

Case track limits and the claims process for personal injury claims

Response by Thompsons Solicitors

July 2007

About Thompsons

Thompsons is the UK's largest trade union and personal injury law firm. It has a network of 22 offices across the UK, including the separate legal jurisdictions of Scotland and Northern Ireland.

Thompsons only acts for trade union members and the victims of injury, never for employers or insurance companies. At any one time the firm will be running 70,000 claims.

The firm participates regularly in government consultations on legislative issues.

Thompsons' position

- Thompsons welcomes the decision not to increase the small claims limit.
- The assumption that any case under £25,000 only requires one medical report is unfair.
- We oppose the "beat your own offer" proposal.
- If we are to accept these proposals they should be applied only to RTA cases, which represent 70% of PI cases.

Thompsons is keen that the claims process works as effectively as possible for our claimant clients. However, we fear that too much of this consultation paper reflects very intensive (and effective) lobbying by the insurance industry.

Many of these proposals, if not substantially modified or trialed in RTA cases only, have the potential to be very damaging indeed to access to justice for injured people.

The insurance industry mantra for some time has been that there is a "crisis" in the personal injury claims process in the UK. Quite simply, there isn't.

The furore around compensation culture was fanned by repeated claims that there was a massive and inherent imbalance between compensation awarded to claimants and costs paid to their lawyers. No conclusive independent evidence has ever been produced to justify the claims.

The consultation paper is predicated on three assumptions, none of which we believe to be correct and the evidence for which has never been produced:

1. that there is a crisis
2. that costs are always disproportionate to damages
3. that the current funding regime and litigation process needs fundamental overhaul.

Case track limits and the claims process for personal injury claims

Crisis, what crisis?

The Prime Minister noted in a speech to the Institute for Public Policy Research in May 2005 that, between 2000 and 2005, the number of accident claims actually fell by 5.3%. During the same period, accident claims against local authorities, schools, voluntary organisations and other public sector bodies fell by 7.5%.

The Compensation Recovery Unit of the Department for Work and Pensions most up-to-date figures for employers' liability claims, the year 2005/6, show they fell by 53% on the previous year:

The cost of tort claims in the UK in 2000 were, the Prime Minister noted, 0.6% of GDP. That was the lowest of any developed nation except Denmark. In that same year, the cost of all tort litigation in the UK as a percentage of GDP was less than a third of that in the United States.

Who is to blame?

There are numerous suggestions within the paper of modifications needed by claimant lawyers to make the claims process "quicker and easier". Incredibly, nowhere within the paper is it suggested that there needs to be any fundamental change in the behaviour of defendants other than fairly simple administrative ones. The 'crisis', the cause of disproportionality and the need to overhaul the current system is all seemingly down to the claimant.

Thompsons' experience in over 70,000 cases a year, is that the majority of problems in the present system stem from the conduct of employers and their insurers. Cases are settled, "eventually", but all too frequently insurers will have dragged their feet and driven up costs throughout the process. There is also a real issue with a lack of consistent enforcement of current rules.

Where are the facts around costs?

The insurance industry is forever claiming that costs are disproportionate at around 40% of any damages settlement. Thompsons has still to see any real evidence to support this. Despite asking many times for hard evidence, it has never been produced.

The only study by the insurance industry, carried out by Frontier Economics, concentrated mainly on attempting to show that legally represented claimants receive lower compensation. It was extremely poor and our independent expert was able to easily take it apart – see **Appendix 3**.

We do not know if the 40% figure includes disbursements, insurance company costs or defendant solicitors fees. And yet the 40% figure is regularly repeated as fact. This consultation paper goes further to state on page 78 that legal costs in claims between £1k and £5k are around 80%.

Costs in any personal injury case have to be reasonable, necessary and proportionate. Current procedures allow defendants quickly and simply to challenge any costs claim they believe to be unreasonable through the costs assessment process. The reality, in Thompsons' experience, is that, when challenges do take place, they rarely lead to any substantial reductions. It has to follow that challenges fail because costs claimed are both appropriate and proportionate and/or have been caused by the conduct of defendants who are complaining about the costs.

Case track limits and the claims process for personal injury claims

What do real claimants think?

As part of this consultation response, Thompsons conducted a survey of over 1,000 clients. The details and results are contained in **Appendix I**. The results clearly show that claimants consider the government's proposals in relation to costs to be unfair:

A snapshot

Clients were asked whether fixing the costs that the claimant's lawyer can be paid would be likely to affect the amount of work the solicitor would be likely to do on their case:

YES	854	85.1%
NO	122	12.2%
UNSURE/DON'T KNOW	27	2.7%
	1003	100.0%

Simple steps needed

The key to ensuring a fair, efficient and effective claims process is consistent enforcement of the current rules, including penalties imposed by courts for failure to comply with pre-action protocols.

What neither claimants nor the courts nor even the defendants need is an overhaul that will simply introduce more delays, penalise the victims of injury and do nothing about the real problem, which is the conduct of the parties.

Why the move for wholesale reform when there are simple solutions such as requiring settlement conferences that will deliver earlier settlements at reduced cost, combined with liability discussions in contested cases to minimise and identify the key issues in those cases?

The proposed new procedures, with modifications, may be suitable for road traffic accident cases but will not be appropriate for employers' liability cases, which make up the majority of union-supported claims. See the response to question 9 below.

Responses to questions

In responding to the specific questions put in the consultation paper, we will address only those that relate directly to the work of Thompsons and our trade union clients.

Q1 Do you agree that the small claims limit for personal injuries should remain at £1,000 in view of the proposals set out in the second part of this paper to improve the claims process? If not please set out your reasons why and state what you consider the appropriate level to be.

This is very welcome from a claimant perspective and the arguments for and against an increase are comprehensive and well presented. We will not therefore re-run them here.

However, the consultation paper's proposal to fix costs in all cases settled without proceedings and in all cases where proceedings are required only in order to consider the amount of compensation will, we believe, effectively increase the small claims limit by the back door. We will set out our reasons for stating this in our response to Q18.

Q4 Do you agree that the small claims limit for other claims should remain at £5,000? If not please set out your reasons why and state what you consider the appropriate level should be.

Thompsons has no comment to make.

Q5 Do you agree that the fast track limit should be increased to £25,000? If not, please set out your reasons why and state what you consider the appropriate level should be.

Thompsons would only be in favour of this increase if there is provision to ensure appropriate cases are dealt with under the multi-track process. Any case that will take more than a day to hear or is otherwise appropriate for the multi-track (such as a disease case) must be allocated to the multi-track regardless of value.

While this new fast track limit is itself unobjectionable, the paper suggests at paragraph 96 that any claim with a value within the fast track limit will have the new claims process applied to it. That is unacceptable. As well as being inappropriate for employers liability claims, the procedure is not suitable in cases requiring more than one medical report.

Q6 Are there any measures that would make the handling of intellectual property claims more efficient and effective? If so please tell us what those measures are.

Thompsons acts for the National Union of Journalists (NUJ). We would refer the Ministry to the NUJ's response to the recent IPO consultation on the Gowers Review of Intellectual Property.

The IPO paper asked for views on how intellectual property cases could be dealt with in a more efficient and cost-effective way.

In its submission, the NUJ proposed the establishment of a new Small Copyright Claims court. The union pointed out that journalists' claims for copyright infringement can be small – typically in the range of £200-£1000. But claimants have no certainty as to where their claims will end up.

Small claims courts often decline to hear copyright claims that are well within the £5,000 limit because of their complexity. Few judges who sit in small claims courts are competent in copyright law.

Where a case is taken out of small claims and allocated to the fast or multi track, the risk arises of the claimant being ordered to pay the defendant's costs in the event that the claim is not successful or on the grounds of proportionality.

Case track limits and the claims process for personal injury claims

Costs in multi track can be substantial and would in almost all cases exceed the value of the claim. This makes pursuing such action prohibitive in many cases. The current legal system is, in effect, deterring many victims of copyright infringement from enforcing their statutory rights.

The NUJ proposes, and Thompsons agrees, that a quarterly Small Copyright Claims court be set up, presided over by a judge conversant with copyright law. This would remove the current random element of allocation and render it possible to deal with copyright claims nationally at a small claims level. Hearings on fixed dates in each of the court circuits in England and Wales would probably be sufficient.

Such a system would provide access to justice for claimants in a cost-effective manner. No further resources would be required, only a simple re-organisation of existing resources and possibly sufficient training for a small pool of judges if that proves necessary.

We have no comment on the remainder of the IP related questions.

Q9 Do you agree that these proposals set out a procedure for dealing with claims that provide fair compensation in a more timely and cost-effective way? If not, please say why and set out any alternative proposals.

We start from the presumption that delay is always in the interests of the insurer and to the detriment of the claimant.

Thompsons considers these proposals will fundamentally damage the ability of injury victims to pursue claims effectively and secure fair compensation in a more timely and cost effective way.

They are based upon a flawed assumption that insurers will reverse their cutbacks of recent years and re-invest in their claims departments so as to be able to respond promptly to claims made and quickly and efficiently agree settlements. There is no evidence for this assumption, which is wholly contrary to the practice of the insurance industry in recent years.

It is precisely because insurers cannot quickly and efficiently resolve claims, that costs are incurred which they then, ironically, complain about.

At present, claimants lawyers can mitigate insurers' delays by investigating the case and preparing it for proceedings pending the insurers protocol reply. By this means, the claim can be pursued quickly when the insurers fail to comply with the protocol time limit or repudiate liability. The proposal is that this will be effectively banned by penalising claimants pursuing timely investigations. An automatic delay will be introduced, during which the claimant must await the decision of the insurer.

That may be workable in road traffic cases where the vehicle damage element will frequently have been dealt with in advance of the personal injury claim such that insurers will already have investigated. But it is not workable in employers liability cases. This simply introduces a new delay. Insurers consistently flout the current three-month period under the protocol. In discussions that Thompsons has been part of, they have been reluctant to accept any lesser period and have argued for a reduction to only two months.

Whether it is six weeks as now proposed, two months as suggested by the insurers or three months as at present, the insurance industry has demonstrated that it simply cannot and will not comply. This is not because insurers believe they cannot fail in defending a claim. Rather it is through active choice by them not to invest in claims investigators.

Case track limits and the claims process for personal injury claims

Under the protocol, this non-compliance does not significantly delay the case because the claimant's investigation will be proceeding so that the case is ready to be pursued once the protocol period expires. Under the proposal, the investigation and the case as a whole will be delayed for six weeks with no action permitted by the claimant and, unless there is some wholesale change in defendant behaviour, almost certainly no real action by the defendant either. No one will gain.

The only beneficiary of these changes will be the insurer who will retain the compensation sum in their bank for an extra six weeks at the expense of the claimant.

Medical reports

There is an assumption throughout the paper that there will be a move in all cases below £25,000 to have only one medical report. This is wholly unrealistic.

Because damages remain low, in spite of clear Law Commission recommendations, a £25,000 case will inevitably be a relatively serious injury which can rarely be concluded with only one medical report obtained at the outset. It will often be some time before a final prognosis can be given and many injuries in this bracket will require ongoing medical treatment requiring a series of medical reports.

There cannot be an assumption that a single GP's report is adequate for any case up to £25,000. Many cases up to £25,000 require reports from experts of different specialities eg an orthopaedic injury with psychiatric and/or neurological symptoms.

The proposals simply do not deal with cases requiring more than one report and, as formulated, would not work in cases that are more complex, take longer and require interim payment arrangements pending settlement.

It is not enough to state, as the paper does in paragraph 65, that the parties may agree to wait for six months for a full prognosis and that neither side should carry out any unnecessary work during this time. Any case requiring this kind of stay is exactly the type of case that should be pulled out of any track or medical report limitations procedure.

If this new procedure were to go ahead, it should be limited to cases requiring only one medical report.

There is also reference to a fixed fee for medical reports. As with fixed costs, we cannot see how this could be fair without, as happened in the RTA fixed fee arrangements, a transparent process of research pooling data from all stakeholders and annual reviews with automatic uprating in default of a review being ready in time.

Referral fees

We welcome the acceptance in the paper that it is claims companies and insurers who charge high referral fees. Thompsons condemns such practices. Unlike trade unions, claims companies and insurers exist to make a profit.

We agree that many claims companies and insurers have been profiteering and have charged excessive referral fees. But the reference to referral fees is misleading where it is then translated into a conclusion that excess costs are being charged by solicitors.

Case track limits and the claims process for personal injury claims

Excess referral fees are evidence of injury victims being exploited by those seeking to profit from the system. That is precisely why the Compensation Act now regulates the claims companies and we are confident that the new regulatory regime will substantially resolve this problem.

Incredibly, despite insurers being at both ends of the food chain, there is no suggestion that insurers capturing and funding claims should be subject to the same regulation as claims companies. The insurance industry is being allowed to complain about legal costs but it is the insurance industry that is the source of much of the problem.

Liability insurers drag their feet and draw out claims, so driving up costs. Before the Event (BTE) insurers – typically owned by or with close financial connections to the liability insurers – profit from this by charging excessive referral fees.

We do not believe that injury victims, whose solicitors are paying excessive referral fees, are receiving the service they deserve. Cases that would previously be referred direct to solicitors are now diverted to these intermediaries leaving solicitors with little choice but to pay the sums demanded.

Intermediaries have no interest in the outcome of the case or the way it is handled. Personal injury is rarely (luckily for the claimant) a repeat business. It is also one in which there is a gulf in knowledge between the consumer and their adviser. It is very different from the consumer needing their car fixed – they may be introduced to a garage via the AA or the RAC following a breakdown but they will know whether the work required has been done and the breakdown company (who may receive an introduction fee or a reduced bill for making the referral) has an interest in monitoring quality, otherwise they will be picking them up again from the side of the road.

BTE providers and claims companies restrict resources available to provide a service to the injury victim and exert overt or covert pressure on solicitors to advise acceptance of low offers to maintain turnover and minimise risk.

Rather than vaguely referring to the issue of referral fees in the paper, and suggesting this feeds a culture of excessive costs, Thompsons believes there should be a thorough investigation of the issue to establish whether, as we believe, victims are being exploited.

The paper also fails to acknowledge that, outside of BTE and claims company cases, referral fees are often simply a reallocation of resources, rather than an additional cost. Historically, solicitors have maintained high street locations to attract business. Now, many firms can save on these costs, re-locate to commercial estates or similar premises and attract business by means of modest referral fees or by advertising and using web-based services.

Ultimately no element can be claimed for referral fees at present within a claim for costs. They are a marketing issue. Where they exist, they come off the solicitor's bottom line profit. The guidance issued by the Law Society Rules and Ethics Committee on 21 December 2005 states:

“Referral fees are simply part of the cost of running your practice, in the same way as other marketing costs. They may be taken into account in calculating the fees to be charged, either generally or in respect of particular clients, but they may not be charged directly to the client ... a referral fee is not a disbursement and may not be charged to a client as such.”

Case track limits and the claims process for personal injury claims

Rehabilitation

There is reference in paragraph 61 of the paper to rehabilitation being “provided as early as possible, usually before a claim is made” but no cross reference to the work going on to try and deal with a process for rehabilitation. Nor is there any attempt to deal with the real problem at the heart of rehabilitation: who will pay for it and whether, if a claimant, however legitimately, refuses to undergo rehabilitation, their claim will be prejudiced in any way.

Admissions

While we support the proposals within paragraph 63 we query what this adds to the Rules of Court following amendment to CPR Part 14 effective from April 2007

Sanctions and rights to independent legal advice

We have two points of concern:

1. Lack of appropriate sanctions to ensure time limits and protocols are adhered to. Only strong sanctions that are consistently enforced will prevent defendants ignoring time limits and protocols. There should be a reversal of the burden of proof in cases where defendants fail to respond within the protocol period. Additional punitive damages should be payable where they delay in putting forward settlement proposals.
2. No settlement should be binding unless the claimant has received independent legal advice from a solicitor or through their trade union. As the answers to our survey make clear, simply telling someone of their right to seek independent advice is not enough:

Q3 Do you think it is important that people are made fully aware that they have a right to independent specialist legal advice through their union if they are injured in an accident that is not their fault?

YES	997	99.4%
NO	5	0.5%
UNSURE	1	0.1%
	1003	100.0%

Who knows what may be in a letter of advice that may discourage a claimant from checking elsewhere? All of Thompsons' clients who have had offers direct from insurers would have been ripped off had they accepted the offer.

We previously brought the Ministry's attention to examples of this in our August 2006 response to the consultation on the Compensation Bill including:

Mrs M who was involved in a road traffic accident and made a claim herself against the driver's insurance. She received an offer of £500 compensation.

On the advice of a friend she came to Thompsons and by return on receiving our letter of claim, the insurer upped the offer to £1,250, even though there was still no medical evidence. Once the medical report was received the case settled for £2,250.

Case track limits and the claims process for personal injury claims

Mr H who submitted a claim through his employer's insurer, which sent him for a medical and subsequently offered £1,000 for his injuries. He asked Thompsons for advice on the offer and, without obtaining any further evidence, we were able to settle the claim for £2,000.

Claimants should be told in plain English that failure to obtain independent advice could seriously reduce the level of damages in their case.

Q10 Do you have any comments or suggested amendments in relation to the draft forms?

The draft forms should be amended to include a clear warning to claimants that they risk receiving lower damages if they do not seek independent legal advice. The forms should also inform a claimant that, if they or a member of their family are a union member, to contact the trade union.

If the insurers are making fair offers they have nothing to lose in encouraging this.

Q11 Do you agree with the above time periods? If not please state why not and what they should be.

As outlined, the time periods for RTA cases are probably workable but, for non-RTA cases, the insurers have shown no evidence at all that they can or will comply. Penalising and effectively banning investigations during these time periods will build in delay and benefit the insurers at the claimants' expense.

The proposals are flawed because they are based on the wrong assumption that claimants are rushing to litigation and that insurers are desperate to settle cases quickly if only they were given the opportunity. In our extensive experience that is not the case. We can only conclude that the Ministry has listened to insurers and ignored injury victims and their representatives.

In the in-depth interviews conducted to supplement the quantitative findings of our survey, Mrs C contrasted the straightforward nature of her claim with that of a previous one where the employer's response had been different. She had not rushed into taking the second claim but had pursued it because she was aware that other people had endured similar accidents and she was anxious not only to protect other colleagues but also the children in the school.

RTAs make up the vast majority of cases – over 70% on CRU figures. The proposals within this consultation paper are defective because they seek to extend to other cases a process designed to operate for RTA cases alone. One size does not fit all.

We propose that the process is limited to RTA claims only. That way the vast majority of cases are covered and the procedure is given the best chance to work in the cases most appropriate and for which it was initially conceived.

The proposed £10,000 limit would include many cases requiring more than one report where the quantum timetable would not work, even if the insurers did move as quickly as they should.

It is Thompsons' firm view that, as well as non-RTA claims, cases requiring more than one medical report should be excluded.

For this to work with RTA cases, it is important that the time for admitting liability is no longer than at present and it must be absolute. Any longer will hold back investigations and will create more delay as claimants will be prevented from preparing the case until the period expires.

Paragraphs 60 and 79 refer to cases where defendants require more time. What happens after that is unclear. A claimant may agree a short extension but in many cases that will simply mean more delay.

Case track limits and the claims process for personal injury claims

In order not to be negligent, a solicitor must gather evidence before it becomes stale. Gathering evidence will incur costs, which will not be provided for in the fixed costs. Similarly, on quantum, a defendant may delay in making an offer, or in providing relevant documents. Costs may then be incurred preparing a case for court before a late offer is made and accepted. A solicitor is therefore in conflict between his professional obligations and the budget provided for the costs.

For this system to work for RTA cases, the fixed costs should only apply to cases where the timetable is strictly adhered to. Where the defendants delay the case must fall out of the system and current procedures apply with the following modifications:

- i) Reversal of the burden of proof where there are delays on liability and
- ii) Punitive damages where the delays concern costs.

Defendants should not escape the consequences of their conduct. They should have to pay the actual costs incurred where they have not complied.

Fixed costs are a reward for defendants and should only be allowed where the case has been simple and the defendants have complied.

What must be avoided is any opportunity for arguments about whether extensions should have been agreed and for how long. That can only lead to uncertainty and satellite litigation and, ultimately, more cost. Defendants cannot reasonably expect to pay only fixed costs in any case if in fact their delays cause increased costs for the claimant.

Q12 Do you agree that, where the amount of damages cannot be agreed, there should be an application to the court through the simplest procedure possible? If you agree, your views are sought on the procedures set out above. If you do not agree please state why.

It is correct that the court process can be simplified in fast track quantum only cases. There should be no need for any pleading – a short endorsement on the claim form should be sufficient with the medical report and special damage schedule attached. Defences are not required – a simple acknowledgment would be sufficient with a shorter period needed for that.

To cut delays, service on insurers should be permitted. It is absurd that delays are caused by the requirement to serve on the defendant rather than their insurer who has had conduct of the case throughout. Currently insurers can nominate solicitors to accept service but they frequently do not do so and it is unacceptable to leave this to their discretion as the delay only benefits them.

In any event, the nomination of a solicitor by the insurer automatically increases their costs.

Instead of simple and practical reforms, the proposals suggest a procedure that introduces a third tier: those with cases under and over £2,500.

Any new procedures should be as simple as possible. Introducing an arbitrary figure will add to delays and create additional difficulties. There would have to be a process to determine whether a case is above or below £2,500.

A case valued at £2,400 does not require a different procedure from a case valued at £2,600. The real distinction between cases is the evidence required.

Case track limits and the claims process for personal injury claims

Where there is dispute, courts need to hear from the claimants about their injuries in order to properly value claims, whether the value is £2,000 or £3,000. It takes only a short amount of a court's time and no longer than it takes to read a statement, but where there is a dispute between the parties, meaning a case has not settled but proceeded to court, seeing the injury victim is hugely important. Paragraph 76 confirms there will be a hearing so the claimant will be at court anyway.

Cases with more than one medical report require more extensive procedures as do cases requiring other witnesses, eg where there is a care element. Courts can deal with these matters by appropriate directions.

Q13 Your views are sought on whether additional measures could be introduced that would help improve the process where liability is not admitted or is denied.

Where there is a delay in responding on liability, the burden of proof should be reversed. This should also apply where a denial does not provide sufficient detail or documents as required by the Protocol.

There is a further simple step that it is extraordinary has not been considered.

Why not have a requirement for meetings or discussions on liability where it is denied and on quantum in all cases? It has become commonplace for government, the judiciary and bodies such as the Civil Justice Council (CJC) to call for mediation between the parties in litigation but in the context of personal injury cases experienced insurers and claimants' solicitors should not require a mediator. Cases can and do settle by discussion and this should be encouraged.

The problem is that discussions presently happen too late in the process. Insurer staff cutbacks have meant they no longer have the experienced claims staff who previously would settle numerous cases in a few hours at a meeting with claimants solicitors, substantially reducing the costs. These arrangements have proven to be effective in the past as well as leading to improved working relationships as trust develops.

Where liability is denied, Thompsons suggests that a meeting between the two sides should be obligatory. The insurers can request that this be by mediation provided the insurers pay the mediation costs whatever the outcome.

In practice, mediation is likely to be a short term issue to help insurers where, due to cutbacks, their claims staff are inexperienced or lack confidence to meet a claimant's solicitor without support.

The requirement to meet should be backed with sanctions such as reversal of the burden of proof where there is a failure to participate in a discussion.

Part 36 should be strengthened so that punitive damages are payable by defendants who drag a case out after a claimant's offer. They should eventually have to pay the amount offered or a higher sum. The current sanction of additional interest is toothless and has proved to be ineffective.

Similarly punitive damages should be payable where defendants delay in making quantum proposals.

Q14 Do you agree with the proposals set out in appendix 7? If not please say why and set out any alternative proposals.

Paragraph 82 does not, with sufficient clarity, explain what was agreed by the working party. These figures were not agreed as upper limits for certain losses.

Case track limits and the claims process for personal injury claims

Appendix 7 of the consultation paper is clear – these are limits below which insurers will normally take the claim on trust. More can be claimed but there would normally then be a requirement for evidence. Similarly, even if these figures or less are claimed, insurers can still require evidence but this would be exceptional.

The paper fails to cover the position where an insurer breaches this procedure and routinely calls for evidence in cases below these figures. The fixed costs in RTA cases will presumably be based on insurers complying with the procedure so there will need to be a sanction for insurers who don't.

Q15 Do you agree that regional hourly rates should be set and if so, how should they be set?

Any setting of hourly rates for care and other help provided to a claimant would require a transparent procedure, such as a form of representative hearing, with evidence, submissions and rights of appeal. This cannot be done arbitrarily unless it is agreed by all sides.

Claimants should always be able to claim the sums actually paid where this is reasonable and necessary.

Q16 Your views are sought on developing an assessment tool for general damages.

An assessment tool such as an improved and expanded version of the JSB Guidelines may be useful. However, IT based systems developed and controlled by insurers, such as Colossus and Claims Outcome Adviser work only as unilateral devices to achieve internal consistency and to drive down damages levels.

Thompsons attended the demonstrations of these systems arranged by insurers. We were not impressed. By setting damages based on what insurers have settled claims at, insurers can drive compensation levels down.

At present, claimants who settle for low damages due to liability or other case related complications, for personal reasons or because they have poor lawyers who may not recognise or be prepared to hold out for the proper value of a case, drive down the damages of other claimants.

This is especially the case when fixed costs apply. Fixed costs will reward insurers and lazy lawyers and punish claimants.

These systems can actually be tuned according to their "opponent" and can "learn" which claimant lawyers are "pushovers" and unlikely to fight for maximum damages for the claimant.

These systems were designed by insurers for insurers. The programmes are confidential and based on highly controversial core data.

We endorse the position that these IT-based tools are not appropriate. Where not agreed, damages can only be established by transparent judicial procedures, with bilateral involvement and awards open to challenge.

Q17 Do you agree that there is little scope for standardising contributory negligence? If not please set out how it might be done.

We agree.

Q18 do you agree with the proposals in relation to cost? If not please give your reasons and set out any alternative proposals.

Case track limits and the claims process for personal injury claims

Thompsons' view has always been that fixed costs will harm injury victims and access to justice and only benefit insurers. The results of our survey bear this out.

Q5 At present – in personal injury cases, the person found responsible for the injury pays the costs of your lawyer i.e. the guilty party pays all. Do you think this is a fair approach?

YES	953	95.0%
NO	43	4.3%
UNSURE/DON'T KNOW	6	0.6%
DEPENDS ON CASE	1	0.1%
	1003	100.0%

Q6 One of the government's proposals is that the amount the claimant's lawyer can be paid will be fixed. At the moment the lawyer is paid for the actual work and time they need to spend on your case. If the lawyer is only going to be paid a fixed amount – do you think this will affect the amount of work they will do on your case?

YES	854	85.1%
NO	122	12.2%
UNSURE/DON'T KNOW	27	2.7%
	1003	100.0%

Fixed costs are unacceptable in personal injury cases generally and employers liability cases in particular; for the reasons set out in **Appendix 2**.

Applying fixed costs only to RTA cases as we propose will need to be done carefully to ensure that they reflect the actual costs incurred under the new system. There must be a rigorous, evidence-based process to establish them and clear provision for an annual review with a default provision for automatic uplifts where such a review is delayed.

There can be no suggestion that fixed costs are determined in some theoretical way. Costs are incurred in real cases dealing with individuals, experts, courts and insurance companies. Time and time again procedures have been introduced to reduce costs but these have had no effect or have increased costs – as we have predicted on each occasion.

Costs incurred can only be assessed by reference to real costs in cases proceeding under this process. That is how the current RTA costs were fixed under the existing system, with a research-based approach including data input from insurers and claimants, which has proved to be acceptable to both parties in RTA cases.

Fixed success fees were also established by this means.

This is an entirely new procedure. If it is to be introduced then it should be for RTA cases only but also by way of a pilot to ensure that costs reflect the full financial reality involved in the process. A concern we have that in any pilot the insurers could concentrate their resources so that they fully comply, thereby minimise claimants' costs (only to revert to form once the costs are fixed at artificially low levels), would be addressed if the pilot was long term with regular spot checks.

Case track limits and the claims process for personal injury claims

To start the scheme limited to RTA cases only could initially follow the current levels of fixed costs. Research would then be based on actual cases under the scheme as it developed.

For the duration of the pilot, costs in RTA cases with a value above £10,000 would be the actual costs incurred.

Even with these provisos, fixed costs will retain their disadvantages. They give less incentive for insurers to settle early and are likely to lead to the minimum amount of work being done on a case. Some solicitors will choose to “cherry pick” cases and the overall result will be a production line approach to claims handling, which will not be in the interests of claimants or the civil justice process.

The suggestion in paragraph 86 that costs “will not include the cost of referral fees” misses the point. As explained earlier, no element of a referral fee can be recovered by way of costs. If solicitors choose within their marketing spend to attract business by means of referral fees rather than High Street locations, that is a matter of no consequence unless they pay excessive fees.

We condemn such excessive fees and invite an investigation into the insurers and other profiteers acting in this way.

There will also need to be sufficient flexibility to cope with particular RTA cases. Those requiring more than one medical report would need to be excluded as outlined. But other special cases arise, such as infant approval cases, which require additional costs to be taken into account.

No costs without offer beaten

We are opposed to the extraordinary proposal that no costs will be payable for proceedings unless the claimant beats their own offer. This would see claimants and solicitors having to offer and accept less than the case is worth in order to cover the costs the negligent defendant has caused them to incur. This is completely unacceptable and would put solicitors in to conflict with their professional duty to do the best for their clients.

It is also something that the clients we surveyed were very clear was wholly disadvantageous to the claimant.

There is no exact science to valuing a case and solicitors can only advise as to the range of likely damages and seek to recover the mid point or higher. By definition, a mid point has as many cases either side of it. Under this proposal, claimants offering the mid point will recover their costs in only half of the cases. Solicitors will be forced to offer the bottom of the range to recover costs in most cases rather than risk having no costs. This will drive down damages generally and is completely against the interests of both injury victims and justice.

Separate costs for claims above and below £2,500

The suggestion that there be a separate cost system for claims above and below £2,500 will create a further tier which is artificial and quite inappropriate. See our comments above in answer to Q12.

Success Fees

Paragraph 87 refers to fixed success fees but these already exist. These were agreed by stakeholders following CJC mediation and extensive research with data from all parties including the government. The process involved real cases and was based on detailed decision tree models establishing the costs and risks involved in RTA and employers liability cases.

This was a complex, protracted process but it was time well spent as it has been a success. We were very much involved in this bilateral and open process and provided extensive data as did insurers and other stakeholders.

We would hope that the proposal is not to change the figures already agreed after such a forensic process and would oppose any such suggestion. For areas of personal injury law not yet covered, such as public liability cases, a similar procedure should be adopted.

This process also highlighted the extent to which employers liability cases differ from RTA cases. For cases that settle before trial there is a single RTA success fee. For employers liability cases there are seven different figures which are considerably higher than the RTA success fee ranging from double to eight times higher.

Q19 Do you agree that ATE insurance cannot be justified in the circumstances set out above and therefore should not be recoverable? If not, please give your reasons, identifying the risk that is being insured, and set out any alternative proposals.

No. It can be justified and must be recoverable for ATE to survive. This suggestion is based on a fundamental misunderstanding of insurance generally and ATE cover in particular.

Union personal injury cases are covered by either ATE or by union self insurance. We echo the TUC's concern with the proposals within paragraphs 90 to 95. It is simply not the case that claims where the defendant admits liability carry no risk.

There are many circumstances where disbursements are unrecovered or adverse costs are payable where liability is admitted. Indeed, if brought into operation, the proposals would substantially increase this risk by providing for no costs unless the claim is undervalued by the claimant.

But the question misses the point. It is not the correct question to ask in the context of ATE insurance. All cases carry some risk and it is a basic principle of insurance that the risk must be spread for insurance to work.

In addition, we would refer to the case of *Rogers -v- Merthyr Tydfil EWCA 18/7/06*, which confirmed that the premiums charged were reasonable and proportionate. Premiums can be easily challenged by defendants and are disallowed if they are disproportionate. Such a challenge was brought in the Rogers case. It failed because the premium was reasonable and proportionate.

The reality is that average premiums are much smaller in proportion to damages than the paper suggests, while union self-insurance has proved to be a successful and cost effective alternative to ATE.

Case track limits and the claims process for personal injury claims

The impact of this proposal on ATE will be devastating. DAS Legal Expenses, the biggest ATE provider, in its response to this consultation, confirms this:

Having spent over ten years fighting to establish a reasonably predictable market and overcoming a series of challenges, particularly by establishing that there is no direct link between the risk of adverse costs and the amount of damages claimed (see Rogers -v- Merthyr Tydfil for example), the market would be destabilised by the DCA proposal that premiums should only be recoverable in high risk cases and it is entirely possible that the UK regulated insurers may review their market participation, leaving consumers either unable to arrange cover or being forced to arrange cover through offshore markets.

It is a basic principle of insurance that the many pay for the losses of the few. The DCA proposal is in effect that only the few pay and this is an unworkable insurance model.

Therefore, individual insurance premiums would be very much higher under the DCA proposal (£3,000 - £4,000 per policy). Even this would not necessarily be adequate to maintain a market, where it is necessary to win cases in order to achieve any premium income at all, since policies self insure premiums due if the case is lost.

In simple terms, the proposal is akin to asking motor insurers only to insure 17-year-olds driving sports cars.

The Judge, one of the main ATE brokers, has written to Thompsons and other law firms stressing the importance of insuring early and not waiting for denials of liability. It confirms that many insurers won't consider late applications stressing that:

"Once a defence has been served it becomes an alert factor for insurers and they will immediately be on guard that the defendant believes there is a case worth contesting"

The courts have also repeatedly stressed the fragile nature of the ATE market and the need for caution.

In *Rogers -v- Merthyr Tydfil* EWCA 18/7/06, referred to above, it was stressed that:

District judges and costs judges do not ... have the expertise to judge the reasonableness of a premium except in very broad brush terms, and the viability of the ATE market will be imperilled if they regard themselves (without the assistance of expert evidence) as better qualified than the underwriter to rate the financial risk the insurer faces. Although the claimant very often does not have to pay the premium himself, this does not mean that there are no competitive or other pressures at all in the market. As the evidence before this court shows, it is not in an insurer's interest to fix a premium at a level that will attract frequent challenges.

We are very surprised that the Ministry has adopted the position the liability insurers have unsuccessfully peddled since ATE was introduced – that ATE should only be taken out once liability is denied.

In the first test case on the legislation providing for recoverable ATE, *Callery -v- Gray* UKHL 27/6/02, the insurers argued precisely this point. After extensive submissions, the Court of Appeal and the House of Lords wholly rejected the argument in carefully considered judgments. It was stressed that the many must pay for the few.

Ignoring all of this and without any research or reasoning as to why it is now considered that both the Court of Appeal and the House of Lords were wrong, the proposal is to do a complete "U" turn.

These proposals undermine the principle of ATE and union self-insurance, which is based on spreading the risk as widely as possible. This would make it impossible for unions to operate effectively in any personal injury case where there is a denial of liability or a failure to agree on quantum.

Case track limits and the claims process for personal injury claims

All insurance operates on the basis of the many paying the few. All motorists take out RTA insurance but only a minority claim on those in any one year. Similarly with household and travel insurance. Removing the many will leave the few paying for the few which is simply unworkable.

Thompsons believes that the proposals on ATE should be removed from the proposed system and ATE reviewed following the promised CJC discussions on this issue, which must include all stakeholders.

These proposals will also lead to satellite litigation. Cases such as *Callery* and *Rogers* have led to settled law on the recovery of ATE premiums. Disputes are rare and easily resolved. That progress will be lost and we will be back to square one facing a guerrilla war of protracted litigation if these proposals are not withdrawn.

In addition, as elsewhere in the paper, the proposals on ATE appear to be about setting a second tier at £2,500 with no insurance premium being recoverable in cases below £2,500 even where proceedings are required. Who would then pay for the court fee and the other disbursements incurred?

Q20 What would be the impact on the ATE market of these proposals?

ATE insurers estimate that they will potentially lose up to 75% of low risk cases from the risk pool, which would see a massive increase in the cost of premiums across the remaining risk pool. Market failure is a very real risk. It is likely that there will also be a vast amount of additional satellite litigation relating to costs (which would be underwritten by ATE) as well as additional satellite litigation on the cost of premiums.

We would refer to the comments of the Legal Expenses Insurance Group, the only representative body for ATE providers representing the main providers in the ATE market:

The proposals assume that there will actually be an ATE insurance market left, in spite of the fact that insurers will be selected against by only being able to insure high risk cases. With so few underwriters participating even in the current market, this assumption is far from certain.

The current proposals would make ATE a very unattractive market to be in. If there is to be an ATE market for the more risky cases, this is more likely to be achieved in an environment where a lower premium is paid by all, in order to generate the funds required to meet the claims costs on higher risk cases.

An alternative approach would be to continue to develop the staged premium model, whereby lower risk cases attract lower premiums. This ensures that the ATE insurers are getting some premium into the common pool, which will offset the higher risks at the next stage of the legal action. This approach has already gained great favour with both the courts and third party (TP) insurers alike.

The justification for a "considerably reduced" premium for quantum-only cases is also based on the proposed new costs structure for these cases (i.e. the cost risk is purely for the quantum hearing).

The alternative to this is the potentially huge increases in premiums for those cases that require insurance. However, there can be no guarantee that any ATE insurer will wish to remain in such a market where the individual risks are too high. An added risk is also a return to the days of satellite litigation with TP insurers challenging all premiums and holding up payments for years with the aim of destabilising the market further. The LEIG would like to put forward an alternative way of proceeding to the one advanced:

- *To restrict scope of the current proposals to RTA cases and monitor how it works and the ability of TP insurers to comply with the timescales and new arrangements. As noted above, it should be possible for TP insurers to be able to accept or deny liability within the requisite period on c. 90% of cases. Will they achieve this and how will claims be settled in such cases?*
- *Linked to this a new, limited ATE policy for RTA liability admitted cases. This would have a low premium commensurate with providing protection for the reduced risks that still exist.*

Case track limits and the claims process for personal injury claims

The LEIG submissions are consistent with our position that the proposed scheme, subject to modifications, should be confined to RTA cases, which, as indicated, represent 70% of personal injury claims.

To quote DAS again:

In the current format these proposals are at best likely to reduce capacity in a limited market and at worst could potentially destroy the entire ATE insurance market. The few remaining insurers, who are still in the market after 10 years of uncertainty and turmoil, may consider this future uncertainty a step too far and decide not to continue underwriting ATE cover, as many major names have already done before them.

The ATE insurance market has only just begun to become predictable, with insurers being able to underwrite on actual ATE claims experience as gained from the previous 10 years or so of trading. The Rogers -v- Merthyr Tydfil CBC [2006] EWCA Civ 1134 case brought many of the problems of the market to the attention of the Court of Appeal, along with detailed actuarial evidence and data.

The Court of Appeal acknowledged and endorsed this data and agreed that the ATE insurance premium, staged premium models and the many paying for the few approach was appropriate and proportionate. This judgement brought to the market some much needed clarity and certainty regarding ATE premiums for the first time.

Only eight months after this judgment was handed down the proposals would potentially destroy all the progress made to date. Certainty will once again be replaced by uncertainty, and the ATE insurance market will once again become very fragile and volatile, (if it even exists at all).

... In summary, the proposal is likely to have no impact on costs to TP insurers (or even increase them), reduce choice in the market, lead to a further round of wasteful litigation and encourage dubious activities by some solicitor firms.

Abbey Legal Protect's David Hartley, who runs The Accident Line, the longest running ATE scheme and the only provider endorsed by the Law Society takes a similar view:

If the proposals happen and the insurers change their processes, then the volume ATE market disappears... I am not surprised, but there is still a lot for the Ministry of Justice to understand about the ATE market that it doesn't at the moment.

Q21 Do you agree that the new claims process should apply to all claims for personal injury, except clinical negligence, with a value of less than the fast track limit? If not, please give your reasons and identify which cases should use the proposed system.

We believe that, with modifications as suggested, and for the reasons detailed, this can only work at present for RTA cases requiring one medical report which in practice will mean lower value claims and more straightforward cases.

We urge the Ministry to ensure that there is one procedure for all RTA cases under £25,000 requiring one medical report rather than the two-tier proposal within the consultation document.

Thompsons Solicitors Personal Injury Claimants Survey results and In-depth interview Report

I Background

Thompsons Solicitors employed The Campaign Company, an independent communications organisation, to commission and undertake a quantitative survey of 1000 successful personal injury claimants, drawing from a source list of UNISON, NASUWT and FBU members.

The telephone survey was undertaken between 28 June and 4 July.

Six in-depth telephone interviews to supplement the quantitative findings to support the responses were also carried out with those who were:

- trade union members themselves (not a family member also entitled to free independent legal representation)
- those with a claim relating to an accident or injury at work
- motivated to take their claim forward because it might help to prevent similar accident to others and improve health and safety in the workplace – and
- could identify that taking the claim forward had made a difference to health and safety in the workplace.

Telephone interviews were conducted between 3 and 5 July.

Five respondents were female and one male. The cases of all those spoken to were settled out of court.

2. Survey Results

2.1 All results

Breakdown of members surveyed

Union Group	Total	%
FBU	73	7.3%
NASUWT	22	2.2%
UNISON	908	90.5%
	1003	100.0%

Appendix I

Q1. Can I ask if you are a member of (UNION) yourself or if you made a claim because you are a relative of a trade union member?

Q1	Total	%
Trade Union Member	958	95.5%
Family Member	45	4.5%
	1003	100.0%

Q2. Before your accident/you were injured, did you know that you had a right to independent specialist legal advice through your union/because a member of your family is a trade union member?

Q2	Total	%
YES	587	58.5%
NO	416	41.5%
	1003	100.0%

Q3. Do you think it is important that people are made fully aware that they have a right to independent specialist legal advice through their union if they are injured in an accident that is not their fault?

Q3	Total	%
YES	997	99.4%
NO	5	0.5%
UNSURE	1	0.1%
	1003	100.0%

Q4. One of the proposals being considered is that the claimant and their lawyer will be required to put a compensation value on the case before it is heard, and if that valuation is higher than what the court awards when the case has been heard, even by a very small amount, the successful claimant will not be awarded any costs. Do you think that is fair?

Q4	Total	%
NO	813	81.1%
YES	172	17.1%
UNSURE/DON'T KNOW	14	1.4%
DEPENDS ON CASE	4	0.4%
	1003	100.0%

Appendix I

Q5. At present, in personal injury cases, the person found responsible for the injury pays the costs of your lawyer i.e. the guilty party pays all. Do you think this is a fair approach?

Q5	Total	%
YES	953	95.0%
NO	43	4.3%
UNSURE/DON'T KNOW	6	0.6%
DEPENDS ON CASE	1	0.1%
	1003	100.0%

Q6. One of the government's proposals is that the amount the claimant's lawyer can be paid will be fixed. At the moment the lawyer is paid for the actual work and time they need to spend on your case. If the lawyer is only going to be paid a fixed amount, do you think this will affect the amount of work they will do on your case?

Q6	Total	%
YES	854	85.1%
NO	122	12.2%
UNSURE/DON'T KNOW	27	2.7%
	1003	100.0%

Q7. Did your claim relate to an accident or injury at work?

Q7	Total	%
YES	736	73.4%
NO	267	26.6%
	1003	100.0%

Q8. And finally, when you decided to make your claim, was a consideration that in taking your claim forward that it might help to prevent a similar accident/injury happening to someone else and improve health and safety in your work place?

Q8	Total	%
YES	622	84.5%
NO	114	15.5%
	736	100.0%

Q9. Did it actually make a difference?

Q9	Total	%
YES	390	62.7%
NO	221	35.5%
UNSURE	11	1.8%
	622	100.0%

3 Interview reports

3.1 Respondent I – Ms D

Female UNISON member; employed in a local authority social services department as a social worker. Partially sighted.

Nature of successful claim – broken ankle sustained in a fall when leaving an exit which was poorly lit - accident happened approx five years ago – settled out of court – damages £6,504.27.

Ms D also had experience of attempting (unsuccessfully) to bring a subsequent case and was keen to compare/contrast her two experiences. The second case related to stress stated to be due to bullying by a manager resulting in time off work (9 months plus 8 months) due to severe clinical depression.

Awareness of access to independent specialist legal advice

In relation to her successful claim, Ms D was unaware that she

- a) could have a case against her employer – and
- b) that, through her union membership, she had a right to independent specialist legal advice.

She was very clear that she should have been told about her rights.

Costs of claim

“Beat your own offer”

Ms D was very clear that she regarded this proposal as being unfair. She indicated that her lawyers' initial estimate of damages was c. £3,500 but that her out of court settlement (accepted offer from the employers side) was £6,504.27 plus costs. She attributed this to the length of time that elapsed between injury and settlement, length of time for her injury to heal, and because, as a result of her partial sight, she had required the assistance of a carer during her convalescence.

It was Ms D's view that, had her case gone to court, the pre-hearing valuation would have been set at a significantly lower figure than she was actually awarded.

Who should pay the costs?

Ms D was very clear that the person(s) responsible should pay the costs.

Fixed costs

Ms D was very clear that the introduction of fixed costs would lead to a very basic service and that there was a risk “corners would be cut in order to stick to budget”.

She was anxious to explain how the fees should reflect the need for the lawyer to deal with the emotional stress associated with the injury. While her injury had been physical, she explained: “I really lost my confidence, I even began to blame myself for falling because of my partial sight, and my solicitor gave me the emotional support and strength I needed to carry on in very difficult circumstances.”

She gave some specific examples of the service she had received about which she was very positive – the “out of hours” contact; home visits she had received and provision of materials that she needed to read in large print – all of which she felt would have been “at risk” under a fixed cost arrangement.

Ms D also referred to her subsequent case which she felt was far more complex and would have been even more vulnerable to a fixed fees approach. She made a number of points – reiterating the need for the lawyer to have time not only to deal with the emotional aspects of bringing a case but also to deal with someone in a severe clinical condition; that bringing a personal injury “stress” case is far more complex in terms of proving cause and effect and will require much more time.

Ms D said that, if she had felt that her lawyer would only be able to offer a limited level of support (work and time) due to a fixed fee, that this would have been an additional deterrent when considering making a claim/taking her case forward. She stated that her case had been taken forward in a very hostile climate – employer took three years to accept responsibility – and that her lawyer had given her confidence due to the quality of legal representation.

Impact on health and safety

This was a driving force in Ms D bringing this case. She stated she had previously complained formally about the poor lighting and was concerned to improve the exit from the building which was unsafe both due to poor lighting but also via a car park, which had no speed restrictions. She was particularly concerned for the safety of a colleague who was a wheelchair user.

Ms D stated that the employer had subsequently made improvements to the exit from the premises although these took some 18 months to complete.

3.2 Respondent 2 – Mrs H

Female UNISON member – working for NHS in hospital canteen as part-time weekend worker for 14 years, now retired. Suffered stroke in 2002 but recovered sufficiently to return to work.

Nature of successful claim – injury occurred when serving food/carrying tray and fell over obstacle, which should not have been present. Facial bruising, jarred neck, legs and elbows injured.

Awareness of access to independent specialist legal advice

In relation to her successful claim, Mrs H was unaware that she had a potential claim or of her access to independent specialist legal advice through her union. She was advised of her rights by a supervisor and then by union representative who gave her the confidence to take her claim forward. Mrs H was very clear that without free legal advice she would not have proceeded with her case.

Mrs H was very clear that she should have known of her rights.

Costs of claim

“Beat your own offer”

Mrs H's case was settled out of court. She was not aware of an estimate of the value of her claim being made by her lawyer. An offer of c. £4,000 was made which she was very pleased to accept as she had only expected a few hundred pounds.

Fixed Costs

Mrs H stated she was very anxious about her case which she had found mentally and physically damaging. Her lawyer gave her a lot of support during her case, which she described as “*over and above just the legal advice they are paid to do*”.

She said: “*I was lucky because my employers didn't hold it against me. Well, they couldn't really with a room full of witnesses including the health and safety rep.*”

But she was clear that in a fixed fee context her lawyer would probably not have had the time to give her the extra support and that had her case been more problematic the fee limit could have affected the outcome.

Impact on health and safety

Mrs H was motivated in that her claim could prevent future accidents.

Since her claim was resolved she has been informed by former colleagues that, while the responsibility for ensuring a safe working environment still rests with operational staff, formal health and safety inspections are now undertaken before major events, such as the one in which she was involved, when she sustained her injuries.

3.3 Respondent 3 Mrs C

Female NASUWT member – working as teacher for LEA in primary school.

Nature of successful claim – injury occurred when she slipped on a wet floor and broke her elbow, off work five months.

Awareness of access to independent specialist legal advice

Mrs H was very clear that she should have known of her rights and that it was the government's responsibility to make sure she was advised of her rights.

Costs of claim

“Beat your own offer”

She was very clear that this proposal is unfair – *“if you win, the costs should be paid whatever”*. It was Mrs C’s view that this approach would drive down the value of damages and demean the value of the accident. In her own case, she had understood from her lawyer that the maximum she could expect was c. £7,000 – in the event her case was settled for c. £5,000.

She was concerned that from her experience she would probably have lost out under the new arrangements as a higher value than she actually received was put on her case.

Mrs C stated: *“the person who has had the accident should not be made to feel the guilty party. Barriers like this will stop people making legitimate claims and not only will they lose out but the health and safety of others will be compromised.”*

Who should pay the costs

The person responsible for the injury. Absolutely.

Fixed costs

Mrs C was clear that her case was pretty straightforward (liability accepted, settled very quickly, no acrimony, very supportive head teacher, documented report on the record from fire officer that floor was unsafe) and that therefore within a fixed fee context she would probably have been OK.

However, she contrasted this experience with a previous case she had tried to bring. Similar accident, slipped on same floor when wet – but very different response from the employer and she was told she would have to pay £5k to take the case to court, which she could not afford to do.

Mrs C was very clear that “no two cases are alike”.

She was very clear that *“of course a fixed fee would affect the time put into your case and it would affect the quality of the work done and the outcome of the case”*.

Impact on health and safety

Mrs C brought the case because she had previously suffered an injury on the same wet floor; she was aware that other people had had similar accidents and she was anxious not only to protect other colleagues but also the children in the school.

A new non-slip floor was fitted within two weeks of her accident taking place – she thinks before liability was accepted. She was very clear that her commencing her case was the trigger, notwithstanding previous accidents and an adverse fire officer report.

3.4 Respondent 4 Mrs A

Female UNISON member – working as a Health Care Assistant in an NHS Respite Unit caring for children with special needs.

Nature of successful claim – injury occurred when newly installed fire doors (installed on a trial basis) closed and trapped fingers, later found to have been fractured/broken. Mrs A had been on holiday at the time of installation, had not been advised of new (auto closing) facility on her return, no inspection had been made to identify the “fault” and doors were inappropriately wedged open.

Awareness of access to independent specialist legal advice

Mrs A was not aware of her rights prior to her injury. She went to the union when colleagues suggested she may have a claim and that union membership included free independent specialist legal advice.

Mrs A was very clear that people should know of their rights, but her view was that there was a need for caution *“because people would want to claim willy-nilly”*. She was aware of the problems with “ambulance chasing” companies. She felt that there needed to be a *“careful balance between information and making sure people were aware of their rights (to independent specialist legal advice) but not in a way that encouraged people to claim and sue inappropriately”*.

Mrs A felt it should be the employers’ responsibility. *“If they know people know their rights and are likely to sue, and that they may have to pay it would be an incentive to them to maintain health and safety.”*

Costs of claim

“Beat your own offer”

Mrs A was very clear that this was unfair: *“The only one who would benefit would be the employer”*. Mrs A was of the very clear view that the successful claimant should get what they deserve – in her case approx 50% of the damages related to loss of earnings, loss of unsocial hours pay and cost of drugs etc. Her view was that only 50% related to the actual injury and future suffering. Since her injury she now has arthritis in her fingers and she is worried that if this proposal proceeds an even smaller percentage of the damages would relate to the injury – current and future suffering.

Who should pay the costs?

Mrs A said the guilty party should pay the injured person’s costs..

Fixed costs

No. Mrs A felt that in her case a fixed fee would have speeded up the progress of her case. She felt that a fixed fee approach would act as a driver to economies of scale.

However alongside this, she felt there ought also to be time limits for employers to respond at various stages and fines/penalties on the employer for delays.

Impact on health and safety

Mrs A was adamant that this was the principal driver of her claim and her motivation was the protection of the special needs children for whom she cares. It was her view that an injury of the kind she sustained would probably have caused a loss of fingers or additional severe disablement had it happened to a small child.

Mrs A stated that it had, the doors were checked immediately; they are now labelled warning of their nature and potential danger; the doors are now checked on an annual basis rather than on an ad hoc basis as before.

3.5 Respondent 5 Mrs C (2)

Female UNISON member – working in a refectory in an FE college.

Nature of successful claim – injury occurred when she slipped on a wet floor caused by a leaking roof – which had been leaking for three years and reported on several occasions.

She suffered torn ligaments, was off work for two periods of five months, required an operation and still has problems – pain, swelling etc

Awareness of access to independent specialist legal advice

Mrs C (2) did not know of her rights prior to her injury, she was advised of them by her husband who is a shop steward. She believes the right may have been contained in a union booklet but she admitted to rarely reading such literature.

She agreed people should be made fully aware of their rights.

Costs of claim

“Beat your own offer”

Mrs C (2) did not think the proposal was fair: *“There’s no point going to court to fight your case if you’ve agreed the damages beforehand. It’s a bit of a catch 22, the claimant will always lose out”*.

Who should pay the costs

The person who caused the injury, because it is their fault, *“a lot of cases, like mine, are just due to neglect. It’s quite right that they have to pay if it’s their fault”*.

Fixed costs

Mrs C (2) was undecided. It was her view that it depended on the nature of the case. It would probably be acceptable for a simple straightforward case. It would depend on how dedicated the lawyer was, she had had a very positive experience (lawyer whom she said was very good and dedicated in a case which lasted over three years).

Impact on health and safety

Mrs C (2)’s accident occurred at 9.30 am and by lunchtime workmen were on site repairing the roof. All staff have since (within two weeks) been issued with, and are required to wear, safety shoes. She was very angry that she had sustained an injury, with lasting consequences, due to a repair which took only a short time and (she says) cost only £300.

3.6 Respondent 6 Mr H

Male FBU member – now retired from role as firefighter.

Nature of successful claim – injury occurred when changes were made in office accommodation to accommodate restructuring and provide office space for senior officers. He and colleagues were not consulted about the changes. He was moved into a new office with a tiled, as opposed to previously carpeted, floor. Chairs with castors were moved (with no risk assessment) and his lower back injury was sustained when his chair skidded across the floor and he fell off, due he believes to the floor being tiled. The chairs were suitable for a carpeted floor but not for a tiled one.

Awareness of access to independent specialist legal advice

Mr H was aware, he regularly read the union publications and newsletters, which regularly contain articles (from Thompsons) advising members of their rights in a range of areas. He was clear, though, that he works in a job role where health and safety – both personally and generally – is taken very seriously.

It was his view that the responsibility was both trade union and employer. Again, his view was that he has a responsible employer but that is not the case for all employers.

Costs of claim

“Beat your own offer”

Mr H felt this proposal to be unfair. *“It’s a guessing game open to manipulation. The damages should be decided by a Judge, within guidelines, and decisions about damages to be awarded made after all the evidence has been heard and all individual circumstances taken into account.”*

Who should pay the costs?

The guilty party. *“And this should be the case even if the case does not go to court; otherwise no-one would take their employer to court. It’s even more important for those at the poor end of society who’ve got shyster employers.”*

Fixed costs

Mr H found this a difficult question. He believed it probably would, but felt that *“certain lawyers have queered the pitch for themselves and the good ones”*. He talked about the solicitors involved with miners cases and felt *“they have creamed off a lot and shot themselves in the foot”*.

A fixed fee could affect which cases lawyers would take on. Sometimes cases drag on for a long time and Mr H wondered if a fixed fee might speed things up? But he felt a risk was that if cases were dealt with very quickly some injuries might not have fully manifested and people would not be properly compensated for the long term implications.

Impact on health and safety

Mr H brought his case to safeguard others and also because he felt it was evidence of a “them and us” approach by senior officers. He was angry at the lack of consultation about the changes and, had an apology been made and the matter addressed, stated he would probably not have made a claim.

Appendix I

He felt it was ironic in that after years of service he had never sustained a serious “fire fighting” related injury but had been injured as a result of an avoidable office accident.

He stated that the chairs were changed “within the hour” and added that an initial internal accident investigation was cursory and in his view very unsatisfactory but that when his employers became aware of the involvement of solicitors a proper investigation was conducted (slip tests etc). He felt this was further evidence of the need to avoid any changes that deter people from making rightful claims as often this is the only way in which health and safety is taken seriously and necessary changes made.

Ten objections to fixed costs

1. There is already an adequate cost control mechanism in place. Lawyers can only recover their “reasonable, necessary and proportionate” costs. If the defendants do not agree with any costs claimed, they have the right to challenge them by way of the Costs Assessment Process. The reality, as far as Thompsons is concerned, is that they rarely challenge them and when they do they lose the challenge.
2. There has been no independent or verifiable evidence produced by the government or the insurance industry that costs in personal injury cases are out of control.
3. It is morally right that when someone has caused injury they should meet not only the compensation for the injury but the full reasonable, necessary and proportionate costs caused by their negligence.
4. Fixed costs will mean that the health and safety deterrent on employers, of having to pay not only compensation but the cost of proving negligence will go.
5. Fixed costs will remove the financial incentives on insurers to “behave” in litigation. If insurers know that what they have to pay to injured people is fixed, the “stick” that costs will reflect their behaviour will disappear.
6. There is a risk that non-union solicitors will seek to recover costs incurred above the capped limit from the injured person’s compensation.
7. In the alternative, unscrupulous lawyers will settle cases early rather than pursue the matter in the best interest of the client, because in that way they will recover the same fixed cost for less work.
8. In true no-win no-fee and trade union backed cases, the cost arrangements are irrelevant. Claimants will not pick up the bill for costs win, lose or draw. Either the solicitor will incur personal liability for the costs or the insurance or litigation funder will step in.
9. Recoverable insurance premiums and success fees in conditional fee cases were, in part, specifically designed to encourage lawyers to take on personal injury cases under the regime introduced by the Access to Justice Act. Capping recoverable costs threatens once more to reduce the pool of lawyers prepared to take on personal injury cases and in turn threatens access to justice.
10. In personal injury cases the claimant is always an individual with limited means and the defendant always a wealthy insurance company with unlimited financial backing.

NB Appendix 3 attached as a separate document