Review of Civil Litigation Costs: Preliminary Report
(published 8 May 2009)

Response of Berrymans Lace Mawer LLP to phase II of the review

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Introduction

Berrymans Lace Mawer LLP, blm-law.com is a law firm that provides clear concise advice to a broad range of commercial and insurance clients. We operate from Birmingham, Cardiff, Leeds, Liverpool, London, Manchester, Southampton and Stockton-on-Tees.

The firm’s clients are drawn from across the commercial sector, FTSE-100 companies, the insurance industry, local authorities, the public sector and professionals. The firm has more than 100 partners and a staff of over 1000.

We welcome the publication of the Preliminary Report of the Review of Civil Litigation Costs, which is being conducted by Lord Justice Jackson. For ease of reference we shall refer throughout this response either to ‘the review’ or to ‘the Jackson review’. Representatives from BLM attended each of the four main phase II events and we were represented at several of the secondary phase II events in the latter part of July.

The preliminary report and the consultation mark phase II of the review. We have already provided detailed data and submissions to phase I of the review. We provide further claims data, generally updated to the end of quarter 2, 2009, with this phase II response. The data is provided in an identical format to that provided previously and on the same confidentiality basis, ie that it may be used, interpreted and modelled by the review team without restriction, save that we shall not be identified by name as the source of any data.

In this phase II response we focus on the key areas for personal injury litigation in general and we also provide comments regarding clinical negligence claims. We confine our remarks to these areas purely as a matter of priority. Over the remainder of the review period (to the year end) we would of course be pleased to provide views and/or to discuss costs issues in other areas of our practice such as: professional negligence, defamation, construction, property, product liability, local authority and housing, and commercial litigation.

Over the last 18 months we have also provided data and submissions to the Advisory Committee on Civil Costs (ACCC), chaired by Professor Nickell. This appears to us to have been operating somewhat in parallel with the present review. We are pleased to repeat here the offer we made in responding to phase I: that we would be happy to provide material supplied to the ACCC to the present review if that were thought helpful.
Executive summary

This response covers our views on the preliminary report. We deal primarily with the costs problems and solutions in personal injury claims as well as providing comments regarding clinical negligence claims.

The ideas in our response, when taken collectively, set out broad principles which apply to costs in personal injury claims in the following ways.

**Fast track**
- fixed costs throughout
- to apply all claims
- to include litigated matters
- limited exceptions defined at the outset
- staging of costs post issue
- discount(s) for early admission
- regime to be reviewable periodically
- general damages to be assessed using judicially sanctioned applications

**Multi track**
- costs should not simply be ‘at large’
- budgets, estimate and caps should become commonplace
- benchmarking of costs could apply in catastrophic injury claims

The figures in the report’s matrices of fixed costs are likely to be unsustainably high if based on current costs and settlement behaviours.

We believe that occupational disease claims are generally suited a fast track regime, but that any exceptions will need attention.

We give qualified support to the idea of one-way costs shifting. This is subject to developing effective mechanisms for deterring spurious claims and making offers to settle, both of which are problematic absent full costs shifting.

We believe that the claimant should have a stake in his or her claim and that this will act to exert competitive ex ante pressure on costs and additional liabilities (if any). We do not accept that damages should be sacrosanct. If the principle is that damages may be spent as one sees fit then that must include spending something on costs.

We are minded to suggest that additional liabilities should not be recoverable between the parties and recognise the effect this would have on certain business models.

We maintain that the key to driving good pre and post action behaviour is for the system to have the right ‘prompts’ – provisions which reward desired behaviours (such as early admission and accurate offers to settle) and other provisions which penalise poor behaviours (such as premature issue).

We support judicial docketing but recognise the structural barriers in practice.

In clinical negligence claims, we believe that two way costs shifting should have a role. We believe that there needs to be greater scrutiny of pre-action costs and behaviours in these claims because increasing numbers settle at this stage.
Part I – Background material

Key findings from our data submitted for phase II

1. Claimant costs invariably exceed damages in all fast track injury claims (annex 1) [identical to our phase I finding]
2. Claimant costs, regardless of case value, average over two thirds of damages (annex 3) [our phase I finding was over four fifths]
3. In multi track claims under £100,000, claimant costs average around two thirds of damages (annex 1) [identical to our phase I finding]
4. In multi track claims over £100,000, claimant costs average around one fifth of damages (annex 1) [identical to our phase I finding]
5. Average total claimant costs in fast track EL claims in 2009 (to date) were around £4,600, an increase of around 2.5% from 2008 (annex 4) [our phase I finding was a 6% increase from 2006-2008]
6. Average total claimant costs in fast track PL claims in 2008 were around £5,600, an increase of around 17% from 2006 (annex 4). [restating our phase I finding2].

Our recommendations made at phase I

1. Fixed recoverable costs schemes should be extended throughout the personal injury fast track
2. Absent specific fixed recoverable amounts, costs should be presumed disproportionate if they exceed damages
3. The fact that the claimant has no financial stake in the costs of his claim has removed an important market force from costs and this should be reconsidered
4. Procedural rules leading to the outcomes in Lamont and Kilby should be reviewed urgently
5. The referral fee market and its mechanics should be within the review’s scope
6. The use of costs capping, budgeting and estimate should become much more widespread
7. Further research into the viability, possible impact and potential unintended consequences of a contingency fee approach should be undertaken.

1 The sole exception over the last four years is for motor fast track claims concluded in the first half of 2009, in which costs average 96% of damages.
2 The fast track costs data set for PL claims concluded in 2009 is presently too small for analysis.
Summary of client seminar held on 14 May 2009

### Technical aspects

1. **Support for the matrices of fixed costs** in principle throughout the fast track.  
   - Injury claims are easier to address than clinical or other types  
   - But still a good case for fixed fees for clinical cases  
   - Timing of these matrices could assist the MoJ RTA process – but the figures in them are based on current rates, and hence may arguably be too high

2. **Support – with reservations – for one way costs shifting** in principle  
   - If there are adequate controls and safeguards so as to avoid the ‘have a go’ culture  
   - The quid pro quo for one way shifting would be no success fees and no ATEs  
   - There will need to be penalties on both sides for abuses of one way shifting  
   - Is there a floodgate risk with one-way shifting in clinical negligence?  
   - How does one way shifting sit with restoring a stake in the costs system (below)?

3. **Support for more widespread costs budgets and estimates** in multi track injury claims. Need for more transparency on costs generally.

4. **Support for software tools for general damages assessment** (in fast track)  
   - Judicially sanctioned  
   - Greater control and predictability of outcome – certainty a key driver for insurers  
   - Would need to be more detailed than current JSB guidelines  
   - Unlikely to be suitable for multi track injury generally and possibly many clinical negligence claims  
   - Reality is that claimant solicitors accept the use of these tools in accepting thousands of offers made based on valuations.

5. **Need to control poor conduct and behaviour** generally by claimant solicitors  
   - Pre-action conduct can be very poor indeed  
     - especially in clinical negligence claims  
     - prospect of costs sanctions at this stage? (how to reconcile with one way cost shifting?)  
     - note that Jackson classes pre-action protocol issues as ‘some of the most intractable questions’  
   - Start now to collect evidence of conduct and behaviours (both pre and post action)  
   - Introduce appropriate and clear conduct and behaviour sanctions via this review  
   - Balance with clean hands & fair approach from defence  
     - must promote access to justice for genuine claims/claimants  
     - and apply ‘treating customers fairly’ in practice.

6. **Success fees are perceived as excessive** in relation to risks run. They need to come down.

7. **Restore the claimant having a stake** in the system and some responsibility for costs.  
   - One idea was to make the defendant responsible only for e.g. 90% of costs between the parties, with the other 10% recovered from damages or proceeds  
   - This might introduce competition since firms might waive the 10% altogether to secure the work (or charge the claimant a lower or higher % depending upon risk).

8. **Some support for increasing the small claims limit** to £2,500 or £5,000. Others thought any change was unlikely in practice.
Part II – Key issues in personal injury claims

Opening remarks

The touchstone of the review is access to justice at proportionate cost. This is fundamental to a properly functioning civil justice system in which society, and the potential litigants among it, can have confidence. It is our view that the effective systemic control of the proportionality of litigation costs remains unfinished business following the ‘Woolf reforms’ of the late 1990s.

The so-called costs war which followed shortly afterwards – accelerated by the recoverability of additional costs liabilities as a consequence of the Access to Justice Act 1999 and set out in the preliminary report at chapter 3 – serves to illustrate the great concern amongst paying parties about the levels of costs in the civil justice system and in personal injury claims in particular (as evidenced in Callery v Gray [2002] UKHL 28 3).

The so-called costs war also acutely illustrates the need for systemic costs controls so that parties can reasonably predict the costs consequences, in advance, of their litigation behaviours and hence make informed decisions as to how to resolve their disputes most efficiently and effectively.

Following the so called costs war some welcome progress has been made towards these ends, generally via a combination of activity sponsored by the Civil Justice Council (fixed recoverable costs and fixed success fees) and of policy initiatives led by the Ministry of Justice (in particular in its work on the claims process for low value road traffic injury claims and on costs capping).

To assist ourselves and our clients in responding to phase II of the review, we organised a half day seminar in London on 14 May 2009 to discuss initial views of the report and the questions which it raised. Some 30 senior representatives from various ‘repeat defendant’ clients attended and the event offered us an invaluable opportunity to test the ideas aired at phase I and to frame the key issues for responding to phase II. The summary of these discussions, which we circulated shortly after the seminar, is provided as part of our background material at page 5 above. It has acted as a helpful shorthand reminder in the preparation of our response to phase II.

We look forward to the present review producing a robust set of recommendations which furthers the ends of access to justice, proportionality, predictability and efficiency. Perhaps more importantly, we express here a very firm hope for swift implementation of its recommendations.

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3 Per Lord Hoffman at paragraph 31 & 32:
‘The liability insurers who supported these appeals accept that the policy of the Access to Justice Act 1999 was to transfer the burden of funding unsuccessful motor accident claims from public funds to the motor liability insurers and thence to the motoring public by way of increased premiums … As I have already said, solicitors offering motor accident personal injury CFAs have no incentive to compete on the success fees they charge … In such circumstances there is no restraint upon a ratchet effect whereby the highest success fees obtainable from a costs judge are relied upon in subsequent assessments.’

4 The terms covers insurers, large retail organisations, local authorities and other public sector compensators.
Fixed costs in the fast track

- Firm support in principle

We fully support the extension of fixed costs across the personal injury fast track, including to litigated claims. Professor Peysner styles the fixing of costs post-issue as ‘the meat in the sandwich’, filling the gap between the present fixed recoverable costs and fixed fast track trial costs.

Extending fixed costs was the first recommendation in our response to phase I of the review (see page 4 above). In that vein, we welcome Lord Justice Jackson’s comments when addressing the London phase II seminar on 10 July 2009:

‘Although I shall not reach a final conclusion on this issue until the end of the three month consultation period, nothing which I have heard or read during the first two months of consultation has altered my preliminary view that fixing costs in the fast track is the right way forward. The panel of assessors all adhere to that view as well.’

The policy arguments in favour of fixed costs regimes are captured in full in the preliminary report and we do not propose to rehearse them here. Equally importantly, the practical experience of CPR part 45 proves fixed costs work – as demonstrated by the two part report in 2007 by Fenn & Rickman for the then DCA.

- Secondary issues

This 2007 report throws up three important secondary considerations regarding fixed costs.

First, that there has not been a review of the fee structure since its inception. This is a fair criticism. We accept that any fixed costs regimes which may emerge from this review must have an in-built review mechanism so that they retain the confidence of litigants and practitioners alike. If the review were independent that could further bolster confidence.

However, we cannot accept that review automatically equates to an inflationary increase. Fees need to be set at a level which rewards efficient claims handling. Further efficiencies may be promoted by lowering fee levels, but not of course to the detriment of quality of service or of access to justice.

Second, the 2007 report found that litigation over items other than costs increased by between 31% and 43% of the pre-scheme level. We interpret this as meaning that background litigation rates rose by at least one third on introduction of the scheme, simply because claimant firms were seeking to escape from the scheme on to more lucrative hourly rates. If our interpretation is correct, then this sort of conduct is highly detrimental to the principles of a fixed costs scheme (if not abusive) and will need to be guarded against when the extended fixed costs rules are designed.

Third, the case for exceptions to the fixed costs schemes needs careful consideration. The theoretical ideal would be that exceptions to fixed costs are extremely limited and identical across all injury claims types.

We can foresee that in practice, however, there may be nuances as between say road traffic claims and employers’ liability claims. And we suspect that the exception settings for employers’

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5 ‘Monitoring the Fixed Recoverable Costs Scheme’, Paul Fenn & Neil Rickman, February 2007
liability occupational disease claims may well need to be based on factors particular to this discipline, which we deal with below.

- **Matrices for fixed costs**

Specimen fixed costs matrices feature in the preliminary report. Our firm preference is in favour of table 22.2 – *ie* that with several post-issue stages.

We prefer this model because it guards against the risk of proceedings being issued simply to secure a higher fixed fee (which would be a similar behaviour to that noted in the section above on secondary issues) rather than necessarily to progress the resolution of the claim in a meaningful way. We also favour the idea of a fee reduction for early admission because this promotes sensible resolution behaviour on the defendant side.

We note that the CJC is to facilitate further discussions on fixed fees in the fast track. The aim is for the stakeholders to agree, if possible, the structure of the matrices and figures within them so that these may figure in the Jackson review’s final report.

Hence at this stage, we would merely wish to point out some of the key questions which the CJC-sponsored process will need to address, which include:

- Whether the same structure of matrix should, so far as is practicable, be used for all claims types?
- Whether any exceptions to the fixed costs provisions should, so far as is practicable, apply equally to all claims types?
- How the figures at each stage are structured and weighted so as to promote early resolution of the relevant type of claim?
- How the supporting rules are to be framed?
- What the process for monitoring and reviewing not only the figures but also the behaviours within the scheme(s) looks like?

We support this activity and will participate as best we can in the ten weeks or so over which these discussions are to be held.

We would add that if the figures included for the staged fixed costs in the matrices in chapter 22 simply reflect current costs awards and settlements then they are almost certainly at levels which are too high to be sustainable once the recommendations of this review are implemented.

- **Defence costs**

We note the present fixed recoverable costs scheme and the matrices in the report all deal with claimant fees alone. By way of contrast, in our response to phase I we indicated that a significant proportion of our fast track work in defending injury claims is conducted on a fixed fee basis. We would be very happy to provide further details of these arrangements to the review if that were thought to be helpful.

- **Fixed costs for disease cases**

We note that Lord Justice Jackson’s remarks on 10 July were silent on disease claims. However, the matrices in chapter 22 include entries headed ‘occupational disease’, from which we deduce that they are firmly in scope and will also feature on the CJC-sponsored discussions. We welcome their inclusion.

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6 Preliminary report chapter 22 paragraph 2.3. We accept this analysis covers the main procedural provisions which will be required.
From our perspective, we handle straightforward disease claims with values under £25,000 and others of similar value which are complex. Insurers will conclude in pre-issue stages, a far greater proportion of the former type (straightforward) and we submit that these are well-suited to resolution within a fixed costs regime as envisaged in chapter 22. In disease claims in general, however, value alone may be a comparatively poor proxy for complexity and hence we can see the case for certain disease matters being dealt with other than by way of fixed costs.

We suggest that the key question here is what is the default position for costs regimes in modest value disease claims? We submit that it should be a fixed costs setting, but with defined exceptions.

These exceptions may need to be more extensive than those which may apply say to road traffic claims, because of the range of issues which may complicate even a low value disease matter (for example claims with issues on limitation, causation, latency, breach, apportionment and such like).

At this stage, we feel it is far from easy to define exhaustively the factors which could ground an exceptional disease case or indeed type of claim/condition.

We would therefore recommend that matters related to fixed costs for occupational disease claims should be fully considered by experienced practitioners as part of the CJC-sponsored process to which we have already referred above. We would be very pleased to take part in this as part of any defendant solicitor representation (under the auspices of FOIL).

- Fixed costs, proportionality and indemnity

For completeness, it is worth concluding here that in our view, fixed costs of themselves are not technically subject to proportionality nor to the indemnity principle. We are not suggesting that this is in any way problematic, since both are displaced by proper procedural rules which contain the relevant costs figures and practical provisions. We alluded to this in our response to phase I, from which the table below is taken.

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<th>Costs vs damages</th>
<th>Proportionality</th>
<th>Comment</th>
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<tr>
<td>Yes - procedural rule applies</td>
<td>n/a</td>
<td>n/a (displaced by the rule)</td>
<td>Costs paid as of right under the rule</td>
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Software tools to assess general damages

Whilst we do not operate either of the main proprietary computing applications, a great many of our insurance clients do and will consequently be better placed to comment on points of detail. Hence we will confine our remarks here to matters of principle and to fairly high level comments.

In principle, we see a very strong case for judicially sanctioned software application(s) to be used to value general damages in the fast track. We can foresee the development of these tools further so that the reporting clinician (whether via an agency or otherwise) would be able to provide reports in a manner which integrates fully with the valuation tool.

Judicially approved independent and neutral valuation tools or processes should have the confidence of both sides and should dramatically reduce times and costs which may often be wasted negotiating over small differences in each side’s valuation.

Furthermore, if such tools were publicly accessible then this would greatly ‘demystify’ a process of claims valuation which we suspect appears wholly foreign and arcane to injured claimants and to lay defendants alike. This sort of transparency would in our view restore and enhance public confidence in the civil process for personal injury claims.

For the avoidance of doubt, in supporting in principle judicially sanctioned software tools, we are not advocating what has pejoratively been termed ‘de-lawyering’. What we are, however, recognising is the reality that the valuation of general damages, in the majority of fast track personal injury claims, does not require the technical skills of highly experienced lawyers. In our view, the dispute resolution system for these claims should not be predicated – as it is to a large part at present – on the assumptions that these skills are (a) necessary and (b) will always be paid for in full by the other side.

We accept that there will be exceptions, just as there will be to fixed costs processing, a point which we recognised in the section above. Exceptional cases merit exceptional treatment – but they do not warrant a rethink of the overall approach to the majority unexceptional cases.

The preliminary report mentions ‘proper’ levels of damages against which to calibrate the software applications. It defines this as ‘levels which reflect the damages which judges would award in 2009 if all cases were litigated’. We take issue with this definition. Assume that a fraction of one percent of cases conclude at trial, say 0.5% (we believe evidence from insurers will support this). It follows that 99.5% conclude other than at trial, without a judicial determination of the award. Adopting the definition above leads inevitably to the conclusion that the 99.5% – *ie* 199 in 200 claims – are concluding at levels other than the ‘proper’ one. If this were true it would very quickly bring the system into disrepute. Another reason why such a conclusion does not hold water is that the majority of the 99.5% will be concluded with the benefit of legal advice on quantum.

Consequently it is our view that the ‘proper’ level is not that defined above and it should remain a matter for further consideration during the next stage of the review.

As an aside, the antipathy in certain quarters towards software based tools for valuing general damages seems particularly strange to us when set within the broader context of a society in which each of us uses ever more complex technology for daily routine tasks without question or suspicion.

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7 Chapter 28 paragraph 3.11
One-way costs shifting

There can be no doubt that the decision taken by Parliament and implemented by the Rule Committee to make success fees and ATE premiums recoverable has (a) promoted access to justice for claimants and (b) massively increased the costs burden upon defendants. Claimants can now litigate at no cost and at no personal risk. If successful, they retain the entirety of the damages awarded or agreed. If unsuccessful, they walk away with no liability.

The question must now be asked as to whether the correct balance has been struck. In considering this question, regard must be had to the interests of claimants, defendants, liability insurers, others involved and, of course, the public interest.

Preliminary report chapter 47 (4.1 &4.2)

We understand the case in favour of one way costs shifting, which in broad terms is that it should, all other things being equal, be significantly cheaper to repeat paying parties and hence to society to relieve them of the obligation to pay ATE premiums in successful cases as a quid pro quo for them foregoing the right to recover costs in failed cases (success and fail here being used from the claimants perspective). There is some force in this argument and we note the basic analysis in chapter 25 of the data supplied by insurer X which suggests that the overall outcome should be beneficial.

The preliminary report goes on, rightly in our view, to identify two principal matters which need addressing in one way costs shifting, these being first the lack of a disincentive to speculative or spurious claims and second the uncertainty about the mechanism for making effective offers to settle.

We should emphasise that for these two reasons in the main we do not feel currently able to support one way costs shifting in clinical negligence cases (for reasons identified in Part III below). As regards occupational disease claims, it is our view that two way costs shifting has a necessary deterrent effect and is particularly important in these claims because of the heightened risk of speculative litigation: for emerging or obscure conditions, for psychiatric and other conditions objectively difficult to diagnose, and in matters in which the gap between alleged exposure/breach and manifestation results in evidential difficulties.

Elsewhere, in mainstream personal injury litigation, neither question (the deterrent effect and the offer mechanism) is in our view a ‘show stopper’, but without further detail about these important behavioural controls we find it difficult at this stage to give other than qualified support to the idea of one way costs shifting, subject to these questions being resolved satisfactorily.

Assuming one way costs shifting, ATE insurance will not be recoverable but it will arguably need to be purchased in any event, to fund (unrecovered) disbursements and court fees. If the claimant were actually to pay for this sort of residual ATE cover then that may act as a ‘threshold’ deterrent. We are unable to say if this approach would prove an adequate deterrent to purely speculative actions. In addition, we recognise that it could prove problematic where impecunious clients are concerned.

There is a broader point here, which is that restoring to the claimant some form of stake in the system is we believe an appropriate response to the problem of disproportionate costs. This was a key point of our phase I submission and is worth repeating here.

It is precisely this absence of ex ante market forces exerting downward competitive pressure on the ATE / CFA funding structures which in our view has to a large extent contributed to the ‘costs wars’ and to the level of disproportionate civil litigation costs in personal injury claims, in which the ATE / CFA model is commonplace.
This broader point has echoes not only in the remarks of Lord Hoffman quoted at page 6 above but also in the very pointed concerns expressed by Smith LJ in an annex to Rogers v Merthyr Tydfil [2006] EWCA Civ 1134 at 127 and 129:

‘I do not think it was the intention of Parliament that would-be claimants should be able to litigate weak cases without any risk whatsoever to themselves … At present, the insured claimant can notionally pay the high premium which reflects his poor chances of success, secure in the knowledge that, if he wins, the premium will be recovered and, if he loses, he can walk away unscathed. I find it hard to believe that Parliament intended that claimants should be in so much better a position than a private litigant.’

The approach to effective offers to settle in a one way costs shifted regime may have a similar solution – ie one in which the claimant has a financial interest in the deciding how to respond to the offer. Clearly, the costs sanction for failing to beat an offer would no longer be a liability for adverse costs – to require this would be potentially to negate the whole benefit of one way costs shifting. We also doubt whether simply losing the entitlement to one’s own costs after failing to beat an offer would, of itself, be an adequate control on behaviour.

We note that other suggestions have been made that the sanction for failing to beat an offer could impact on damages – so for example the claimant might surrender a percentage of his or her award. We see problems with this which make it unattractive. First, it may be politically difficult to introduce a regime which risks being portrayed as one in which damages are expressly reduced. Second, we fear that firms might agree to indemnify any damages shortfall so as to permit the case to continue in the hope of generating further costs.

This leads us to suggest the conclusion that the costs sanction for failing to beat an offer probably needs to be paid out of damages secured, and that it actually needs to be charged by the claimant solicitor to his or her client. We believe this would be a matter for the regulation of the retainer. We do not necessarily accept that there may need to be some ring-fencing of certain heads of damage. It seems to us that if the position is that damages belong to the client to spend as he or she sees fit, then that logically must include spending a part of the award on the costs incurred in securing it.

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8 We make no comment as to whether such a course would be appropriate professional conduct. See in addition our comments at footnote 9 below.
Funding

Appropriate funding routes for claims underpin access to justice. In this section we examine some of the options in the preliminary report.

- BTE insurance

We support the views in the preliminary report that the extension of BTE insurance should be encouraged in order to further access to justice.

We note that some types of BTE cover could in theory be made compulsory as a matter of law. In practice however, there could be practical problems with compulsion and market distribution (on which insurers will be better placed to comment) and we believe that universal coverage would be unlikely to be achieved. Hence alternative funding models will need to co-exist.

- CLAF & SLAS

Whilst we are attracted in principle to the idea proposed by the Bar Council as regards a CLAF, we believe that the two main barriers to its implementation – provision of seed capital and selection against the fund – are simply insurmountable in the present economic and political climate.

- ATE insurance
- Conditional Fee Agreements

A key question is whether the additional liabilities associated with these funding options should be generally recoverable from the other side, as has been the case since the implementation of the Access to Justice Act 1999.

We are minded to favour a repealing of recovery between the parties of additional liabilities in order to control litigation costs generally and to bring competitive pressure to bear on those elements of costs which would then actually be paid for by claimants. We do not believe that this change should impact adversely on access to justice, a view which is confirmed in the preliminary report, in a passage which covers the pre-1999 position:

There do not appear to have been complaints from clients represented on Style 1 CFAs about the price which they had to pay for access to justice, namely a deduction of up to 25% from their damages.

[45 This observation has been confirmed by one of my assessors, Michael Napier QC, who has immense experience of acting for claimants and who served as President of the Law Society in 2000-2001.]

Such a change could be introduced either in the present two way costs shifted regime, or equally in a one way costs shifting regime as set out in the preliminary report, and to which we have given some qualified support above.

We recognise that the consequences of repealing recoverability may be radically to alter business models within the ATE insurance market and within claimant law firms acting on CFAs on a widespread basis. In addition we appreciate that there may be a need for some form of regulation of the amounts to be paid by claimants, perhaps along the lines of the 25% cap which applied previously. Such regulation would be necessary even if it might appear run counter to recent relaxations in the CFA regime (often styled as CFA-lite).
We conclude here with an extract from our response to phase I which captures the essence of the points above.

What is missing at present from the system in price control at the point of sale – when the claimant enters into a funding arrangement. Requiring – indeed restoring – a modest contribution towards costs from damages recovered could go some way to bringing about more control on costs. It is only relatively recently – since the Access to Justice Act 1999 – that damages appear to be regarded as ‘sacrosanct’ and protected from recovery to fund costs.

Of course, some may argue that it is not fair, as a matter of policy, for a claimant to surrender part of compensatory damages, especially in injury claims. There is some force in that argument, but we would encourage this review to consider whether deductions or charges might achieve wider access to justice for greater numbers than at present, at the cost of a modest charge to the users. We note that in commercial cases, the Court of Appeal has already endorsed such an approach:

*In the individual case, the net recovery of a successful claimant will be diminished. While this is unfortunate, it seems to us that it is a cost that the impecunious claimant can reasonably be expected to bear.* [Arkin v Bouchard Lines [2005] EWCA Civ 655]
Conduct & case management

Under this heading we group a fairly wide collection of points which largely relate to behavioural tactics and regulatory matters points which impact on claims handling both pre and post litigation.

- Litigation behaviour in general

It is a trite observation that the litigation system and associated costs rules should be designed to promote the efficient and cost effective resolution of disputes. The behaviours of litigants and their representatives should be in tune with this aim. To the extent that they are not, it is our view that there should be clear and predictable sanctions in the procedural and costs frameworks which are consistently enforced, by judicial case management where appropriate.

Thus, for example, the defendant secures a reduction in the fixed costs in the fast track because of an early admission. Another example is that fixed costs are be weighted to reward settlement in the early stages, precisely in order to promote that outcome. A third example is that the fixed costs are also staged, in order properly to reward a claimant who is obliged to escalate the pursuit of his claim (whether to issue or beyond).

By the same token, the sanctions in the system should firmly discourage poor litigation (and pre-action) behaviour. So for example the premature issue of proceedings by claimants should be discouraged. On the other side, late admissions by defendants should be similarly sanctioned. These sanctions should be consistently enforced for the maximum impact on the behaviour of the parties.

The points above apply equally to both pre and post action behaviours. We make them here as points of overriding principle, as opposed to making a detailed examination of individual provisions of the CPR and the pre-action protocols, which we note are among "some of the most intractable questions in the Costs Review".

- Judicial docketing

We support the idea of docketing, defined in the preliminary report as ‘assigning a case to one judge from issue up to and including trial’.

We note that the vast majority of those attending the phase II event in London on 10 July were firmly in favour of it. We recognise the barriers to introducing effective docketing which exist in England & Wales and which are set out in the report at chapter 43 at paragraphs 5.9 – 5.14. We agree with the conclusion of that passage, which is reproduced in full below.

*It may, however, be appropriate to place on record the view of the assessors and myself that, where possible, civil cases should be (a) assigned to a single judge or (b) assigned to a team of specified master/DJ and specified judge. Any structural reforms which facilitate this arrangement are likely to reduce the costs of civil litigation.*

- Perverse incentives

In our view, the rules which led to the outcomes in both *Lamont v Burton* and *Kilby v Gawith* require changing as a matter of urgency. We made detailed submissions on these outcomes in phase I which we shall not repeat here.

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9 Preliminary report chapter 43 paragraph 3.23
10 [2007] EWCA Civ 429
In addition, we suggest that the decision in *Crane v Cannons Leisure*\(^{12}\) will lead to unnecessary and disproportionate expense. Detailed assessment as in *Crane* can be an expensive process and the recovery of success fees on agent’s charges simply serves to increases that expense. If the matter has been pursued to trial the additional liabilities double the cost. And at that stage the receiving party has won the substantive action so the risk is limited. In addition, judgment has wider implications. Through the wording of the same a success fee could be applied to any elements of the claim that the solicitor chooses to outsource. This means that fees of medical agents, inspection agents and firms instructed to taking witness statements could be subject to an uplift.

Whilst *Lamont* could be reversed by simple changes to the provisions of the CPR, we do not yet have a settled view as to how the other two outcomes could be changed. We believe that the review should give this serious consideration in phase III.

- Costs budgets, caps and estimates

We firmly support the widespread use of costs budgets, caps and estimates.

For personal injury claims, the preliminary report appears to envisage a regime for fixed costs in the fast track (which we support) with ‘costs at large’ in the multi track.

It seems to us that the phrase ‘costs at large’ may have undertones of a somewhat laisser faire approach to costs. We would much prefer that clear and firm costs controls, in line with this review’s terms of reference, should be brought to bear in personal injury multi track claims. These controls include budgets, caps and estimates which in our view should be used more often and more widely. They may be used to promote behaviours and conduct designed to speed up the resolution of the claims and they will provide far greater predictability for paying parties (whether or not there is one way costs shifting).

Once we again submit here, as we did in responding to the MoJ / CPRC consultation in 2007, that these tools should not be limited to exceptional cases alone. It is our view that personal injury cases in the multi track are well suited to such approaches.

Some have suggested that there may be satellite litigation about the costs of costs generated by caps and budgets. Whilst we accept new provisions inevitably lead to some litigation to test their boundaries and nuances, we believe that after a relatively short period of such litigation these regimes would ‘bed in’ and be well understood by practitioners, litigants and the judiciary. The minor risk of some initial boundary litigation is not, in our view, a significant argument against the wider use of costs caps, budget and the like.

- Benchmark or modular costs

Certain types of personal injury multi track claims follow a fairly well defined pattern of procedural steps and have very similar evidential requirements – in particular claims for catastrophic brain or spinal injuries.

Anecdotally we understand that some firms are indemnifying claimants against the risk of failing to beat a Part 36 offer, on the basis that they (the firms) estimate that their *Lamont*-style 100% success fee at trial will more than compensate for any damages shortfall as against the refused offer.

\(^{11}\) [2008] EWCA Civ 812  
\(^{12}\) [2007] EWCA Civ 1352
We are very firmly of the view that the procedural steps and requirements for expert evidence in these claims could be readily benchmarked in order to reach indicative costs for each element of the process. This information would be extremely valuable to practitioners and the judiciary in setting costs estimates in similar claims in the future. It would also bring further predictability to costs in these claims and greatly assist compensators in setting their reserves. We would be pleased to discuss this idea in further detail if that were thought to be helpful.

- Mediation and ADR

We believe ADR and mediation are a fundamental part of modern dispute resolution and a valuable way to reduce unnecessary costs and address pressing issues.

Many of our partners are accredited mediators and our national senior partner, Terry Renouf, sits on the Advisory Council of Trust Mediation, a not for profit mediation services dedicated to personal injury claims.

- Referral fees

During phase I we encouraged the review to regard referral fees as within its terms of reference. We note that the preliminary report covers the matter extensively and that it accurately captures the practices associated with referral fees as well as the arguments for and against the outright banning or regulation of referral fees. We agree with the carefully understated conclusion in the report\textsuperscript{13} that:

‘...there appears to be a general view amongst solicitors on both sides of the fence that these are an unwelcome addition to personal injury costs which bring little benefit either to lawyers or to clients.’

We look forward learning of the review’s recommendations regarding referral fees when the final report is published.

For the avoidance of doubt we would like to record that BLM does not pay referral fees for defendant legal work. We have already made this point openly in response to an intervention during the phase II event in Birmingham on 26 June.

\textsuperscript{13} Preliminary report chapter 26 paragraph 2.15
Part III – Comments regarding clinical negligence claims

Introduction

It is our view that the Civil Procedure Rules have had beneficial effects for claimants and defendants alike in resolving clinical negligence claims by way of settlement or discontinuance, without the need to proceed to trial. Only 1% - 2% of cases on which we are instructed proceed to a trial/final disposal hearing and we consider that it may be helpful for this to be borne in mind when considering the overall position on clinical negligence litigation outcomes.

However, we are of the view that high and disproportionate claimant costs remain a problem.

Data sampled and submissions

Table 1 – claimant costs

<table>
<thead>
<tr>
<th>Description</th>
<th>Total claimant costs (including VAT &amp; disbursements) as a proportion of damages paid</th>
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<tr>
<td>All claims (average)</td>
<td>72%</td>
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<td>Claims under £15,000 (ie fast track limit before April 2009)</td>
<td>195%</td>
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<td>Claims £15,000 - £100,000</td>
<td>123%</td>
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<td>Claims under £25,000 (ie fast track limit after April 2009)</td>
<td>199%*</td>
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<td>Claims £25,000 - £100,000</td>
<td>103%</td>
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<td>Claims over £100,000</td>
<td>30%</td>
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* note that for claims between £15,000 and £25,000 costs average 207% of damages

Table 2 – defence costs

<table>
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<th>Description</th>
<th>Average defence costs (including VAT &amp; disbursements) in all claims</th>
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<tr>
<td>Defence costs to damages (average)</td>
<td>28%</td>
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<td>Defence costs to claimant costs (average)</td>
<td>38%</td>
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Table 3 – disposal

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<td>Pre-issue</td>
<td>32%</td>
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<td>Post issue</td>
<td>68%</td>
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Table 4 – funding methods

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<td>Public funding</td>
<td>28%</td>
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<td>Private funding</td>
<td>26%</td>
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<tr>
<td>CFA</td>
<td>36%</td>
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<td>additional liabilities in CFA cases</td>
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<td>average success fee uplift</td>
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<td>ATE premium as % of claimant costs (average)</td>
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<td>BTE</td>
<td>10%</td>
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Our costs statistics (above) and submissions are based on data from the last available 93 settled (damages paid to the claimant) cases.

14 It is our view that fast track processing remains inappropriate for clinical negligence cases generally.
We consider that the most accurate and fully representative statistics would be those obtained directly from medical defence organisations because as defence solicitors we are not usually instructed at the outset of a claim and hence our statistics will not reflect the position pre-action.

A large (and we believe increasing) proportion of clinical cases is resolved at the pre-action stage. Table 3 underestimates this proportion since it is drawn from cases we handle as external solicitors. We anticipate that this trend will continue because of Government and judicial support for early resolution, as evidenced by more rigorous enforcement of the pre-action protocol.

Consequently, we submit that any proposed changes to costs rules should reflect the reality that a significant proportion of claimant and defendant costs are, or are likely to be, incurred at the pre-action stage. Accordingly we would be in favour of firmer costs controls, such as budgets, caps and estimates, being more commonly and more consistently adopted in pre-action stages. This point is consistent with our submission to the MoJ / CPRC consultation on costs capping in 2008 which formed annex 5 to our phase I submission and it is an area of concern which surfaced again at our client seminar on the preliminary report, is noted above in part I of this response.

However, the present costs rules already amount effectively to one–way costs shifting, pre-action, in favour of the claimant. We question whether this is fair or desirable as substantial defendant costs are incurred pre-action with no prospect of their recovery.

We raise the question whether, particularly given the increasing importance of the pre-action protocol and the status of a letter of claim, defendants should be required to incur sometimes substantial costs with no prospect of recovery if the claim does not proceed. For example, the letter of claim might be the trigger point for two way costs shifting: bringing the costs shifting forward in this fashion should assist parties in reaching resolution pre-action, which is consistent with judicial and Government views on this matter. Nevertheless, we are aware of the counter argument to this proposition, which is that introducing pre-action two way costs shifting may reinforce the case for buying ATE and drive up premiums.

In our sample, ATE insurance premiums paid out on CFA cases average 18% of total claimant costs. We raise two issues in relation to ATE premiums. First, and based on the data above, we challenge the inference that a reason for doing away with two-way costs shifting (at the litigated stage) would be to reduce or do away with the need for ATE insurance premiums in all claims, given that only 36% of the cases in our sample were funded by CFAs.

Second, it appears to us to be inappropriate that claimants may recover ATE insurance premiums pre-action at levels which reflect the defendant’s costs – since there is no liability for these pre-action (see above). If one-way costs shifting remains at the pre-action stage, then we contend that only that part of an insurance premium which reflects claimant’s disbursements should be recoverable from the defendant. Again, this is particularly important given increasing numbers of cases are disposed of pre-action.

Introducing one way cost shifting would in our view raise ‘floodgates’ risks in clinical negligence claims, since there would be no litigation or adverse costs risk for claimants in pursuing speculative or unmeritorious claims. Furthermore, we question if one way costs shifting in clinical matters could offer either adequate mechanisms for early and effective offers to settle or meaningful sanctions for inappropriate litigation conduct by a party. The making of a drop hands offer – under which the matter simply discontinues with each side bearing its own costs – by a defendant is and will remain an important tactic for defendants to dispose of clinical cases. We

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15 We note that the preliminary report included data from the NHSLA and the MPS, at appendixes 21 and 22 respectively.
suggest this tactic will be blunted if one-way costs shifting is introduced for litigated clinical cases, precisely because the deterrent effect of the continuing and facing a potential liability for adverse costs will be lost. It is our view that the disposal of clinical negligence claims is, sadly, by its very nature an adversarial process and an equality of arms by way of two-way costs shifting is generally necessary in the interests of fairness and to avoid protracted litigation.

The high level of claimant costs overall in clinical negligence claims is a result of ‘healthy’ guideline court rates\(^\text{16}\) and success fees coupled with a relatively small market for insurance premiums. It appears to us that unless hourly rates and success fees are reduced\(^\text{17}\) together with more intervention in reducing claimant costs at detailed assessment, the marked disproportion between claimant costs, damages and indeed defendant costs, respectively, will continue. We simply mention for completeness that a re-examination of old-style ‘scale costs’ could be among the options to be considered for controlling costs in clinical claims.

\(^{16}\) We share the concerns of the Senior Costs Judge about the level of profit in the guideline hourly rates. See preliminary report, chapter 53 paragraph 2.3 footnote 23:

‘We therefore have a situation where the guideline hourly rates are effectively two thirds solicitors’ overheads and one third profit. If a 100% success fee is added to that, the profit element becomes distorted.’

\(^{17}\) The general point has already been made, above, that success fee uplifts are generally perceived to be excessive and to over-reward claimant firms.
**BLM offices**

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**Disclaimer**

This document does not present a complete or comprehensive statement of the law, nor does it constitute legal advice. It is intended only to highlight issues that may be of interest to clients of Berrymans Lace Mawer. Specialist legal advice should always be sought in any particular case.

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Information is correct at the time of release.