.2 'Brakes' upon claimant behaviour

In our view, in the current system where the majority of claimants have ATE insurance, the existence of the ATE insurer can act as a semi independent check on the merits of a claim because of their needs to be satisfied that the prospects of success are better than 50 per cent. Many ATE providers will also audit files to ensure compliance. This brake would remain if one-way cost shifting with the retention of ATE, were adopted.

There are some obvious merits in considering one way cost shifting as an option but we believe that further consideration into the detail of such a change needed and once developed, any proposals must be subject to further consultation with the profession.

5.3 PI transaction costs

5.3.1 Referral fees

APIL never wanted to remove the ban on payment for referrals. As changes to the civil justice system started to take hold, however, it became clear that the consumer could lose out, as there was no transparency or consistency in what was a chaotic system.

This situation forced us into the position of reluctantly supporting removal of the ban, provided the client is protected from unscrupulous operators and any arrangement made between solicitor and client is completely transparent. We also strongly supported the final wording in the professional rules stipulating that the agent who refers the client to the solicitor should not have acquired the business through any marketing practices which would not be allowed under the solicitor's publicity code, such as cold calling.

APIL does not see or support the need for middlemen i.e. claims management companies and the referral fees that they brought with them. Referral fees are now established within the legal market place, claimant solicitors have the option as to whether or not to pay for referrals or whether to self market their business. The latter could take the form of advertising, continuous updating of website and web material or conference advertising.

Our members continue to voice concerns about reports of very high referral fees being charged, which may affect the way a case is handled. For injured people our concerns lie with the ongoing lack of transparency surrounding the referral fee system. Insurers regularly complain that referral fees are a cause of increased costs, yet we know that insurers are recipients of referral fees from their panel firms. These are often agreed on a closed bid (where there is secret bidding by firms wanting to join a panel those willing to bid the highest figure are often those accepted). This often means that an injured claimant is being kept in the dark about how cases are being conducted. We would like to see full transparency of referral fees paid to insurers to ensure a level playing field and the exploration into the possibility of capping referral fees.

5.3.2 The RTA claims process

All stakeholders involved in the claims process discussions have devoted an enormous amount of time to ensuring that the process is workable and economically viable. When discussions surrounding the process for road traffic claims under £10,000 were being developed the process was done so by drawing on strengths in the current civil procedure and by addressing the problems. We are keen to see this process implemented in 2010 as is now intended by the Ministry of Justice and we believe, therefore, that if reforms are to be implemented as a result this review, this must be done alongside the claims process.

The development and implementation of any new process must be given time to become established and any teething problems ironed out before it can be considered for expansion into other areas. Despite our heavy involvement in developing this process it has not reassured us that this system is yet right for development into other areas.

We do not, therefore, believe that the process should apply to all fast track claims. The new process places serious restrictions on a claimant's ability to prove his case. Personal injury law has distinctive features which mean that claimants need particular protection, and yet to apply the proposed process to all claims within the fast track is to give personal injury claimants fewer rights than any other claimant using the fast track.

The new process is designed to deal with low value cases which incur what are seen as disproportionate costs. We do not therefore believe that at this time the process would be suited to other main types of case such as employer, public and occupier liability.

Employers' liability (EL)

The relationship between an employer and employee is unique. An employer has power over his employees: he pays wages, controls workloads and has the ability to discipline workers. If an employee has a potential claim against his employer, the dynamics of this imbalanced relationship are likely to influence the way in which the claim is conducted.

Under the process contained in the original Department for Constitutional Affairs consultation paper, *Case track limits and the claims process for personal injury claims*, it was

proposed that the new system for EL claims would allow an employer six weeks to investigate a claim, during which time the claimant could do nothing to advance his case. It is likely that the witnesses would be approached, by his employer or perhaps the insurer's claims handler, at his place of work. This could be intimidating for the injured person's colleagues who may have concerns about the stability of their own employment. The employer or insurer, who has a vested interest in the outcome of the case, is likely to ask questions in a manner most beneficial to them: as a result, the answers may not be accurate. Claimants will then have to deal with the results of a denial of liability based on incorrect evidence. The injured person's colleagues may then face further questions from both the parties' representatives, putting the colleagues under more pressure and driving up the costs of investigating the claim.

In addition to the potential for employers to pressurise witnesses, they may also pressurise claimants who are still working for them to abandon their claim or deal directly with the employer's insurers. One APIL member has told us about a case in which the defendant employer and his managerial staff visited the claimant in hospital, where he was awaiting a foot operation to deal with a fracture and other injuries. The aim of the visits was to try to get a statement from him before he contacted solicitors. In this case, the claimant's solicitors have been able to stop this pressure being applied by telephoning and faxing the employer. Another member tells us that his client has been approached by his employer to sign a method statement retrospectively after the accident. If the new proposals were introduced for this type of case, the implication is that this practice would be allowed. This puts claimants under undue and unfair pressure and could lead to injured people being undercompensated for their losses.

The scope for the defendant to unduly influence the claimant does not exist in other types of case such as those which arise as a result of RTAs or a slip or trip on a public highway.

Furthermore, many employer liability cases involve allegations of breach of statutory duty, rather than negligence.

Currently, a claimant's solicitor sets out any alleged breaches of statutory duty in the letter of claim, enabling the defendant to look at the specific details of the allegations and admit or deny breaching these. It is important that these allegations are clearly explained to the defendant, so that the decision the defendant makes is an informed one. It cannot be assumed that defendants or insurers' claims handlers have the necessary knowledge of the statutory requirements to allow them to know whether they should properly admit or deny a case.

If employers' liability cases caused by one-off incidents are included in the new process, insurers will be put in a position whereby their policy holders are denying cases which they should be admitting. This will result in the case having to come out of the new process, and the claimant having to put funding in place and investigate the claim. The claimant's case may have been prejudiced by having to wait six weeks from notifying the defendant of the claim. In any event, the case will be delayed and more expensive to bring, because any after the event insurance that has to be taken out will be done so on the basis that the defendant has already denied liability, and therefore become considerably more risky to insure. Furthermore, it is not always easy to identify who the employer is, especially in an environment where there are likely to be main and sub contractors, or where agencies are involved.

Finally, it should be remembered that litigation assists with the implementation of health and safety laws. It should not be a policy of this Government to make it cheaper for employers to injure their staff.

Disease cases

The new process is entirely unsuitable for claimants in disease cases. In a long tail disease case both the employer and insurers must be found.

There may be multiple defendants; even if there is only one defendant, there may be multiple insurers; and even if there is only one defendant and one insurer it will often take more than the proposed five days to discover that, let alone be economical to carry out such necessary work under a fixed costs regime.

There are often issues of limitation that do not arise as a result of injury caused by a single event.

Furthermore, issues such as apportionment between defendants, reductions for negligent defendants for non-negligent exposure and (cumulative) causation issues may all arise. There is a separate protocol and a higher success fee for disease cases, which shows that they are already recognised as potentially complex.

Public & occupier's liability

In many of these cases the identity of the defendant is not always clear. In a tripping accident on a tow path, for example, the defendant might be the local authority or it could be British Waterways. Furthermore, the work required to establish the defendant's identity may make such cases unattractive to solicitors, depending on the level of fees.

In addition, public authorities have a statutory obligation to repair a highway if they know of a defect. Early notification of potential claims will oblige defendants to repair the defect before the claimant has had the opportunity to collect evidence of it. This makes the injured person entirely dependent on the defendant preserving and producing documents to prove his claim. Such records cannot be relied upon as being as detailed as they need to in order for the claimant to prove his claim. Even if properly kept, the records might, for example, record that a paving stone was repaired on a certain date on "the High Street". They are unlikely to record the exact location of the defect, and they certainly will not be as detailed as the evidence currently gathered by claimants. This evidence usually includes photographs of the defect which show its extent and context. Such evidence simply will not be available to the court if the defect is repaired before a claimant is allowed to investigate his case. This will irreparably damage a claimant's ability to prove his claim.

We also believe that defendants will find it very difficult, if not impossible, to carry out their investigations within any reasonable time limit which may be set. This is because, as mentioned above, the defendants in these cases have no prior knowledge of the potential claim.

5.4 Assessment of general damages

5.4.1 Can the assessment of general damages for personal injuries be made simpler and more predictable in lower value cases?

Tariff systems are inflexible and will not benefit the injured person who, in each case, is an individual who suffered injuries whose effects or consequences will not be directly comparable with the effects of those same injuries suffered by other claimants. It is impossible for an assessment tool to cater for every type of injury and the effects every injury will have on different claimants. For example, two individuals injure their dominant hand. This is bad enough, but one of those individuals also plays the guitar, to a high standard, for pleasure. The effects of the same injury are necessarily different for each of them.

The purpose of general damages is to compensate injured people for their pain, suffering and loss of amenity. This is entirely subjective. No tool or table will be able to properly assess the effect of the loss on each individual. There is no single right award from a particular injury as an injury can affect different people in different ways for example a healthy young adult living at home with his parent will be much less affected with a broken arm than an elderly person who lives alone as basic tasks will prove a problem.

In addition, many of our members have told us that the court has never awarded a lower amount than defendants have offered on the basis of calculations carried out by, for example, Colossus. This assertion has recently been verified by a survey conducted by the Personal Injuries Bar Association (PIBA) which surveyed its members earlier this year on cases its members had handled in the preceding six months. The survey criteria involved cases where the main issue was quantum; the defendant's offer had been made based on details entered into a computer program and the defendant insurer had an actual or apparent policy of refusing to increase such offers. The survey results were emphatic: in the 1,349 cases which fitted these criteria, there were a mere 19 (1.3 per cent) cases where the claimant failed to beat the defendant's computer generated offer.

While we agree that calculation of damages may necessarily be complicated dependent on the nature of the injuries involved, we do not accept that the introduction of further electronic processes such as those suggested in the report would create any more ease or certainty.

We do not object to the introduction of technology where practitioners find this helpful. Indeed, many of the sources that are currently used to calculate general damages such as Kemp and Kemp, and the Judicial Studies Board's Guidelines are currently available in a digital format. In addition, a majority of law firms subscribe to extensive searchable case law databases such as Lawtel, Westlaw and Lexis PSL. Lawtel currently has over 80,000 practitioner users and for personal injury awards alone, contains the searchable electronic details of over 2,800 quantum reports, reported and unreported, in an archive spanning the past 25 years. Westlaw is more commercially orientated, but has a formidable database of reported cases and legislation. Lexis PSL provides access to a searchable quantum database of over 2,000 cases. These databases are run by Thomson Reuters and Lexis Nexis respectively and claim to have no claimant, defendant or insurer bias in their content and provide excellent resources for personal injury lawyers who, using their skill and judgment can calculate the correct amount of a likely award already.

However, there is a risk that such databases, should they become the main source of claim valuation, can be 'swamped' by decisions with either claimant or defendant bias. We are aware that Kemp and Kemp, another quantum calculation publication (which has paper and digital formats) found itself receiving inordinate numbers of county court decisions on quantum from defendant sources, and had to introduce procedures to ensure that its valuations are not biased one way or the other in the future.

We firmly believe the proposal to introduce a new and compulsory computerised assessment tool is a defendant-driven attempt to save costs rather than a proposal to ensure injured people receive the appropriate level of damages. Even if it were possible to create a system which contained no claimant or defendant bias in the calculation of its awards, it seems likely that the result of using the software would be a range of values for each particular injury. Without recourse to recently settled or litigated claims, it would be

very difficult for claimants to convince the defendant or defendant's insurers that anything other than the lower end of the range should be payable and it would be extremely likely, for all the reasons already discussed in our earlier submissions (duty to shareholders, profit margins and so on) that insurers would pitch their offers to settle towards the bottom end of any such range.

This view is backed by recent events in the USA. There has been long-running class action litigation against various US insurers who use Colossus software to value personal injury claims and Computer Science Corp the US distributor. The actions have recently settled out of court, with the settlement document containing various pledges as to how the software will be used and marketed in the future. "The Colossus recommendation is only a tool, and should not be used as the sole basis for determining the amount to be paid for a Bodily Injury Claim," the court documents state[30].

The original class action was filed on 7 February 2005 against various insurance companies which use Computer Science Corp.'s software Colossus, Insurance Services Office's software COA and Claim IQ's software Injury IQ. The class action alleged that insurance companies use these software programs to systematically undervalue bodily-injury claim settlements in an effort to increase profits. Defending the use, the insurance companies argued these programs can provide a consistent estimate for bodily-injury claims through the data inputs of insurance adjusters.

Litigation included: *Hunsucker vs. American Standard Insurance Company* in which defendants were accused of "lowballing" bodily injury claims through their use of Colossus. A preliminary settlement approval hearing included over $52 million for class members.

In *Sweeten vs. American Insurance Company*, the class settlement includes the payments of an incentive fee to plaintiff for $5,000 and supplement for eligible class members.

[30] *CSC settles out of Colossus class action* 19 March 2009, Michelle Massey, Southeast Texas Record (S. E, Texas' Legal Journal).

In *Easley vs. Ohio Casualty Insurance Company*, the proposed settlement stipulations include over $5.9 million to supplement cash payments to eligible class members.

In *Johnson vs. Clarendon America Insurance Company*, preliminary settlement stipulations called for $744,418 for class members.

In *Atkinson vs. General Casualty Company of Wisconsin*, a proposed settlement stated stipulations including $2.7 million for class members.

In addition settled Miller County class action Colossus cases include:
Gross vs. Graphic Arts Mutual Insurance, Republic Franklin, Insurance and UTICA.
Hunter vs. American Central Insurance Company. Settlement includes an incentive fee to plaintiff for $5,000 and $1.8 million to class members.

Zareboki vs. Hartford Insurance. Approved on 13 Feb2007, eligible class members received over $215 million.

While admitting use of the software, those settling insurance companies continue to deny the plaintiffs' allegations of under-settlement.

Another concern regarding the introduction of software to assess damages relates to the development of the law in general. The law of personal injuries does not stand still. Any system must allow lawyers to take on cases which include a degree of risk, otherwise injured people whose cases involve a degree of risk will not be able to find a solicitor willing to represent them, and only the cases that are more certain to be successful will be taken on.

Commoditisation of the calculation of the award in the way suggested would lead to the death of reported case law for those types of claims included in the scheme. No advances in the law would be possible. For example, in the 1980s, while representing fire-fighters, Andrew Dismore (APIL member and now MP for Hendon) persuaded the courts to accept

a new head of damages for "loss of congenial employment", now established in personal injury law. As Lord Rodger recently said at APIL's annual conference, cases such as *Corr v IBC* [31] and *Savage v South Essex Partnership Foundation NHS Trust*[32] (liability for suicide) and the case of *Gray v Thames Trains* (*ex turpi causa)*[33] show that the law relating to personal injuries continues to develop. While it is accepted that settlement and avoidance of trials is a good thing in the modern litigation process, Lord Rodger ensured that his view of any changes to the claims process was made clear. He said, "I think it is right to remember that we need new cases if the law is to be refreshed and kept up to date. Those of you who bring and fight those new cases perform a service from which all members of our society ultimately stand to benefit."

5.4.2 Is under-settlement of claims perceived as being a significant problem, and, if so, whether the use of such a settlement system might benefit claimants by reducing the risks of under-settlement?

See also our comments in answer to the question posed immediately above. We are aware that when electronic settlement software is used, there is a serious risk of under-settlement. We disagree, as we have expounded above, with the view that the use of such a system might benefit claimants by reducing the risk of under-settlement. The use of the JSB guidelines which are regularly updated using awards made by the courts, along with reported and unreported quantum reports remains the most effective way of ensuring that claimants receive the correct and most up to date sum for their injuries.

APIL members were canvassed for their views of the currently existing software. These were published in APILs membership magazine and make instructive reading. They include:

"As I was alarmed at the significant difference in valuations I spoke to the [defendant insurer's] solicitor who cut the conversation short by apologising, stated her principals had instructed her to pay in this sum calculated by Colossus and whilst she admitted her view

[31] [2008] UKHL 13
[32] [2008] UKHL 74
[33] [2009] UKHL 33

that generals were probably [double the amount offered] she had no authority to negotiate. Clearly this is going to result in a hearing".

"I have come up against Colossus on many occasions. Generally, when insurers will not give authorities in support of their valuation it is because they are using Colossus software. I recently settled a case where the insurers made an offer of £4,000. They did not put forward any authorities and I asked if they were using Colossus. They admitted they were and said they could not go above £4,200. My estimate of general damages was £6,000. Proceedings were issued and the solicitors instructed by the insurers then rapidly agreed general damages of £6,000. When dealing with insurers it is essential that we justify our valuation of general damages as much as possible. Showing which section of the JSBG and citing the authorities shows we are making a genuine effort to settle the claim."

"We were recently involved in a case where the third party insurers were [well known defendant insurer]. They instructed X solicitors. A Part 36 offer was made at £5,600 which was clearly inadequate and, off the record, accepted as such. We countered with a Part 36 proposal at £8,000. The claimant received £7,803."

5.4.3 Whether the use of such a system might assist in reducing the (currently substantial) costs of handling lower value personal injuries claims.

There is no doubt that those defendants and their insurers who currently use such systems do so in the belief that they cut the costs of claims handling. By introducing such systems, they no longer need to employ the same type of claims handlers as they did before their introduction. These systems can be operated by relatively inexperienced (and less expensive) staff who need only to be able to differentiate between the cervical spine and the cervix when inputting the relevant data. We have anecdotal evidence that even this is not always possible. An APIL member recently commented that when he explained to the defendant claims handler that the client's cervical spine had been damaged, the response he received was to the effect that the handler wanted to know why the claimant had changed his story as he had originally said that his neck was injured.

The introduction of a mechanised process to reduce costs envisages relatively unqualified staff working on the claim. While we accept that a lot of the work on low value cases may be carried out by more junior staff, more experienced staff are needed to properly advise clients on some aspects of their claim. Claimants will not be served well if the person who is dealing with their case throughout is unqualified and has no experience.

6 Specific Litigation

6.1 Collective actions

6.1.1 No costs regime

APIL does not support a no cost regime.

If this option were adopted, then it would decimate group litigation as a whole. There are no benefits for the claimant of being unable to recover costs which would inevitably become payable out of the award. As a large percentage of any such actions tend to be low value, the costs liability would outweigh any advantage in pursuing the claim at all.

In *Dawson v First Choice Travel*[34] the awards were mostly of between £2,000 and £5,000. Even with the claimants' costs capped in this case, (capped at thirty percent of their £726,000 estimated costs) non recoverability of costs would have made pursuing these entirely meritorious claims simply impossible.

Even in the miners' group actions against British Coal for vibration white finger and respiratory disease, some of the awards were relatively low and the viability of such claims was only possible due to the ability to recover costs and the relatively huge cohort of claimants allowing for economies of scale.

[34] 12 March 2007, HHJ McDuff (unreported)

Group actions can easily generate costs, especially when the claim is pursued against an aggressive or intransigent defendant. An inability for the successful party to recover costs is a bar to access to justice.

6.1.2 SLAS/CLAF

The preliminary report states at 5.11(iv) of Part 7: Chapter 38 that "if collective litigation in England and Wales is funded by a CLAF or a SLAS, there could be no principled objection to that fund taking a percentage of the damages."

The problem is that at present, no such CLAF or SLAS exists and previous consideration of these vehicles (particularly at the time that legal aid was withdrawn for the majority of personal injury claims) resulted in no progress. Where would the substantial seed funds be found to set up a CLAF or SLAS? In 1998 APIL calculated that it would cost £34 million to set up a CLAF for personal injury claims only, requiring a seven per cent levy on all damages recovered. At the time we noted that difficult or complex claims, which collective actions surely are, would be unsuitable for a CLAF and that by excluding them the set up costs and levy would possibly reduce[35].

What about adverse selection? The reason the Hong Kong CLAF works is that there is a large pool of potential cases, not just collective actions, and very little adverse selection. This means that the pool includes many 'simple' cases which provide the essential funds to maintain the pool and pay for the few claims which lose. A CLAF relying only on collective actions, with a variable success rate would, in all probability, fail.

In summary APIL's view on a no costs system are:

(a) There is an inability for the successful party to recover costs is a bar to access to justice.

(b) No side benefits in this proposed regime: the current system of being 'paid by results' (successful party recovers costs) offers an incentive to both sides to take on only

[35] *Access to Justice with Conditional Fees, APIL response to the Lord Chancellor's consultation, 30 April 1998*

meritorious claims or counter with only supportable defences. In a no cost regime the defendant has nothing to lose by vigorously defending claims, and can do so, knowing that he is causing the claimant to run up ever increasing costs as he pursues the claim, which may force the claimant to capitulate.

(c) If there is to be no costs shifting, claimants with modest but meritorious claims will be unable to fund their actions. If they did, costs deducted from any award would make it uneconomic for the claimant to pursue. Contrary to the view expressed at 5.11(iv) of Part 7: Chapter 38 of the preliminary report, there is no CLAF or SLAS, and previous consideration of these vehicles have resulted in no progress.

6.1.3 One way cost shifting in collective actions

One way cost shifting has merits, providing that our concerns in section 5.2 are met.

6.1.4 Cost shifting in collective actions – different solutions for different claims.

This is the third option suggested by the preliminary report.

Rather than adopting a rigid costs shifting regime for all collective actions, APIL's view is that by their very nature, the types of claims involved will be diverse. It is APIL's view that the court should be able to look at funding issues, to ascertain whether the funding arrangements are fair as between the parties early on in the progress of collective actions through the court. We suggest that this is the appropriate time for the court to look at whether the parties can afford to take part in the process, and if there is justiciable point, then innovative costs solutions should be available for the judge to apply.

APIL recommends that further consideration is given to other ways of dealing with costs, all of which are already discussed in detail in the CJC's consultation paper on collective actions[36]. The court should be considering how to deal with costs in each individual case:

[36] Improving Access to Justice through Collective Actions. Developing a More Efficient and Effective Procedure for Collective Actions - July 2008

is full costs shifting appropriate, or should there be *Corner House (R (on the application of Corner House Research) v Secretary of State for Trade and Industry*[37]*)* type procedures when considering protective costs or cost capping orders? Should there be costs caps and if so how are they to be dealt with?

6.1.5 Deterrent effect

The view expressed by various commentators, and referred to in the preliminary report, that cost shifting is a deterrent against speculative or so-called blackmail litigation is too simplistic and the recommendation that either a no-costs regime or full costs shifting should be the only options available to the court to remedy this, is too restrictive. No-one wants to encourage unmeritorious litigation, but there are meritorious cases which might not otherwise be heard where there is an access to justice issue at stake if either no-costs or full cost shifting are applied.

A robust court based certification procedure should be designed to look at individual potential collective actions and recognise where there is an issue which merits court attention, even if the claimants are impecunious.

6.1.6 Changes to the CPR

We disagree with the notion that the CPR should be amended to institute a no-cost shifting rule, for the reasons already stated in this section of our response. We also disagree with the suggestion at Part 7, chapter 38, 8.1 (i)(a) that the exception to this should be to allow cost shifting for frivolous or improper litigation tactics. If the CPR were properly amended to create a single set of rules for collective actions, as envisaged by the CJC's consultation paper (referred to above) then a proper certification process would require the claimants to show there is a justiciable point worth investigation, and if there is, then the parties should be permitted to go to the next stage of the process. With robust case management, if it later appears that there is no meritorious issue or the parties are

[37] [2005] EWCA Civ 192

indulging in frivolous or vexations behaviour, then the court should have the power to bring the case to an end.

6.1.7 Cost shifting for only part of the collective proceedings

We agree that there would need to be some protective mechanism which applied up to certification stage which would allow cases to go before a judge without fear of harsh costs sanction. If a group or representative body were to go before the judge at certification stage and risk bearing the penalty of the costs of that stage, it may well be a sizeable disincentive to bringing the action at all.

6.1.8 Lower scale costs

As these claims are invariably unusual, we do not think that subjecting them to a lower scale of costs would be beneficial to the parties involved. If such claims became uneconomic for lawyers to take on, claimants would find it difficult to obtain legal representation from lawyers with the requisite experience to deal with their particular claim. For example, pharmaceutical collective actions require a level of expertise which would simply not be available on a reduced scale of costs.

6.1.9 Indemnity costs against lawyers

We envisage that this suggestion would lead to satellite litigation every time a collective action failed for whatever reason. The prospects of success are sometimes obscure at the beginning of an action and only become apparent upon disclosure if 'all the cards' are held by the defendants. Similarly, collective actions which appear to be viable at the start may subsequently appear, upon disclosure, to be unlikely to succeed for whatever reasons unforeseen earlier in the process. With robust case management, the court would have the power to bring such cases to an end. But we envisage that this could then be the trigger for a round of satellite litigation by the defendant to 'penalise' the claimant's lawyers with the benefit of hindsight.

6.2 Appeals

6.2.1 Comments on appeals to the Court of Appeal.

We note LJ Jackson's conclusion that control of costs on appeal to the Court of Appeal should be addressed after decisions are taken about costs in the first instance and do not therefore propose to address this issue in detail at this stage.

We do, however, think it is important to raise our concerns about funding for appeals to the Court of Appeal (and in fact appeals to other courts in fast track cases) when a claimant in personal injury cases has funding under a CFA. There are hardly any appeals to the Court of Appeal made by claimants in such circumstances, as it is extremely difficult to get ATE insurance to take the claimant's case to this stage. Those claimants who are able to appeal to the Court of Appeal usually do so under collective CFAs, with the financial backing of a trade union.

The lack of funding for claimants means that the insurance industry is the effective driver of whether appeals are made to the Court of Appeal in personal injury cases. Such appeals are therefore an attempt at a money saving exercise by the insurance industry. The appeal is not made by either claimant or defendant, but a third party seeking to ensure future profit.

We believe that this imbalance could be addressed by the one way cost shifting measures proposed elsewhere in the costs review, our detailed view of which is set out elsewhere in this response.

Finally, the costs of litigation as a whole could be reduced if fewer appeals were needed because more parties to cases felt that decisions were being reached correctly at first instance. An investment in specialist judges or more training for judges could therefore save money in the long run.

7 Controlling the cost of litigation

7.1 E-disclosure

Our members have had very little experience of E-disclosure. However we understand that that there is a working party being led by Senior Master Whitaker and we await with interest the draft practice direction for comment.

7.2 Disclosure generally

APIL is of the view that disclosure in personal injury cases works well in cases where defendants cooperate. There has been some suggestion by defendants that applications for pre-action disclosure have become a cottage industry and that claimant solicitors make applications for minor breaches of the protocol. It is our view that these applications only happens where a defendant fails to cooperate with the claimants and comply with the protocol. Because of the lack of sanctions in the protocols applications for pre-action disclosure are made to progress a claim (See our response to the case management section7.4, for additional information.)

APIL believes that further work could be done to enhance these sanctions. This could take the form of a "show cause" procedure similar to that used in mesothelioma cases or a simple paper application for non-compliance. This application could include a request for pre-action disclosure and/or a sanction for non compliance. Sanctions could take the form of an order for costs and/or an unless order leading to the possibility of a debarring order if compliance is still not met.[38]

[38] See appendix seven

7.3 Witness statements and expert reports

7.3.1 Witness statements

We agree with Lord Justice Jackson's view[39] that written witness statements have generally saved time and cost, and efficiently enable all parties to know the evidence they will have to meet.

We note that there are some concerns about witness statements taken over the telephone, or by inexperienced staff, and note with regret that this practice is likely to increase as restraints are placed on the work done by solicitors in personal injury cases. Face to face interviews with witnesses can often allow a solicitor to assess the demeanour of a witness and this can be absolutely crucial in assessing the risks of pursuing a claim. Too often, valuable work to iron out early issues, and even therefore identify potentially unsuccessful claims, is seen as extraneous and excessive and is the subject of criticism from those who do not understand the process and who are seeking only to cut costs. A witness statement is a claimant's evidence in chief and therefore must deal with all the necessary issues at stake. This can often mean lengthy statements in cases where defendants are not prepared to narrow the issues.

There is a view that is often reiterated, and in fact is repeated in Lord Justice Jackson's preliminary report, that many personal injury claims are straightforward. We believe that they are only made to seem this way because specialist lawyers deal with the complex issues personal injury claims can raise on a regular basis. Examples of such issues are reasonable practicability and contributory negligence. Insurers and even judges often misunderstand such issues, as Lady Justice Janet Smith can be seen to state in a recent judgement when considering reasonable practicability[40]: *"It appears therefore from the authorities that the process is well-established by which liability under section 29 is to be proved. First, the claimant must show that his place of work was not safe. If he achieves that, the burden passes to the employer to show that it was not reasonably practicable for him to*

[39] As expressed in para 1.2, chapter 42, part 8 of Jackson LJ preliminary report
[40] In the context of section 29 of the Factories Act 1961

eliminate the risk of harm. To avoid liability he has to show that the burden of eliminating the risk substantially outweighed the 'quantum of risk'. When that forensic process is compared and contrasted with the process by which liability at common law is established, it is hard to understand how lawyers and judges have so often fallen into the error of thinking that there is no significant difference between the two. That was the assumption upon which Rose J was working in Fazakerley and it is the effect of Judge Inglis's conclusion. In my view, that assumption or conclusion is clearly wrong."[41]

Equally important to running a case efficiently, and thus making it seem straightforward, is understanding a client's case. We note the commentary that a lawyer spending sufficient time with a witness so that he understands what the witness is trying to say can "rack up costs"[42] and would say that although this can be a time consuming and therefore expensive duty, it is a fundamental professional duty which cannot be curtailed. In addition, failure to understand a client's case properly is likely to lead to additional costs rather than the other way around.

We do not therefore think that deep-seated changes need to or should be made to witness statements themselves. Rather there could be improvements made to the process to ensure that parties know the basic details of the witnesses and the facts to which they will attest at an early stage.

Many of our members are, for example, constantly frustrated by the fact that defendants frequently do not complete the section regarding witnesses on the Allocation Questionnaire, leaving this blank or putting "to be advised". Correctly completed allocation questionnaires enable the parties and the court to understand the framework of each party's case and accordingly enable everybody to focus on the relevant issues. Consistently good case management by judges, and the application of sanctions where appropriate, would ensure that such forms are properly completed.

[41] Baker v Quantum Clothing Group & Others [2009] EWCA Civ 566
[42] Para 3.5, chapter 42, part 8 of Jackson LJ preliminary report

Furthermore proper case management, rather than simply providing trial directions, where there is a discussion of the issues to be decided by the court and the witness evidence required, would benefit all parties to the case and work to reduce costs in the long run. Effective case management which identifies the relevant issues in the case is key to ensuring that witness and expert evidence pertinent to the issues is obtained, and that extraneous work is not carried out, and so if the case does not settle (although it is more likely to do so), the trial and associated work for this is also likely to be more efficient. Specialist judges would be best placed to carry out such case management activities.

Finally, whilst we believe that witness statements should continue to serve as evidence in chief, one of the disadvantages of this system is that witnesses are confronted with often hostile representatives of the opposing party almost immediately they take the stand, which may result in them being tense and not answering questions as clearly as they may otherwise. This could be mitigated if judges took the opportunity to talk to a witness before cross-examination to fill in any gaps he feels there are in the witness' statement, which may also encourage a more natural response during cross-examination. In addition, specialist judges would readily be able to identify what lines of questioning are relevant to the issues in a case and be able to control the cross-examination more effectively as a result.

7.3.2 Experts evidence

We agree that the courts must investigate non-compliance with the pre-action protocol (see section 7.5.5 concerning a "show cause procedure") with the aim of encouraging the parties to narrow issues, so far as is practicable, before or without issue of proceedings, as observed by Lord Justice Jackson[43].

Once again, however, we do not think there are problems in relation to the rules regarding the instruction of experts in personal injury cases: problems stem from current practice.

[43] Para 9.2, Chapter 42, Part 8 of Jackson LJ preliminary report

The burden of proving the claim remains with the claimant and we therefore believe it is right that he may instruct an expert, albeit having given the defendant an opportunity to object to the instruction of that expert in the fast track.

There are disagreements in many personal injury cases about the selection of experts. It is common for claimant solicitors to write to defendants/their insurers with a list of three suggested experts, and an invitation to object to the instruction of these. A common response (if one is received at all) is: this is not a joint instruction, so we are not objecting to your proposed experts, but we reserve the right to instruct our own expert. The defendants then receive a report they don't like from the expert instructed by the claimants, and apply to the court to obtain their own. We do not believe however, that such applications should be routinely allowed.

7.3.3 Appointment of experts at the appropriate time.

In relation to timing, the rules require a claimant's medical evidence to be served with proceedings. This means that the claimant has to instruct an expert before commencing proceedings, without the benefit of directions from a judge. The claimant therefore has to justify his reasons for a unilateral instruction (if that is what he believes is most appropriate) when seeking to recover costs.

Defendants often spurn the opportunity to object to the claimant's nominated medical experts, and then raise the issue of a second expert typically only at the first case management hearing. This means that many months (and commonly many thousands of pounds) later, these issues are only being actively explored by the defendant.

Medical opinion can be relevant to establishing liability (which connotes proof of some damage), causation (i.e. is the injury complained of consistent with the mechanism/account provided) as well as identifying the nature and extent of the damage suffered. Medical opinion is also potentially relevant to the advice provided on mitigation of loss and contributory negligence.

If the court allows a defendant to instruct an expert at case management stage, as is often the case, this causes considerable delay. The court should show much greater reluctance to allow the defendant to take steps that should have be taken on a timely basis. This issue comes back to the issue of effective case management. In an efficiently run case, the judge would look for genuine reasons for the defendant to instruct his own expert at this stage. Instead this appears to be happening routinely.

7.3.4 Schemes for Fast Track- RTA, EL and PL cases

We are concerned that Lord Justice Jackson is under the impression that costs of experts' reports can be up to or more than the amount being claimed in damages[44]. It is our members' experience that this is rarely the case. In most personal injury cases, the only expert evidence is medical evidence, which in the case of a general practitioner or accident and emergency report is usually far below the level of damages claimed. More complex cases sometimes require reports on liability, which can be expensive, but these are certainly the exception rather than the rule.

7.3.5 Accredited experts

We are concerned about who would provide such accreditation and, even if a scheme were successfully implemented, it would not be able to show that an expert really is impartial.

7.3.6 Joint expert binding defendant but not claimant

We have concerns about a proposal for a joint experts report to be obtained which intends to bind defendants but not claimants. We would be worried that if such a system was introduced the courts would be reluctant in practice to let a claimant obtain a further report as the suggestions envisages.

[44] Para 13.1, chapter 42, part 8 of LJ Jackson's preliminary report

7.3.7 Should there be sequential exchange of expert evidence on liability as standard. In personal injury/clinical negligence cases, should the claimant be obliged to disclose their expert report with service of proceedings?

We believe this proposal is wrong in principle. Obliging claimants to put their evidence to defendants before the defendant is obliged to obtain his own evidence will not have the desired result of a defendant considering the claimant's evidence carefully and, if it considers it to be fair, seeking to settle the case. Instead it will result in a defendant appointing its own expert with instructions to pick holes in the claimant's evidence, rather than give them real advice on the relevant issues.

In addition, the use of liability evidence in personal injury cases is very limited. It is typically restricted to disease cases where (subject to some exceptions in smaller cases) the current system has been refined over many decades and works satisfactorily. Expert liability evidence in RTA cases is very rare and often described by trial judges as having been of limited assistance if obtained. In some other cases the burden of proof rests with the defendant to provide, at the very least, an explanation as to the how the event occurred without breach of duty on its part, either because of the statutory regime or by operation of the res ipsa loquitor principle. It would not therefore be reasonable for a claimant to have served an expert report on liability with proceedings.

Finally, problems with delay and cost in clinical negligence cases commonly arise from the defendant's failure to seek independent expert opinion an early stage. Requiring the claimant to serve evidence earlier would not address this.

7.3.8 Should there be a presumption that all quantum experts will be instructed on a "single joint" basis, unless the court decides that there is a good reason for individual experts to be permitted? Experts could be agreed prior to instruction and one party will not be required to jointly instruct "after the fact" an expert who has been unilaterally instructed by another party.

We do not believe that there should be a presumption that single joint experts should be instructed with regard to quantum. It is the claimant who needs to prove the existence

and extent of his injury and it is right that he or his representative be allowed to obtain the evidence necessary in order to do this. In addition, there are many factors which a claimant may want to take in to account when choosing an expert that the defendant will not be concerned about, such as ease of getting an appointment, locality and ease of access, and even a doctor's bedside manner.

In addition, there is already procedure in place in pre-action protocols which allows defendants to object to the claimant's nominated experts, and there is cost control in place in terms of the claimant having to prove disbursements are reasonable.

7.3.9 Should the parties be able to recover the costs of expert reports which are not relied upon or not covered by leave given for experts to be called?

We also disagree with this proposal. There are many instances in which it is reasonable to obtain a medical report without leave of the court, and the report does not need to be relied upon. The fact that it is reasonable to obtain the report should mean the costs can be recovered. This system which involves judicial scrutiny works perfectly satisfactorily at present.

By way of an example of a medical report being reasonably obtained but not relied upon, take the case of a child who has received a blow to the head in the course of an RTA. The initial medical report advises a further report is obtained from a neurologist to ensure there are no issues regarding epilepsy or other mild brain injury. Such a report is obtained, and happily confirms there are no such concerns. Why should an innocent claimant not recover the cost of this report, and a negligent defendant escape paying for it?

7.3.10 Should the Australian procedure be included in the CPR?

We note the Australian 'hot tub' procedure set out in the report and in particular note that it seems to be an inquisitorial procedure set in an adversarial system. We believe that it may work in some cases, although note the comments that it works "where there are no

issues of credit and the experts know and respect each other"[45]. In many cases, the defendant calls expert evidence with the sole purposes of placing "credit" in issue and no doubt practitioners can all give examples of experts who are commonly called on either side who have little or no professional respect.

7.4 Case management

We believe that effective case management is the key to ensuring cases proceed as efficiently as possible. Early identification of the issues in dispute and the necessary evidence to resolve these matters would bring cases to conclusion as quickly and cost-effectively as possible.

The protocols are an attempt at unsupervised case management. A protocol aims to get the case into shape before it comes before the court and subject to the more stringent case management rules contained in the civil procedure rules.

A judge is of course, the only person who can ensure that the parties are complying with their case management obligations. When a case comes before a judge for the first time, we believe the judge ought to be ensuring the case is ready to proceed. To do this, he needs to manage backwards to the protocol – and ensure that any outstanding matters will be resolved, and forward to either settlement or trial.

We believe that there should be specialist judges who deal with personal injury cases, and that a good knowledge of personal injury law is actually more pertinent at case management stage than at trial. Due to the way the legal profession has developed, solicitors and barristers usually now specialise in one area of the law. This has not yet been reflected in the way the judiciary is allocated its work, and it is therefore inevitable that the judge hearing a case may never have practiced personal injury law. Despite some judicial training, it cannot therefore be expected that all judges have the necessary experience to

[45] Para 4.17, Chapter 58, Part 11 of LJ Jackson's preliminary report

make quick decisions about whether to allow, for example, a further expert's report to be obtained.

We believe that having specialist judges and ensuring that effective case management is applied in every case would be far more productive than some proposals contained in Lord Justice Jackson's report, such as allowing defendants to issue proceedings.

7.5 Pre-action protocols

7.5.1 Do any of the protocols needs to be made simpler or less onerous?

We believe that the protocols relating to personal injury (that is personal injury, clinical negligence and disease) have generally been a real success in that those cases in which the protocols are adhered to are generally run efficiently, with cases settling quickly and relatively cheaply. The protocols do encourage an element of front loading, but this is work which is usually necessary in order to settle a case or take it to trial in any event. As far as we are aware, the personal injury protocols are not subject to the same kind of criticism as the protocols in commercial cases, possibly because there is usually less disclosure. We do not therefore think that any of the protocols need to be made simpler or less onerous.

Problems with the protocols lie not with the documents themselves but with non-compliance with these. In fact, in our view, if all parties complied with the protocols, this costs review would not have been deemed necessary.

The most common problem our members experience is that protocol time limits are routinely flouted. Voluntary adherence to the protocols is clearly not working. In our view this is because of the lack of sanctions for non-compliance. We believe such sanctions, for all parties, should be introduced.

There is a case, however, for amending some of the civil procedure rules, to allow for compliance with the protocol to be taken in to account. For example, disclosure is

required at the protocol stage and then again in litigation, which needlessly duplicates work and cost. Some rationalisation of the rules may therefore be possible.

7.5.2 Should any restriction be placed upon recoverable costs in respect of the protocol period?

We do not think there should be any further restriction placed on recoverable costs in respect of the protocol period. Parties carry out the work they think is necessary to present their case and are already subject to a reasonableness test with regard to recovery of their costs. No further restriction is required and to do so would encourage short cuts which should be avoided.

7.5.3 Could any of the "pre-action" processes sensibly be brought into the post-issue period, either along the lines suggested by the LTWP or along the lines suggested by certain TCC judges and practitioners?

Bringing any protocol steps into the post-issue period would be completely contrary to the principles behind the protocol. Doing work at the beginning of a case to ensure it is a case that should be pursued, as well as to narrow the issues, can save work and money later in the process.

7.5.4 Would any detailed amendments to individual protocols (for example, of the type canvassed above in respect of clinical negligence) assist in promoting settlement?

We do not believe that there are, at the moment, amendments which could be made to the protocol (save for the sanctions referred to below) which would assist in promoting settlement. This may change in the future of course, and there are benefits which could be obtained from regularly reviewing the protocols. We note, however, that the Civil Justice Committee (CJC) is charged with keeping the protocols updated, and is very efficient at doing this (it has published three consultations in three years on the issue of protocols), and believe that the CJC should therefore carry out such a review.

7.5.5 Should there be more effective sanctions (possibly prescribed sanctions) for non-compliance with the protocols. This appears to be a particular issue in respect of the Pre-action Protocol for Personal Injury Claims. Both sides make complaints about non-compliance with this protocol.

APIL believes that there should be sanctions for substantive breaches of the protocol. Including sanctions for non compliance can only improve personal injury law and give injured people certainty that if a party does not play by the rules, they will be penalised accordingly.

The intention of the protocols is that parties set out their case in advance of any proceedings. One of the most common problems our members encounter, however, is that defendants do not set out the basis for their position or disclose relevant documents early enough.

Responses to letters of claim are often either only acknowledgements or straightforward denials with no supporting arguments or evidence. It is not uncommon for a defendant simply to say he is putting the claimant to proof. Requests for disclosure are routinely ignored, and even pre-action disclosure applications do not necessarily result in the defendant setting out his case clearly. A claimant often needs to issue his claim just to establish what the defendant's case is.

We believe that a simple pre-action paper application could resolve these problems, potentially saving the costs of issuing proceedings. The procedure we envisage is similar to the show cause procedure set out in the mesothelioma practice direction, where the defendant is required to identify the evidence and legal arguments that give the defendant a real prospect of success on any or all issues of liability. Like that practice direction, one aim of this proposed procedure would be to ensure the basis of every party's case is clearly set out and that the issues are narrowed appropriately.

We suggest[46]:

1) In order for the court to adopt the show cause procedure, the claimant must show the court that he sent a letter of claim containing the relevant information as identified by the protocol.

2) Where the defendant has replied regarding the issue of liability but has failed to provide disclosure or details of why liability is denied, or after the three month period stipulated by the protocol has expired and a response has not been received from the defendant, the claimant may make a pre-action application for the court for the defendant to "show cause".

3) A specialist judge will consider the paper work and make an order requiring the defendant to:

   a) show cause, namely identify all evidence and legal arguments that give the defendants real prospects of success on all or some of the issues of liability; and
   b) provide disclosure to the claimant of all documents and information required by the pre-action protocol and requested by the claimant in his letter of claim.

4) If the defendant does not file and serve the above documents by the date specified in the order, the court will debar the defendant from the defending the claim and may, if the claimant has demonstrated a real need, order an interim payment to be made by the defendant on account of damages by a specified date.

5) Where the defendant fails to show cause on some issues, the court will normally debar the defendant from defending these particular issues.

We anticipate that such an application would usually be dealt with on a paper basis only, and therefore attract a minimal court fee.

[46] Our separate paper on this was submitted to Jackson LJ on 21 July a copy is appended. (appendix seven)

If such a procedure were introduced, consequential changes to the pre-action protocol on personal injury claims and the CPR would need to be made, although we do not believe that these would be difficult to introduce. The basis on which the court considers the application, for example, could be similar to the current pre-action disclosure application, with regard to considering whether the proposed parties are in fact likely to be party to proceedings in the future.

It is also suggested that if a party does not comply with the protocol or the request for pre-action disclosure and an application is required, then the party in breach should be required to show why he should not pay the costs of the application, rather than the party who made the application showing that the costs order should be made.

7.5.6 Should defendants be able to bring to an end protracted pre-issue processes by themselves issuing proceedings?

As a fundamental point of principle, defendants should not be allowed to take on a claimants claim and his choice as to whether and when to make this. We believe that this proposal could lead to difficulties where defendants issue without claimants having found funding to prove their case, and allow a claimant's claim to be extinguished without the claimant having an adequate opportunity to put his case. In the one case, that we are aware of, where the defendants have issued an application for a declaration from the court that they were not liable for the accident the court refused the application[47]. All this case did was generate costs, contrary to the overriding objection.

In addition, we believe this would generate more litigation as it could lead to situation where defendants felt they had to issue to prove their "innocence".

[47] Jewel Ahmed Toropdar v D (a minor by the official solicitor as his litigation friend) [2009] EWHC 567

7.5.7 Should claimants be required to notify claims which they are investigating, so that defendants can do parallel investigations if they wish to?

Claimant lawyers investigate many claims before a decision is reached on whether or not a claim has reasonable prospects of success. We believe that notifying all these cases to the insurers would prove costly and would not provide a benefit to either party. If implemented, however, this would have to be a mutual obligation with potential defendants under a duty to tell potential claimants that they think the claimant may have a claim against them.

7.5.8 Other case management issues

We support the proposal contained in part 8 chapter 43 paragraph 4.20 of the preliminary report to permit a party who is able to proceed with exchange of documents to file its evidence with the court in default of the other party complying. We think this would be a useful way of encouraging parties to comply with such orders, and make it clear to the court which party was at fault, in case this becomes relevant later.

7.5.9 Court resourcing

Judiciary

We strongly believe that having specialist personal injury judges would help save costs in personal injury litigation.

Specialist judges are far better placed than generalist judges to manage personal injury cases. In our view, specialist judges are more important at case management stage than at trial. In the latter, an experienced judge can listen to and assess the evidence whatever his or her background. At case management stage, however, only a personal injury specialist may properly be able to quickly identify the relevant issues in a case and make directions as to the evidence to be produced accordingly.

Specialist judges would be able to efficiently manage cases back to the protocol, by imposing sanctions where necessary, and forward to settlement or trial, by ensuring that the issues are narrowed and necessary evidence will be adduced.

At the moment, however, it is possible to come before a judge who has never conducted a personal injury case while practising law, having spent all their career specialising in, for example, family law. This is because of the way the legal profession has developed over recent decades, with solicitors and barristers increasingly specialising in a particular area of law from an early stage in their career. This same trend means, however, that it should be easier than ever to recruit experienced specialist lawyers in to the judiciary.

Personal injury claims constitute a significant part of county court work (we would like to be able to draw on statistics at this point, but the Judicial and Court Statistics reports do not break down the type of claim made in the county courts) and we believe that introducing specialist judges to deal with personal injury claims where possible would be a sensible and cost effective measure.

We would also welcome the introduction of docketing, which would be more practical if judges were specialists and did not have to deal with other case types. In our view, docketing ensures efficient case management as judges would not have to familiarise themselves with the details of a new case every time the file comes before the court.

Technology

We support the use of technology in courts where this is able to help the court and the parties progress the case effectively.

Increased use of e-mail and telephone conferencing can and generally does make communication more efficient and cuts out unnecessary travel time.

It should be recognised, however, that technology is not always as effective as it promises to be, and we refer here to our views with regard to software systems for assessing general damages, which are set out elsewhere in the paper.

ADR

We welcome Lord Justice Jackson's views that ADR is not a universal panacea[48]. We recognise that mediation can work well in cases in which there is an ongoing relationship (such as an employers' liability claim), where the injured person wants more than monetary compensation such as an apology, or negotiations have broken down or stalled. In no circumstances, however, should mediation be forced on unwilling parties by the courts. It simply does not work when it is compulsory. We believe therefore, that although the courts should make information about alternative dispute resolution available, it should not be imposed on parties at the case management stage.

7.6 Trials

In our members' experience, personal injury trials often turn on one issue, although it is often not apparent until the trial itself is reached that this will be the case. In this fairly common situation, cost are incurred in preparing documents and issues for trial which in the end, turn out not to be disputed, or that are thought to be irrelevant. In our opinion, the only way to avoid this and to reduce the associated costs is by more active case management to narrow the issues in a case. We refer to this further in our submissions regarding case management.

Once the relevant issues have been identified, we believe that technology has a significant part to play in reducing the cost of preparation for trial. Electronic trial bundles, for example, are not only easier to prepare in terms of the pure logistics of ensuring each page is correctly numbered, and providing the requisite number of duplicate copies, but they are easier to amend, and there is less chance of human error resulting in different parties having incomplete or inaccurate copies of the bundle.

[48] Para 2.4, part 1, chapter 4 of Jackson LJ preliminary report

Investment in court technology could, in the long term, reduce the cost of trials. If for example, a court has broadband facilities and video conferencing facilities installed, and an expert is permitted to give evidence by video link, this would reduce the experts' time commitment. He would not have to travel to give evidence, and travel costs and waiting fees may reduced or eliminated.

There are some costs of trial which are, however, both unavoidable and difficult to put any sort of constraint upon. To be awarded damages, an injured claimant has to prove his case, that is: duty, breach, causation and harm. The time needed to identify relevant documents and construct arguments cannot be prescribed, as it is different in every case. A claimant does not have the luxury of deciding not to argue one aspect of his case, as a defendant has the option not to contest, for example, causation.

We therefore support the use of more effective case management to ensure trials are as concise as possible, and believe that where technology can be used to make the process more efficient it should be, but none of these measures should impede the parties' opportunity to state their case to the court.

7.7 Cost capping

New civil procedure rules on cost capping came into force on 6 April 2009. CPR 44.18-44.20 set out the new rules which codify some of the existing case law on cost capping.

The practice direction (PD) amendments which go with the changes to the CPR are contained in section 23A of the existing practice direction about costs. The PD makes it clear that cost capping orders are only to be made in exceptional circumstances. The factors to be taken into account are those currently listed in CPR 44.5 – 'factors to be taken into account in deciding the amount of costs' which apply to assessment of costs in all cases and the additional factors set out in 44.18.

Supplementing this practice direction, is of course, the existing case law. APIL's view is that cost capping, within the context of detailed and experienced case management, is one of a number of tools available to the court.

We agree that it is a serious means of controlling litigation and as such, should continue to be used only in exceptional cases and circumstances and where it is in the interests of justice to do so. There are other methods of control which should be looked at first, including judicial case management, (such as limiting the number or type of experts, the amount of disclosure, or witness evidence and how it is dealt with, where appropriate) or cost budgeting, for example.

We take the view that the new rules are working well and would support maintaining these rules as they are. The practice direction and new rules came as a result of the digestion of all the relevant case law and after a thoughtful consultation.

There are sufficient guidelines for the court which ensure that the rules are not too prescriptive. If there had been sufficient evidence that cost capping ought to have been extended in application, then the rules committee would have drafted more a prescriptive version of the new rules.

We also agree with Lord Justice Jackson's view that the rule should not allow retrospective caps on costs.

It is also worth repeating that while cost caps are seen as traditionally being of use to defendants to prevent the escalation of claimants' costs, they can be equally helpful to claimants who can show exceptional, justified, reasons for their imposition, for example, where there is a serious 'inequality of arms'.

7.7.1 DJ Lethem's model at the Tunbridge Wells county court

We would like to comment on the use of cost capping in Tunbridge Wells. The system adopted by DJ Lethem is one where, every case in which costs estimates are submitted at

the allocation questionnaire stage is deemed potentially suitable for a cost capping order. This is at odds with the practice direction which states quite clearly that such an order will only be made in exceptional circumstances. We submit that it is difficult to justify imposing cost caps on low value claims. The use of proportionality in this process as a means of justification goes against the criteria set out in the rule and PD. It is clearly stated within the Rule 44.18 (5) that a cap should only be imposed if:

"(a) it is in the interests of justice to do so;
(b) there is a substantial risk that without such an order costs will be disproportionately incurred; **and [our emphasis]**
(c) **it is not satisfied that the risk in sub-paragraph (b) can be adequately controlled by –**
(i) case management directions or orders made under Part 3; and
(ii) detailed assessment of costs.

The clear direction in the rule is that case management directions, orders and detailed assessment of costs should be considered before cost capping. There is no evidence that this is done in DJ Letham's court. Unless there are exceptional circumstances, these other methods, as already outlined above, should act as adequate checks.

Furthermore, by taking into consideration the grade of solicitor conducting the claim, the court is not looking at the total costs of the litigation, but at how the claimant's solicitor has chosen to do the work. We would submit that there are circumstances where a more experienced solicitor may deal with the claim more quickly and efficiently, saving costs, than an inexperienced or lower grade practitioner. There is no requirement in the rule for the court to examine the grade of solicitor, but instead that he should look to the "overall costs of the litigation."

7.8 ATE and success fees.

7.8.1 Should success fees and ATE insurance premiums remain recoverable?

It should not be forgotten that ATE and success fees were introduced and calculated on the basis that the many pay for the few. Success fees are not a bounty recovered in isolation from the cases that are investigated and that don't get off the ground, and cases that are pursued but are unsuccessful or withdrawn; it is this that creates access to justice.

APIL believes that success fees and ATE premiums should be retained and should remain recoverable. Access to justice should not be prevented by an injured person being unable to fund a claim for personal injury. APIL believes in the principle of polluter pays, therefore if an individual is negligently injured by another he should not be prevented from making a claim based on his means.

Even if one way costs shifting were to be introduced there would have to be serious consideration given to retention of ATE due to the concerns surrounding claimants disbursements if a claim were unsuccessful (see section 'one way cost shifting').

Our members believe that success fees are working well. There have been few challenges to them since their introduction. There are some areas of outstanding work that requires urgent attention which are addresses below. Before recoverability claimants were left in the unfortunate position of having to suffer a reduction in their damages. We do not accept that the pre-200 CFA was without problems. One member reports that he brought a clinical negligence claim on behalf of a client under the old scheme that resulted in damages of £6,000 less success fee of 25 percent amounting to £1,500 and an ATE premium of £2,300 (which in today market would be regarded as very cheap) which meant that the claimant's damages were significantly reduced.

7.8.2 EL disease success fee agreement – test case exceptionality clause

At the final mediated meeting on employers' liability (EL) success fee levels for disease claims there was a bilateral agreement that the deal was based on first, obtaining full 'buy-in' by the insurer representatives, the DTI and FSCS and second, the drafting of an

exceptionality clause for submission to the rule committee. A clause was drafted with one disputed word – 'materially' – in the following clause:

Test cases – proposed draft rule 45.26 (1)(d)

(d) "The case is one which is [materially] affected by a test case which raises a general principle"

APIL's continuing view is that the issue of an appropriate exceptionality clause remains as urgent now as it was at the time of the mediated agreement on success fee levels. Evidence for this need has been submitted to the Civil Justice Council and APIL seeks an agreed plan of action to finalise an agreement, the details of which were first publicised in 2004.

Success fee levels

An urgent review is also required of the success fees for claims arising from asbestos-related diseases. The current fixed success fees were set before the failure of pleural plaques cases was an issue and also pre-date current wave of 'trigger issue' cases, both of which substantially affect the success rates of potential claims.

Definition of 'trial'

There also remains outstanding from EL negotiations such things as the definition of 'trial' for success fee purposes. This is despite the fact that agreed wording was drafted at the time of the EL success fee negotiations. Failure to define 'trial' has already led to contradictory case law on the subject.

We believe therefore that fixed success fees in other areas of personal injury would be beneficial. They would help promote certainty and would be one method of reducing costs. APIL would be interested in working with other stakeholders to develop these

We are unable to comment on the appropriateness of the levels of ATE premiums as they are set by the insurance industry. It is essential that this remains the case to ensure that the market can function. APIL believes that this is currently working well.

(See the appropriate sections for comment on cost capping, levels of general damages, CLAF or SLAS funding.)

7.9 Costs management

7.9.1 Should costs management become a feature of or adjunct to case management?

Costs management should already be a feature of, or adjunct to, case management. As already indicated in our responses to part 7, chapter 38 (collective actions) and part 8 chapter 45 (cost capping)[49], dealing with costs is one of the aspects which should be employed by the judge in his case management conferences or paper exercises.

Where costs become an issue during the progress of a claim, APIL agrees that as a means of controlling litigation judicial case management, (such as limiting the number or type of experts, the amount of disclosure, or witness evidence and how it is dealt with, where appropriate) or cost budgeting, for example, both form part of the costs management of the claim.

In respect of collective actions, we have already commented that robust case management, and early consideration of costs issues of such claims, should be implemented by the court to weed out unmeritorious claims or to curb undesirable behaviour.

We have also indicated, however, that we do not agree that the cost capping rules should be extended as is suggested at part 8 chapter 48 paragraph 3.21 of the preliminary

[49] Of Jackson LJ preliminary report

report[50]. As we have said elsewhere, capping is an extreme means of controlling litigation and as such, should continue to be used only in exceptional cases and circumstances and where it is in the interests of justice to do so. There are other methods of control which should be looked at first, including judicial case management, or cost budgeting, for example.

7.9.2 Should section 6 of the CPD or any equivalent be "elevated" to a rule?

Solicitors, and increasingly as the Legal Services Act begins to take effect, law firms are required by the Solicitors Code of Conduct to tell clients how fees are calculated, and to provide the client with regular updates on the costs incurred so far. As indicated in the preliminary report, section 6 of the CPD has been progressively revised and expanded over recent years. There is no indication that it needs to be elevated to a rule: in our experience the courts implement the requirements of this CPD. See for example the recent case of *Mastercigars Direct Ltd v Withers LLP* [51]; *Reynolds v Stone Rowe Brewer (A Firm)*[52] and the Court of Appeal Guidance on the application of 6.6 of the CPD in *Leigh v Michelin Tyre Plc* [53].

7.9.3 Should those provisions (whether in the rules or in a practice direction) be strengthened, to give the court greater power to manage and control costs?

We take the view that the court already has sufficient power to manage and control costs, but does not always use that power.

7.9.4 What further amendments are required to the rules to enable the court to carry out effective costs management?

[50] Of Jackson LJ preliminary report
[51] [2009] EWHC 651 (Ch)
[52] [2008] EWHC 497 (QB)
[53] [2003] EWCA Civ 1766

As indicated above APIL believes that the court already has all the cost management powers necessary but often the court fails to use them. In relation to personal injury claims we see no need for additional cost management rules.

7.9.5 What improvements, if any, should be made to Form H? In particular should a detailed breakdown of costs estimate/budget be required?

Form H is, we believe, really only suitable in its current format for use in high value or complex claims. Practitioners tell APIL that a lot of them never use it at all, it is so detailed and time consuming to complete. Those who do say that they invariably have to send their file to a costs draftsman so that he can complete the form instead.

Despite this drain on practitioners' time, lawyers are penalised if their actual fees go 20 per cent over the estimate submitted. We believe that this encourages lawyers to put in 'top end' estimates.

Furthermore, the information on this form only provides a snapshot in time: for example, one of APIL's executive committee members has described to APIL how his form H on a particular case set out a certain planned course of events, but, due to a change of circumstances, periodical payments later became a live issue on the case. This was never envisaged when the form H was completed: far more work than planned would now have to be done as a consequence, putting him at risk of penalty if his costs subsequently exceed by 20 per cent the estimate already submitted.

There is a danger, too, with a narrative on the form, that the lawyer will disclose plans for the claim which subsequently become redundant for whatever reason, thereby leaving the lawyer open to penalties for reasons which may have been beyond his control.

If the form is not used for the majority of cases, and instead is replaced with straightforward estimates, the 20 per cent penalty could still apply, but the additional layer of work and costs incurred by detailed completion of the form would be avoided. By way of example, we are informed by members who use the Burnley and Coventry county

courts that they use a very simplified costs estimate form across the board and this is acceptable in both courts.

For high value or complex cases, or those involving something exceptional such as a split trial, something along the lines of the Legal Services Commission case plans for clinical negligence case/or a Form H style estimate, would still be appropriate as the time taken to complete it/costs incurred would be more proportionate to the value or complexity of the claim.

There is a danger, with the combined effects of using the form and the risk of incurring a 20 per cent penalty, that lawyers will over-estimate their costs to justify the time spent completing the form and avoiding the penalty as there is no sanction for over-estimates.

What is the purpose of the form? It isn't to encourage inflation of costs or disproportionate work on the file, but these are its effects.

Whilst discussing costs forms, APIL would also like to highlight form N260[54] which is an important form for claimants. (See 'summary assessment' section 8.1for further information).

7.9.6 Should the more Draconian form of costs management canvassed in paragraphs 3.21 to 3.24 be introduced for any categories of litigation, e.g. business disputes?

We can only comment on personal injury litigation and do not believe that a more Draconian form of costs management is advocated in this question.

8 Assessment of costs

[54] Statement of costs (summary assessment)

8.1 Summary assessment

It is APIL's view that summary assessment on interim hearings is working adequately but in terms of fast track trials, summary assessment is unsatisfactory.

We accept that summary assessment was developed with speed and cost in mind but we do not accept that the current system works in all cases where it is used. We agree that the lack of costs knowledge both by counsel and the hearing judge post trial can be a disadvantage to both claimant and defendants. It is essential that adequate training on costs is provided for the judiciary. In addition it is an awkward process at the end of a trial when the judge is often rushed, there is little desire to do a proper job, counsel is unfamiliar with the file and therefore unable to deal with discreet issues on the file that may need explanation.

APIL believes that further work should be done to develop the idea of an early interim payment on costs post trial.

We recommend that on conclusion of a fast track trial the judge makes an interim award on base costs to the successful party. The interim payment should be made to the successful party within 14 working days of the conclusion of the hearing. Consideration would need to be given to what percentage of base costs would be awarded at this stage and whether at this interim stage a judge should also make an award for disbursements and a percentage of any additional liabilities. It would also need to be made clear that any payment would be made on an interim basis only pending detailed assessment unless both sides agreed that the figure offered was in full and final settlement of the claim for costs. If an interim order for costs were to be agreed in full and final settlement between the parties a consent order would be filed with the court concluding matters.

In order to drive the behaviours of both the claimants and defendants either party would have the option of applying for detailed assessment once an interim payment had been made. The claimant would have the option to apply if he thought that the overall settlement proposed by the defendant, taking in to account the interim payment, was

insufficient. The defendant would have such an option if they thought that the payment was excessive and the claimant had decided to accept it in full and final settlement. Therefore, if there were claims that bills were disproportionate, a defendant would have the option to challenge this before an experienced costs judge. It will then be the experienced costs judges who will make a decision whether or not to allow it. This would allow the defendants to continue to make any cost challenges they felt appropriate but in the meantime would also provide prompt payment to the claimant's solicitor for work that they have completed, and is likely to lead to the issues that eventually end up before the court having been narrowed.

APIL would also like to highlight form N260 (statement of costs (summary assessment)) which is an important form for claimants. It currently takes at least 45 minutes to complete, but its usefulness is negated by its bad layout. Most law firms use case management systems which will tell them the number of letters written, calls made, attendances recorded, but it will not tell them to whom letters or calls have been sent or made (ie: to the client or to someone else). So rather than this being a simple form to complete, as it should be, it becomes a time consuming requiring a manual trawl through the file, increasing the time taken to complete it and the costs on the file.

8.2 Detailed assessment

It is APIL's view that the rules governing detailed assessment need to be changed. Our members talk about defendants making a series of offers which drag out the negotiations until just before the detailed assessment hearing. APIL suggests amending part 47 of the civil procedure rules, which we believe currently lacks teeth and have a part 36 style rule with sanctions. In addition to this amendment we believe that the rules should limit the number of times that claimants and defendants can make offers on costs. This would ensure that best offers of costs were made early on.

It is our suggestion that prior to applying for detailed assessment both sides should be free to make as many offers as they wished. Once detailed assessment proceedings had been instigated, however, the defendant would have to make a mandatory offer, which

would have part 36 type sanctions. This offer would have to be made at the points of dispute stage. If a challenge were to be made to the retainer an offer would still have to be made but it would have to be stated that it was subject to the challenge. The claimant would then be free to either accept this offer or if it was not being accepted would be obliged to make a counter offer on filing replies to the points of dispute. This type of rule would force both parties to make their best offers thus ensuring that disputes on costs are settled as early as possible and therefore saving the time of the court.

We do not believe that such rules would prevent negotiations continuing but the parties would not have the protection of part 36 style rules if offers were made and accepted at any other stage.

One issue that would need further consideration is the risk involved with making an offer on costs subject to Part 36 type provisions. There would need to be further consideration given to ATE insurance and whether the policy would/should include any costs liability if an offer was not beaten at the detailed assessment stage.

Our members fill our forums with discussions regarding defendants' challenges to claimants' retainers. As part of our work with the Civil Justice Council, we suggested a number of solutions to this problem.

One solution was to re-write the rules to penalise a defendant for failed or withdrawn challenges. A rule that ensures that parties who make a technical challenge, who then withdraw the challenge prior to the assessment hearing, or who fail with the challenge at assessment, are substantially penalised, in costs. Quite often these technical challenges are raised at an early stage in the costs negotiations merely to 'up the ante' and in the hope that some solicitors will back off and accept a reduction in their fees. Such a sanction might ensure that only those who had a valid challenger would risk raising it as an issue.

To make this rule stronger we also suggested that there be strict limits for raising retainer disputes. Solicitors need to be told at an early stage that their retainer is challenged – ie:

within 28 days of the date of the letter of claim, otherwise such a challenge would be viewed as too late to bring up.

We suggested to the CJC the approach to costs adopted by the multi track code[55] as a good way forward. This code gives the parties a time limit within which they must raise issues on the validity of the retainer, failure to do so results in debarring the issue from being raised at a later stage.

The multi track code states:

> "5. COSTS
> 5.1. The parties agree that any challenges to the enforceability of the retainer can only be made within 28 calendar days of letter of claim and any such challenges will be discussed constructively by the parties.
>
> 5.2. In the absence of any such challenges within the period of 28 calendar days it shall be conclusively and irrevocably presumed that the retainer is enforceable and will not be subject to challenge at any later stage of the claim."

Linked with these challenges to retainers is the question of whether there is any longer a need for the indemnity principle. As we said earlier in this paper abrogation of the indemnity principle would save a lot of court time as it would end challenges to retainers, thus making the process simpler and fairer. We believe that there should be a presumption that if a client engages a solicitor to act for them in litigation the unsuccessful defendant should pay the claimants solicitors costs, subject to the existing courts powers in the CPR to award only those amounts that are reasonably incurred and proportionate to the issues at stake.

Members report that paying parties habitually look for any breach of the principle to avoid their liability for costs and indeed the indemnity principle has lead to technical challenges and satellite litigation in recent years.

[55] See appendix nine

There has been concern expressed in some quarters that the removal of the indemnity principle would abolish the only mechanism in litigation that controls costs. We do not however, agree with this argument. We have guideline hourly rates and detailed assessment which would ensure that costs do not escalate. Under the legal aid scheme, the courts regularly determined reasonable hourly rates for the assessment of costs to be paid by the loser, notwithstanding the absence of any agreement with the client and the absence of any like between the rate paid by the loser and those paid by the Legal Aid Board.

Abrogation of the indemnity principle for personal injury claims would allow the development of a simpler CFA, which would be easy for solicitors to use and for clients to understand and difficult for insurers to unreasonably challenge. This would eliminate satellite litigation in this area. The claimant would still retain their independent rights in contract and statute against their own solicitor if they were not satisfied with any demand for costs that their solicitor was asking them to make from their own pocket.

By removing the indemnity principle a far simpler bill of costs would suffice as claimants would not be required to justify each element of their bill to the principle. The current bill of costs that we are required to prepare for detailed assessment is outdated and anachronistic. Software is available to allow claimant lawyers to produce bills in house but the software is expensive. We are keen to see what suggested changes to the bill are recommended by the working group[56], however, any work in this area must bear in mind that there will need to be sufficient detail in the bill to ensure that a claimant can prove the costs have been reasonably incurred as the burden of proof is on the claimant, however, we agree that there must be work that can be done to ensure that it is less antiquated. A side point of simplification may even be that the need for a costs industry is reduced.

Members in Manchester tell us that their local county court issues standard directions prior to detailed assessment. These directions aim at narrowing the issues on costs and

[56] There is a working group headed by Senior Costs Judge Jeremy Morgan QC.

where possible facilitating settlement. Those that have received these directions feel that further examination of directions with a view to considering wider implementation could be helpful. The directions include:

1) Solicitors for the parties shall confer and, if necessary, meet with a view to compromising or narrowing the issues and shall prepare and sign a memorandum settling out:
    a) The terms of any settlement reached
    b) Those issue which are agreed and those issues which remain in dispute.

The receiving party shall lodge a copy of the joint statement with the court together with a request for hearing incorporating any estimated length of hearing and specifying any further directions required which shall be referred to the costs judge on filing.

Members report that the length of points of dispute can often be horrendous and run into many pages. We do not believe that limiting these points to a certain number of pages would manage behaviours, but one behaviour that could be managed is a change in rule to prevent parties from including large quotes from case law within the body of the points of dispute. This would be better managed by attaching relevant case law or a list of relevant cases to the points of dispute. The suggestion made in the review paper that general points should only be made once and not repeated was welcomed by our members.

Appendices

Appendix one

The claimant was a pedestrian and 10 years old at the time of the accident. He suffered a serious brain injury when he was run over by a speeding motorist. The claimant was 22 years old at the time that claim was concluded.

The claimant came from an extremely under privileged background in Derbyshire. He had an inadequate mother and in his early teens Social Services had to intervene on numerous occasions because of his severe behavioural difficulties caused as a direct consequence of the injuries sustained in the accident. He suffered frontal lobe damage. He was at risk of falling into the criminal justice system and had begun to engage in alcohol and substance abuse.

Liability was initially denied but judgement was successfully obtained. Through the litigation process extremely specialised brain injury rehabilitation was arranged through a leading residential institution. Although this was a lengthy process as a consequence of the claimant's age, by virtue of the rehabilitation programme, he has been able to learn coping strategies and techniques which will give him semi independence, and will enable him to participate in sheltered or possibly remunerative employment and eventually to return to a community setting. He has developed a range of hobbies and interests.

The claimant's award included the funding of his entire rehabilitation programme, a substantial lump sum and lifelong periodical payments to continue to ensure his supervision and safety.

Appendix two

The claimant was a printing operative who injured his hand whilst using unfenced machinery.

The defendant made a part 36 offer of £16,000 in February 2008, confirmed that causation and contributory negligence were in issue and that continuing loss/handicap is denied entirely. The defendant made an application to court regarding a trial listed for October 2008 (claiming costs of £1,319.33 for the application) to either:

a) vacate the trial in its entirety, or

b) Limit the claimant to claim on preliminary schedule (i.e. to PSLA and past loss).

The defendant's application was refused, but the quantum assessment was adjourned (to allow defendant an opportunity to consider quantum). Defendant offered £33,000 in full and final settlement subject to liability.

The trial proceeded on causation and contributory negligence and the claimant successfully obtained judgment on 100% basis after a fully contested hearing and with no offer having been put forward by defendant as to liability.

The defendant made a revised Part 36 of £43,000. This was not accepted by the claimant and the matter proceeded to a contested quantum trial in February 2009, where damages of just over £111,000 were awarded (258% more than the defendant was prepared to offer). This is a case where the defendant added considerable delay and additional costs to the claim because of its failure to properly consider quantum.

Appendix three

The claimant suffered an injury whilst at work. On 29 June 2005 the claimant was working in a lift shaft when a house brick fell from the underneath of the lift carriage and hit him on the top of his left arm. The claimant suffered a broken arm and psychological injuries.

Claimant solicitors were instructed on 12 July 2005. A letter of claim was submitted to the defendant on 12 July 2005. That was acknowledged by the defendants on 3 August 2005. Defendant insurers wrote on 15 August 2005 saying that they were investigating the matter. On 2 November 2005 claimant solicitors wrote to defendant insurers pointing out their failure to comply with the Personal Injury Pre-Action Protocol and requesting documents. On 16 November 2005 an application for pre-action disclosure was made. An order for pre-action disclosure was made on the 18 January 2006. Defendant insurers did not comply with the order.

Around 14 February 2006 substantive court proceedings were issued. On 24 February 2006 a court application was made seeking enforcement of the order for pre-action disclosure. On the 20 March 2006 defendant through its insurers disclosed a ring-binder of papers saying that they were all of the documents it had, which were relevant to the claimant's accident. By letter of 20 March 2006 defendant insurers denied liability. On 6 April 2006 a claim form was served upon the defendant. The claim proceeded and on 29 November 2006 the claimant made a Part 36 offer on liability of 95/5% in the claimant's favour.

On 23 January 2007 the claimant and defendant exchanged witness statements. On 23 January 2007 the defendant served a supplemental list of documents and by 19 April 2007 the defendant indicated that it might seek to join a second defendant.

An application was made on 24 May 2007 by the first defendant for leave to join second defendant. The case proceeded and on 28 August 2007 the second defendant, filed and served its defence.

Witness statements were exchanged on 27 November 2007 with both first and second defendants. Listing questionnaires were filed and the case was allocated to a trial window beginning 22 February 2008. On 11 January 2008 the case settled for £20,000 plus costs.

Liability had been disputed throughout by both defendants. There was extensive and technical disclosure by both defendants. The documents filled a number of lever arch files. The final settlement was, in the claimant's opinion, without any deduction in respect of contributory negligence, which in any event, was always fully denied. The vast majority of the costs incurred by the claimant in this matter could have been avoided by an admission of liability within the protocol period or the acceptance by the first defendant, of the claimant's part 36 offer in respect of liability made in November 2006.

Costs were agreed by both defendants at a total of £25,000 including VAT and disbursements. There was no success fee. Disbursements were about £6,000.

Although the circumstances of the accident were in one sense very straightforward the defendants chose to defend the claim and raised a number of technical issues. In their defence the first defendant made allegations criticising the claimant and alleged that he had attached the offending brick to the underside of the lift carriage.
The defendant also decided some time into the proceedings, and was given permission, to add a second defendant. This very significantly added to the costs. Between the two defendants a total of six witness statements were disclosed.

Appendix four

The claimant suffered an accident at work. The claim had a moderate value.

A formal letter of claim was sent on 26 October 2008, which was acknowledged. The defendant insurer promised a "decision on liability within the time limit laid down". The insurer failed to make a decision as to liability at all. Much correspondence over the intervening months went unanswered. Requests for information about the client's wages, wages of comparable employees and pension information were ignored. The stock take letter sent on 16 March 2009 was also ignored. Legal proceedings were commenced on 14 May. A defence was then served. The defence stated:

- No admissions are made as to whether the claimant sustained injury;
- It is denied that the defendant was negligent and in breach of statutory duty;
- It is denied that even if there was negligence it in anyway caused, occasioned, or contributed to the claimant's alleged injury;
- The claimant is put to strict proof as to medical causation;
- It is not admitted that the claimant sustained any injury ;
- The claimant is required to prove the occurrence of his injury, the history of his systems, all medical treatment and the current condition and prognosis;
- The medical report (of the jointly selected expert) is not admitted – the defendants have addressed no questions to the expert whose report was disclosed prior to the issue of proceedings;
- The schedule of special damages is not admitted;
- The claimant is put to strict proof as to each head of loss claimed, the amount claimed and its reasonable attributability to the alleged accident

This is type of standard response is routinely seen by claimant lawyers and means that the claimant must prove every single element of his claim as the defendant has failed to narrow the issues.

Appendix five

The claimant in this case had no other means of funding a claim.

His wife became pregnant with their first child after IVF treatment at the age of 45. On being admitted for the birth of their child the decision was made to perform a caesarean section under general anaesthetic. Two errors were made by the anaesthetists and the claimant's wife died.

The errors of the anaesthetists were acknowledged within a few days of the claimant's wife's death; however, an admission of liability was not made until 11 months thereafter because of delays by the defendants.

An independent medical report which was commission very quickly after the event was promised to the claimant. This was never provided and as a consequence of this and the delay on liability experts were instructed to provide reports into the likely cause of death. Substantial costs could have been saved if defendants had dealt with matters more proactively.

Appendix six

In spring 2008 APIL members were surveyed on costs issues. One unexpected outcome from the survey was the number who reported continuous difficulties recovering costs under the predictable costs scheme (CPR Part 45, Part II). The issues and comments are set out below :

General problems reported in the free comments section are:

- Failure by losing party to promptly pay predictable costs, delays reaching several months in many cases;

- Failure to pay agreed damages – as indicated in the first part of this paper, APIL members report that agreed damages are being left unpaid by defendants, requiring the issue of Part 8 proceedings to recover the damages and, usually, costs.

- Continuous attempts to challenge the predictable costs claimed or aspects of them;

- Insurers routinely sending predictable costs claims to costs negotiators who then seek to reduce the amount of the predictable claim and or its disbursements;

- Refusing to pay predictable costs in RTA claims where there is no personal injury (ie: bent metal claims) which are clearly within the ambit of the rules.

Specific comments on predictable costs from the APIL survey were:

- Almost every insurer does not pay predictable costs promptly, sometimes many weeks or even months after agreement.

- Defendants continue to challenge claimant's costs by whatever means possible. Even in predictable costs cases, challenges are frequent thus defeating the object of the scheme.

- I usually negotiate my way out of such disputes. However this causes Part 8 proceedings to have to be issued where there is little need and actually often increased costs unnecessary. For example all cases [from a particular insurer] appear to go to [one firm] in relation to predictable cost cases where the calculations are so simple, then in turn [the law firm] seeks to knock £50 of the cost of the medical report seemingly regardless of the cost resulting in increased costs overall due to Part 8. Clearly they do this as not all solicitors issue Part 8 and some back down , in this regard the predictable cost regime is being abused and this is just one such example.

- Predictable costs are rarely agreed immediately upon settlement and certainly not paid swiftly. Firms such as [a particular law firm] regularly challenge disbursements or the calculation itself by reference to what damages should be included in the calculation. Costs, more often than not, remain the most contentious aspect of most cases and taking the matter to task in the Courts can take between 6-12 months after the primary claim for damages has concluded. We have seen more detailed assessments than trials over the last few years and preparation time for a detailed assessment can now easily match and often exceed the preparation time required for trial.

- The use of cost consultant firms in simple predictable cost case is extremely annoying as are arguments re medical report fees (we do not use agencies). We can spend longer arguing a difference of £50 for a medical report than the case took to conclude!

- There has been an increase in technical challenges. Even on predictable costs claims there will be routinely a challenge on some aspect be it CFA or a disbursement, to try and reduce the level of costs.

- Why do insurers send predictable fees files to solicitors/costs draftsmen thereby delaying payment by four to six weeks?

- Seems to have swung further into satellite litigation so that almost every item is now challenged. For example recently in a bill for around a total of £6,000, nearly every item was challenged in PODs. Nothing too contentious in the bill either. Are we supposed to do them for nothing? Seeing more challenges to predictable costs too.

- We are finding increasing challenges to non-PI predictable costs cases (ie: bent metal claims), where damages exceed £5,000. Defendant insurers attempt to argue that there is no costs entitlement at all in these cases. This is despite full notice being given in our letters of claim that we expect predictable costs to be paid. The defendant insurers stay silent until the conclusion of the claim when predictable costs are requested and then they refuse to pay. We are currently running some Part 7 claims in this respect.

Appendix Seven

Proposal for a pre-action application to show cause

We believe that the protocols relating to personal injury have improved pre-action communications between the parties significantly. Those cases in which the protocols are adhered to are generally run efficiently, with cases settling quickly and relatively cheaply. The protocols do encourage an element of front loading, but this is work which is usually necessary in order to settle a case or take it to trial in any event.

Problems with the protocols lie not with the documents themselves but with non-compliance with these. The most common problem our members experience is that protocol time limits are routinely flouted. Voluntary adherence to the protocols is clearly not working. We therefore believe such that there should be sanctions for substantive breaches of the protocol.

The intention of the protocols is that parties set out their case in advance of any proceedings. All too often, however, defendants do not set out the basis for their position or disclose relevant documents early enough. Responses to letters of claim are often either only acknowledgements or straightforward denials with no supporting arguments or evidence. It is not uncommon for a defendant simply to say he is putting the claimant to proof.

In our view, insurers play a numbers game, denying legitimate claims because overall that is cheaper than properly investigating and responding and there are a proportion of

legitimate genuine claims that will not be pursued once a bare denial of liability or even no response is received. Insurers bank on these claims falling away[57].

Requests for disclosure are routinely ignored, and even pre-action disclosure applications do not necessarily result in the defendant setting out his case clearly. A claimant often needs to issue his claim just to establish what the defendant's case is.

We believe that a simple pre-action paper application could resolve these problems, potentially saving the costs of issuing the application. The procedure we envisage is similar to the show cause procedure set out in the mesothelioma practice direction[58], where the defendant is required to identify the evidence and legal arguments that give the defendant a real prospect of success on any or all issues of liability.
Like that practice direction, this aim of this proposed procedure would be to ensure the basis of every party's case is clearly set out and that the issues are narrowed appropriately.

We suggest:

1) In order for the court to adopt the show cause procedure, the claimant must show the court that he sent a letter of claim containing the relevant information as identified by the protocol.

2) Where the defendant has replied regarding the issue of liability but has failed to provide disclosure or details of why liability is denied, or after the three month period stipulated by the protocol has expired and a response has not been received from the defendant, the claimant may make a pre-action application for the court for the defendant to "show cause".

3) A specialist judge will consider the paper work and make an order requiring the defendant to:

[57] See the attached article "Insurers and Personal Injury Litigation: Acknowledging the Elephant in the Living Room", Richard Lewis [2005] JPIL Issue 1/05, particularly p.6, "Delay, uncertainty, financial need and other pressures cause claimants to accept sums much lower than a judge would award."
[58] See Master Whitaker's discussion of his show cause procedure starting on p.176 of the attached article "Thee Years On – the "Mesothelioma Fast Track" at the Royal Courts of Justice", Master Steven Whitaker, [2005] JPIL Issue 2/05

a) show cause, namely identify all evidence and legal arguments that give the defendants real prospects of success on all or some of the issues of liability; and
b) provide disclosure to the claimant of all documents and information required by the pre-action protocol and requested by the claimant in his letter of claim.

4) If the defendant does not file and serve the above documents by the date specified in the order, the court will debar the defendant from the defending the claim and may, if the claimant has demonstrated a real need, order an interim payment to be made by the defendant on account of damages by a specified date.

5) Where the defendant fails to show cause on some issues, the court will normally debar the defendant from defending these particular issues.

We anticipate that such an application would usually be dealt with on a paper basis only, and therefore attract a minimal court fee.

If such a procedure were introduced, consequential changes to the pre-action protocol on personal injury claims and the CPR would need to be made, although we do not believe that these would be difficult to introduce. The basis on which the court considers the application, for example, could be similar to the current pre-action disclosure application, with regard to considering whether the proposed parties are in fact likely to be party to proceeding in the future.

21 July 2009

Appendix eight

[redacted]

NORWICH UNION
an AVIVA company

[redacted]

For our joint protection calls may be recorded and monitored

Our Ref: [redacted]

28 May 2009

[redacted]

Re. Road Traffic Accident on 20/05/2009

With reference to the above accident, please note our interest in this matter as the insurers of [redacted] I have tried to contact you by telephone but without success so far.

The purpose of this letter is to enquire if you suffered an injury directly as a result of this accident and to establish whether you intend to pursue a claim.

If so, I am willing to offer my expertise as your dedicated Claims Handler and would be happy to discuss the range of solutions and services we can offer to get you back on the road and to aid your recovery from any injury. This may include:

- compensation for any injuries
- ensuring your claim is settled quickly, fairly and with minimum inconvenience
- regular contact to ensure that you are kept update with the progress of your claim
- medical or physiotherapy treatment where appropriate, at no cost to you
- interim payment(s) for out of pocket expenses e.g. Loss of Earnings, Travel, Telephone, Postage Expenses and etc.
- a like for like hire car while you wait for your total loss settlement or vehicle repairs to be completed

Should you not wish to deal with Norwich Union directly, then we can also arrange for a Solicitor to advise you if necessary.

My direct contact details can be found below including my personal email address should you prefer this form of communication. I have also enclosed a copy of our leaflet which outlines our services and answers some 'Frequently asked Questions'.

If you have already instructed a solicitor, please disregard this letter as we will not be able to discuss any matter with you directly, and all correspondence or queries must be directed through your solicitor.

Yours Sincerely,

NCoughlan

Nicola Coughlan
Un-represented PI Claims
Direct Tel: 0845 3028345 ext 280820
Email: Nicola.coughlan@aviva.co.uk

Appendix nine

PERSONAL INJURY

MULTI-TRACK CODE

APIL and FOIL

INTRODUCTION

The multi track code is designed for personal injury cases (excluding clinical negligence and asbestos related disease cases) within the multi track arena and will be piloted to capture claims with a predicted value of more than £250,000.

The code is intended to help parties involved in these multi track claims to resolve liability, put in place a system that meets the reasonable needs of the injured claimant and then work towards settling the case by narrowing the issues before either settlement or trial.

This code creates a new environment for case planning, encouraging changes in behaviour on both sides, and will work in parallel with the Civil Procedure Rules. This code does not change the law, which requires a claimant to prove his case, and failure to comply with the code should not in itself be taken into account by the court when considering the conduct of the parties. Furthermore, nothing in the code affects a solicitor's duties to act in the best interests of the client and upon their instructions.

This multi track code document comprises the following:

- Objectives – a summary of the key aims of the code and the key actions required to meet these

- The Code - the main text of the code focuses on the behaviour consistent with efficient, cost proportionate and "claimant centred", subject to liability, claim resolution. It is not to be used as a tactical weapon to "score" points and promote adversarial behaviour.

  The concept of "mapping" is introduced, which is central to the behaviours expected of the parties. As the type of claim that may be handled under the route map is very wide ranging, it is up to the parties to sensibly identify what steps are needed according to the facts and issues in a case. Parties must consider proportionality and the appropriateness of each step in the case being handled.

- Guidelines - these provide guidance on "behaviour" in certain areas which is seen as conducive with the aims of the code and set out a standard which will generally be expected of parties working under it. The guidelines cover:

  - Guideline A: Managing cases where criminal proceedings arise
  - Guideline B: Rehabilitation and funding
  - Guideline C: Schedules of Loss
  - Guideline D: Admissions
  - Guideline E: Checklists
  - Guideline F: Costs

- The Pilot – details of the pilot scheme to be operated to ascertain whether the multi track code will work in practice.

OBJECTIVES

The following is a summary of the key objectives which should be referred to in all cases to illustrate the behaviour that is expected under the code, but in respect of each one the detail is in the code.

KEY OBJECTIVE:

To resolve liability as quickly as possible, help claimants to access rehabilitation when appropriate and resolve their claims in a cost effective manner and within an appropriate time frame, meeting their individual needs, with all sides working together in an environment of mutual trust and collaboration.

The collaborative approach should produce a procedure and process for handling cases which bring tangible benefits to all sides. The key tenets of this approach are as follows:

i. Early notification of claims to defendants or their insurers.

ii. Prompt dialogue as to arrangements for the investigation of liability.

iii. For cases handled within the pilot admissions to be binding except in the face of evidence of fraud which should not be determined differently from cases handled outside the pilot.

iv. Discussion at the earliest opportunity by all parties to agree a care regime, accommodation, equipment and/or other forms of rehabilitation where reasonably required, and options for the funding thereof, to rehabilitate the injured person and resolve the case as quickly as possible, providing appropriate compensation.

v. In all cases, a commitment to resolve liability by agreement or if necessary trial, with a view to being dealt with in a maximum period of six months from date of first notification.

vi. A willingness to make early and continuing interim payments where appropriate.

vii. No Part 36/Calderbank offers unless or until the parties have tried to agree an issue through dialogue and negotiation but cannot do so.

viii. Appointment where necessary of an independent clinical case manager instructed by the claimant.

ix. Commitment by all parties to obtain and disclose promptly all relevant information, i.e.

a. liability documents disclosable under the pre action protocol
b. police reports in road accident cases
c. accident report documentation
d. notes and records
e. documents relating to schedule of loss
f. regular reports of case manager

x. Commitment by all parties to obtain evidence in such a way as to avoid duplication of effort and cost, and sharing the evidence obtained as soon as practicable.

xi. Agreement that any challenges to the enforceability of the retainer can only be made within 28 calendar days of letter of claim and any such challenges will be discussed constructively by the parties.

xii. A commitment to an early interim payment of disbursements (the subject matter of which has been disclosed) and those base costs relating to liability, once this issue has been resolved, with any such payment to be an interim payment as to costs and to be taken in to account on conclusion of the case.

THE CODE

1. THE COLLABORATIVE APPROACH – AN OUTLINE

1.1. The aims and objectives of this multi-track code will be achieved through the parties working together, allocating tasks and narrowing the issues throughout the claim, leading to a settlement or some means of dispute resolution at the earliest time.

1.2. Commencing with a commitment to early notification of a claim to the potential defendant, the parties will for each case agree a case specific 'route map' which will include a succession of review dates with a pre-defined agenda for each review, and mechanisms for resolving any disputes there may be as to the route map.

1.3. The route map should set out:-

1.3.1. A resolution process in which there is a full and frank exchange of information as soon is practicable involving open exchange of information by both sides in accordance with the key objective

1.3.2. An efficient and economical process that involves task allocation, avoids duplication of effort and expense wherever possible

1.3.3. A process of case planning, agreed between the parties, and which is directed towards :-

- liability resolution
- maximising rehabilitation opportunities
- making provision for early interim payments
- emphasising restitution and redress, (rather than just compensation)
- early identification of issues not in dispute
- flexible approaches to resolution of issues in dispute.

1.3.4. Throughout, an agreed timetable and action plan to resolve the case.

1.3.5. Above all, a defined collaborative way of working between the parties that achieves the above.

1.4. The pre-defined agenda is to identify:

- What issues are there?
- What needs to be done to resolve them?
- Who should take those steps?
- By when should those steps be completed?
- What was the outcome of any previous actions agreed?
- What issues are capable of agreement?
- What action needs to be taken over schedules of loss?

- When should the parties meet/talk next/again?
- Who will update and share the route map?
- If agreement is not possible, what steps need to be and have been taken to narrow down as far as possible the areas of disagreement?
- The appropriate and most efficient way to resolve outstanding issues.

1.5. The collaborative approach is therefore one whereby the parties jointly agree a plan, a timetable and tasks**,** dates for review sessions with clear milestones for the progression of any claim towards resolution.

1.6. Parties will naturally continue contact between review dates. The reviews will be essential stock take and planning sessions which will define the way in which a case proceeds. In appropriate cases some or all of the reviews may take place face to face. In other cases, or on certain occasions, reviews by telephone will be acceptable.

2. DOCUMENTING THE PROCESS

2.1. To promote the process the parties should exchange correspondence which:

- records agreed issues and identifies issues yet to be resolved
- records which parties are tasked with what steps to progress the claim
- records the timetable agreed for the resolution of those issues and steps.

3. THE "TRIGGER" PHASE – EARLY NOTIFICATION

3.1. The claimant's solicitor should ensure that defendants are given early notification of the claim. The benefits of the code can not apply until this step is taken – claimant representatives accept a commitment to trigger the code by making early contact with the defendant's insurers. The recommended contents of this "trigger letter" are set out in 3.3 below. Compliance with paragraph 3.3 is fundamental to the code.

3.2. A full formal detailed letter of claim is not expected. The aim is to alert the proposed defendant or insurer to the potential claim and to enable:

- an initial view for the purpose of reserve
- allocation of the case to an appropriate level of file handler within their organisation
- liability to be resolved promptly without further investigation by the proposed claimant.

3.3. The claimant's solicitors should aim to send a written notification within 7 calendar days of instruction. This should convey (on a 'without prejudice' basis):

- Name, address, date of birth and NI number of claimant
- Date, time and place of accident or date of onset of condition giving rise to the claim
- Factual outline of accident and injury if available
- Who is said to be responsible and relationship to claimant
- Any other party approached
- Occupation and approximate income
- Name and address of employer if there is one
- Current medical status in summary form (e.g. inpatient or discharged)
- Any immediate medical or rehabilitation needs if known
- Any other information the claimant solicitor feels comfortable to give in the spirit of the code.

3.4. In the trigger letter, the name of file hander and immediate line manager/supervisor conducting the claim should be identified. If it is practical relevant e-mail addresses and telephone numbers should also be included.

3.5. The solicitors representing the claimant should take all reasonable steps to locate the appropriate insurer, and notify that insurer. If unable to do so, a short notification letter should be sent to the proposed defendant with a request to pass it on to any relevant insurer. In RTA cases, the MIB should be approached in the absence of an alternative insurer.

3.6. The reasonable costs of the solicitor in complying with this section will not be challenged for the lack of a retainer at this point in time.

4. THE "RESPONSE" PHASE – ROUTE PLANNING COMMENCES.

4.1. First contact call / meeting

4.1.1. Within 28 calendar days of receipt of the trigger letter, the defendant or insurer shall make contact with the claimant solicitor. Generally this will be by telephone, though in appropriate cases, and if time is available, such meeting might take place in person.

4.1.2. For the purposes of this contact, the insurer should secure basic data regarding the claim from their insured. Both parties should consider what matters the case specific 'route map' should contain/address at this early stage.

4.1.3. The defendant or insurer's representative should also respond in writing, and this first response letter should include, the name of file handler and immediate line manager / supervisor conducting the claim should be

identified. If it is practical relevant e-mail addresses and telephone numbers should also be included.

4.1.4. The first meeting or discussion should take place and cover the pre-defined agenda (see 1.4)

4.2. Planned Review sessions

4.2.1. It is an important part of this Code that the parties agree review sessions within the route map at appropriate points to ensure:-

- outstanding and unresolved issues be the subject of periodic review and reconsideration; and
- that the parties always have in mind a shared target date, by which the claim should reach claim conclusion whether negotiated or otherwise.

4.2.2. Accordingly resort to legal proceedings does not suspend this Code and it is recognised that it is proper for legal proceedings to be pursued so that a claim that has not settled under this Code, can be tried as promptly as the Court permits.

4.2.3. At each review session the pre-defined agenda should be reviewed and the route map developed in the light of the review session.

5. COSTS

5.1. The parties agree that any challenges to the enforceability of the retainer can only be made within 28 calendar days of letter of claim and any such challenges will be discussed constructively by the parties.

5.2. In the absence of any such challenges within the period of 28 calendar days it shall be conclusively and irrevocably presumed that the retainer is enforceable and will not be subject to challenge at any later stage of the claim.

5.3. The claimant's solicitors should accommodate all reasonable requests for information to enable the issue to be resolved conclusively within the longer of [a] 28 calendar days of the letter of claim, or [b] 14 calendar days after the challenge, recognising also that the claimant cannot be asked to disclose more than would be disclosable prior to a detailed assessment, and cannot disclose any information relating to risk assessment. In the event of a challenge remaining unresolved at the end of the stipulated period [a] or [b] the parties agree the case will not be dealt with, within the pilot.

5.4. Following resolution of liability a commitment to pay disbursements and base costs concerning liability and meet reasonable requests for interim payments

to meet disbursements in relation to outstanding issues, with any such payments being made on an interim basis on account of costs.

GUIDELINE A

MANAGING CASES WHERE CRIMINAL PROCEEDINGS ARISE

A.1 The parties recognise the seriousness of criminal proceedings against a potential defendant and the need to ensure that no action is taken which compromises the defendant's defence of them.

A.2 It is also recognised that valuable information which is material to the assessment of civil liability may not become available until criminal proceedings (potential or otherwise) are completed. In such circumstances, the defendant (or insurer) may not be able to complete liability enquiries until that time.

A.3 Those considerations aside, defendants undertake not to regard the existence of outstanding criminal prosecutions as a bar to making early decisions on liability so that progress can be made to resolve a valid claim from an injured claimant. Defendants will conduct a realistic assessment of the facts. Should the outcome of a criminal prosecution be irrelevant to the validity of the claim, then the defendant will make known their views to that effect at the earliest time.

A.4 In any case where a defendant is not able to progress liability pending completion of criminal prosecutions, the reasons for this will be explained to the claimant's solicitor and, to the extent reasonable to do so, will not prevent taking of any other steps which might be reasonable to move the claim along.

A.5 The defendant should where practicable comply with disclosure obligations as agreed within the route map.

A.6 This approach applies to inquest proceedings as well as criminal prosecutions.

GUIDELINE B

REHABILITATION AND FUNDING

Whether the guidance contained herein applies will depend on the extent and nature of the injuries sustained.

B.1 All parties will aim to work within the 2007 Rehabilitation Code

B.2 All parties recognise that rehabilitation should meet the reasonable requirements (including social, domestic and vocational) of the claimant. The choices of the claimant should be taken in to account. It is important that the parties co-operate to identify the statutory obligations that are owed to the claimant at an early stage.

B.3 Consideration should be given to obligations imposed under statute, whereby the consideration of PCT and LA obligations take place prior to the point of discharge. This will ensure no delay arises in achieving the benefits set out above. At all times the full and early rehabilitation of the claimant should be a priority, by whatever means is reasonably available.

B.4 The claimant's representative should, as soon as is practicable, obtain records and as much information as possible regarding the claimant's condition and treatment and will share relevant information with the defendant's representative.

B.5 The claimant's representative should establish liaison with the treating consultant, and identify likely date of discharge and share that information with the defendant's representative. At that stage the parties should:

- discuss whether to procure an immediate needs assessment,
- if so discuss whether it should come from the treating consultant if possible or whether to seek it from another, and if so, what source
- Otherwise, agree if possible on an appropriate course of action.

B.6 If there is potential for involvement of social services and the National Health Service (NHS) and other agencies the parties or appointed representatives should give consideration to the involvement of these agencies and this may, where appropriate, include the instruction of a suitable expert for statutory services liaison

B.7 If a clinical case manager is engaged by the claimant, whilst the parties should try to agree who that clinical case manager should be, it is recognised that ultimately it is the claimant who will finally decide who will be the clinical case manager and appoint direct.

B.7.1 The case manager should provide records and regular reports to claimant's representative who, in turn, shall promptly disclose those documents that are not privileged to the defendant's representative. Where any information has been removed because it is privileged, the claimant's representative will promptly tell the defendant's representative of the removal and the reason for this.

B.7.2 Invitations will be made by the claimant's representative to the defendant's representative to regularly review and discuss rehabilitation.

B.7.3 The defendant may retain someone to advise on the case management aspects of the case

B.8 The insurers will agree to pay agreed service providers directly.

GUIDELINE C

SCHEDULES OF LOSS

C.1 The parties should agree a timetable for the exchange of schedules of loss, counter schedule and reviews thereof.

C.2 Exchange should not be deferred until all heads of claim can be quantified with accuracy.

C.3 The defendant should respond in respect of each loss, identifying those which are agreed and those required to be proven or for which further evidence is required.

C.4 Past losses should be particularised by the claimant as soon as possible and these should be endorsed by a statement of truth.

C.5 If a head of claim cannot be particularised, the claimant should, where practicable, give an approximate value in order to inform the proportionality of enquiries to be pursued.

C.6 Updated schedules should be served as necessary in accordance with the agreed timetable and route map.

C.7 Further to C4 above, witness evidence should not be obtained on any item of loss unless the defendant has required it to be proven or unless the claimant's representative reasonably believes that such evidence or the cogency or potency of the evidence will, in the opinion of the claimant's solicitors, be adversely affected if not captured prior to the defendant's compliance with C3 above.

C.8 In respect of gratuitous care the care provider should endorse the section dealing with the care they have provided and for which a claim is made with a statement of truth. Witness evidence with regard to such care is not required unless specifically required by the Defendant.

GUIDELINE D

ADMISSIONS

D.1 Good relations between the parties and the process of continually narrowing issues (a key objective of the code) depend on admissions being made by either side when it is appropriate to do so. It is essential, therefore that both parties are able to confidently plan their involvement in a claim in the light of admissions conveyed to them.

D.2 However, it is also recognised by all parties, that a fundamental tenet of the compensation system is the delivery of compensation only to those who are entitled to receive it. Accordingly compensation should not be paid where no entitlement exists.

D.3 It is essential that the parties conduct themselves in a way that balances these two principles.

D.4 The following are guidelines that seek to promote good practice in this area:

D.4.1 Admissions are central to the code and the parties should make them wherever and whenever able to – a culture of never admitting anything is not acceptable.

D.4.2 It is a matter for each party to ensure that it obtains and handles information competently and that it makes admissions at the appropriate time.

GUIDELINE E

CHECKLISTS

The following is intended as a guide to the issues that may be discussed at each route map review. It is not exhaustive, not is it prescriptive and will need to be tailored in each case. When considering the checklists, thought should be given to the principles referred to in the introduction to the code, including considering each step being taken is proportionate.

E.1 Insurance / indemnity issues

E.1.1 The insurer should identify to the proposed claimant's solicitor any issues (subject to data protection and confidentiality issues) anticipated as to:

- Status of insurer
- Limit of indemnity
- MIB involvement
- Dual Insurance
- Doubtful / absence of policy cover.

E.1.2 If any of these issues are identified, the insurer should also detail**:**

- the steps that are proposed to resolve those issues
- the time scales proposed for resolution.

E.2 Liability/Causation/Quantum

E.2.1 Are immediate admissions/agreements possible in relation to:

- Primary breach of duty
- Causation
- Contributory negligence
- Quantum?

E.2.2 If such admissions are made or intimated, they should be put in writing.

E.2.3 If only a provisional concession is contemplated, this should be put in writing.

E.2.4 If such admissions are not made or intimated, the reasons are to be explained and put in to writing..

E.3 Factual liability and quantum evidence collection

Parties should note objective ten, to obtain evidence in such a way as to avoid duplication of effort and cost. In order to achieve this, parties may wish to consider:

- What relevant factual information or evidence which is reasonably necessary to any outstanding liability issues in the case is or should be available?
- What steps should be taken to obtain or preserve that information / evidence?
- Who should take those steps?
- By when should those steps be taken? (usually before the next review date)
- Who should bear the costs of taking those steps?

E.4 Lay evidence regarding liability or quantum

- Do the parties have material evidence that is considered decisive on any issue / issues?
- If so the parties should agree a timetable for exchange of evidence on an issue by issue basis as soon as exchange is practicable.
- If either party has access to documents which will come into the public domain (for example in criminal proceedings or an inquest), this evidence should be disclosed on a confidential basis, so as to encourage the parties to resolve liability issues as early as possible.

E.5 Expert evidence regarding liability or quantum

- Parties will be at liberty to discuss how this evidence should be obtained
- Parties shall consider whether to agree to single joint instruction adopting CPR Part 35.8. If not, the parties should prepare a joint instruction letter to ensure all issues as identified by both parties are addressed by each expert instructed
- A timetable for exchange of information on a specialty by specialty basis should be agreed and should provide for exchange as soon as is practicable (usually before the review date);
- A timetable for asking and answering questions of experts pursuant to CPR Part 35 should be agreed and should allow for questions to be asked as soon as it is practicable.

E.6 Expert evidence regarding quantum alone

E.6.1 Any party considering instructing an expert should consider whether evidence from that expert is appropriate, taking account of the principles

set out in Parts 1 and 35 of the CPR. (Parties are at liberty to obtain own expert evidence)

E.6.2 Does either party intend to secure expert evidence on any issue(s)? If so the parties should consider a discussion and endeavour to agree:

- A timetable
- The relevant issues
- The relevant specialties
- At what approximate cost and how does this compare to the importance of the issue to the resolution of the claim and to the potential value of the claim?
- To consider possible joint examination by experts in the same speciality (failing which the entitlement of the insurer to facilities for medical examination of the claimant by an expert of its choice is acknowledged and to achieve the aims of the protocol facilities will be granted

GUIDELINE F

COSTS

F.1 All parties acknowledge that mutual trust and collaboration between the parties is a key objective. The issue of Costs is no exception to this objective and part 5 of the code contains detailed provisions with regard to how any retainer challenges are to be resolved. The parties recognise that claimants who have been injured will be best served by being able to focus on recovery and receiving prompt compensation rather than having to be concerned about the complexities of legal costs throughout the duration of a claim.

F.2 By way of further guidance however the parties acknowledge that challenges to the retainer should not be regarded as "normal procedure" and it is only if there are particular concerns about the retainer that a challenge should be made . Any such concerns will be identified as a pre condition of the particular challenge being considered.

F.3 The parties also recognise that it is in keeping with the claimant centred philosophy of the Code that claimants should receive their compensation promptly and without unnecessary deductions. Objective 12 goes some way towards promoting this philosophy but by way of further guidance it is acknowledged by the parties that, when the final amount of the claimant's compensation has been ascertained (whether by agreement or court order), reasonable requests for payments on account of legal fees and disbursements will be regarded as routine procedure and that such payments will be made without the necessity of incurring the costs of a contested court hearing.

THE PILOT

For the purposes of the Pilot only designated representatives in participating solicitor firms and insurers shall have authority to enter the Pilot.

Association of Personal Injury Lawyers

▶ 11 Castle Quay, Nottingham, NG7 1FW ● T: 0115 958 0585
● W: www.apil.org.uk ● E: abi.jennings@apil.org.uk