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Litigation Costs and Before-the-Event Insurance: The Key to Access to Justice?

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The cost of civil litigation is a key factor in determining the extent of access to justice. Following cuts in legal aid attention has focused upon finding alternative methods of assisting litigants without producing costs which are out of proportion to the damages obtained. The recent report by Lord Justice Jackson attempts to deal with concerns about increasing and disproportionate costs said to arise in part because of the encouragement of conditional fee agreements. This article considers the proposals made in the report, and argues that too little attention has been paid to before-the-event insurance as a means of securing access to justice for the great majority of claimants who suffer personal injury.

INTRODUCTION

This article looks at particular recommendations made by Lord Justice Jackson in his review of the costs of civil litigation.¹ In a two volume report running to over a thousand pages he proposes to make radical changes. If the complex, inter-related reforms are all introduced, they would be even more significant than those procedural

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¹ R. Jackson LJ, *Review of Civil Litigation Costs: Final Report* (London: Judiciary of England and Wales, January 2010), and R. Jackson LJ, *Civil Litigation Costs Review – Preliminary Report by Lord Justice Jackson* (London: Judiciary of England and Wales, May 2009). The review was commissioned by the Master of the Rolls, Sir Anthony Clarke, in November 2008 and speedily completed in a year.

changes set in train by Lord Woolf fifteen years ago.² The proposals have been much discussed by the legal profession but, as yet, they have largely escaped the attention of academic law journals.³ They received support in a recent report on compensation culture,⁴ and the Government have announced that they are to form the foundation for its reform of civil litigation. The Jackson proposals are to be taken forward as a matter of priority.⁵

Here the focus is upon one particular issue: the potential use of before-the-event insurance (BTE). This is insurance against future legal costs that was in place before the event which gave rise to the claim, such as the accident which caused the injury. It is sometimes referred to as legal expenses insurance, although that term can also include after-the-event insurance (ATE) where a policy is taken out after the accident in order to cover the risk of having to pay the opponent's legal costs. Although this article therefore has a narrow focus it nevertheless makes wider points about the problems identified by the Jackson report and the solutions it proposes. Reforming BTE could have wide repercussions on litigation, especially in cases involving personal injury. Whether extending this particular means of obtaining representation would lead to an increase in access to justice is a question which has divided

² Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London: HMSO, July 1996).

³ But see the general review by A.S. Zuckerman, "The Jackson Final Report on Costs – Plastering the Cracks to Shore up a Dysfunctional System" (2010) 29 (3) *Civil Justice Q* 263 – 283, and contrast M. Lyons, "Jackson – An Initial Response" [2010] *J Personal Injury Law* 74 – 92.

⁴ Lord Young, *Common Sense Common Safety* (2010). This is a report to the Prime Minister following a Whitehall-wide review of the operation of health and safety laws and the growth of the compensation culture, and at p 22 it recommends that Jackson's proposals be adopted as soon as possible.

http://www.number10.gov.uk/wp-content/uploads/402906_CommonSense_acc.pdf

⁵ Ministry of Justice, *Proposals for Reform of Civil Litigation Funding and Costs in England and Wales* (Consultation Paper CP13/10) (Cm 7947) (London: Ministry of Justice, November 2010) section 1.1.

practitioners; but whether it could offer a more workable solution than some of those put forward by Jackson may provoke a more favourable response. The argument here is that more attention should be paid to BTE than has previously been the case: it may hold the key to access to justice for many potential litigants.

SHIFTING THE COST FROM PUBLIC TO PRIVATE SOURCES

Against a political background where all parties agree that substantial cuts in public expenditure are required, it is not realistic to expect much support for an increase in public funding to enable civil cases to be litigated.⁶ It is to private funding that we must turn if we seek to make it easier to obtain civil redress. However, we should not forget that until recently public funding for personal injury cases was common. Where would we be now had it remained available?

The question is an unusual one because legal aid for such claims already seems to be a relic from the remote past, and there is no suggestion that it should be revived. Legal aid was indeed ‘the most friendless wing of the welfare state.’⁷ Although in personal injury cases it may have cost the Treasury little (partly because of the welfare benefits that were recovered from insurers), the apparent exponential increase in expenditure made legal aid in general an easy target. Even if it had continued in place, there is good reason to believe that it would now be a vestige of its former self. The current prescribed rates for assistance do not meet expenses, and financial eligibility has collapsed to about 36 per cent of the population.⁸ David Marshall, a former President of the Association of Personal Injury Lawyers (APIL), notes: ‘In effect

⁶ In the Ministry of Justice Consultation Paper *ibid* the Government proposes further substantial cuts to legal aid amounting to £350 million to help to provide a real reduction of 23% in the Ministry’s budget by 2014-2015.

⁷ S. Hynes and J. Robins, *The Justice Gap: Whatever Happened to Legal Aid?* (London: Legal Action Group, 2009) chapter 2.

⁸ This is actually a 7 per cent increase compared to two years previously, but this reflects only a downturn in the economy not an increase in eligibility rates. See Final Report n 1 above p 68 para 3.1.

“public funding” is now a “no win, lower fee” conditional fee agreement for the socially excluded only, but without a success fee for taking the risk of losing.”⁹

That is, if solicitors accept legal aid cases today, they must work at very low rates which cannot be increased in the event of claims being won. Marshall suggests that by now, in an unreformed system, solicitors in high value cases would have been forced to fund litigation by using contingency fees with clients paying lawyers from the damages they were awarded. As for the mass of low value claims, solicitors would have abandoned the work and left it to unqualified claims assessors. We would have a very different tort system.

The Access to Justice Act 1999 removed almost all legal aid for personal injury cases. As a substitute, it encouraged the use of conditional fee agreements (CFAs) which had first been made lawful only four years earlier.¹⁰ Claimant lawyers could secure an increase in their fees in each case that they won under such an arrangement. They could recover up to double their costs if they were successful, but nothing at all if they lost.¹¹ Claimants themselves were encouraged to litigate under these “no-win, no fee” deals because the only financial risk to which they were exposed was liability for the defendant’s costs if the case was lost. Even though in most cases this risk was only a remote one, further protection was at hand: for a suitable premium, ATE insurance could be arranged so as to relieve the claimant of any concern over funding his claim. Damages could thus be sought at no financial risk to the claimant.

⁹ D. Marshall, ‘A Short History of the Costs Wars’ (2010) 20 (4) APIL Focus 24.

¹⁰ The Conditional Fee Agreements Order 1995 SI No 1674 made under the Courts and Legal Services Act 1990.

¹¹ In practice in nine out of ten personal injury cases the uplift in fees is limited by industry wide agreements. In road traffic accident cases it is restricted to 12.5%, in employment accident cases to 25%, and in employment disease cases to 27.5%. Civil Procedure Rules Part 45 sections III, IV and V. G. Wignall (ed) *Conditional Fees, a Guide to CFAs and Litigation Funding* (London: The Law Society, 2008).

Liability insurers and public body defendants acting as self-insurers, such as the National Health Service, viewed these developments with dismay because the cost of the changes fell upon them. They were responsible for paying not only the success fee, but also the cost of the ATE insurance. Insurers considered that the result was an unreasonable increase the cost of litigation, and they fought a series of bitter wars in the courts in an effort to contain the effect of the changes upon them. This satellite litigation produced by the complex rules on costs was without parallel anywhere in the world.¹² It proved largely unsuccessful for insurers. Overall the funding risk has been transferred from the state's legal aid system to private sources, with the cost initially falling upon defendants and their insurers. Ultimately, of course, it is the public at large who meets the bill, albeit by a more circuitous route than via direct taxation.

It is not only defendants and insurers that have been subjected to increasing financial risk as a result of the funding changes. In those relatively few claims which produce no damages at all claimant lawyers working on a CFA may also suffer loss. Financial risk management and concerns about disbursement costs and the firm's cash flow have become key features of claimant personal injury work. Such matters when coupled with continuous revision of the civil procedure rules often seem to take precedence over more traditional concerns about liability issues. The changes have affected not only the type of injury claim that a firm accepts but also the stage at which that claim may be settled. For example, for some firms the complexities of litigating industrial disease cases and the financial risks involved has meant that they have become too difficult to run. Instead of dealing with such claims firms might prefer the more economically attractive scenario, as described in a practitioner seminar, of a double-decker bus crash next to the law firm's office where a large number of straightforward claims can be processed from the one incident. Access to the legal system - especially for the less usual, more problematic, type of claim - has changed.

¹² Zuckerman n 3 above, 264.

JACKSON'S MAIN PROPOSALS

Jackson identifies the CFA regime together with these recent changes in funding as major factors which have led to an excessive rise in the cost of litigation.¹³ Costs are said to be disproportionate to the damages obtained especially in the mass of personal injury claims which are settled for less than £5,000. The criticisms of CFAs are that claimants have no interest in or control over the costs which may be incurred in their name; the resulting costs burden upon defendants is excessive, and forces the admission of liability in spite of the prospects of a successful defence; and finally, claimant lawyers may chose only to take on the most lucrative cases and this tends to demean them in the eyes of the public.¹⁴

Although Jackson accepts that CFAs and ATE have a role to play in facilitating access to justice, he considers that the cost should not be borne by defendants. The key strategy he proposes is to transfer their costs to claimants and their lawyers. His main recommendation is that neither success fees in CFAs nor ATE premiums should be recoverable.¹⁵ This is his “most urgent” reform.

To offset this, he makes two other sets of recommendations in favour of claimants. He does so in an attempt to reduce the risk that, because of the changes, they may have to pay for their lawyer’s success fee and for the premium charged for their ATE. First, he proposes that there be one-way cost shifting in personal injury cases so as to obviate the need for ATE.¹⁶ This means that whereas the defendant will continue to pay the claimant’s costs if the case succeeds, if it fails no claim for costs can be made by the defendant. To a large extent this reflects current practice because costs against

¹³ Final Report n 1 above, para 3.26.

¹⁴ Final Report n 1 above, para 4.19.

¹⁵ Final Report n 1 above, para 2.2.

¹⁶ Final Report n 1 above para 4.7.

claimants are seldom recovered, and defendants therefore derive little benefit from the existing two-way cost shifting. Instead they will now benefit much more by not having to pay the claimant's ATE premiums. One-way cost shifting is seen as the simpler and cheaper alternative because claimants will not have to pay for any insurance.

The second set of proposals aimed at protecting claimants deal with the risk that they may now have to meet the cost of any success fee out of their own pocket. Jackson begins by imposing a limit upon the level of this success fee: it is not to exceed a quarter of the damages paid excluding any compensation awarded for future economic loss. This may be a difficult calculation to make given that damages in settled cases are rarely agreed across all or even any heads of damage and it is only the bottom line figure that is accepted by both sides. To enable claimants more easily to pay the success fee Jackson also proposes that general damages for pain, suffering and loss of amenity be increased by ten per cent.¹⁷ This increase is intended to leave the great majority of claimants whose claims settle early no worse off than at present, although the empirical evidence for this balancing act equating the cost of the success fee with the rise in damages has not been made public. In criticism of the proposal one London law firm, after carrying out a study of its own cases, concluded that in serious injury cases claimants would suffer considerably. It found that where damages exceeded £250,000 the average claimant would be £47,000 worse off.¹⁸

In line with his opposition to unnecessary costs, Jackson is in favour of extending the present fixed costs regime. This applies to road traffic cases which settle before issue for up to £10,000.¹⁹ He would extend the scheme to all personal injury cases

¹⁷ Final Report n 1 above, para 5.3.

¹⁸ J. Chamberlain, "Stewart's Law Response to Jackson on Costs."
<http://www.stewartslaw.com/stewarts-laws-response-to-final-report-by-lj-jackson.aspx>

¹⁹ The amount was fixed as £800 plus 20% of damages agreed up to £5,000 and 15% of damages agreed between £5,000 and £10,000. A new streamlined system involving online procedures was

decided in the fast track, that is, for cases up to £25,000.²⁰ To further limit costs Jackson also proposes a ban on referral fees in personal injury cases or, as a fallback position, that at least they be capped at £200.²¹ Referral fees are payments made to third parties for introducing work to the firm. Although commonly associated with claims management companies trawling for accident business, referral fees are also paid to BTE insurers for passing on cases to those firms they choose to appoint to their panel. The Government recognises that the future of referral fees is especially contentious and is awaiting the result of further consultation before expressing its view.²²

Finally, and especially worthy of note here, is Jackson's support of damages-based agreements to increase access to justice because CFAs are now to be made less attractive.²³ Jackson would permit contingent fees to be used for the first time in contentious civil litigation although they have been a feature of certain tribunal work

introduced in April 2010 with recoverable costs set at three stages in the process by the Civil Procedure (Amendment) Rules 2010 SI No 621.

²⁰ Final Report n 1 above, para 5.8.

²¹ Final Report n 1 above, para 5.1.

²² Ministry of Justice Consultation Paper, n 5 above, section 3.1. The Legal Services Board is considering the role and impact of referral fees on costs and access to justice within its field. It has provisionally concluded that there is no compelling case for banning them and that it is arguable that they have improved access to justice. See its Discussion Document, *Referral Fees, Referral Arrangements and Fee Sharing* (September, 2010) para 5.1. In contrast Lord Young in his Report *Common Sense Common Safety* (2010) 20 strongly supports Jackson's proposal that such fees be banned.

²³ Final Report n 1 above, para 5. 1. For an earlier discussion see the Ministry of Justice, *Regulating Damage Based Agreements – A Consultation Paper* CP10/09 (London: Ministry of Justice, 2009). This resulted in the Damages-Based Agreement Regulations 2010 SI No 1206.

since 1995.²⁴ By this means the lawyer's costs can be fixed in advance so as to equal an agreed percentage of the damages recovered. Jackson considers that the contingent fee should be capped at the same level he thought appropriate for the maximum success fee: the reward ought not to exceed a quarter of the total damages, excluding any compensation for future losses. The advantages claimed for contingent fees are that the costs would clearly be proportionate to the award, and unlike under CFAs, lawyers would have incentives not only to control their costs but also to maximise damages for their client. Jackson thinks that fears of premature settlement and over-compensation of lawyers can be limited by regulation. Abuse of the system, for example, is to be controlled by solicitors being required to inform clients of the different methods of funding, and an independent solicitor must be employed to give advice concerning the suitability of the contingent fee. There are obvious difficulties here. Widespread objections from almost all groups involved in personal injury litigation had little effect upon Jackson. In particular, concern from the Association of Personal Injury Lawyers and from trade unions that costs would be taken from damages and leave the claimant under-compensated made no impression. Jackson considered that these objections arose from claimant satisfaction with the current CFA arrangements and that views would change if that regime were reformed.²⁵ The prospect of contingency fees thus now looms large as an alternative to the revised CFA system.

Jackson summarises what he hopes will be the overall result of his proposals:

- (i) Most personal injury claimants will recover more damages than they do at present, although some will recover less.
- (ii) Claimants will have a financial interest in the level of costs which are being incurred on their behalf.
- (iii) Claimant solicitors will still be able to make a reasonable profit.

²⁴ R. Moorhead, 'An American Future? Contingency Fees, Claims Explosions and Evidence from Employment Tribunals' (2010) 73 (5) MLR 752 – 784.

²⁵ Final Report n 1 above, para 4.3.

(iv) Costs payable to claimant solicitors by liability insurers will be significantly reduced.

(v) Costs will also become more proportionate, because defendants will no longer have to pay success fees and ATE insurance premiums.²⁶

JACKSON AND THE DEVELOPMENT OF BTE IN AN EXPANDING CLAIMS MARKET

With these various proposals and objectives in mind, how ought we to view the possibilities for BTE? In his preliminary report Jackson was enthusiastic about BTE, tentatively concluding that promoting its substantial extension would be in the public interest.²⁷ However, eight months later this support evaporated and his final report is largely non-committal. He makes no recommendation either for or against the use of BTE in personal injury cases, although as an add-on to household insurance he considers it a beneficial product which should be encouraged.²⁸ He notes that, as with all other insurance, it would enable the many to pay for the few. However, overall he gives little space to BTE, devoting only nine pages of the 557 in the report to the subject and making only one recommendation about it out of over a hundred made in total. Why did he not consider in more detail the possible extension of BTE in relation to personal injury especially following his radical proposals to change existing sources of funding? Before answering this question, we shall look briefly at the remarkable growth of BTE and the type of personal injury cases that are presently being litigated.

²⁶ Final Report n 1 above, para 2.7.

²⁷ Preliminary Report n 1 above, para 4.5.

²⁸ Final Report n 1 above, para 7.1.

Although BTE has been widely used in other countries for many years, it was first sold in the UK only in 1974.²⁹ There had been little demand for it partly because people were often unaware of the risk of incurring legal costs and, in any event, there was a competitor - the protection offered by legal aid. Insurers also faced difficulties in pricing the insurance when the cost of litigation was much less predictable in the UK than in other countries. Given the relatively few years during which BTE has been offered, it is remarkable that eligibility for its benefits has expanded so rapidly: almost 3 in 5 adults now have some form of this insurance.³⁰ Over 18 million drivers hold it as part of their motor insurance, and 14 million householders as part of their buildings and contents insurance. In total these number about 22 million people.³¹ In addition, for example, about 7 million workers are entitled to BTE benefits resulting from their trade union membership, although this is a declining number.

This wide penetration of the market has been achieved largely because BTE has been sold as an additional benefit to be included in existing motor liability or household insurance. In effect, there has been a great deal of inertia selling. Few people opt to take out stand alone BTE policies, but they commonly accept legal expenses cover as part of a wider package. A factor which may have led to the more recent growth of BTE has been the attempt by certain composite insurers to pre-empt the possibility of claimants seeking assistance from solicitors operating on a CFA and ATE basis. Insurers fear having to pay for what they perceive as unreasonably high costs resulting from a combination of inflated premiums in the ATE market and

²⁹ A.E. Holdsworth, 'The Experience in England' in W. Pfenningstorf and A.M. Schwartz (eds), *Legal Protection Insurance* (1986, American Bar Foundation, Chicago) 14 and M. Kilian, 'Alternatives to Public Provision: The Role of Legal Expenses Insurance in Broadening Access to Justice: The German Experience' (2003) 30 (1) J Law and Society 31 - 48.

³⁰ FWD, *The Market for 'BTE' Insurance* (London: Ministry of Justice, 2007) para 3.3.

³¹ Mintel, *Legal Expenses Insurance* (London: Mintel, April 2008).

unnecessary work done under CFA agreements. For whatever reason, the growth of BTE has been remarkable.

With the growth of BTE there has been an increase in the number of claims brought for personal injury, although this must not be taken to imply that there is a clear causal connection between the two. In fact the increase in claims has been very uneven over the years, and has been much misunderstood. There is a popular belief that a ‘compensation culture’ attitude in the last ten years or so has led to a sustained increase in the number of claims. In fact, in 2008 claims were roughly at the same level as they were seven years earlier: the statistics deny any suggestion that the introduction of CFAs in 2000 led to a ‘have a go’ world and an increase in litigation.³² The comprehensive figures from the Compensation Recovery Unit that I have discussed elsewhere show that there was no such increase in claims in the early years of this new millennium.³³

However, it is true that claims have risen by ten per cent in the last two years. More importantly, it is also true that in the last forty years or so claims have increased substantially: they have more than tripled from an estimated 250,000 in 1973 to 861,000 in 2009-10,³⁴ and represent one claim each year for every 73 people in the

³² Better Regulation Task Force, *Better Routes to Redress* (London: Cabinet Office Publications, 2004), A. Morris, ‘Spiralling or Stabilising? The Compensation Culture and our Propensity to Claim Damages for Personal Injury’ (2007) 70 (3) MLR 349. The most recent report is that of Lord Young, *Common Sense Common Safety* (2010) op cit above n 4. Although he concludes that compensation culture is a problem of perception rather than reality, he nevertheless suggests claims have been too easily encouraged and that this has been fuelled by the funding changes that have been made.

³³ R. Lewis, A. Morris and K. Oliphant ‘Tort Personal Injury Claim Statistics: Is There a Compensation Culture in the UK?’ (2006) 14 (2) Torts Law Journal 158 and [2006] J Personal Injury Law 87. J. Hand, ‘The Compensation Culture: Cliché or Cause for Concern?’ (2010) 37 (4) J Law and Society 569.

³⁴ The current figure is published by the Compensation Recovery Unit www.dwp.gov.uk/other-specialists/compensation-recovery-unit/performance-and-statistics/performance-statistics/

country. Motor claims have increased at almost twice that overall rate rising from 102,000 to 674,000. They have increased by 22 per cent in the last two years alone. With the continuing decline in work accident claims, motor cases now constitute 78 per cent of all the claims made. BTE is thus operating in a much expanded litigation system from when it first began, and the number and proportion of motor claims has risen very considerably. If any reform were specifically directed at road traffic accidents it could have a major effect upon the system overall. Jackson should have concentrated his attention in this area.

THE POTENTIAL REFORM OF BTE

The suggestion put forward here is that legal advice could be more easily available if, when forced to purchase insurance against liability in tort, every motorist were also required to take out BTE as an addition to the policy. The insurance would benefit not only the policyholder and the passengers, but also any pedestrians or other roadusers injured by the insured vehicle. The mechanism for effecting the change – compulsory third party insurance against motor liability – already exists. As others have often noted, it would be relatively easy to build upon it.³⁵ By doing so access to justice could be secured for three out of four claims presently brought.³⁶

A proposal along these lines was included as part of wider reforms put forward by the Bar's Contingency Legal Aid Fund (CLAF) Group. However, the Group proposed

The 1973 figure was estimated by the *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (1978, cmnd 7054) vol 2 paras 59 and 63, chairman Lord Pearson.

³⁵ P. Bartrip, 'No-Fault Compensation on the Roads in Twentieth Century Britain' (2010) 69 Cambridge LJ 263 - 286. See also the road accident proposals in the *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (1978, cmnd 7054) chairman Lord Pearson. Lord Neuberger MR recently has argued that no-fault should again be examined by policymakers if we fail to achieve proportionate costs in personal injury litigation.
<http://www.judiciary.gov.uk/docs/speeches/mr-piba-conf-march-2010.pdf>

³⁶ Note 34 above and associated text.

that BTE be extended in a much more ambitious manner from that being discussed here. The CLAF scheme sought to include not only motorists but also employers and occupiers and others. These latter groups would each insure respectively for the benefit of those injured at work, or on premises, or elsewhere. Even those injured in hospital would be covered. In addition, the Group suggested that protection could be extended to include, for example, those suffering a loss as a result of the act of a person required to have professional liability insurance cover. According to the Group the overall result would be that

... access to justice for the general public would be increased at no cost to the taxpayer and with none of the disadvantages inherent in CFAs and many additional advantages.³⁷

However, not only is this a very much broader and more complex scheme than that now being put forward, but it is also based on mistaken assumptions. For example, it is not the case that occupiers must insure as a matter of law. Instead of supporting this broad scheme, the suggestion here is that we concentrate only upon road traffic cases, albeit with many of the same goals in mind.

The main advantage of a motor scheme is that those injured will have ready access to legal advice and a fund to cover their costs should their case fail. There would be less need than at present to arrange unsatisfactory or expensive funding such as loans to claimants to cover the cost of their disbursements. Nor would there be the same need to resort to what would be an excessively complicated post-Jackson CFA world. As an example of that complexity we are asked to accept that claimants will make reasoned choices between law firms based on their competitive marketing of success fee levels. This is hard to imagine. Indeed, in a key sentence in the report, Jackson admits that there would be difficulties in devising such advertising. Instead he sees the future as inevitably involving claims brought on a contingent fee basis: 'Clients will

³⁷ <http://www.barcouncil.org.uk/assets/documents/CCF%20Paper%202%20April%202009.pdf> at paras 123 et seq.

no doubt find it easier to grasp the concept of a deduction of a percentage of their damages and solicitors will find it easier to advertise on that basis.³⁸

The difficulties involved in Jackson's proposal for a regulated system of contingent fees are not discussed in detail here.³⁹ However, that proposal is a major alternative with which the possibilities for BTE should be compared.

Following an increase in ready access to legal advice, the second advantage claimed for the BTE proposal is that the system would be more efficient than at present because the costs of pursuing the case would be more closely monitored by the claimant's side. Unlike claimants at present, BTE insurers would be directly affected by the costs of bringing the case. They would be able to sift claims, using a merits test to weed out those which should not be pursued further. They would then be able to channel claimants to those who specialise in providing the representation needed. A good comparator, from this viewpoint, is the way in which trade unions at present enable injured workers to gain expert advice from the handful of specialist firms to which unions direct cases. What are the flaws in such a comparison and where might the difficulties with an extension of BTE lie?

THE DIFFICULTIES

Choice of Lawyer

At present BTE limits the freedom to choose one's own lawyer because claimants are directed to use firms which are on the firm's approved panel.⁴⁰ These firms may be located a considerable distance from the claimant's home. Firms are selected for the panel after a closed bidding process intended to ensure that insurers are exposed to the

³⁸ Final Report n 1 above, para 2.5.

³⁹ But see n 23 above and associated text.

⁴⁰ H. Blundell, 'Free to Choose? BTE Legal Expenses Insurance and Freedom of Choice' [2004] J Personal Injury Law 93.

lowest possible risk. In return for limiting their costs and ensuring that the cases are dealt with efficiently, panel firms are guaranteed a flow of work from the BTE insurer. There are strict service level agreements and audits of the work carried out. At present these firms also pay the insurer a referral fee for each case received. Many non-panel solicitors object to these features. However, one claimant lawyer has recently argued strongly that these criticisms are without foundation and merely reflect firms' own economic interests.⁴¹ Here it is suggested that, for several reasons, too much weight should not be placed upon the argument that BTE unduly limits the claimant's freedom to choose his solicitor.

Firstly, it is doubtful whether many claimants in any event make informed choices when selecting their solicitor. In spite of extensive advertising, there is little useful information enabling them to discriminate between firms easily. Where guidance exists, in practice it is rarely used. Secondly, the freedom to choose is restricted in other situations and yet attracts little criticism. In particular, when workers take advantage of the legal assistance offered by trade unions they are similarly directed to specific firms. The restriction here is seen in a positive light because it enables the designated firms to establish particular expertise in the specialised cases referred to them. If BTE claimants were all to be represented as well as workers are by these trade union firms⁴² there would be little objection to their lack of choice. Thirdly, there is some recent evidence that BTE insurers have changed their view and are now more prepared to accept a claimant's choice of lawyer provided the firm is experienced in such work.⁴³ Indeed this freedom is already supported in law, at least

⁴¹ M. Harvey, 'Before the Event Legal Expenses Insurance – Why do so Many Seek to Close This Access to Justice Gate?' [2010] J Personal Injury Law 93. For an even more robust defence see P. Smith, 'Panel Solicitors: the Legal Expense Insurer's Perspective' (2004) 14 (3) *APIL PI Focus* 15.

⁴² For the success of such specialist firms see H. Genn, *Hard Bargaining: Out of Court Settlements in Personal Injury Actions* (Oxford: Clarendon Press, 1987).

⁴³ J. Rowley [2010] J Personal Injury Law C35. Contrast the evidence given to Jackson by the Law Society. Final Report n 1 above para 6.2.

from when formal proceedings are issued.⁴⁴ In spite of this, it must be recognised that injured people in practice are still encouraged to accept a panel solicitor even though it may not always be convenient for them to do so.⁴⁵

Jackson is equivocal in his support of choice. On the one hand, he is prepared to support an amendment to the regulations to reinforce the claimant's right to choose his own lawyer from an earlier date than he is allowed at present: the freedom should exist from when a letter of claim is first sent rather than only from the later date of when formal proceedings are issued. On the other hand, he qualifies this view by stating that this change is only to be made if its impact upon the premiums charged for BTE would be modest.⁴⁶ From what has been said above, the problem of choice may not now be as significant as some may suppose, although the informal pressure to accept a panel solicitor remains.

Quality of Legal Work

There are fears that BTE lawyers will not represent their clients as vigorously as those operating on a different fee basis. The Trades Union Congress simply states that their quality of service is suspect.⁴⁷ In part this is because of conflicts of interest that may arise. For example, in litigation in 2001 it was estimated that Norwich Union could be both representing the defendant driver and funding the claimant driver in just over six per cent of all its claims.⁴⁸ More generally, there is concern that BTE lawyers may be too ready to compromise a case at a low figure in order to avoid the possibility

⁴⁴ Directive 87/334, Legal Expenses Directive (1987) OJ L185/77, is supported domestically by the Insurance Companies (Legal Expenses Insurance) Regulations 1990 SI No 1159.

⁴⁵ P. Abram, *In Sure Hands?* (London: University of Westminster, 2002).

⁴⁶ Final Report n 1 above, para 6.3.

⁴⁷ Final Report n 1 above, para 3.3.

⁴⁸ *Sarwar v Alarm* [2002] 1 WLR 125.

of defeat even though the case has a high chance of success. They thereby safeguard their own costs and ensure that there will be no call upon the resources of the BTE insurer. The result has been compared to third party capture whereby defendant liability insurers directly contact injured people and settle their claims at a low level, assisted by the claimants' lack of legal representation. This comparison is unfair: an undue readiness to settle may affect firms litigating on fee bases other than BTE, including where a conditional fee is involved. Even within trade union firms, although under-settlement is not a feature, regular assessments are made of the merits of proceeding further with a case, and there is awareness of who is ultimately paying the bill. Contrary to these criticisms concerning the quality of service provided, one study concluded that overall there were distinct advantages in using panel solicitors as opposed to those arranged via claims referral companies.⁴⁹

Although consumers value face to face contact with their lawyer,⁵⁰ the BTE panel solicitor may be far removed from the area where the claimant lives and contact may be confined to mail and telephone calls. The physical distance between the claimant and his lawyer has been said to affect the quality of the work done, or at least the claimant's perception of the how well he is being treated. In their defence, insurers argue that cases are more efficiently dealt with by a specialised team able to use e-mail and telephone contact albeit at some distance from the claimant. This may be especially the case when dealing with the mass of low value motor vehicle claims. However, in the few cases which involve serious injury the potential loss of personal contact could be important. The claimant could ensure that contact is possible by insisting upon choosing a local lawyer.

Amount of Work

⁴⁹ P. Abram, *In Sure Hands?* (London: University of Westminster, 2002).

⁵⁰ J. Robins, *Shopping Around: What Consumers Want from the New Legal Services Market* (London: Jures Publications, June 2010).

There is concern that the financial limits set by the BTE policy may be too low, and this restricts the work that can be done for the claimant and, in particular, hampers the ability to take matters to trial. Commonly a policy may confine the insurer's liability to a ceiling of £50,000, and also excludes cover for certain types of claim such as clinical negligence or disease. However, these limits are much less significant here because they are usually sufficient for the mass of fast track motor claims of concern in this article. In addition, the level of cover could be increased by the insurer if there is a high chance of success. However, this may be only a theoretical option because these are just the cases where a speedy, low cost resolution might be expected. Overall, as yet, there is no empirical evidence to support these various fears about the quality of work done in BTE cases, and the concerns do not apply to the vast majority of road accident claims.

Cost of Insurance

At present the premiums for add-on BTE are exceptionally low, being only about £20 for motor⁵¹ and slightly less for household policies. However, if we look at premiums for BTE in Europe the cost is much higher because the scope of the insurance cover provided is much wider and costs are not recoverable. The typical premium for a stand- alone policy is well over £200. If we then look at the typical premium charged for ATE the cost is higher again. In a fast track road traffic case about £350 would be paid, and for other types of claim almost double that sum.⁵² ATE premiums for industrial disease cases cost £1,000 each. For cases above the fast track limit of £25,000 premiums rise further so that even for a road traffic case about £1,500 would be paid. These higher figures are sometimes cited to illustrate the fear that the cost of BTE insurance could rise significantly if the present regime were to

⁵¹ Preliminary Report n 1 above, para 2.1.

⁵² See the current adverts in the journal *Litigation Funding* and the general discussion in the Preliminary Report n 1 above para 2.3.

change. Although Jackson gave no detailed figures, he was persuaded that this might happen. There are several reasons for his fears.

Firstly, if referral fees are abolished, as Jackson proposes, insurers would suffer a significant loss and this would have to be reflected in the premiums. The extent of the existing subsidy is unknown, although referral fees have been said to be the major source of BTE profit⁵³ with one insurer charging between £600 and £900 for cases in the fast track.⁵⁴ However, the fee debate is far from closed and opinion on all sides is divided. At present it is very much in doubt whether these fees will indeed be abolished.⁵⁵

Secondly, it is said that premiums may rise because, at present, insurers are not exposed to the true risks involved in providing BTE insurance and this could change. The argument is that, having bought the insurance only as an add-on to another policy, people are unaware of its existence and do not claim upon it. Attitudes could change if BTE were to be emphasised more as it would if it were made compulsory, and if other funding mechanisms were made less attractive, as Jackson proposes. Although this argument may have some force in connection with household insurance, it is much weaker if only motor insurance is considered. Following a road rather than a home accident an insured is much more likely to visit a solicitor who, in turn, is legally required to inquire of the client whether BTE insurance exists before other forms of funding are considered.⁵⁶ If there is doubt, it is now standard practice to search for and examine the relevant policies. Because of this, Jackson does not believe that ignorance of the cover which has been purchased is an obstacle to the use of BTE. Contrary to

⁵³ FWD, *The Market for 'BTE' Insurance* (2007, Ministry of Justice) at 4A II 4.

⁵⁴ Final Report n 1 above, para 3.18.

⁵⁵ N. Rose, 'Crunch Time on Referral Fees' (2010) 67 *Litigation Funding* 3 and see above n 22.

⁵⁶ *Sarwar v Alarm* n 48 above; and see the Solicitors Regulation Authority, *Solicitors' Code of Conduct* (2007) para 2.03(i)(d)(ii).

the limited exposure argument, therefore, it is suggested here that the take-up of BTE policies in motor cases does not leave insurers benefitting significantly from policies where there might be liability for costs but where indemnities are not being sought.

There is another, stronger, argument supporting the claim that BTE insurers are not facing the true risks. This is that in many BTE cases the insurer merely passes on the claim to its panel solicitor, and thereafter it is dealt with on a CFA basis, with ATE being taken out. The risks of losing thus fall upon other than the BTE insurer. If it were otherwise it is said that BTE premiums would need to rise substantially. However, the extent to which CFAs and ATEs are being used when there is also BTE is uncertain although DAS, a leading BTE provider, is now said to require solicitors to act using a CFA.⁵⁷ In theory it could be argued that there should be few such cases because the Court of Appeal considerably restricted the options in most cases where BTE was available, especially if the claim was for less than £5,000.⁵⁸ However, subsequent litigation resulting in a costs war over this decision has not clarified the position.⁵⁹ If Jackson were implemented, success fees and ATE premiums would no longer be recoverable anyway, and recourse to BTE would then become more important.

To date there has been no detailed empirical investigation into how BTE operates in practice, and how it is in fact financed. This means that no estimate can be made of the extent that premiums would have to rise if BTE were to be used in all road accident claims. Would insurers really be exposing themselves to a much increased

⁵⁷ Chamberlain n 18 above. Most insurers use CFAs according to J. Robins, 'Before the Deluge' (2010) 69 *Litigation Funding* 6.

⁵⁸ *Sarwar v Alarm* n 48 above.

⁵⁹ Most recently, the failure to inquire into BTE was ignored in relation to success fees, but not ATE, claimed under a CFA in a low value case in *Kilby v Gawith* [2009] 1 WLR 853. Jackson would reverse this decision and make BTE relevant to the success fee. Final Report n 1 above para 5.26. See also J. Rowley, 'Is it Too Soon to Reconsider Prematurity?' [2010] *J Personal Injury Law* 39.

liability for the unsuccessful cases? Given the present very high success rate of motor claims, the prospect of insurers being liable for costs is confined to a very small percentage of all actions brought. Limiting the reform of BTE to road traffic cases means that insurers would not be exposed to problematic claims such as those for disease or for clinical errors. Nor could they be sued for other than personal injury as happens in other European countries where claimants can even rely upon BTE to begin a class action in a commercial dispute.⁶⁰ Instead of an increase in costs, it could be argued that there would be savings and efficiencies produced by dealing with all motor vehicle cases via compulsory BTE. Indeed at present Jackson notes that, in spite of the low premiums charged, BTE insurers in motor claims receive more money than they pay out. Their position would be further safeguarded by one way cost shifting. As a result, an affordable increase in the premiums collected from all drivers may be sufficient to fund the few failed claims that are brought. Of course, because of the much larger group involved in paying these premiums, they would be substantially lower than those presently levied for ATE where it is already known that the claimant has need of legal assistance. Under BTE the many who might need assistance would help pay for the few who actually do. Overall, therefore, the rise in the premium required may be much lower than has been feared.

CONCLUSION

As already noted, Jackson refused to make any recommendation either for or against BTE although initially he was attracted by the potential benefits arising from the wide ranging CLAF scheme. However, he specifically rejected the idea being promoted here that BTE should be made a compulsory feature of motor insurance. The idea, he says, met with strong opposition.

However, these opponents may not have had in mind the radical changes to funding contained elsewhere in the Jackson report. For example, in spite of the many problems of ATE, it has been thought reckless to remove it for those do not have

⁶⁰ Case C-199/08 *Eschig v Uniqua Sachversicherung* [2009] ECR I-8295.

BTE.⁶¹ In addition, Jackson noted that there was significant support for an extension of BTE. Both the Forum of Insurance Lawyers and the Council of Circuit Judges were in favour of compulsion, whilst the Association of Personal Injury Lawyers supported the use of BTE provided that the freedom to choose one's own lawyer was not curtailed. The Conservative party, whilst welcoming Jackson's proposals, said that it would work with the Bar to improve the CLAF scheme and that it would discuss with insurers the extension of BTE.⁶² This approach was further endorsed in a report for the Prime Minister by Lord Young who commented that extending BTE might be a fair solution to the problem of extending access to justice.⁶³ The Government would welcome a change of culture so that greater use is made of BTE but in its Consultation Paper on the reforms it does not mention the possibility of making such insurance compulsory.⁶⁴

This article suggests that the provision of compulsory BTE for motor vehicles would enable three quarters of all the tort claims made for personal injury to be litigated efficiently and with ready access to legal advice.⁶⁵ By confining the CLAF proposals to road traffic claims alone much can be done with relative ease. In a post-Jackson world where success fees and ATE premiums are not recoverable, the provision of BTE offers an acceptable solution to what otherwise could be a very different (and perhaps contingent fee) world. The solution is not without its problems, but it merits a more detailed analysis than Jackson had time to provide.

⁶¹ N. Kinsella, 'Evolution not Revolution' in J. Robins (ed), *Closing the Justice Gap* (London: the Solicitors Journal, 2010).

⁶² See the then Shadow Justice Minister's article, Henry Bellingham, 'Worth Fighting For' in Robins (ed) *ibid*.

⁶³ n 4 above, at 22.

⁶⁴ n 5 above, section 3.5.

⁶⁵ According to Compensation Recovery Unit figures road accidents constitute 78 per cent of all claims for personal injury that are made. See note 34 above and associated text.